

# Constitutional Liquidity between Rigidity and Flexibility: Constitutional Liquidity Clauses<sup>1</sup>

*La liquidez constitucional entre rigidez y flexibilidad:  
las cláusulas de liquidez constitucional<sup>2</sup>*

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RECEIVED: June 5, 2023

ACCEPTED: September 5, 2023

DOI: <https://doi.org/10.22201/ijj.24487937e.2024.18.18712>

**RESUMEN:** La estabilidad es una de las características centrales de una constitución, aunque su consecución trascienda los planteamientos puramente constitucionales. Los métodos institucionales que se han utilizado para, en cierta medida, intentar alcanzarla son diversos (y a veces contradictorios) según se adapten más o menos fácilmente a la demanda de cambio constitucional. Entre estos fenómenos, este trabajo formula un nuevo concepto denominado liquidez constitucional cuya utilidad radica en propiciar dimensiones de flexibilidad en constituciones rígidas. La liquidez constitucional se canaliza a través de las denominadas cláusulas de liquidez constitucional que se formulan inductivamente a la luz de la Constitución española de 1978 y que son analizadas estructural y funcionalmente. Finalmente, se comparan con otros conceptos tradicionales relativos al tratamiento de la estabilidad

<sup>1</sup> Traducción realizada por la doctora Ioana Cornea y Mariana Esparza Castilla.

<sup>2</sup> This work originates from a broader academic effort enriched by the opportune comments of professors José Juan Moreso and Marina Gascón, to whom I extend my gratitude for their generosity and good judgment. I also thank the participants in the seminar on philosophy of law at the Universitat Pompeu Fabra for their suggestions and criticisms, especially, professors Marc Carrillo, Víctor Ferreres, José Luis Pérez Triviño, and Lorena Ramírez for their active participation in the event. Finally, my gratitude to professor Álvaro Núñez of the Universidad de Murcia for assembling the colloquium that motivated this publication and to professors Josep Aguiló, Ana Carmona, Marcela Chahuán, Ignacio González, and Josep M<sup>a</sup> Vilajosana, as well as to Rafael Hernández Marín, Juan José Iniesta and Antonio Moreno for their sharp comments and accurate criticisms. The text now published substantially goes back to the source text in order to keep the logic of the dialogue with the remaining commentators. Moreover, the work is part of the project *Construcción de Derechos Emergentes* (Construction of Emerging Rights)(PID2019-106904RB-I00) of the Agencia Estatal de Investigación española (State Research Agency).

y el cambio constitucional.

**Palabras clave:** Liquidez constitucional. Constituciones flexibles y rígidas. Reforma y mutación constitucional. Artículo 10.2, artículo 65, artículo 93 y Disposición Adición 1ª de la Constitución Española de 1978.

**ABSTRACT:** Stability is one of the essential characteristics of a constitution, however, its achievement transcends purely constitutional considerations. The institutional methods that have been used to try to achieve it are diverse —and sometimes contradictory— based on how easily they adapt to the demand for constitutional change. Within these phenomena, this paper proposes a new concept called constitutional liquidity which enables dimensions of flexibility in rigid constitutions. Constitutional liquidity is channeled through the constitutional liquidity clauses that are induced from the Spanish Constitution of 1978 and which this paper analyses in structural and functional terms.

**Keywords:** Constitutional liquidity, flexible and rigid constitutions, constitutional reform and mutation, Articles 10.2, 65, 93, and Additional Provision 1 of the Spanish Constitution of 1978. Lastly, these clauses are compared with other traditional concepts regarding stability treatment and constitutional change.

**CONTENTS:** I. On the notion of constitutional liquidity. II. Constitutional liquidity clauses. III. Provision of interpretation in accordance with International Human Rights Law (Article 10.2 SC). IV. The Household of HM the King (Article 65 SC). V. Recognition of the primacy and direct effect of European Union Law (Article 93 SC). VI. Update of historic rights (1st AP SC). VII. Features of constitutional liquidity clauses and their theoretical implications. VIII. References.

## I. ON THE NOTION OF CONSTITUTIONAL LIQUIDITY

The claim to stability is a common feature of constitutional dynamics. One might even think along with Joseph Raz that this aspiration to stability is one of the defining or essential features of a constitution.<sup>3</sup> However, stability is not a normative concept nor a technical one, and obeys a multiplicity of political, cultural, social, economic factors, among others, that are usually framed in long-standing historical evolutions, both at the local and international levels. Therefore, what can be confronted with certain specificity by constitutional theory, institutional regulation and, in general, constitutional politics has a far more concrete profile and more limited effects.

<sup>3</sup> Raz proposes to define the concept of constitution by seven criteria: constitutive, stable (at least in terms of aspiration), written (although not necessarily in its entirety), supreme, justiciable, and rigid character, and expression of a common ideology (2007, pp. 43-46).

One of the issues most profusely associated with the treatment of constitutional stability concerns the greater or lesser degree of rigidity or flexibility that the regulation of constitutional reform may adopt regarding changes in the constitution. A first approach to the matter would seem to indicate a tendency to regard a parallelism between constitutional rigidity and constitutional stability, on the one hand, and constitutional flexibility and constitutional instability, on the other. I believe this view would be incorrect since, as I indicated above, stability is a notorious characteristic of constitutions due to a set of variables of different nature, among which these technical reflections hold a subordinate position. However, the choice of one of the different constitutional regulations, as well as the interpretations of the constitutional text, operate within a framework of normative preferences tending to regulate constitutional change from a perspective that prioritizes constitutional stability over the adequacy of the constitution to the social, political, economic or cultural evolution of the society to which it seeks to provide a regulatory framework.

Thus, we can observe that the conceptual framework from which this dimension of constitutional change is elaborated and managed resorts to the concepts of immutability, express or implicit intangibility, temporary intangibility (premature or deferred), hyper-rigidity, rigidity, entrenchment, reform, mutation, and flexibility that can be presented in a regulative scale ranging from the primacy of stability to the preference for normative adequacy. Furthermore, considering the agents that urge constitutional change —nation, people, states, legislative, executive, even judicial— may vary and the reference to each of them also entails preferences between these two value poles. Finally, we can also mention the progressive sophistication of the proceedings and requirements to undertake constitutional reforms and how, to a large extent, they all serve this balance between stability and progressive adequacy.<sup>4</sup>

Within all this complexity there is one phenomenon that I believe has not been unequivocally identified and, thus, has not been systematically considered. I mean the idea of regulatory fluidity, which I will call constitutional liquidity. It is the regulatory phenomenon whereby substantially different and eventually incompatible regulatory spheres coexist in the same constitution and operate as instruments aimed to promote constitutional stability by modulating constitutional rigidity. So, in a preliminary basis, this modulation refers to those cases in which constitutional prescriptions become partially inapplicable due to the constitution itself has provided the acceptance of precedence of other regulations that

<sup>4</sup> I have dealt with these matters in (Saucá, 2024, in press).

may eventually come into existence. The constitutional provisions that operate as source of constitutional liquidity will be referred to as constitutional liquidity clauses and for their identification I shall limit myself to an inductive approach based on the Spanish Constitution of 1978.

## II. CONSTITUTIONAL LIQUIDITY CLAUSES

The Spanish Constitution of 1978 establishes in an explicit manner some constitutional provisions that enable the possibility of adopting, in the future, legal norms whose content may be eventually unconstitutional. The referral of the Constitution to legislative development occurs in general throughout many of its passages, both in the substantive regulation of the rights it recognizes and the duties it imposes, and in the articulation of certain dimensions of the institutions and bodies it establishes. Likewise, there are numerous provisions and mechanisms for the delegation of competences of normative development for which the conditions and proceedings of each case are established. All these constitutional provisions are characterized by maintaining the demand of adequacy in the exercise of these normative powers in compliance with such constitutional provisions. Thus, the outcome of these normative powers is subject to substantial and procedural conformity with the Constitution.

A simple reading of the constitutional text offers a broad perspective of these provisions and referral mechanisms, both in substantive and institutional regulation and delegation. In the first sense, Title I, which concerns about fundamental rights and duties, displays a profuse use of the strategy of the constituent, referring their development to the legislative regulation in a comprehensive manner. The expression “in the manner provided by the law” appears repeatedly in numerous occasions that set a vast substantive reservation of the law.

To this end, when art. 53, in section 1, formulates the reservation of law—which must be organic considering art. 80.1—to regulate the exercise of the rights and liberties of Section 1 of Chapter Two, it merely summarizes what is established in multiple rights. Thus, art. 15 refers to the law of war to exempt the abolition of death penalty; whereas art. 17.1 refers to the cases and forms of deprivation of liberty and provides the terms for the arrested person’s access to a lawyer in legal and criminal proceedings. Moreover, art. 17.4 refers to the regulation of “habeas corpus”. Article 18.4, to the limitation on the use of information technology to guarantee the honor and both personal and family privacy of citizens, and the full exercise of their rights. Article 19, to the right to freely enter

and leave Spain. Article 20.3, to the organization and parliamentary control of the social communications media under the control of the State or any public agency, and the guarantee of access to such media to the main social and political groups. Article 23.2 refers to the access on equal terms to public office, and the second paragraph of art. 24.2 refers to the exempt of the obligation of making statements regarding alleged criminal offences for reasons of family relationship or professional secrecy. Article 25.1, to the referral to the law in force for convictions and sanctions, and art. 25.2 to the referral to penal law. Article 27. 7, to the involvement in educational centers funded by the State. Article 28.1 concerns to limit or exempt the right to freely join a trade union in the case of the Armed Forces or Institutes or other bodies subject to military discipline, and to regulate the special conditions of its exercise by civil servants and art. 28.2 devote to regulate the right to strike. In Section 2 of Chapter II, the referral to the law is even more frequent. According to art. 30.2, it shall determine the military obligations of Spaniards and art. 30.4, the duties of citizens in the event of grave risk, catastrophe, or public calamity. Article 31.3 refers to the law for establishing personal or property contributions for public purposes, art. 32.2 for the regulation of marriage, art. 33.2 for determining the social function of property, art. 33.3 for expropriations, art. 34.1 for the right to set up foundations for purposes of general interest, art. 35.2 for establishing a Workers' Statute, art. 36 for Professional Associations, art. 37.1 for guarantee the right to collective labor bargaining and the binding force of the agreements to guarantee collective labor bargaining and the binding force of agreements and lastly, art. 37.2 for regulating collective labor dispute measures. Regarding Chapter III, Article 53.3 provides, in general, that its principles may only be invoked before the ordinary courts in accordance with the legal provisions by which they are developed, limiting itself to establishing public duties of promotion. Furthermore, there are specific provisions of reservation of law such as art. 45.3. for sanctions and obligations to make good the damage in environmental matters, art. 52 for the regulation of professional organizations, and, finally, in Title I, the provision of an organic law to develop the institution of the Ombudsman (art. 54), and for the suspension of rights (art. 55). Apart from Title I, there are also referrals to the law for the regulation of issues such as: the rights of hearing and access to information of article 105, compensation of art. 106.2, free justice of art. 119, popular action of art. 125, tax and fiscal regime of article 133, and the participation in the jury of art. 125, in Social Security of art. 129.1, within companies of art. 129.2 or in the election of municipal authorities and in open council of art. 140. The Constitu-

tion also provides a referral to an organic law for the regulation of states of alarm, emergency, and siege (art. 116).

In the second sense, the organic part includes reservations of law also in a frequent way to establish the conditions for the organization of the constitutional organs. Thus, Title II of the Crown provides a referral to the organic law of art. 57.5 for the succession question. Title III provides a referral for elections to Congress (art. 68) and Senate (art.69.2), for the ineligibilities and incompatibilities for the elected to (art. 70.1), their validity of the certificates of election and credentials (art. 70.2), and the penalties imposed for failure to comply with the fact-finding committees. Title IV provides a referral for the composition of the Government (art. 97.1), and for the status and incompatibilities of its members (art. 97.2). Title VI provides a referral for the statute of judges and magistrates (arts. 117.2 & 122.1), their incompatibilities (art. 127.2), and the system and methods of professional association (art. 127.1), for the establishment of authority and procedure of the exercise of judicial authority (arts. 117.3 & 117.4), for the regulation of justice within military limits (art. 117.5), for the public nature of hearings (art. 120), for the Constitution, for the setting up, operation and control of judicial power (art. 122.1), of its General Council (arts.122.2 & 122.3), and the President of the Supreme Court (art. 123.2), for the statute of the Office of the Public Prosecutor (art. 124.3), and for the judicial police (art. 126). Title VIII provides a referral for the composition, organization and duties of the Court of Audit (art. 136.4) and Title IX provides it for regulating the statutes of Constitutional Court members, and the procedure to be followed, and the conditions governing actions brought before it (art. 165).

In the third sense, the typology of normative production includes some cases of delegation. Hence, in art. 80 for establishing the organic laws, in arts. 8, 83, 84 and 85 for legislative delegation— as art. 75.2—, in art. 86 for norms of the Government with the status of law, in art. 87.3 for popular legislative initiative, in art. 92.3 for referendum, in arts. 94 and 96 for international treaties, in art. 134 for budget law— arts. 156, 157 and 158 for the Autonomous Communities—, in art. 135.3 for public debt or borrowing commitments, and in art. 135.5 for budget stability. The peculiarities and standing Orders of the Parliament (arts. 72 and 89) are included in all of them. Title VII also provides other reservations of law regarding economic activity —art. 128.2 for public initiative, art. 131 for planning, art. 132 for public domain and community property and State and national heritage—. It also includes the reservations of tax law in art. 133 and local provision of art. 142. Lastly, Title VIII includes multiple reservations for the development of the process, distribution of competences

and laws of functioning of the autonomous communities. In this manner, besides the referral to the organization of the provinces in art. 141, the Constitution offers in the first sense several provisions for legislative regulation (arts. 144, 146, 147.3, 151, 152, repeals TT. 1st, 2nd, 3rd, 5th, 6th and 7th). In the second sense, it provides arts. 148 and 149 and in the third sense, art. 150.

This complex mechanism of reservations and referrals set forth in the Constitution conforms the normative production structure to which the statutory authority is added (arts. 97 and 152). What is relevant herein is that the outcome of the exercise of these normative powers must comply with the established constitutional provisions and, thus, the eventual declaration of unconstitutionality entails the loss of its validity. However, there are some rare exceptions in which this normative referral enables the production of norms whose content may be incompatible with constitutional regulation. This possible contradiction with the Constitution, and this is the decisive point, does not imply the inapplicability of such regulations, but rather that they are immune from the corresponding control of constitutionality. They are, therefore, cases in which constitutional regulation becomes liquid since the Constitution itself enables the conditions for unconstitutional normative creation. I suggest the term constitutional liquidity clauses for referring to these normative provisions of the Constitution that contain the possibility of creating norms of unconstitutional content.

We can find four constitutional liquidity clauses in the Spanish Constitution of 1978 contained in art. 10.2, art. 65.2 (art. 65.1 in fine), art. 93 (regarding art. 135.2 and art. 135.6 3rd paragraph), and first additional provision.

### **III. PROVISION OF INTERPRETATION IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW (ARTICLE 10.2 SC)**

The first one sets forth that “Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce, se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España (The principles relating to the fundamental rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.).” This provision implies a bridge between national law and international human rights law that

operates within interpretative and compliance parameters. The scope of this regulation would seem to be limited by such parameters, however, given its subject matter and effects, it continues to be universally applicable. The interpretative dimension of fundamental rights is the core element that allows identifying the contents of each right and weighing its concurrence with other rights or interpretations in specific cases. Thus, the interpretation of rights plays a key role in determining their practical content. Moreover, it is envisaged to interpretate in compliance with the Constitution itself.<sup>5</sup>

The scope of this requirement of compliant interpretation is debatable. As Alejandro Saiz Arnaiz (2013, pp. 48, 51-52) points out, the margin of appreciation on the interpretation of an international treaty or agreement is significantly different whether they have a judicial organ in charge of their interpretation. In the absence of such institutional support, the margin of appreciation regarding the interpretation of the texts may be wide and enable the conditions for such compliant interpretation to be fulfilled. Nevertheless, when they do exist—as notably in the cases of the European Court of Human Rights (ECHR) and the various United Nations Committees (such as the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), the Committee on the Rights of the Child (CRC) and the Subcommittee on Prevention of Torture (SPT)<sup>6</sup>—and when they exercise an authoritative interpretative power over the Convention in question, the State interpretation must follow that one. The chances that it may not be consistent with the Constitution are unavoidable. All this implies “*adecuar la actuación de los intérpretes constitucionales a los contenidos de aquellos tratados, que poseen así una nueva y singular eficacia (adapting the actions of constitutional interpreters to the contents of those treaties, which thus possess a new and singular effectiveness. Transl. Mariana Esparza)* (Saiz Arnaiz, 2018, p. 231).” The idea that the ECHR has pro-

<sup>5</sup> In fact, there has been no need for any constitutional reform due to Spain's ratification of no international treaty on fundamental rights. Regarding the remarks of the Council of State in the Opinions of May 17, 1990 (File No. 54617) and July 22, 1999 (File No. 1374), see (Jimena Quesada, 2020).

<sup>6</sup> Alejandro Saiz Arnaiz (2018, pp. 234-238) adds, also in a non-formalist reading, the recommendations and resolutions of the International Labour Organization, both the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, and even some treaty not yet ratified. He gives as well comprehensive references to judgments of the Spanish Constitutional Court along these lines. Basically, with some jurisprudential ambivalence, this is the classic approach to the issue. See (Sánchez Morón, 1983, pp. 55-56).



gressively become a European constitutional court is strengthened by the doctrine of *res judicata* (Queralt Jiménez, 2009; García Roca y Nogueira Alcalá, 2017; García Roca y Queralt Jiménez, 2019; Ferrer Mac-Gregor & Queralt Jiménez, 2017)<sup>7</sup>, its development through *pilot judgments* (García Roca, 2019), and with the entry into force of Protocol No.16 of the European Convention on Human Rights<sup>8</sup>. And thus, the objective meaning of this Court judgments is enhanced (García Roca, 2019, p. 66). At the same time, the possibility of applying a control on conventionality in the scope of Spanish national courts' action has become more widespread (Jiménez Quesada, 2019, 2014, 2010, Alonso García, 2020, & Perotti Pinciroli, 2021). The Constitutional Court judgement 140/2018, of December 20, in a still hesitant manner, has ratified the openness of the Spanish legal system to the incorporation of such control. So far, the Constitutional Court has held a position of integration between its case law and the ECHR's — for example, the analyses on the extension of the concept of inviolability of the home within privacy in Saiz Arnaiz (2018) and Ripol Carulla (2014). But considering these new expectations, a diffuse control of legality by the ordinary judge on the criteria for interpreting the judgments of the European court tends to be accepted. Based on these premises, I deem that the forecast is the integration of the interpretations by international courts (and any other incorporated organs) with preference to those established in the Constitution itself, regardless the defense of its own powers in the last constitutional interpretation and the formal exclusion of international human rights treaties from the constitutional framework. Hence, the clause of art. 10.2 of the Constitution operates as a liquidity clause of its own regulation in favor of international regulation on fundamental rights.

<sup>7</sup> Despite the extension, I hereby quote the statements of former President Spielmann: "The second way in which the reality of the Convention mechanism surpasses the original model is in the impact of the Court's judgments. The States' express obligation to abide by judgments only concerns judgments delivered against them, as Article 46 § 1 provides. Yet that fails to capture the true potency of the Court's rulings. Its binding determinations in a case, contained in the operative provisions of the judgment, rest upon its authoritative interpretation of the text of the Convention. To put it another way, *res judicata* is paired with *res interpretata*". The translation in the original text is from the author, José María Sauca, and the quote is from the text of Alejandro Saiz Arnaiz (2018, p. 226).

<sup>8</sup> Protocol No. 16 to the European Convention on Human Rights ("Convention") was submitted for ratifications on October 2, 2013. On April 12, 2018, France filed its instrument of ratification. Thus, the number of 10 countries required for the entry into force of the protocol was completed on August 1, 2018, fulfilling the so-called "Interlaken Process". The President of the European Court of Human Rights in 2013 referred to this protocol as "Protocol of Dialogue", since it allows European highest courts to request advisory opinions on the interpretation or application of the rights and freedoms guaranteed by the Convention. See (Cacho Sánchez, 2019).

#### IV. THE HOUSEHOLD OF HM THE KING (ARTICLE 65 SC)

The second constitutional liquidity clause that I identify in the Spanish Constitution alludes to art. 65.2 (art. 65.1 in fine). Such Article provides that "The King freely appoints and dismisses the civil and military members of his Household." And has as antecedent the financial angle contained in the former section thereof: "The King receives an overall amount from the State Budget for the upkeep of his Family and Household and distributes it freely." The constitutional liquidity of this case results from the enablement of a power that may have normative effects and that is freely exercised by that who is constitutionally inviolable and not held accountable (art. 56.3 SC). In this way, and to say it plainly, the highest authority of the State can freely make decisions on constitutional grounds and create legal norms on the internal relations of the Royal Household whose content may not be in compliance with constitutional principles or rights and may be constitutionally unaccountable for all of this. As Torres del Moral states: "el Rey es Rey trescientos sesenta y cinco días al año y veinticuatro horas diarias. Nada en él ni en su familia es ajeno a los intereses del Estado... En lo tocante a la Corona [sic], todo es de Derecho Público (The King is King three hundred sixty-five days a year, twenty-four hours a day. Nothing about him nor his family is unrelated to the interests of the State... regarding the Corona [sic], everything is public law. Transl. Mariana Esparza) (1992, p. 21)".

The dawn of the Royal Household is related to the institution of monarchy and has a long history. Asunción de la Iglesia Chamarro indicates that the first regulation in Spain regarding the King Household dates to 1707 and sought to regulate the staff in the service of the monarch. However, the first provision that regulates and structures the different services and ranks is a regulation of March 18, 1749 (2019, p. 130). On a constitutional basis and following the precedent of its regulation in arts. 25 and 26 of the Bayona Statute, arts. 213 to 218 of the Constitution of 1812 recognized the institution and the budgetary endowment that went with it. The subsequent constitutions that mention the King Household regulation are those of 1837, 1845 and 1869, although they only refer to its budgetary endowment or the system of incompatibilities (Bassols Coma, 1983, p. 166). The current Household of HM the King was created by proclamation of Decree 2942/1975, of November 25, which unified the civil and military households of the former Head of State. After the promulgation of the Constitution, Royal Decree 310/1979 (of February

13) was approved, which restructured the Household of the King. Later, it was reformed by Royal Decrees 1677/1987 (of December 30), 343/1988 (of May 6), and 1033/2001 (of September 3) and it was included in the subjective scope of application (art. 2 f and 6th Additional Provision) of Act 19/2013 (of December 9) on Transparency, Access to Public Information, and Good Governance. Javier Cremades proposes to describe the Household of the King as follows:

es el Organismo que, con una dependencia directa y completa del Titular de la Corona, tiene como misión servirle de apoyo en cuantas actividades se deriven del ejercicio de sus funciones como Jefe del Estado. Dentro de esta general tarea y además de desempeñar cuantas funciones políticas, administrativas y económicas le correspondan, deberá atender especialmente a las relaciones del Jefe del Estado con los organismos oficiales, entidades y particulares; a la seguridad de Persona y Real Familia, así como a la rendición de los honores reglamentarios y a la prestación del servicio de escoltas cuando proceda. Del mismo modo deberá atender a la organización y funcionamiento del régimen interior de la Residencia de la Familia Real (Is the body that, directly and completely subordinated to the Head of the Crown, is responsible for supporting him in all activities deriving from the exercise of his functions as Head of State. Within this general task, and besides performing all the political, administrative, and economic functions that may correspond it, it must especially attend to the relations of the Head of State with official agencies, entities, and individuals, to the personal and royal family safety, and to the rendering of the statutory honors and escort service when appropriate. Likewise, it must attend to the organization and operation of the internal regime of the Royal Family Residence. Transl. Mariana Esparza) (1998, pp. 25-26).

In general terms, the management of this administrative organization belongs to the King with full freedom from the unlimited nature with which he appoints and dismisses the members of his Household. As Luis María Díez-Picazo indicates, “el gobierno interno de su Casa es el último residuo que queda al Rey de las ilimitadas potestades de un monarca absoluto (the internal government of his Household is the final remainder left to the King of the unlimited powers of an absolute monarch. Transl. Mariana Esparza) (1982, p. 128)”. Such freedom is complemented by the unaccountability of the King, according to art. 56.3 SC, which has favor that, to some extent and despite the *free* nature on the organization and budgetary disposition, every act of the King is supported by some kind of counter-signature. In this sense, Royal Decrees have been used to proceed with the appointments, thus the Council of Ministers offers an endorsement, although its content seems to have been previously designated by the

King with complete autonomy or, at least, in an agreed manner. This approach is controversial, for example, Cremades (1998, pp. 131 et seq.) fully supports this system while Carmen Fernández-Miranda Campoamor (1995, pp. 281-323) understands that it forgets about the dignity of the Crown. Lastly, Joan Oliver Araújo (2020, pp. 55 and 56) considers that art. 65 must be reformed to establish a statutory endorsement for the appointment of the civilian and military members of the Household of the King. Nevertheless, the purpose of this approach is to cover the administrative judicial control (and possible “recurso de amparo constitucional” [appeal for constitutional protection]) to which, according to Constitutional Court Judgment (CCJ) 112/1984, of November 28, the Royal Household is subject as a “organización estatal no insertada en ninguna de las administraciones públicas (state organization not part of any of the public administrations).” Hence, the situation is that the King freely manages and selects the members of H.M. Household and, otherwise, is inviolable and unaccountable.<sup>9</sup> However, judicial protection for the members of the Household is guaranteed in terms of their rights as participants in a unique type of administration. When appropriate, this rights protection may have all the effects derived from the statutory recognition except, precisely, that of forcing the King to incorporate or reincorporate into *his* Household anyone who may not have been elected or may have been relieved from his duties. Indeed, art. 65.2 of the Constitution determines an arcane power that is not subject to the principle of legality. I trust that political dimensions will serve to establish a framework of stability that controls the functioning of this singular administration and to reconcile the freedom of the monarch on the Constitution and the respect for the rights of the members of this organization. But such control cannot be a legal one interfering with the power of free organization granted to the Royal Household whose holder enjoys unaccountability.

Herein lies the constitutional liquidity of this clause. Perhaps it is part of the price for having a parliamentary monarchy. Unlike the liquidity clause discussed in the previous section where there is a tendency towards its progressive extension, we can rely herein on a progressive control and solidification of constitutional regulation, which, currently, remains liquid.

## **V. RECOGNITION OF THE PRIMACY AND DIRECT EFFECT OF EUROPEAN UNION LAW (ARTICLE 93 SC)**

<sup>9</sup> See the excellent work of Patricia García Majado (2021) for further information on the evolution of this matter.

The third liquidity clause that I identify in the Constitution of 1978 displays a paradigmatic character and is contained in Article 93, which provides:

Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cesión (By means of an organic law, authorization may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organization or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organizations in which the powers have been vested).

This provision is supplemented by art. 135.2 —introduced by the constitutional reform of September 27, 2011— which establishes that: “El Estado y las Comunidades Autónomas no podrán incurrir en un déficit estructural que supere los márgenes establecidos, en su caso, por la Unión Europea para sus Estados Miembros (Neither the State nor the Autonomous Communities shall enter into a structural deficit beyond the limits stipulated, if applicable, by the European Union for its Member States)”.<sup>10</sup>

The enormous complexity of this process cannot, and should not, be addressed herein. Thus, and since the Constitutional Court is inclined not to recognized the constitutional character of European Union Law,<sup>11</sup>

<sup>10</sup> It is also relevant paragraph 3 of number 3 of such Article, which was introduced in the same reform, because it states that: “el volumen de deuda pública del conjunto de las Administraciones Públicas en relación con el producto interior bruto del Estado no podrá superar el valor de referencia establecido en el Tratado de Funcionamiento de la Unión Europea (The volume of public debt for all the Public Administrations as a whole as a ratio of the State’s Gross Domestic Product shall not surpass the benchmark figure set forth in the Treaty on the Functioning of the European Union).” Contrary to the prior case, this Article refers to a specific normative document and not to a referral to the eventual and unspecified norms that may be adopted in the future by an entity outside the Spanish constitutional system.

<sup>11</sup> In particular, CCJ 28/1991, of February 14, 1991, and CCJ 64/1991, of March 22, to which CCJ 180/1993, of May 31, is added. Pablo Pérez-Tremps (2004, pp. 113-119) argues that there is also a wide repertoire of Constitutional Court judgments on territorial organization of the State and titles of competence: CCJ 252/1988 (fresh meat trade) —to which it adds Supplemented Constitutional Court Judgment (SCCJ) 79/1992 (Aid to cattle), 117/1992 (Aid to butter), 29/1994 (Sheep and goat premiums), 213/1994 (Agricultural structures 1), 148/1998 (Fishing plans), 128/1999 (Agricultural structures 2), 45, and 95/2001 (Dairy sector 1 and Dairy sector 2)—, CCJ 208/1991 (surface waters), CCJ 236/1991 (metrological control), CCJ 13/1998 (Environmental Impact Assessment), CCJ 14/2004 (Aragonese Law on

I will only recall that the major milestones on the matter are established by Statement 1/1992 —made by the Constitutional Court on July 1 regarding Request 1.236/19 of the Spanish government for finding the existence or inexistence of a contradiction between art. 13.2 of the SC and art. 8 B, section 1, of the Treaty establishing the European Economic Community, in the wording that would result from art. G B 10, of the Treaty on European Union—, 10. by the statement of the plenary session of the Constitutional Court 1/2004 —made on December 1, 2004, about the Request 6603-2004 of the Spanish government for determining the constitutionality of Articles I-6, II-111, and II-112 of the Treaty establishing a Constitution for Europe signed on October 29, 2004, on Rome—, and, lastly, by the report of the State Council —made on February 16, 2006, by means of which it is issued the response for the request submitted by the Council of Ministers of March 4, 2005, *for changes on the Spanish Constitution*, which includes the question about the reception in the Constitution of the European Union establishment process.

The case law cited herein, specifically CCJ 28/1991 and CCJ 64/1991, insisted on the sub-constitutionality of European law and reaffirmed the authority of Constitutional Court to control the grievances of fundamental rights by their application. Thus, the 4th ground the decision held that:

Therefore, in conclusion, it is also clear that when, by means of an injunction —*amparo* trial—, an action from any public power made from the enforcement of European Union Law may damage a fundamental right, this constitutional jurisdiction shall know of such claim regardless of whether that action is regulate or not from the strict perspective of the European Community system and without prejudice to the value that it may have for the purposes of the provisions of art. 10.2 SC (Transl. Mariana Esparza).

To some extent, this logic is still in force until Constitutional Court Statement (CCS) 1/1992 that relates European law to an implicit reform of the Constitution that is rejected. Thus, the Statement concludes as follows:

Territorial Planning), CCJ 147/1998 (Fishing Plans), CCJ 38/2002 (Cabo de Gata-Níjar), CCJ 175/2003 (industry and research), CCJ 235/2001 (public safety of listed chemical substances), CCJ 235/1999 (discipline and intervention of credit institutions), CCJ 21/1999 (forest reproductive material), CCJ 330/1994 (mediation in private insurance), CCJ 62 and 72/2003 on the Canary Islands (Canary Islands general indirect tax and refurbish of the fleet of vehicles, respectively), and CCJ 165/1994 (Basque Office in Brussels). As well as a repertoire on fundamental rights: CCJ 145/1991 (Cleaners of the Gregorio Marañón Hospital), CCJ 41/2002 (Dismissal for pregnancy), CCJ 130/1995 (Ahmed v. Instituto Social de la Marina), CCJ 120/1998 (turtle smuggling), CCJ 224/1999 (Sexual harassment), CCJ 292/2000 (data protection), and CCJ 53/2002 (Asylum). And, lastly, on constitutional economics, CCJ 96/2002 (Tax benefits).

By virtue of art. 93, the Cortes Generales can, in sum, transfer or assign the exercise of “powers derived from the Constitution” but they cannot dispose of the Constitution itself, contradicting or allowing contradicting its resolutions, because neither the power of constitutional revision is a “power” whose exercise is susceptible to be transferred nor does the Constitution itself admit being reformed by any other channel than that of Title X, i.e., by the procedures and guarantees provided therein and the express modification of its own text (Transl. Mariana Esparza).

These approaches received some critiques since they do not address the specificity of the integration process (Pérez-Tremps, 1993, López Castillo, 1996, Alonso García, 1999, and López Castillo, Saiz Arnaiz & Ferreres, 2005) and had a partial reception in the doctrine of CCS 1/2004. In the light of same, the principle of primacy —not supremacy— of European law is reaffirmed, albeit ambiguously to appear to be in continuity with the previous Statement, by virtue of the enablement art. 93 SC which dismiss contradictions on common values and principles shared between it and the Constitution. In its own words, “producida la integración debe destacarse que la Constitución no es ya el marco de validez de las normas comunitarias, sino el propio Tratado cuya celebración instrumenta la operación soberana de cesión del ejercicio de competencias derivadas de aquélla, si bien la Constitución exige que el Ordenamiento aceptado como consecuencia de la cesión sea compatible con sus principios y valores básicos (once the integration has taken place, it should be stressed that the Constitution is no longer the framework for the validity of community norms, but the Treaty itself whose conclusion implements the sovereign operation of transferring the exercise of powers derived from same, although the Constitution requires that the resulted legal system be compatible with its basic principles and values. Transl. Mariana Esparza)”. As Ricardo Alonso summarizes, where “essentially lies what I deem the main change of Statement 1/2004 in relation to Statement 1/1992” is in “allowing greater flexibility in the reading of the constitutional text capable of saving, in an accentuated framework of interpretation *pro-communitate*, collisions that would otherwise arise more readily (2005, p. 256)”. Finally, the Report of the Council of State of February 16, 2006, although with a certain critical tone, recognizes that “at first, hypothetically, in principle it is possible to expressly accept in our Constitution a constitutional mutation that supposes the community obligation of the judges and courts to not enforce norms with law status against those provided by Articles 117 and 163 of the Constitution” (Transl. Mariana Esparza) (Rubio Llorente & Álvarez Junco, 2006, p. 94) to conclude that, for reasons of le-

gal certainty, replacing the current art. 93 SC by a new *European clause* is appropriate.<sup>12</sup>

In conclusion, there are multiple aspects involved in the interpretation of art. 93 SC and its evolution is in line with the one developed by the conflicting interpretations between the Court of Justice of the European Union and the Constitutional Courts of the Member States. The favorable predisposition expressed by the former president of the German Constitutional Court to the collaboration between both institutions is noteworthy, but the truth is that there are several deeply relevant disputes open whose meaning is yet to be elucidated (Vosskuhle, 2017). Nevertheless, I believe that the situation of the current interpretation of Article 93 enables the precedence of European Union Law over Spanish Law, including the Constitution, except for some general limits that the CC deems improbable to be transgressed. I think it is a paradigmatic clause of constitutional liquidity by virtue of which its supremacy succumbs to the precedence of the integration. As Pablo Pérez-Tremps early pointed out:

el tenor de estas conclusiones quizá pueda parecer excesivamente alejado de los principios y técnicas jurídicas del Derecho constitucional tradicional. Lo que sucede es que la idea de «integración» pasa, desde este punto de vista, por aceptar que se está limitando la «soberanía» en el sentido indicado. Esta es la idea que subyace en la doctrina del Tribunal de Justicia de la Comunidad y, en cuanto que es congruente con la de «integración», creo que es la que hay que aceptar, siendo el único límite el de la conquista básica de ese Estado moderno en el mundo occidental: el Estado democrático de derecho (The tone of these conclusions may seem excessively apart from the legal principles and techniques of Traditional Constitutional Law. What happens from this point of view is that the idea of “integration” accepts that “sovereignty” is being limited in the indicated sense. This idea underlines the doctrine of the Court of Justice of the European Community and, as far as it is consistent with that of “integration”, I think it is the one we must accept. The only limit is the basic conquest of that modern State in the Western world: the democratic rule of law. Transl. Mariana Esparza) (1985, p. 181).

## VI. UPDATE OF HISTORIC RIGHTS (1ST AP SC)

<sup>12</sup> See the comparative analyses in the Report itself on pp. 83-89, and the systematic work of Celotto & Groppi (2005).



The fourth constitutional liquidity clause that I identify within the Spanish Constitution is contained in the 1st Additional Provision, which states that: “La Constitución ampara y respeta los derechos históricos de los territorios forales. La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía (The Constitution protects and respects the historic rights of the territories with fueros —local laws—. The general updating of the fuero system shall be carried out, when appropriate, within the framework of the Constitution and of the Statutes of Autonomy. Transl. From the official translation of the Spanish Constitution).” This Article is probably the most controversial of all the studied herein and has a clear connotation of exceptionality within constitutional framework. However, it is not exclusive of this Provision because it is related with the 4th Interim Provision that establishes an exceptional procedure compared to the one prescribed in art. 143 SC for the eventual incorporation of Navarre, at the request of the competent Foral Organ and subsequent ratification by referendum, to the Basque General Council or the Basque autonomous regime that replaces it, which establishes a five-year period for each time that the consultation may be proposed. Moreover, among Repeals, the 2nd provides that “to the extent that it may still retain some validity, the Law of October 25, 1839, shall be definitively repealed in so far as it affects the provinces of Alava, Guipuzcoa and Vizcaya. Subject to the same terms, the Law of July 21, 1876, shall be considered definitively repealed.” The first law was about the confirmation of the fueros (local laws) “without prejudice to constitutional unity” and the second about the repeal of the Foral regime.<sup>13</sup>

According to Corcuera, the term *historic rights* is recent as it is dated in a manifesto of a radical split in Basque nationalism (Basque Nationalist Community) in 1922.<sup>14</sup> From a controversial perspective, the former constitutional rapporteur, Herrero de Miñón, argues that

los Derechos Históricos son un a priori material caracterizado por la pre y para constitucionalidad. Ello se concreta en tres notas fundamentales: En primer

<sup>13</sup> See (Tamayo Salaberría, 1994) and (Echevarría Pérez-Agua, 2019) on the process of adopting these provisions.

<sup>14</sup> The text in question stated: “1st. Euzkadi, la nación vasca consciente de sí misma, es la única Patria de los Vascos. 2nd. Euzkadi, por derecho natural, por derecho histórico, por derecho de conveniencia suprema y por derecho de su propia voluntad, debe ser dueña absoluta de sus propios destinos para regirse a sí misma en la forma que estime conveniente (Euzkadi, the self-aware Basque nation, is the only homeland of the Basques. Euzkadi, by natural right, historical right, right of supreme convenience and right of her own will, should be the absolute master of its own destiny to govern itself as it sees fit)” (Corcuera Aienza, 2001, p. 168 and 1991, p. 302) and qualifies them as a myth in (1984, p. 10).

lugar, los Derechos Históricos no son una creación de la Constitución [...] sino que la preceden [...]. En segundo lugar, [...] son inmunes ante la revisión constitucional [...] Por último, [...] suponen una reserva permanente de autogobierno, ello se debe no a la inderogabilidad de unas competencias determinadas, sino a la infungibilidad de un hecho diferencial, conscientemente asumido por el pueblo vasco y que da un “derecho a ser” con identidad propia (historic rights are a priori material characterized by pre-constitutionality and para-constitutionality. He gives three main arguments: Firstly, Historic Rights are not a creation of the Constitution [...] but rather they precede it [...]. Secondly, [...] they are immune from constitutional revision [...] Finally, [...] they imply a permanent reservation of self-government due not to the non-repealance of certain powers, but to the infungibility of a differential fact, consciously assumed by the Basque people and which gives a “right to be” with its own identity (Transl. Mariana Esparza) (1998, pp. 86-87).<sup>15</sup>

Obviously, this reference to historic rights relates to the Foral tradition that gathers more than six centuries of history (Monreal Zia, 2001). To see an exposition of the Foral system refer to the classic work of Monreal Zia (1974). As Echevarría states, the Foralist tradition will have three contemporary readings or interpretations

que por orden cronológico serán la constitucionalista, la tradicionalista y la soberanista. Cada una de ellas procedía de una ideología propia, que el propio fuerismo logró trascender y modificar: la liberal, la carlista y la nacionalista. De un inicial rechazo, caso del foralismo constitucionalista, al desdén inicial tradicionalista y más marcado aún en el caso soberanista, aquellas ideologías terminaron por asumir completamente la foralidad, que presentaba así otra característica, que confirmará el paso del tiempo: su poliformismo, su adaptación a cualquier doctrina política general, hasta el punto de absorberla, demostrando la propia fortaleza del fuerismo (that in chronological order will be the constitutionalist, the traditionalist, and the sovereigntist. Each of them came from its own ideology, which fuerismo itself managed to transcend and modify: the liberal, the Carlist and the nationalist. From an initial rejection, as in the constitutionalist Foralism, to the initial traditionalist disdain which was even more notorious in the sovereigntist case, those ideologies came to completely assume forality which, thus, presented another characteristic, one that time will confirm: its polymorphism, its adaptation to any general political doctrine up to the point of absorbing it and demonstrating, this way, the very strength of fuerism) (Transl. Mariana Esparza) (2019, p. 22-23).

Within this constitutional framework, it should be added that the 4th Additional Provision also refers to the Statute of Autonomy of the Basque

<sup>15</sup> Against, see (Corcuera, 1984) and (Fernandez, 1985). For a special reference to the problem of constitutional changes limitations, see Ruipérez (2005, pp. 149 et seq.).

and the Statute of Autonomous Government of Navarre and includes their denial of waiver.<sup>16</sup> Nevertheless, the Constitutional Court has held a restrictive interpretative position regarding their recognition, although it has maintained the peculiar systems of the Basque Economic Agreement, which has established a unique tax regime that has been ratified in the European context (Lucas Murillo de la Cueva, 2005 y Pérez Arraiz, 1994). I should also highlight that the Proposal to Reform the Statute of Autonomy of the Basque Country, known as *the Ibarretxe Plan*, proposed a joint sovereignty system under agreement based on the updating of these historic rights and was rejected by the Cortes Generales (Sauca, 2010). We are indeed facing an eventual constitutional liquidity clause whose virtuality and future projection is undetermined. The constitutional and statutory frameworks establish the procedural channels for updating the historic rights herein and that, by virtue of them, exceptional regimes have been adopted within constitutional design that, otherwise, would not have justification. The extent of constitutional liquidity they can achieve is to be seen.

## VII. FEATURES OF CONSTITUTIONAL LIQUIDITY CLAUSES AND THEIR THEORETICAL IMPLICATIONS

Hereinafter I will enlist the features that would define this type of constitutional liquidity clauses (henceforward CLC)<sup>17</sup> through an inductive exercise

<sup>16</sup> The only Additional Provision establishes that: "The acceptance of the system of autonomy established in this Statute does not imply that the Basque People waive the rights that as such may have accrued to them in virtue of their history and which may be updated in accordance with the stipulations of the legal system." Organic Law 3/1979, of 18 December, on The Statute of Autonomy of the Basque Country. Moreover, the First Additional Provision provides that: "The acceptance of the regime established hereby does not mean the waiver of any other original and historic rights that may belong to Navarre, whose incorporation into the legal system will be carried out, where appropriate, in accordance with the provisions of Article 71. (Transl. Mariana Esparza)" Organic Law 13/1982, of August 10, on the Restoration and Improvement of the Autonomous Government of Navarre.

<sup>17</sup> The formula *constitutional liquidity clauses* suffers from a certain ambiguity that is identified in its opposition to the denomination of *constitutional clauses of liquidity*, in the happy formula that Professor Macario Alemany suggested me and that I thank him for. The latter emphasizes the constitutional dimension of these regulations (constitutional clauses) and functionally deems them as producers of liquidity, that is, of the enablement of normative creation that lacks constitutional status but enjoys, as I will soon explain, of precedence. However, the initial claim that I hold herein is based on the idea that these clauses are producers of liquidity in the Constitution. In other words, that certain matters regulated by the Constitution are susceptible of receiving an alternative regulation, in some aspects, to the provided in the constitutional text and, therefore, dilute, to that extent, constitutional rigidity.

involving the abstraction of presented cases. This will be accomplished by situating them within various types of instruments that pertain to constitutional stability.

The first feature concerns their express nature. By this I convey that there is a constitutional precept that identifies a specific constitutional regulation or, more precisely, there is a linguistic statement capable of containing an intelligible proposition with an acceptable degree of univocity. Obviously, this precept is subject to all the hermeneutic considerations relevant to any constitutional norm<sup>18</sup>. However, it does not imply the interpretative reconstruction of a plurality of constitutional texts, along with other implicit or underlying considerations, but rather an explicit formulation of a normative regulation. Although the interpretative effort involved in the reconstruction of each one of the CLCs may be complex, they are displayed by an identifiable linguistic support.<sup>19</sup>

Secondly, their structure resembles that of a norm that responds to the characteristics that generally accompany the concept of rule. I deem it unnecessary and inconvenient to reproduce herein the complex conceptualization of the types of norms and the debates that go along with the distinction between rules and principles. I am referring to the fundamental idea that their structure does not respond to the degree of generality and ambiguity that usually characterizes constitutional principles. Instead, they have an average or indirect relationship with a moral justification, and they are resistant to an application under unavoidable concur-

It is true what Jerome Frank states about norms: "to deny that a cow consists of grass is not to deny the reality of grass or that the cow eats it", nevertheless, at least in the languages that I know, its different to say *the milk of the cow than the cow of the milk* (Transl. Mariana Esparza) (Frank, 1949, p. 132).

<sup>18</sup> Thus, eventually reproducing its typical problems. Regarding this distinction, see the alternatives of (Atienza, 2012) that I follow below, in particular pp. 67-124 and (Guastini, 2014, pp. 311-336).

<sup>19</sup> The centrality of this first feature responds precisely to the inductive process followed on the Spanish constitutional regulation of 1978. Outside this framework of analysis and, eventually, based on other normative presumptions, it would be worth reflecting on the plausibility of accepting what could perhaps be called implicit CLC. I say *perhaps* because they would not strictly be *clauses* since the absence of a linguistic formulation in this sense. Such implicit CLCs would share with the explicit ones the remaining features indicated herein, but their formulation would mean both an hermeneutic reconstruction of the constitutional text as a whole, and the underlying principles, and values and the possibility of eventually using the analogy between explicit CLCs and other constitutional relevance realities by which identity of reason would be appreciated. Strictly speaking, the logic inclined to recognize formulas of constitutional flexibility through the generation of liquidity would endure the justifying effort of an eventual implicit or tacit transfer of sovereignty, but it would not be conceptually inadmissible. Nonetheless, same implicit CLCs would be found, possibly but not necessarily, within the scope of constitutional mutations.

rence or that they structurally require weighting. It is evident that the cases presented as CLC in the Spanish Constitution allude or presuppose a political and, eventually, moral justification, however, these aspects are not included in their formulation. It does not seem unreasonable to think that a universal conception of human rights is presupposed by the concept of conforming interpretation included in art. 10.2 SC regarding declarations, treaties, and other international instruments on human rights that have been ratified by the Kingdom of Spain and that have organs or institutions empowered to formulate interpretations of the same. When these rights are considered fundamental—or as Ferrajoli would say, capable of having a universal quantifier of their holders (1999, p. 379)—, the preferred normative space will be the one that incorporates a broader subjective element and a more universal deliberative forum. Regarding the CLC contained in art. 65, the inspiring assumption is probably the monarchical principle with its connotations to the historical legitimacy for the personification of the State and the recognition of a type of traditional legitimacy. Meanwhile, it seems clear that in the CLC contained in art. 93 the principle of integration underlies, which, in its European dimension, usually entails concomitance with the values of peace, human rights, democracy, the rule of law, prosperity and other principles and guidelines for use. Finally, the 1st AP presupposes a principle of recognition of a singular political identity that does not seem to be alien to the value of pluralism and respect for minorities.

Thirdly, CLCs are rules that confer powers, especially normative ones. Their specific feature is that they enable rule-making power by attributing jurisdictional rules. The transfer of powers may be of a massive scope as in art. 93 SC or, on the contrary, of an extremely limited scope of normative creation as in art. 65 SC. However, from a normative standpoint, they share the assumption, as I was saying, of the attribution of legal creation powers. In the case of the CLC in art. 10.2, the formulation of the corresponding interpretations belongs to the organs with the power to establish authoritative interpretations of the rights contained in the corresponding treaty or convention. The same interpretations constitute the normative production generated and applicable by reason of the CLC, regardless of the type of theory of interpretation to which we adhere (Guastini, 2008, 2005). The attribution of normative power is conferred to the King in the CLC of art. 65. As we had the opportunity to observe, there is a continuity between the person and the title of the institution—the Crown—that holds the power to freely appoint or dismiss the members of a particular administration, and to distribute the budget in it. We would think that the normative created is particular and concrete (appointments, dismiss-

als, agreements, administrative instruments, etc.) but we should hold the possibility of including general normative dimensions since such power may imply the exception of the application of normative and labor provisions—even collective— concurrent in the matter.

The CLC contained in art. 93 does not merit further comment considering the transcendence of the normative impact it entails for Spanish law. From the point of view of the normative precedence, general effects, direct application, powers affected, etc., the normative creation that is recognized by the CLC in question is of an extraordinary order of magnitude. Therefore, we can understand the national strategies for establishing ultimate or intangible limits regarding the maintenance of the statehood of each Member State in the Union. The CLC contained in the 1st AP has a higher degree of indeterminacy. The distinctive element concerning the enablement of normative production entails, indirectly, an agreement character typical of the proceedings for the elaboration and reform of the Statutes of Autonomy established in the Constitution. In this way, historic rights constitute the material heritage of extraordinary powers, which are subject to the updating through the bilateral proceedings for statute innovation. Such updating, by definition—unless it is a provision lacking meaning—, exceeds the limitations set forward in art. 149.1 of the SC regarding the distribution of powers subject to the principle of disponibility. Consequently, the normative power conferred means that the normative power of establishing an alternative regulation to that provided in the Constitution on the attribution of powers is conferred to some Autonomous Communities without requiring its formal reform. Indeed, CLCs have a nomodynamic character that, to a greater or lesser extent and through one or another procedure, generates new norms whose content is not set *a priori* of the acts of normative production.

Fourthly, CLCs establishes a relationship of precedence over constitutional regulations—I employ herein the concepts of validity as pertaining and validity and applicability in the sense canonically proposed by Eugenio Bulygin (1991). This way, the Constitution, through the CLCs, authorizes the existence of an enabling rule for the external applicability of the rules that may be produced through the exercise of such power.<sup>20</sup> The norms produced by CLCs shall possess, in addition to the feature of external applicability, that of their validity as pertaining to the Spanish legal system in the cases of the CLCs of art. 65 and 1st AP, while the external applicability in the scenarios of CLCs provided by art. 10.2 and 93 does

<sup>20</sup> Regarding the concept of external applicability and its relation with validity and effectiveness, I follow Pablo E. Navarro and José Juan Moreso (1997).

not entail they can be deemed as pertaining to the system.<sup>21</sup> Configuring the CLCs in this manner avoids that the norms produced due to each one of them, and that may have contents discrepant from the constitutional regulation, come into a relation of contradiction. The determination of different conditions of applicability implies that they are related through the principle of prevalence rather than the application of a criterion of hierarchy or temporality<sup>22</sup> Lastly, we should clarify that the norms issued under CLC do not have the character of delegated norms. The framework, transfer and delegation laws operate within the ordinary parameters of attribution of powers for normative development. This happens, in a broad sense, in the cases of forwarding to the legislator the duty of regulate certain matters, as we saw *supra* in paragraph 2 herein, and, strictly speaking, in the norms derived from art. 150 SC, in particular paragraph 2 thereof. In all these cases, the constitutionally established limits are not affected.

Fifthly, the Constitution admits that the norms produced by a CLC may have a normative content that, eventually, becomes incompatible or *prima facie* incompatible with the ordinary regulation of the Constitution. As I stated in the previous paragraph, the normative contradiction does not occur because these CLCs operate as enablements for a future alternative regulation to the one contained in the constitutional text. However, these referrals operate as an exercise of the same power that enabled the creation of the Constitution (or its eventual reforms). Thus, whether the CLCs are contained in the original text of the Constitution (as the ones provided herein) or in texts resulted from constitutional reforms, their creation enablement implies the manifestation of a power of the same nature as the constituent —or constituted, in the case of reforms. Therefore,

<sup>21</sup> I agree with the analysis of Argentine professors Jorge L. Rodríguez and Daniel E. Vicente (2009). I believe that the approach herein is compatible with models 2, 3 and 8 explained in p. 199 on International Law. Furthermore, the authors equalize the formal treatment of the applicability of International Law in general with that of International Human Rights Law, whose parameters are not necessarily identical. Likewise, I should stress that the conditions of applicability are not homogeneous in international human rights regulations, in which there is no organ with authoritative interpretative power in the opposite case. On this matter, I refer to the remarks I made in (Saucá, 2021). Finally, it should be noted that this conceptual reconstruction is not susceptible of being a project on the conditions of applicability of European Union Law since its relevance does not depend on the acceptance of national law. We do not need to remind that the settling of the conditions of applicability concerning the primacy and direct effect of European Union Law was adopted, via jurisprudence, by the European legal system itself.

<sup>22</sup> In this sense, the remarks made by Giorgio Pino (2011) about the conditions for establishing applicability criteria that transcend the detailed regulations of positive law and that can only be decided based on internal convictions of legal culture are relevant for this analysis.

the CLCs imply the use of the same sovereign power that substantiates the Constitution if they are part of it and such sovereign power is filtered to the regulations that may be created through its exercise. Indeed, CLCs are part of the Constitution, they have the same legitimacy as any other component thereof and their peculiarity lies in the enablement of normative production that shall enjoy precedence over those contained in the constitutional text and those produced under it. To simply put it, CLCs imply a partial transfer of sovereignty, the same sovereignty that legitimates the Constitution itself.

In the light of these considerations, I hereby suggest a definition of CLCs, which may be analyzed and debated in the future:

Constitutional liquidity clauses are express constitutional provisions that contain rules transferring powers of normative creation. The exercise of these powers can create, successively, norms conferred with precedence over those provided within the constitutional text or the law derived thereof, thus implying that sovereign powers are shared.

This structural characterization should be observed from a functional approach regarding the benefits that CLCs can provide in a constitutional framework. There are six most relevant functions. First, they play a role of constitutional stability because they protect the Constitution from having to be reformed more frequently than desirable, as some of the changes from particularly dynamic sectors, such as those regulated by CLCs, require. Second, they play a moderating role in the tensions that the Constitution endures to proceed with the need for its formal reform to correct the antinomies that may arise from international and supranational commitments and internal ones. Likewise, they also moderate the need to proceed with the adoption of constitutional mutations for the adaptation of the Constitution to these same requirements. Third, they play a role of normative integration of the constitutional spheres since they enable the concurrent compatibility of differentiated dynamics of constitutional relevance. Fourth, they encourage institutional cooperation between the various actors and favor dynamics of deference between the participating organs, especially between courts. Fifth, they diversify the deliberative levels and spaces by promoting multi-level dialogue based on the relevant thematic areas in the context of each CLC and avoiding entanglement dynamics due to the last word decision. Finally, they promote a multi-level configuration of sovereignty, which contributes to overcoming a monolithic vision of it and distributing its exercise in different cooperative spaces.

From this characterization, the differences of the CLCs with the other relevant figures related to constitutional stability and change could



be identified in an obvious way. Thus, CLCs would differ from constitutional mutation phenomena in two aspects. On the one hand, the CLCs imply a conscious decision from the constituent author thereof, while the mutations could not have been contemplated by him. On the other hand, CLCs have an explicit linguistic support in a constitutional precept, while mutations do not operate on normative statements. From the opposite point of view, both are ways of increasing constitutional dynamism without having to resort to the use of power of reform.

Moreover, CLCs share with the intangibility clauses, at least the explicit ones, an express constitutional formulation, although their meaning is the opposite: while the intangibility clauses operate on the idea of petrifying the formal change of the constitution, the CLCs enable the fluidity of constitutional evolution, at least, in the material scopes in which they act. Likewise, they share a clearly opposite meaning to the clauses of temporary intangibility at term. Same establishes the intangibility of the Constitution for a period ranging from its formulation to a certain time or to the verification of a certain historical event. CLCs enables the possibility that the Constitution evolves in accordance with circumstances in a flexible way and without any time limit, but with a clear orientation to the future.

CLCs share the constitutional reform procedures of rigid constitutions that generate a constitutional change of a rational-formal nature as far as the change is the product of the adoption of explicit normative measures formulated through the issuance of new authoritative documents. Nevertheless, the difference lies in that constitutional reform can, in some cases, decide the constitutional texts that are replaced, produce an express repeal of them, or add new constitutional texts that may have generic or tacit repeal effects on norms contained in previous constitutional precepts. Whereas CLCs cannot replace constitutional texts nor constitutional norms, they can only determine that the norms created would have precedence despite their materially incompatible content. Finally, I should stress that reforms to the Constitution that do not affect CLC provisions would not have, in application of the principle of *lex posterior derogat legi priori*, derogatory effects on them. The generic or tacit repeal force of an impending reform of the Constitution would not be, *ope constitutionis*, a repeal of the regulations created by the reform in question. However, the effects of an explicit repeal are different. Like any constitutional norm that is not defined as an intangibility clause, CLCs are susceptible of being reformed, and eventually abolished, by a subsequent constitutional reform of an express nature, all without impairing compliance with the specific supplementary requirements that could have been adopted in this regard in the normative development generated through the CLC itself.

In conclusion, constitutional realities are complex and necessarily present multiple aspects that escape the univocity of the classifying criteria of employment. The categorization of constitutions as unchangeable or reformable, written or mixed, flexible or rigid, entrenched, intangible, open or closed, etc., usually fails to establish a unique identity for each constitution. All constitutions, with a greater inclination to one criterion or another, include several of these components that may contradict each other, and the Spanish Constitution is certainly not an exception. The Spanish Constitution of 1978 is a written and unitary constitution of a rigid nature. It employs a hyper-rigid entire revision procedure that has been deemed as a constructive intangibility and to which part of the constitutional doctrine suggests adding the formulation of the existence of implicit intangibility clauses. Over its 44 years of effectiveness, the Constitution has undergone only two specific reforms, both compelled by European regulations. Other attempts at reform have faced blockades. Finally, it is a Constitution that suffers, according to a growing consensus, from a lack of adaptation to social, political, cultural, economic, technological, environmental, etc., reality. It is definitely complex. In this context, the hermeneutic proposal of CLCs offers a categorical understanding of aspects of the Constitution that are presented as controversial and enables a novel, and perhaps original, theoretical perspective that justifies spaces of constitutional flexibility. Constitutional liquidity is thus presented as a formula for increasing constitutional stability by strengthening processes of political adherence to it.

## VIII. REFERENCES

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