Revisión anticipada o tácita del tratado de la UE mediante procedimiento simplificado bajo el control de los parlamentos nacionales: el caso de España (condiciones constitucionales para la participación del parlamento español)

Anticipated or tacit EU treaty revision via simplified procedures under the control of national parliaments: the case of Spain (constitutional conditions for the participation of the Spanish parliament)

Carlos VIDAL PRADO
Profesor de Derecho Constitucional
Universidad Nacional de Educación a Distancia (España)
cvidal@der.uned.es

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ABSTRACT

The most important innovation of the Lisbon Treaty in relation to the content of the community treaties is the role reserved for the national parliaments, which was already included in the failed European Constitutional Treaty. In Spain, the Parlament (Cortes Generales) approved the Act number 24 from 2009, but this Act does not contain any reference to the simplified revision procedure of the treaties established in the Article 48.6 TEU. The Act deals only with the procedure established in article 48.7 TEU.

Keywords: Lisbon Treaty, Simplified revision procedure of the treaties, National Parliaments, Spanish Parliament.

JEL Classification: K00.

RESUMEN

La innovación más importante del Tratado de Lisboa en relación con el contenido los tratados constitutivos es el papel reservado a los parlamentos nacionales, que ya estaba incluida en el frustrado Tratado Constitucional Europeo. En España, el Parlamento aprobó la Ley 24/2009, pero esta Ley no contiene ninguna referencia al proceso de revisión simplificada de los Tratados establecido en el art. 48.6 del Tratado de la UE. La Ley solamente se refiere al procedimiento establecido en el art. 48.7 del Tratado.

Palabras Clave: Tratado de Lisboa, Procedimiento simplificado de Reforma de los tratados, Parlamentos nacionales, Parlamento español.

Clasificación JEL: K00.

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1. INTRODUCTION

Simplified revision procedures – less complex processes than the ordinary procedure – refer to modifications of treaties that are intimately linked to the effectiveness of the ordinary functioning of the European Union (for this reason, they are limited to the third part of the Treaty on the Functioning of the European Union, relative to the internal policies and actions of the Union, which is somewhat similar to that which was contemplated in relation to Part III of the Constitutional Treaty). They are modifications that are not associated, therefore, with what we could define as the "constitutional framework" of the Union.

Both the system contemplated in Article 48.6 and that of Article 48.7 TEU are procedures that do not give rise, strictly speaking, to reforms of the treaties. It is rather a question, as Bar Cendón has affirmed, of two procedures that – in technical terms – would be appropriate to conceptualise as constitutional exceptions or even as forms of constitutional mutation and not, strictly speaking, as a revision procedure[1]. In any case, one could speak of mixed reform systems because although considerable power for reform is attributed to the community institutions, the effectiveness of the modifications handled by such procedures (almost identical to those of Article IV-445 and IV-444 of the European Constitutional Treaty, respectively) is conditional upon a subsequent intervention by the member states.

The procedure that interests us here, as contemplated in Article 48.7 TEU, may be considered a subspecies of the 'passerelle' clauses that were already included in the Community Treaties[2], although they differ with regard to the requisites necessary for their use and the scope of their material application. In fact, this type of modification has been designated as a 'general passerelle' or simply as a 'bridging clause' (*passerelle* or *Bridge clause* or *bridging clause*[3]); as was already contemplated by the Constitutional Treaty, each national parliament may oppose the application of a 'bridging' clause.

The most important innovation in relation to the content of the community treaties is the role reserved for the national parliaments, which was already included in the failed European Constitutional Treaty[4]. The reform approved via a bridging clause is made known to the national parliaments and can only take effect if none of them opposes the decision of the European Council[5].

The procedure is extremely rigid because it effectively means the possibility of a double veto in the hands of each Member State: on the one hand, via the Member State's

representation on the Council (since the decision requires unanimity) and, on the other hand, through the Member State's Parliament via the procedure that we are analysing[6].

2. THE MECHANISMS FOR PARTICIPATION OF THE SPANISH PARLIAMENT IN THE SIMPLIFIED REFORM PROCEDURES

The Spanish Parliament (Cortes Generales) is bicameral. Matters regarding the European Union enter within the scope of action of the Mixed Commission for the European Union of the Cortes Generales, a joint Commission of deputies and senators. This Commission, in its session held on 18 December 2007, unanimously approved an extensive and detailed report, which concluded more than two years of activity of the Working Party created within the Commission to study the application by the Cortes Generales of the Treaty to establish a Constitution for Europe.

After the approval of the Treaty of Lisbon, the Working Party urgently proceeded to adapt that Report to this new text. In its conclusions, the Report made different suggestions and recommendations, with the objective of adapting the Act 8/1994, on the regulation of the Mixed Commission for the European Union, to the provisions of the Treaty of Lisbon.

In the current Legislature (2008/2012), the Mixed Commission for the European Union constituted among its members a Study Committee for the adaptation of the said Act 8/1994 to the provisions of the Treaty of Lisbon. The Committee prepared an agreed-upon text that was approved, by consent, by the Mixed Commission in its meeting of 24 March 2009 and that constitutes the content of the Act 24/2009, of 22 December[7].

To adapt this latter Act to the former Act the list of competences of the Mixed Commission was first enlarged, incorporating those competences that were conferred upon the national parliaments by the Treaty of Lisbon.

Among these, it is appropriate to highlight those regarding the control of the application of the principle of subsidiarity by European legislative initiatives, which concerns the designated "Early Warning System" developed by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Lisbon.

The Act attributes to the Mixed Commission the power to issue on behalf of the Cortes Generales reasoned opinions regarding the infringement of the principle of subsidiarity, notwithstanding the fact that the Plenary Sessions of the Congress and the Senate may advocate debate and voting on the opinion prepared by the Mixed Commission for the European Union in the terms contemplated by the respective Standing Orders of the Chambers.

Furthermore, the Act admits the possibility contemplated in the Protocol annexed to the Treaty of Lisbon consisting that national parliaments may consult regional parliaments that possess legislative competences. This possibility is articulated in a general manner via the remission to the parliaments of the Autonomous Communities of all of the European legislative initiatives as soon as they are received, without pre-judging the existence of affected autonomous competences. The said parliaments have a term of four weeks for their opinion to be taken into account by the Mixed Commission, which, should it approve a reasoned opinion regarding the infringement of the principle of subsidiarity by a draft legislative act of the European Union, must incorporate the list of opinions remitted by the parliaments of the Autonomous Communities and the necessary references for consultation.

The Mixed Commission for the European Union is also granted the power to request the Government to bring actions before the Court of Justice against a European legislative act due to a breach of the principle of subsidiarity, a power that must be exercised within six weeks of the official publication of the European legislative act. However, the Government may rule out, in reasoned form, the bringing of the action requested by either one of the Chambers or the Mixed Commission for the European Union, a decision for which reasons must be given via the appearance of the Government before the Mixed Commission for the European Union when the latter so requests.

Regarding what is of interest to us for the purposes of this brief contribution, that is, the procedures for the participation of national parliaments to express their opposition to certain initiatives of the European Council, such as those for the modification of the rules regarding majorities and the procedures for approval of legislative acts (which has been designated as a simplified revision of the treaties), these are also dealt with, as is logical, in the said legal reform. In the case of the Cortes Generales, the proposal establishes that it will correspond with the Plenary Sessions of the Congress and the Senate to adopt this agreement at the proposal of the Mixed Commission for the European Union.

Specifically, the said procedure is regulated in Article 8 of the Act. Section 1 of this Article establishes the following:

> "1. The opposition of the Cortes Generales to the initiatives taken by the European Council authorising the Council to pronounce by qualified majority in place of unanimity or to adopt legislative acts by the ordinary legislative procedure instead of by a special procedure, in the exercise of the authorisation established in Article 48.7 of the Treaty of the European Union, will correspond to the Plenary Sessions of the Congress of Deputies and of the Senate at the proposal of the Mixed Commission for the European Union".

Subsequently, in section 2, it is established that: "If the Plenary Sessions of the Congress of Deputies and of the Senate ratify the proposal of opposition to the initiative of the European Council, the said decision will be handled in the terms determined by regulation, being transferred to the Government for its knowledge". Lastly, section 3 of the same Article provides that: "[t]he same procedure will be applicable to the opposition of the Cortes Generales to the decisions of the Council relative to the determination of aspects of Family Law with cross-border implications that may be the object of acts adopted via ordinary legislative procedure in accordance with that provided in Article 81.3 of the Treaty of the Functioning of the European Union".

One will notice that the Act number 24 from 2009 does not contain any reference to the simplified revision procedure of the treaties established in the Article 48.6 TEU. However, we can suppose that Parliament's role should be crucial with regards to the cases through which the amending procedure of the treaties implies a transferral of powers derived from the Constitution to the European Union. As provided for in Article 48.6 TEU, the simplified revision procedure requires a unanimous decision by the European Council, which enters into force after being "approved by the Member States in accordance with their respective constitutional requirements".

In the Spanish legal system, these cases will be regulated by Article 93.1 of the Spanish Constitution, which establishes the following: "[a]uthorisation 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 resolutions originating in the international and supranational organizations to which such powers have been so transferred".

We can argue that, in these cases, the Spanish Parliament should follow a procedure similar to that contemplated in the respective Standing Orders of the Congress and of the Senate for the authorisation or repudiation of international treaties (Section 154 to Section 160)[8], taking into account the fact that the Committee referred to in these procedures, which must resolve the possible discrepancies between both Chambers, is already created in the case of the European Union, which is the Mixed Committee. Moreover, this Committee, in cases relative to the European Union, acts before the Plenary Session of each Chamber, which makes it foreseeable that discrepancies between Congress and Senate can be avoided.

In my opinion, it would have been more appropriate to include in the Act number 24 of 2009 some provisions establishing the need for the Cortes Generales to participate in a simplified revision procedure, which was settled in Article 48.6 TEU, in line with the statement of the Federal Constitutional Court of Germany in its judgment of June 2009[9]. However, although these provisions have not been included, it is clear, in my opinion,

that Article 93 of the Spanish Constitution should apply, thereby granting the participation of the Cortes Generales in the simplified Treaty revision.

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2 In Art. 42 TEU included the clause known as the 'general passerelle', a system of self-reform that was not used. For its part, the Treaty of Amsterdam established the so-called 'mini-passerelle' in Art. 67 of the Treaty establishing the European Community (hereafter, EC Treaty). This latter system was used by the Council via its decision of 22 December 2004 (OJEC L 396, of 31 December, p. 45). Regarding this matter, cfr. B. De Witte, "European Treaty Revision: A Case Of Multilevel Constitutionalism" in I. Pernice and J. Zemánek (eds.) *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Baden-Baden, Nomos, 2005) [http://www.ecln.net/elements/conferences/book_prag/deWitteFinal.pdf], B. De Witte, "La procédure de revision: continuité dans le mode de changement", in C. Kaddous and A. Auer, A. (eds.), *Les principes fondamentaux de la Constitution européenne*, (Brussel, Helbing & Lichtenhahn, Bruylant, 2006) p. 147 at p. 161; H. Oberdorff, "La ratification et la révision du traité établissant une Constitution pour l'Europe", 38 *Notre Europe Etudes et recherches*, (2005) [http://www.notre-europe.eu/uploads/tx_publication/Etud38-fr.pdf], p. 18; O. Pfersmann, "The New Revision of the Old Constitution", in J.H.H. Weiler and Ch. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective,* Jean Monnet Working Paper 5/04, [http://www.jeanmonnetprogram.org/papers/04/040501-10.html], p. 11; M. Urrea Corres, "The new treaty revision procedure and the entry into force of the Constitutional Treaty" (Global Fellows Forum, Spring 2007, New York University Law, [http://www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM_DLV_013828&RevisionSelectionMethod=LatestReleased].

3 The so-called "passerelle clause" or 'bridging clause' incorporated in the Treaty of Lisbon provides for the possibility for conferring areas of unanimous decision making to majority votes. This possibility, which has been foreseen by previous treaties in a limited version, requires a unanimous decision by the European Council.

4 Regarding the similar provision that was carried out in the Constitutional Treaty vid. Decision 2004-505 of the Conseil constitutionnel (France), on 19 November 2004 [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2004505dc.pdf]. Judgment of the Federal Constitutional Court of Germany of 30 June 2009: "In so far as the general bridging clause under Article 48.7 Lisbon TEU enables the transition from the principle of unanimity to the principle of qualified majority in the decision-making of the Council, or the transition from the special to the ordinary legislative procedure, this is a treaty amendment under primary law, which is to be assessed pursuant to Article 23.1 second sentence of the Basic Law. Already in its judgment on the Treaty of Maastricht, the Federal Constitutional Court pointed out as regards the challenge made there concerning the loss of statehood in the area of Justice and Home Affairs, an area central to the subject of fundamental rights, that in the "Third Pillar" decisions were only adopted unanimously and that by these decisions no law was passed that would be directly applicable in the Member States and would claim precedence there (see BVerfGE 89, 155 <176>). The Treaty of Lisbon now transfers exactly this area to the supranational power of the Union by providing that by decisions adopted in the European Council in the general bridging procedure,

areas can be transferred, with a right of opposition of the national parliaments but without a requirement of ratification in the Member States, from unanimity to qualified majority voting or from the special to the ordinary legislative procedure. This affects the core of the justifying line of argument of the judgment on the Treaty of Maastricht cited above. The national parliaments' right to make known their opposition (Article 48.7(3) Lisbon TEU) is not a sufficient equivalent of the requirement of ratification; therefore, approval by the representative of the German government always requires a law within the meaning of Article 23.1 second sentence, and if necessary third sentence, of the Basic Law. It is only in this way that the German legislative bodies exercise their responsibility for integration in a given case and also decide whether the level of democratic legitimation is still high enough to accept the majority decision. The representative of the German government in the European Council may only approve a treaty amendment brought about by the application of the general bridging clause if the German Bundestag and the Bundesrat have adopted a law pursuant to Article 23.1 of the Basic Law within a period yet to be determined in accordance with the purpose of Article 48.7(3) Lisbon TEU. This also applies to cases where the special bridging clause under Article 81.3(2) is used" (BVerfG, 2 BvE 2/08, 30 June 2009, No. 319, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

5 In the preparation stage of the European Constitutional Treaty, this provision was included in the document presented by the Italian presidency on 9 December 2003 (CIG 60/03 ADD1, Annexe 35, p. 49). It can be maintained that this was a response to the position of the United Kingdom, via the document entitled *The Convention on the Future of Europe and the Role of National Parliaments*, prepared by the House of Commons, in which it stated on p. 19 that "the idea that parts of the Treaty would be amendable without national ratification was unacceptable".

6 The possibility has been proposed of requiring a certain number of parliamentary vetoes: thus, Duff proposes that that it should be possible for 1/3 of the national parliaments to veto the initiative: A. Duff, "Plan B: How to Rescue the European Constitution", 52 *Notre Europe. Etudes et recherches*, (2006), pp. 17 [http://www.notre-europe.eu/uploads/tx_publication/Etud52-en_01.pdf]

7 Act 24/2009, of 22 December, modifying the Act 8/1994 of 19 May, which regulates the Mixed Commission for the European Union, for its adaptation to the Treaty of Lisbon of 13 December 2007 (Official State Gazette, 23 December).

8 The New Avalaible on: http://www.congreso.es/portal/page/portal/Congreso Congreso/ Informacion/Normas/standing_orders_02.pdf

9 The New BVerfG, 2 BvE 2/08, 30 June 2009: http://www.bverfg.de/entscheidungen/es 20090630_2bve000208en.html


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