Procedures for the review of constitutionality of constitutional amendments in the Spanish legal system

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Abstract: The Spanish Constitution does not contain any rules regarding the constitutional controls of its own reform. The objective of this article is to find a solution to this deficiency, analysing the role that corresponds to the constitutional court, as well as the different constitutional procedures that can be used for this purpose.

Keywords: checks of constitutionality; 1978 Spanish Constitution; constituent power.

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1 Introduction

The 1978 Spanish Constitution (EC) omits any reference to checks of constitutionality of its own reform. This is no small problem, since, as I will attempt to explain in this article, we find ourselves on a bare stage, with little direction, the main focus of which is on the

relationship between constituent power and constituted powers, between originating constituent power and derived constituent power, and lastly between the constitution as supreme law and constitutional jurisdiction.

To date, the constitutional court has only had two opportunities to rule in cases shaping its role in the processes of constitutional reform. As will be examined below, in the two rulings about the only two amendments that the 1978 Constitution has had, the court, bound by the principle of procedural congruence, limited itself to the matter before the court (the pre-constitutional review of an international treaty that Spain had agreed to incorporate into Spanish law; and an appeal for protection of parliamentary rights claiming the violation of parliamentary powers due to possible procedural defects during the reform of art. 135 EC). It did not pronounce *obiter dictum* on other procedural possibilities of constitutional control, nor on the possibility of the court's intervention once a reform is approved, promulgated, published, and in force.

Correspondingly, over time the need to amend various provisions of the constitution has become more common, and more recently, the abundant constitutional case law as a consequence of the so called 'Catalan sovereignty process' has insisted that the only means of channelling secessionist intentions is by constitutional reform. Thus, with the declaration of the unconstitutionality of Catalan Parliament resolution 1/XI of the 9th of November 2015, related to the "initiation of the political process in Catalonia as a consequence of the results of the 27th September 2015 elections", the constitutional court picked up its precedent case law and recalled that "the constitution as supreme law does not intend for itself the condition of *lex perpetua*. Our constitution accepts and in fact regulates its own total revision (art. 168 EC and [constitutional court judgement] STC 48/2003, 12th March, FJ 7)" (STC 259/2015, 2nd December, FJ 7). This would ensure, the court insisted, "that only the citizens, acting necessarily at the end of the reform process, can access this supreme power, that is, the power to modify the constitution itself without limits (STC 103/2008, 11th September, FJ 2). Each and every constitutional determination may be modified, but only as long as that is not articulated or championed by activities that violate democratic principles, fundamental rights, or the other constitutional obligations, which is why it is essential that any attempt to achieve [such a modification] be done within the framework of the procedures of constitutional reform, since in every single case it is mandatory to comply with these procedures (STC 138/2015, 11th June, FJ 4, and case law cited therein)" (STC 259/2015, 2nd December, FJ 7).

One cannot discount the idea that the mechanisms of control of constitutionality of constitutional reform will gain particular prominence in the coming years, unless the constitution provides clarity on a topic which is related to the principle of continuity of the supreme law of the legal system and its ability to adapt to new social realities.

2 The silence of the constitution about the review of constitutional reform

Our constitution ends with Title X, dedicated to constitutional reform. It is the shortest title in the constitution, made up of four articles specifying those who can legitimately initiate a procedure of constitutional reform (art. 166) and the reform procedures (arts. 167 and 168), closing by setting a limit to the initiation of constitutional reform, 'it cannot be initiated' in time of war or any of the states considered in art. 116 EC (art. 169). Nothing is written about the body or bodies responsible for ensuring the

compliance with the provisions of Title X, nor, in consequence, about the constitutional control procedures that could be initiated to that end. One might say that our supreme law has left the key in the door and there is no guard dog in the garden.

Title IX of the constitution, about the constitutional court, makes no explicit reference to reviews or control of constitutionality of constitutional reform either. We only find one possibility of articulating control mechanisms in the reference that art. 161.1.d) EC makes to organic acts, when it gives them the ability to extend the competencies of the constitutional court. Nonetheless, the current organic law regarding the constitutional court (LOTC) maintains its silence in this regard, as do the standing orders of congress and the senate when they outline the reform procedures noted in Title X of the constitution.

The question arises: why would the law which is the basis and validating condition of the legal system not protect its own supremacy by articulating mechanisms of control against eventual reforms that do not respect what is stated in Title X? If one follows Ockham's razor that the simplest hypothesis is usually the most likely, one might conclude that the constitution does not regulate a system controlling its own reform because the result of such a reform is a constitutional rule, which by its nature, cannot be submitted to the control of a constituted power. According to this hypothesis, once the reform is completed, once it is published and comes into force, we can speak of a constitutional reform conforming to the constitution, or where applicable, a constitutional break which, as such, is not going to be subject to control by any constituted body, supposing in the best case, that the object of the reform has not been the constitutional court itself.

In this sense, Requejo Pagés (1998, p.102) states that "the positive conditioning that the constituted constituent has does not extend beyond the point at which the new constitutional rule is incorporated into the apex of the system", as the result of the constitutional reform, the rule created by a constituted constituent power is confused with that of original constituent power and is, as such, inaccessible to the effects of constituted powers. Requejo Pagés (1998, p.103) understands that the promulgation of a constitutional rule means the impossibility of any subsequent judgement, since the opposite would be like admitting that the effect can come before the cause. On similar lines, Aláez Corral (2000, p.386) states that "the rules of constitutional reform, once recognized as such by the public powers and the citizens, become part of the legal system with the same range as the constitutional laws they amend, or constitutional laws they are the result of, thus reviewing their constitutionality would be out of place." Nevertheless, there are more than a few voices that have raised the possibility of control or review of already-approved reforms via the resource of unconstitutionality [Aragón Reyes, (2001), p.82; Pérez Royo, (1990), p.302; Punset Blanco, (1985), pp.43–ff.], a question we will return to below.

This text will share the arguments about the impossibility of the constitutional court judging the constitutionality of a constitutional reform when it is already in force. This modest work starts from the premise that the mechanisms of constitutional control of constitutional reform, both those in force and those in the future, must be started and finished while the reform process is underway, or if the reform has already been approved by parliament, before a referendum should one be required, and in every case, before the reform is promulgated, published and goes into force.

From the above, it should also be clear that I share the idea that it is constituent power which acts in the constitutional reform process, because if the result of the reform is a

constitutional rule, the foundation of the validity of the rest of the legal system, it can only be the product of constituent power, even though it operates via a 'self-imposed' procedure, acting like a 'constituted-constituent power', or as Aragón Reyes (1989, p.47) puts it, 'a legalised constituent power'[1]. This is so, accepting the deficiencies produced by an unavoidable simplification of the legal category of constituent power, but also understanding, as summed up by Jiménez Campo (1980, p.83) citing Berlin and Marienstras on the French and North American experience, that "constructions about constituent power and about the revision of the constitution are historically inseparable from the foundational and contractualist mythologies of the origin of the political collective; of those, perhaps only the jurist remains today as a valid instrument for analysis, as long as realistic deliberation is needed of the political background that animates those constructions: a debate that once was between the monarch and the nation is still very much alive, animated by different subjects and social forms, about similar clauses in constitutional texts."

3 A brief summary of the conditions of validity of constitutional reform

Title X of the constitution contains rules related to the initiation and process of constitutional reform procedures, and sets down the matters requiring the extended procedure described in art. 168 EC, thus the strict compliance with those rules by legislators are essential for a reform to be considered 'constitutionally valid'. From a reading of Title X it not only emerges that our fundamental law is within the category of 'rigid' constitutions, but also that the power (whether called constituent or constituted) that acts each time a constitutional reform is initiated is legally regulated by the very law that is the object of change. In consequence, the content, as well as the legislative practice of Title X, fundamentally through parliamentary standing orders, make up the canon of constitutionality of constitutional reform. Aláez Corral (2000, p.302) noted that "the formal-functional dogma, constitutionally suited to the 1978 EC, makes the provisions regarding constitutional reform the structural core of fundamental law."

That said, Title X poses significant issues of interpretation that have yet to be resolved and which must be faced by the body charged with controlling the constitutionality of a reform (a body that the constitution does not specify), via the procedures for control (that are not specified either). It is clear that there is no hermeneutical problem raised by art. 166 EC, as it sets out who can legitimately initiate a constitutional reform, by referring to Sections 1 and 2 of art. 97 EC[2]. However, a reading of arts. 167 and 168 brings us to a context which extends beyond a mere regulated procedure. The possibility, according to the literal wording of art. 168 EC, of a complete revision of the constitution, supported by the absence of explicit unamendable clauses, has led to intense jurisprudential debate since the constitution came into force about the implicit limits to the total reform of the constitution and the corresponding existence of an unamendable core, summarised by Jiménez Campo (1980, p.84) when highlighting the confused interpretation in the face of "axiological indifference that drives the forecast, by constitutional rules themselves, of its total abandonment." That does not seem reconcilable with the will of the constituent to establish, through articulation, constitutional principles such as the definition of the state as a social and democratic state of law (art. 1.1 EC); the commitment of public authorities to equality (art. 9.2 EC); and the invocation of inviolable rights of the person (art. 10.1 EC), among others. Nor has the

selection of subjects been left out of the debate, both those included and excluded from the extended procedure of reform in art. 168 EC, which tests the systematic interpretation that must rule all analysis of our fundamental law.

It must be borne in mind that, according to the literal text of art. 168 EC[3], the following articles do not fall under the extended reform procedure: art. 10 EC (which sets out the dignity of the person and inviolable rights that are inherent as a basis of political order and social peace in its first section); art. 14 EC (the right to equality in the content and application of the law); the rights and responsibilities of citizens regulated in the Second Section of Chapter II of Title I; art. 53 EC (which regulates the guarantees of fundamental rights and freedoms); all of the constitutional rules related to the houses of parliament; Title VI (regulating judicial power); Title IX (regulating the constitutional court); and Title X itself, about constitutional reform.

All of this highlights the fact that control of constitutionality of constitutional reform is not limited exclusively to the resolution of formal or procedural problems. It also affects material questions that at first glance should be settled by parliamentary bodies, particularly the Bureau of Congress, at the point that the constitutional reform is assessed and processed, determining whether it should follow the route laid down in art. 167 EC or the route described in art. 168 EC, or ultimately the constitutional court, as even the option of a strictly formal, literal interpretation of Title X of the constitution needs prior reflection with respect to a material concept of the constitution, even if only to discard it.

Lastly, art. 169 EC prohibits the initiation of constitutional reforms in times of war or in circumstances described in art. 116 EC (states of alarm, emergency or siege). This is not exempt from interpretive questions about an eventual control of constitutional reform, because although its literal wording and the constituent debates seem to suggest that the limit refers exclusively to the 'initiation' of a constitutional reform (and would not operate in cases where the reform has been initiated and is in progress), a significant body of jurisprudence understands that art. 169 EC must be interpreted broadly, and is applicable when the reform is in progress, meaning that it should be halted.

4 The role of the constitutional court in the two reforms of the 1978 Spanish Constitution

At the time of writing, there have only been two amendments to the 1978 Spanish Constitution, both of which followed the process described in art. 167 EC. Reform pathways have required the involvement of the constitutional court although as we will see, constitutional control occurred at two different points in the procedure, and through different procedures, leading to the constitutional court declaration of the 1st June 1992 (DTC 1/1992) and to ATC 9/2012, 23rd October.

In the case of DTC 1/1992 we are clearly not looking at a procedure of control of constitutionality of a constitutional reform, but rather a preventive legal instrument through which the constitution gives the constitutional court the dual task of preserving the constitution and ensuring the security and stability of international commitments agreed to on signing treaties. When the court gave its declaration, there had been no constitutional reforms, which is why there was no control exercised over them. It is different, as we will see, in the case of ATC 9/2012, which was in response to a petition for protection of rights, which claimed that the constitutional reform process violated parliamentary rights protected by art. 23.2 EC.

4.1 The constitutional court declaration of the 1st of July 1992 (DTC 1/1992)

This was a ruling responding to a petition of the Abogado del Estado [state solicitor] on behalf of the Spanish Government in relation to the eventual contradiction between art. 13.2 EC and art. 8 B, Section 1 of the treaty establishing the European Economic Community (EEC Treaty), in the revision that would result in art. G B, 10 of the European Union Treaty. The ruling was made under art. 95.2 EC, which regulates what has been classified as "prior control of constitutionality of treaties", by allowing the government or either of the two parliamentary chambers to be able to require the constitutional court to clarify whether there is a contradiction between the constitution and the stipulations of an international treaty whose text is fixed, but which has not yet been approved by the state, a procedure which is laid out in art. 78.1 LOTC.

As indicated above, this is not a procedure of control of constitutionality of a constitutional reform, but rather a preventive legal instrument through which the constitution gives the constitutional court the task of ensuring *a priori* the constitutionality of an international treaty that is going to become part of our legal system. Thus if the constitutionality of the treaty is not confirmed, it will not be ratified without prior constitutional amendment. In this way the primacy of the constitution is ensured using the reform procedure in Title X in this case, before the treaty is signed. The treaty thus examined acquires full legal stability once ratified, thanks to the binding nature of the court's declaration.

In terms of the topic that concerns us, it is interesting to highlight some of the court's statements in DTC 1/1992 (the first ruling applying art. 95.2 EC) responding to all of the government's questions of unconstitutionality, including those related to the constitutional reform procedure that, if it were the case, would have to be followed.

Firstly, in relation to the possibility of ratifying the European Union Treaty using the route in art. 93 EC without needing constitutional reform[4], the court is clear when it states that this article is not a legitimate route for 'implicit or tacit' constitutional reform, given that the statements of the constitution cannot be contradicted except through its express reform via the routes stated in Title X, affirming that "the power of constitutional revision is not a 'competence' whose exercise is susceptible to transfer, nor does the constitution itself accept reform by a route other than that of Title X, that is, via the procedures and with the guarantees therein established and through the express modification of its text" (FJ 4).

Secondly, once the court discounted any connection between art. 8 B.1 EEC Treaty and articles 23.2 EC [FJ 3, b)] and 1.2 EC [FJ 3, c)], confirming only the contradiction between art. 8 B.1 EEC Treaty and art. 13.2 EC[5], indicated (FJ 6) that the constitutional reform procedure that should be followed to appropriately incorporate the treaty rule into the constitution was that established in art. 167 EC. It was a limited statement in the ruling, not accompanied by even the most minimal argumentation, taking for granted that the systematic location of the article to be amended, which was outside of those subjects literally reserved for the reform process in art. 168, redirecting it clearly to the route described in art. 167 EC without needing any kind of reasoning beyond the literal interpretation with respect to the two reform procedures covered by Title X of the constitution.

4.2 Petition for constitutional protection as a procedure of control of constitutional reform: ATC 9/2012, 23rd October

The second constitutional court ruling related to a constitutional reform process was due to a petition for parliamentary protection against a series of agreements in the lower chamber, made as part of the process to reform art. 135 EC. The main aim of this reform was to make it possible for Spain to comply with commitments it had made to join the European Economic and Monetary Union. There was a need to reinforce the constitutional framework to ensure compliance with the principle of budgetary stability in public administrations.

An analysis of the material content of this reform is not the object of this work, it only interests us to indicate that it was the second reform to our constitution, and that it began on the 28th August 2011, when the socialist and popular parliamentary groups in congress presented a proposal for constitutional reform. Together, they requested that it be by accelerated procedures and with a single reading in the chamber. It was this procedural choice, among other extremes, which led to an appeal for amparo [protection of rights] [Villaverde Menéndez, (2012), p.485].

The court opted for an exclusively literal interpretation of art. 168 EC, referring to its previous case law and alluding, unnecessarily in my opinion, to a supposed unanimous position in jurisprudence, forgetting that there had been more than a few authors who had affirmed that the matters subject to extended procedures are not limited to what is deduced from their exact wording, but rather extend to all those constitutional precepts which, even outside of the Titles and sections expressly mentioned in this article, have a narrow material connection with them [Villaverde Menéndez, (2012), pp.484–ff.). In any case, constitutional jurisprudence is perfectly shaped when the court understands that "as has been made clear in all the time the constitution has been in force, the extended procedure described in article 168 EC is limited by its nature to the normative subjects described therein, under no circumstances allowing an extension by any route of requirements already deemed hyper-rigid. This aspiration would lack any sense and is directly contrary to the spirit of a constitutional text that describes the two routes of constitutional reform with some precision" (FJ 2).

Constitutional case law that has been produced is particularly relevant as it constitutes a clear, substantial pronouncement from the constitutional court about the interpretation of arts. 167 and 168 EC, which positions the court in favour of a strictly literal interpretation, which it seals when it states that "the constitutional text establishes precisely the ends of the two reform routes available according to the objects of reform, such that accepting the petitioners' aspiration would upset the balance sought by the framers of the constitution, running the risk of leaving the determination of the constitutional reform process to the discretion of the chamber's organizing body" (ATC 9/2012, FJ 2).

Consequently, in my opinion the court says a lot in this ruling of inadmissibility in relation to constitutional reform procedures, without prejudice to there always being the possibility of a handy *over ruling*, as it remains to be seen what will happen with the strict literal interpretation that is now advocated if, for example, there was an attempt to amend art. 168 EC using the route in art. 167 EC.

So despite being within a constitutional reform process, the constitutional court is affected by the nature of amparo appeals. Both its focus, and the reasoning in this ruling are about the eventual infringement of certain parliamentary powers of the petitioners,

not an abstract control of constitutional reform. For this reason, the court applies its general case law in relation to infringement of parliamentary powers linked to the core of the representative function produced by defects in the legislative process, and does not give the constitutional reform process more procedural assessment, in this sense, than that derived explicitly from the Chamber's standing orders or that indicated in art. 75.3 EC. These arguments lead me to believe that it is a little too categorical to state, as does Tajadura Tejada (2018, p.163), that the court "in practice, also refused to regulate respect of the procedures", as there are various legal foundations to ATC 9/2012 focused on strict control of the procedure to reform art. 135 EC with varying success.

Having outlined the object and application of the claim, as well as the court's main reasoning behind its ruling rejecting the existence of harm, there is an important piece of data that must be considered because it has significant impact on the effect of an eventual positive ruling: the point in time when the appeal for amparo is raised and addressed.

The constitutional reform of art. 135 EC came into force on the 27th of September 2011. The amparo appeal, as indicated before, was lodged on the following day (registered in the constitutional court on the 28th of September 2011). Had there been a positive ruling in which there were judged to have been procedural defects that impacted parliamentary powers protected by art. 23.2 EC, it would only have had declarative effects. In no case could such a ruling have led to the reform being declared null or the excision of the amended article from the constitution.

This is significant because, in a similar way to what happens in the ordinary legislative process, when an amparo appeal successfully contests parliamentary actions which are part of an ongoing legislative procedure, the constitutional court can suspend the procedure, annul it, and act retroactively to repair the defects in the procedure that caused the infringement of the fundamental right. However, if the law is already in force and the amparo appeal is successful, the court can only make a declarative ruling, confirming that there had been an infringement of fundamental rights [art. 55.1.b) LOTC], but it cannot annul the law, remove it from the legal system, or reset actions back to the time before the infringement. To do so would risk converting parliamentary amparo into a kind of indirect request for ruling of unconstitutionality which is not part of our legal system. Nor in these situations can the constitutional court raise an internal question of constitutionality because the 'self-questioning' of unconstitutionality is only suitable when the infringement of rights claimed by the petitioners is due to the application of a law (art. 55.2 LOTC, in connection with art. 35.2 LOTC), but not in the case of procedural defects in legislative processes where, at the time the infringement occurred, clearly there was no extant law.

As the court declared in STCs 167/1986 and 363/1993, amparo appeals do not allow an abstract challenge to general dispositions that would lead, in that case, to a declaration of nullification *erga omnes*, regardless of the existence or otherwise of a specific, current injury to a fundamental right. Hence it is essential to note, as indicated in STC 167/1986, the essentially subjective nature of this resource as a means of protecting rights and liberties.

In conclusion, while there is the possibility of control of constitutional reform procedure through amparo appeals, this check would only be effective if it is done before the reform is approved and comes into force. Therefore, petitioners must raise amparo appeals before the reform procedure finishes and the court must, *ex oficio* or at the request of one of the parties, suspend the procedure until the appeal for amparo is resolved.

5 Constitutionality review bodies and procedures for constitutional reform

5.1 Constitutionality review bodies for constitutional reform

Despite the constitution's silence, it seems unarguable that if control of constitutional reforms is possible, the body to do that is the constitutional court, because as the ultimate interpreter of the constitution, it must ensure compliance with the provisions of Title X of the constitution. That said, the significant role that the constitution grants to the two chambers of parliament in constitutional reform processes means that they also must play an important role in ensuring compliance in procedures in which they are the protagonists. They do this by strict submission to the regulated processes and by using the internal checks and controls aimed at ensuring correct parliamentary activity, and if necessary, by those who are legally authorised to do so raising appeals for amparo in the constitutional court.

As the constitutional court recently reminded the Catalan parliament, the Chamber "cannot set itself up as the source of legal and political legitimacy, going so far as to assume the power to violate the constitutional order that gives it its own authority" (STC 259/2015, FJ 7). Working in this way, the court insists, the parliament would erode its own constitutional and statutory foundation by removing all binds to the constitution and the rest of the legal system and would violate the bases of the state of law, and the norms which declare that all are subject to the constitution (arts. 1.1 and 9.1 EC). The constitutional court declared in STC 103/2008, FJ 4, that respecting the procedures of constitutional reform was mandatory, such that "attempting to circumvent, avoid or simply disregard those procedures would be attempting unlawful conduct (incompatible with the social and democratic state of law proclaimed in art. 1.1 EC) to amend the constitution outside of the constitution, or make it ineffective in practice."

In any case, in a concentrated constitutional legal system such as ours, the natural body for reviewing the constitutionality of constitutional amendments is the constitutional court. A review that, as has been examined, has been exercised making it clear that in our constitutional system there are many ideas that are worth proposing and that "there is no legislative core that is inaccessible to the procedures of constitutional reform" (among others, STC 31/2009, FJ 13).

5.2 Procedures for constitutionality review of constitutional reform

Given that none of the constitutional procedures in the constitution or in the LOTC are aimed at reviewing the constitutionality of constitutional reforms, it is necessary to make the effort to 'adapt' some of those that exist, as long as that can be done without altering their nature, and constitutional or legal configuration.

Discounting the idea that the prior control of constitutionality of international treaties in art. 95 EC can be considered a procedure for the control of constitutionality of a constitutional reform, given that the subject is an international treaty and that the involvement of the CC ends with the declaration of conformity or not with the constitution, and if necessary with the response to questions related to an eventual, future change to the constitution, it remains to examine the remaining procedures the constitutional court is competent to determine.

a Without much effort of argumentation, it can be stated that it is not feasible for constitutionality review of constitutional reforms to be done using the route of conflicts of competencies, as it is not possible for an issue of competency to arise between the state and an autonomous community or between communities from the reform procedures given in Title X of the constitution. For similar reasons the route of conflict in defence of local autonomy does not offer the chance to conduct any kind of review of a reform to the constitution.

b It is very unlikely for there to be a conflict between constitutional bodies as a consequence of the initiation and progress of a constitutional reform procedure, given the clarity with which the constitution sets out the legitimate subjects that can initiate a reform, as well as the constitutional bodies involved in the procedure, but the possibility cannot be completely discounted. The application of the provisions of arts. 73 and ff. of the LOTC giving rise to a court ruling that would determine which body controversial constitutional powers belong to, declaring completed acts null due to encroachment of powers.

Similarly to what happens with amparo appeals, while there is the possibility of a constitutionality review of a constitutional amendment via the resolution of a conflict between constitutional bodies, I believe that it would only be effective if a positive ruling was made before the amendment was approved and came into force. Considering that the legislator does not foresee suspension in this kind of procedure, speed, both in the presentation of the case before the court, and in its resolution, will be key, although legal timescales do not help in this sense. Thus, art. 73 LOTC requires an attempt to reach prior agreements between the affected bodies, allowing that the body that believes its competencies to be infringed must let the infracting body know within a month, requesting it to revoke the injurious act. The latter has another month after the request to rectify things, after which the injured party will have a month to raise the conflict in the constitutional court. Once accepted there is a month in which to present allegations and the court will rule within the month following the final date for allegations.

This is not, in short, a procedure that was conceived for performing reviews of constitutionality of constitutional reforms and the lack of legal provision of the suspension of the act or disposition causing the conflict is good proof of that. In fact, the court has already had the opportunity to affirm, in relation to conflict between constitutional bodies, that "in cases in which the legislator has wanted to grant powers of suspension to the court, it has done so expressly" (ATC 462/1985, 4th July), and that "there is not a legal space that must be included by analogy, but rather the reverse. The LOTC has not provided in this case the power of suspension, which to exist, must be anticipated" (ATC 565/1985, 29th July, FJ 2).

c Because the assemblies of the autonomous communities are part of the bodies that can initiate a constitutional reform (as art. 166 EC refers to art. 87.2 EC), it is feasible that there could be some kind of formal or material irregularity within the autonomic parliaments to do with such an initiative. Consequently, it is worth raising the possibility that the government might use the procedure in art. 161.2 EC, for contesting non-law provisions and resolutions of the autonomous communities. The advantage of this procedure is that it triggers the automatic suspension of the

provision or resolution being contested, and with that, the reform procedure it was intended to begin.

However, according to constitutional case law so far it does not seem as though an initiative from an autonomous community assembly requesting that the government adopt a project of constitutional reform, or sending a constitutional reform proposal to the Bureau of Congress, can be considered "a provision… [or] a resolution" referred to in art. 161.2 EC.

The appeal process in arts. 161.2 EC and 76 and 77 LOTC has never been used to appeal against procedural activities making up a legislative procedure. More specifically, the court deemed that a procedure was not suitable for appealing against, at the time, the Basque Government's agreement of the 25th of October 2003, by which it approved the 'proposal of political status of the community of Euskadi', nor for an appeal against the Basque Government agreement of the 4th of November 2003, which admitted for processing "the reform proposal, for consideration according to ordinary legislative procedures." The court reasoned that these agreements could not be considered resolutions according to arts. 161.2 EC and 76 LOTC as they do not in any way culminate in nor put an end to the statutory reform procedure. These are arguments that could be applied to the appeal against a constitutional reform initiative, defects that, in that case would mean assessing the Bureau when it considers admitting the initiative, which could ultimately be contested through an amparo appeal, but not via the procedures described in art. 161.2 EC.

d When it comes to an appeal of unconstitutionality, we have already seen in this article that it is not considered to be a suitable process to carry out a judicial check of a constitutional reform. Although it is true that the procedure of constitutional reform is described in the congressional standing orders in the section related to special legislative procedures[6], one can agree that this is a procedure that is essentially regulated in Title X of the constitution and which has an autonomous nature, as the result of it is not a legal rule but a constitutional rule.

On the other hand, art. 161.1.a) EC is emphatic when it establishes that an appeal against alleged unconstitutionality is against laws and statutes having the force of law, excluding, at least in a literal reading, not only rules that are less than laws, but also constitutional rules (art. 31 LOTC states that the appeal against unconstitutionality is raised against "laws, normative dispositions or acts with the force of law"). This is logical when it is regulating the mix of dispositions susceptible to review by the constitutional court in order to ensure the primacy of the constitution. There are many things that characterise the 1978 Constitution, but one that stands out is the fact that our legal system organises the sources of law, and is, furthermore, the full source of law, which leads to the articulation of a system of creation of laws and corresponding checks on the constitutionality of the same, which from a logical and legal perspective cannot be blocked, in my opinion, by creating a guardian of the constitution worthy of judging the constitutionality of a law that has already reached the level of constitution, maybe after a referendum, as only from this point on can an appeal of unconstitutionality be raised and the limitation period begin.

It is well known that to date the constitutional court has not had the opportunity to rule on the admissibility of a hypothetical appeal against unconstitutionality against a constitutional rule resulting from a constitutional reform. Thus it has not had the chance to establish a case law distinction between legislative parliamentary procedures, in which parliament acts as constituted powers, and parliamentary constitutional reform procedures, in which, as described above, they act as a constituent power. There is no doubt that the constitutional court must check compliance with the provisions of Title X of the constitution, but the lack of constitutional and legal foresight about the procedures for constitutionality review of constitutional reform cannot lead to the denaturing of existing procedures. I believe that would place the constitutional court in a position of doubtful constitutionality, which would do it few favours. This is particularly so if we recall the socially and politically traumatic experience of declaring the unconstitutionality of various articles of the Catalan Statute of Autonomy (STC 31/2019, 28th June) following their approval by the Catalan parliament chambers and by the electorate in a referendum, a case in which the constitutional court acted with full constitutional legitimacy.

The same arguments are extended to the question of unconstitutionality, as it would seem even more paradoxical if, months after a constitutional reform, a judge could submit 'the constitutionality' of the constitution to the judgement of the constitutional court.

e In contrast, it seems clear that the amparo appeal is a suitable instrument to curb failure to comply with the regulated procedures of constitutional reform, both in the provisions of the constitution and how it is laid out in the standing orders of both congress and the senate. Provided that:

1 the irregularities involve the violation of fundamental rights protected by amparo appeals, which in most cases would mean infringement of parliamentary powers making up the core of the representative function protected by art. 23.2 EC

2 that the amparo appeal is resolved before the constitutional reform comes into force, otherwise the ruling will be merely declarative.

If we focus on the first of these two conditions, as the second has already been dealt with above, it is a requirement linked to the object and goal of the amparo appeal (which is not constitutionality review of a constitutional reform, but rather the protection of fundamental rights). This means that the consolidated constitutional case law in this respect must be borne in mind, according to which not every parliamentary act that infringes the rule of *ius in officium* harms fundamental rights. There is only constitutional significance, in this sense, in the rights or powers attributed to the representative that belong to the core of their parliamentary representative function, such as the exercise of their legislative power (in this case, participation in constitutional reform procedures). Art. 23.2 EC would be infringed if the bodies of the legislative chambers impede or restrict that exercise or take decisions that oppose the nature of the representation, or the equality of the representatives. Such circumstances compel parliamentary bodies to make a restrictive interpretation of all of those rules that could mean a limitation to the exercise of rights or functions making up the constitutionally significant status of

public representative and require them to state their reasons for applying them, under penalty of not only infringing the fundamental rights of the citizens' representative to exercise their role (art. 23.2 EC), but also of violating their rights to participate in public affairs (art. 23.1 EC)[7].

It might be uncontroversial for this doctrine to be extended to cases in which members of congress and the senate are exercising their parliamentary powers derived from participation in a constitutional reform procedure. This leads us to conclude that, while the amparo appeal is not a procedure that by its nature was conceived of as a means of reviewing the constitutionality of a constitutional reform, any defect within parliament which also affect a constitutional reform procedure means, given its nature and object, affecting parliamentary powers belonging to the core of the representative function protected by art. 23.2 EC. Therefore parliamentarians thus affected could, once the internal parliamentary process is exhausted, raise an amparo appeal ex art. 42 LOTC. This would not prevent amparo appeals from also being raised, for the same reasons, by the Ombudsman or the Public Prosecutor's Office [art. 162.1.b) EC and 46.1.b) LOTC].

6 A proposal for lege ferenda: prior constitutionality review of constitutional reform

Faced with the silence of the constitution and the LOTC about specific procedures for checking the constitutionality of constitutional reforms, it is not a new idea to float the possibility that the legislative body institute a prior review of constitutionality of constitutional reforms with similar characteristics to the prior appeal against unconstitutionality for draft Statutes of Autonomy and amendments to Statutes of Autonomy (art. 79 LOTC). Doing so would overcome one of the main issues described in the previous pages, the difficulty of the constitutional court judging the constitutionality of a constitutional level rule.

It is true that this new procedure could be open to some of the objections raised about the prior appeal against unconstitutionality provided in art. 79 LOTC, given its complex nature as an exclusively judicial constitutional procedure, albeit with a non-negligible political aspect which gives parliamentary minorities the keys to encourage the suspension of a law before it comes into force, 'inviting' the constitutional court to involve itself in the legislative process, or in our case, in the constitutional reform process, before the reform has been finalised. However, it is no less true it must also provide prior appeals of constitutionality of constitutional reforms all of the advantages of a procedure that gives the constitutional court the opportunity to make a prior ruling on the constitutionality of a still unfinalised constitutional reform, avoiding all of the problems we have looked at when examining the use of appeals against unconstitutionality as an instrument of control of constitutional reform.

Proof of the fact that prior appeals against unconstitutionality of laws and statutes of autonomy have a significant political aspect is that throughout the last 40 years, temporary parliamentary majorities have decided, depending on the prevailing politics, to regulate or repeal this institution that was never the subject of discussion in the constituent debates (nor was the prior appeal against unconstitutionality of a

constitutional reform), in contrast to what happened with the prior review of international treaties, which culminated in art. 95 EC.

Organic Law 2/1979, 3rd October, on the constitutional court, in its first version, regulated *ex novo* the prior appeal against unconstitutionality of draft statutes of autonomy and organic laws, supported by the reference art. 161.1.d) EC makes to the organic legislator. However, this procedure did not last long, as parliament chose to abolish it via LO 7/1985, 7th June, which was initiated and approved by the congressional socialist group, who at that time had an absolute majority, and believed that prior appeal against unconstitutionality was becoming an 'obstructionist' instrument in the hands of parliamentary minorities to paralyse the legislative process. In the preamble to LO 4 this was justified by arguing that "the accumulated experience of more than three years of constitutional justice has come to demonstrate that this prior appeal has been configured as a distorting factor of the purity of the system regarding constitutional powers of the state, with unexpected, meta-constitutional consequences in the final phase of the process of creating law." On similar lines of justification, the lawmakers gave constitutional, rather than political or practical reasons, stating that the state shaped by the constitution was based on a balance of powers characterised by strict demarcation of political and judicial activity of each "without interference that might upset their harmonious relationship." That relationship could be damaged by the existence of prior appeals against unconstitutionality, as the legislative action of the chambers of parliament, without limits according to art. 66.2 EC, would be blocked by the involvement of the constitutional court, "which would not allow the full configuration of the will of the parliamentary body."

Other arguments can be added to these, aimed at defending the judicial work of the constitutional court, referring to the need to distance this institution from "the political whims of parliamentary practice." It eliminated a prior appeal for unconstitutionality procedure that had compelled the court to involve itself in the process of legislative creation before parliamentary will was definitive. In the short period of time that this law was in force, the constitutional court ruled seven times about prior appeals, all against organic laws. Of those, only three rejected the prior appeal of unconstitutionality.

Due to the parallelism that can be established with the need to regulate a prior appeal against unconstitutionality of a constitutional reform, it is interesting to bring up the Council of State report on modifications to the Spanish Constitution. This was produced years after the prior appeal of unconstitutionality had been repealed, on the 16th of February 2006. The council president, Francisco Rubio Llorente, emphasised the important role of the constitutional court in the face of the hypothetical risk that a new expansion of devolved competencies through the reform of statutes of autonomy would breach the limits of competencies set out in art. 149 EC. He went on to state that "*a posteriori* control may not be the most appropriate for normative sources which, like the statutes, subordinate to the constitution, occupy under it the highest place in the legal hierarchy. In order to free ourselves of the suspicion of unconstitutionality and, *a fortiori*, of the explicit accusation of it, it might be useful to consider the reintroduction of the prior appeal against unconstitutionality."[8]

At a similar time, Aragón Reyes (2006, p.38) also affirmed that the possibility of recovering prior review of constitutionality for the reform of statutes of autonomy "should be the subject of deep reflection (and not only because in some statutes referendums of the citizens of the autonomous community are involved, but also, and especially, because of the particular position and significance of the statutes in our

constitutional model).” In a similar vein, Cruz Villalón (2006, p.290) indicated the necessity that, with suitable caution, a prior process of unconstitutionality “would be open to cases of reform of the constitution and statutes of autonomy. This expansion would not denature the basic option for successive control and would surely contribute to strengthening the judicial guarantee of the normative constitution.” García Roca (2009, p.94) also wrote in favour of recovering the institution, understanding that prior appeal against draft reforms of the statues should not have been eliminated from article 79 of the LOTC “when the same appeal against organic laws which had led to parliamentary obstruction were correctly eliminated. That the constitutional court is obliged to review the constitutionality of an endorsed law is procedurally possible, but it would be a poisoned chalice that could be easily avoided by including prior review of the statutes before they came into force.”

The truth is that from 2006 onwards, because of reforms to statutes, prior appeal of unconstitutionality gained new prominence in the political and jurisprudential debate. Following the failure of the organic law on this matter presented by the Popular Party in April 2006, it would not be until the 24th of January 2014, the day the socialist and popular parliamentary groups in congress registered proposals to reform the organic law on the constitutional court, that there was a proposal to reactivate this idea, solely to preventively review the constitutionality of statutes of autonomy and draft reforms to the same, initiatives which ultimately merged, giving rise to LO 12/2015, 22nd September.

Thus the current art. 79 LOTC came into force with the aim, according to the explanatory text, of “ensuring the not always easy balance between the special legitimacy of the statutes of autonomy as basic institutional norms of the autonomous communities, the approval of which involves both the autonomous communities and the state, and on occasion the electorate via referendum, and the respect of that text for the constitutional framework, constructed around the constitution as the fundamental rule of the state and our legal system.”

It must be said that the same reasons that made it necessary to have the regulation of a procedure granting the constitutional court the possibility of making a prior ruling of unconstitutionality about future statutes of autonomy or reforms of such statues can be transferred to constitutional reform. Consequently, in my opinion, it would have been rather useful if the legislators had ‘hedged their bets’ with a procedure to also have a prior appeal of unconstitutionality for constitutional reforms, before a reform being challenged after coming into force, which is not a completely infeasible hypothesis.

In this sense, and as a proposal of *lege ferenda*, many of the provisions that characterise the current prior appeal of unconstitutionality could be brought over to the prior appeal of unconstitutionality of constitutional reforms. So although art. 79.1 LOTC refers to ‘drafts’ and ‘proposed reforms’ of statutes of autonomy, the text to be reviewed is none other than the definitive text of the statute or its reform, following processing and approval by parliament. Similarly, the subject of a prior appeal of unconstitutionality of a constitutional reform should, in my opinion, be the definitive text of the constitutional reform approved by parliament, before its promulgation and publication, and of course, before any referendum that may be required.

In terms of timescales, the three-day limit following publication in the official parliamentary gazette described in art. 79.4 LOTC seems to also be a reasonable deadline for the prior appeal of unconstitutionality of constitutional reforms, notwithstanding the problems that arose on this point with the first rules in 1979 about prior appeals of unconstitutionality which led to ATC 120/1983 with its three dissenting opinions and the

need for the constitutional court to dictate complementary rules to interpret the rules of application of the prior appeal of unconstitutionality. In addition, and as in the other constitutional procedures, there is no provision in LOTC for the case in which the CC does not meet the six month deadline set by the law to give its ruling, although the law attempts to facilitate this work indicating in art. 79.6 LOTC that the court "will have what it needs to effectively comply with this provision, reducing ordinary timescales and in every case giving preference to the resolution of these appeals ahead of other matters in progress."

Those who could legitimately raise a prior appeal of unconstitutionality would be those who, according to the constitution and the LOTC, are legitimately able to raise appeals of unconstitutionality against statutes of autonomy (art. 79.3 LOTC), is it is also reasonable that those who can legitimately raise a hypothetical prior appeal of unconstitutionality of a constitutional reform would be the same as those who can bring appeals of unconstitutionality now.

In terms of effects, if the court rules no unconstitutionality, the process of amending and improving the constitutional reform would continue, including the corresponding calling of a referendum if necessary. If, however, the court finds the reform procedure unconstitutional, it must specify the articles that applies to, connected articles that are affected by the declaration, and the constitutional articles that justify the declaration of unconstitutionality. In this case, the reform process cannot continue without those articles being eliminated or modified by parliament.

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Notes

1 In contrast, among others Vega (1985, pp.220–ff) and Tajadura Tejada (2018, pp.60–ff).

2 The government, congress and the senate have the power to initiate constitutional reform in accordance with the provisions of the constitution and parliamentary standing orders. The assemblies of the autonomous communities can request that the government initiate a constitutional reform, or send the Bureau of Congress a proposal, delegating a maximum of three assembly members to defend the proposal. Popular initiative is excluded from being able to initiate the reform process.

3 The reform procedure in art. 168 EC is for cases where a complete revision of the constitution is proposed, or "or a partial revision thereof, affecting the preliminary title, Title II, Division 1 of Title I; or Title II.."

4 Art. 93 EC states: "authorization may be granted by an organic act for concluding treaties by which powers derived from the constitution shall be transferred to an international organization or institution. It is incumbent on the Cortes Generales or the government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred."

5 In DTC 1/1992 the constitutional court ruled the existence of a contradiction that could not be resolved by interpretation between art. 8 B, Section 1 EEC Treaty and art. 12.2 EC, as the treaty recognised the right of passive suffrage in municipal elections to a generic set of people (nationals of other member states of the community), whereas art 13.2 EC, prior to the reform, only granted this right to Spanish nationals. Following the constitutional reform approved by plenary sessions of congress, on the 22nd of July 1992, and the senate on the 30th of July 1992 (BOE, 27th August 1992), art. 13.2 EC states that "only Spaniards shall have the rights recognized in Section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity."

6 The standing orders of the Congress of Deputies dedicates Chapter III of Title V to "special rules of legislative procedure", distinguishing among these Organic Bills, the Finance Bill, Statutes of Devolution, and constitutional review and reform (Division 4) in terms of the latter, the standing orders speak of constitutional reform bills and states that they will be dealt with according to the rules laid down in the regulations for bills of law, although they must have the signature of two parliamentary groups or a fifth of members of congress.

7 In this vein, see, amongst many others, STCs 38/1999, 2nd March, FJ 2; 107/2001, 23rd April, FJ 3 a); 203/2001, 15th October, FJ 2; 177/2002, d 14th October, FJ 3, and 200/2014, 15th December, FJ 4.

8 Council of State (2006). The complete text may be found on http://www.consejo-estado.es.