

On the Notion of Constitutional Liquidity. A Close Idea to Kelsen's Thesis of Tacit Alternative Clause¹

*Sobre la noción de liquidez constitucional.
Una idea cercana a la tesis de la cláusula alternativa tácita de
Kelsen²*

Marcela Chahuán Zedan

 <https://orcid.org/0000-0001-7862-2334>

University of Chile

E-mail: mchahuan@derecho.uchile.cl

RECEIVED: July 31, 2023

ACCEPTED: September 19, 2023

DOI: <https://doi.org/10.22201/ijj.24487937e.2024.18.18653>

RESUMEN: En el presente trabajo examino la tesis de José María Sauca sobre la “liquidez constitucional” y las cláusulas de este tipo que identifica en la constitución española. Propondré analizarlas a la luz de la tesis de la cláusula alternativa tácita presentada por Kelsen.

Palabras claves: liquidez constitucional, cláusula alternativa tácita, control de la regularidad normativa, interpretación auténtica de la Constitución, Constitución Española.

ABSTRACT: In this paper I examine the thesis statement of José María Sauca on “constitutional liquidity” and the clauses of this kind that he identifies in the Spanish Constitution. I will analyze them under the light of the tacit alternative clause thesis presented by Kelsen.

Keywords: Constitutional Liquidity, tacit alternative clause, control of normative regulation, authentic interpretation of Constitution, Spanish Constitution.

CONTENTS: I. Introduction. II. On the tacit alternative clause thesis. III. Constitutional liquidity clauses in the Spanish Constitution. A reading through the tacit alternative clause thesis. IV. Structural features

¹ Traducción realizada por la doctora Ioana Cornea y Mariana Esparza Castilla.

² I am grateful to Álvaro Núñez for inviting me to take part in the seminar at the University of Murcia that resulted in this text. Also, of course, I would like to thank José María Sauca for sharing the sharp and stimulating ideas that were discussed at that seminar and in this publication. Likewise, I thank those who reviewed this paper, whose comments contributed to improve its structure and the development of some ideas.

of constitutional liquidity clauses. Close resemblance with Kelsen's thesis. V. Conclusions VI. References

I. INTRODUCTION

In his work "Estabilidad y cambio en la constitución: la liquidez constitucional" (Stability and change in the constitution: constitutional liquidity) (Sauca, 2023), José María Sauca analyzes some features of the constitutions from a theoretical perspective. Specifically, he examines the idea of stability and the institutional mechanisms to reach it, and the ways stability can be adjusted to social change demands. In this framework, the author ponders the concepts of immutability, intangibility, rigidity, entrenchment, reform, mutation, and flexibility, all of them regarding the constitution. In his research, he also addresses a normative phenomenon, which he calls "constitutional liquidity", that, according to him, is enabled by certain clauses (hereinafter CLCs) expressly contained in some constitutions. The author identifies four CLCs in the Spanish Constitution of 1978 and analyzes them by the characterization he provides of this phenomenon.

Sauca stresses that constitutional liquidity is a dimension that has not been systematically explored. In his words, he means:

aquellos supuestos en los que las prescripciones constitucionales devienen parcialmente inaplicables en razón de que la propia constitución ha dispuesto la aceptación de la prioridad aplicativa de otra normativa que eventualmente pudiera llegar a existir (those cases in which constitutional prescriptions become partially inapplicable due to the constitution itself have provided the acceptance of precedence of other regulations that may eventually come into existence. Transl. Mariana Esparza) (Sauca, 2023, p. 31).

Then, he states that the constitutional provisions that serve as source for constitutional liquidity will be called constitutional liquidity clauses. He confines himself to an examination of the Spanish Constitution of 1978 to identify them.

I will review the CLCs identified by Sauca in the Spanish Constitution and analyze them in the light of Kelsen's ideas about the tacit alternative clause (hereinafter TAC). I claim that the ideas that Sauca has on constitutional liquidity (although he attributes an express nature to the enabling clauses) are close to what Kelsen was trying to clarify through his TAC thesis. That is to say, both the applicability and the legal effects of norms that may be incompatible with other norms are intimately related to the institutional design of the control of constitutionality. Thus, it relates to the

judgment that such organs make on the regularity of legal norms and their precedence.

II. ON THE TACIT ALTERNATIVE CLAUSE THESIS

Kelsen is one of the theorists that stresses the dynamic nature of law since it regulates its own creation through norms providing the conditions to validly create other norms. This idea is intimately related to his notion of the hierarchical structure of the legal system, which is formed by norms of different hierarchical levels, whereby the lower hierarchical norms are subordinate to the higher ones. At the highest level of the positive law of legal systems lie the constitutions. Higher norms establish conditions of formal validity regarding the organ with jurisdiction and the procedure it must follow for normative creation. Moreover, in contemporary legal systems, higher norms establish material requirements that usually restrict the content of the norms to create (Kelsen, 1960, p. 201 et seq.).³

Thus, we can conclude that a norm that does not comply with the formal or material provisions established by higher norms is, under this proposal, an invalid norm. However, when Kelsen addresses the issue of unconstitutional norms, he formulates the controversial TAC thesis.

Kelsen claims that constitutions have, on the one hand, a regulation establishing the conditions that must be followed to validly create the other norms of a legal system. And, on the other hand, they have an alternative regulation through which the so-called unconstitutional norms are, in fact, authorized indirectly by the constitution. This alternative regulation implicitly empowers both legislator and judges to formulate general or individual norms, respectively, according to the procedure and content they decide. Unless the control of regularity is entrusted to a different organ other than these, in this case, the constitutionality will rely on the judgments of the organs in charge of such control (Kelsen, 1960, p. 279).⁴

Therefore, following this thesis, even if higher norms establish conditions of formal validity regarding the procedure whereby norms are to

³ We must specify that, according to Kelsen, the first constitution of a legal system comes from a basic norm, which is not a posited nor positive norm but a presupposed one. The author employs this thesis to justify the validity (in a binding sense) of the first constitution (Kelsen, 1960, p. 205 and et seq.). I will briefly address the conceptual ambiguity on Kelsen's use of the expression "validity" paragraphs later. If anyone wishes to consult the critiques regarding the notion of basic norm and the concept of validity in a binding sense, can see the references provided in footnote No. 7 herein.

⁴ Kelsen had already formulated the TAC thesis in the first edition of *Pure Theory of Law* (Kelsen 1934, p. 115-116).

be formulated or establish conditions of material validity, the norms that do not comply with these requirements are “*válidas hasta el momento en que sean anuladas por un tribunal o por un órgano competente de acuerdo con el procedimiento fijado en la constitución* (valid until they are annulled by a court or a competent organ according to the procedure established in the constitution. Transl. Mariana Esparza) (Kelsen, 1960, p. 280).”

It is interesting the reference that Kelsen makes here to King Midas explaining that:

En este respecto, el Derecho se asemeja al Rey Midas. Así como todo lo que aquel tocaba se convertía en oro, todo aquello a que el derecho se refiere, toma carácter jurídico. Dentro del orden jurídico, la nulidad es sólo el grado superior de la anulabilidad (In this respect the law is like King Midas: just as everything he touched turned to gold, so everything to which the law refers assumes legal character. Within the legal order, nullity is only the highest degree of annullability. Transl. Mariana Esparza) (Kelsen, 1960, p. 283).

An understanding of this thesis requires connecting it with other aspects of Kelsen's theory.⁵ One of such is the conceptual ambiguity in his use of the term validity. While it is true that Kelsen proposes as a criterion of legal validity the compliance with higher norms that determine normative creation, he also uses the term “validity” to indicate the legal existence of norms and, also, the enforceability of complying with them. Hence, we can understand the TAC thesis as an attempt to explain the existence and legal effects of invalid norms (irregular norms or not in compliance with the norms on legal creation), so long as they are not positively expelled from the legal system.⁶

Nevertheless, a better understanding of the TAC thesis requires connecting it with the idea of constitutive nature of judgments and “statutes” of unconstitutionality, as well as with the author's notion of authentic inter-

⁵ I will focus only on those aspects of Kelsen's theory that are most relevant for the purposes of this proposal. In another paper I have discussed in greater depth the connections the TAC bears with other theses of Kelsen's theory of law (Chahuán, 2018).

⁶ In this regard, the author states that: “Una norma no válida es una no existente, es la nada jurídica. La expresión “ley inconstitucional”, aplicada a un precepto legal que se considera válido, es una contradicción en los términos (A norms that is not valid would be null, which means it would not be a legal norm at all. The expression “unconstitutional law” applied to a legal precept regarded as valid is a contradiction in terms).” Kelsen, 1960, p. 277. The ambiguity in Kelsen's use of the term “validity”, both in a legal existence and binding sense, has been criticized by other authors. I quote the following works as examples: Hart, 1958; Ross, 1961; Raz, 1979; Nino, 1985; Celano, 1999; Bulygin, 1982, 1990, and Guastini, 1992, 2002.

pretation. Regarding the former, we should remind that, for Kelsen, the so-called “unconstitutional statutes” not only declare but rather constitute unconstitutionality (Kelsen, 1960, p. 246-251). Furthermore, Kelsen argues that authentic interpreters are not, as traditionally understood, the authors of texts. The authentic interpreters in the Kelsenian sense are the organs with the competence to attribute meaning to normative texts, whose judgment establishes legal effects and takes precedence over others. In particular, the authentic interpretation is the one carried out by the higher courts which have the last word on the meaning of normative texts (Kelsen, 1960, p. 350-354).⁷

Overall, the TAC thesis has been widely criticized as contradictory to Kelsen’s own theory of law, specifically, to the idea of the hierarchical structure of the legal system.⁸ In my opinion, although the thesis may seem paradoxical, Kelsen highlights a central issue for the analysis of unconstitutional norms: the institutional design of the mechanisms for the control of constitutional regularity. When there is no authority over a norm other than the one that formulates it, then this same organ shall decide its content (or procedure) without limitations. In contrast, when there is a different organ conferred with the competence to decide on constitutionality, it shall be the one to decide what counts as a regular legal norm. Furthermore, provided such an organ entrusted with the regularity control, a norm counts as valid so long as it has not been positively expelled from the legal system, even if it has been formulated in an irregular way (or thus interpreted by some interpreters).

Some critics of the TAC, particularly Eugenio Bulygin (Bulygin, 1995, p. 17) and Juan Ruiz Manero (Ruiz Manero, 1990, p. 65-67), argue that it alludes to a rule that would mandate opposite conducts: on the one hand, it mandates the formulation of norms in accordance with constitutional norms and, on the other hand, it also authorizes the formulation of unconstitutional norms. In this way, any course of action would comply with constitutional norms and thus cannot be violated. This is why such authors believe that, if we were to follow Kelsen’s thesis, it would entail the loss of normative content, understood as the capacity of norms to guide behavior.

⁷ On Kelsen’s notion of authentic interpretation, see Troper, 1999, p. 475-476.

⁸ On this point, see Bulygin, 1995. A similar criticism can be found in Ruiz Manero, 1990. Letizia Gianformaggio raises suggestive questions about Kelsen’s TAC thesis in Gianformaggio, 1995 —in which she also compiles, along with Stanley Paulson, one of the most widespread debates on Kelsen’s thesis. For a defense of the TAC with realist aspects of Kelsen’s legal theory, see Comanducci, 1997; 1998; 2012; Chiassoni 2010, 2012a y 2012b, 2013; 2017; Ratti, 2014. A proposal for an analysis relating the TAC to the idea of defeatability can be found in Tur, 2013.

However, as I see it, the TAC is a thesis that does not allude to behavioral norms, but to rules of jurisdiction.⁹ Kelsen's thesis shows that the organs with normative competence are granted a power to formulate norms without limitations (other than those they deem appropriate), if their judgments are not subject to a control exercised by a different organ. In this way, the organs with normative powers can formulate norms that contradict other norms regulating normative creation. Conversely, when power is conferred over a different organ than the one formulating the norms, which controls the constitutionality, such organ may invalidate them. It will thus have the last word on the regularity or irregularity of legal norms.

Kelsen emphasizes that the question of regularity relies on which organ oversees the control of constitutionality. In other words, he stresses that the organ with normative power will decide on the content and procedure of the norms it formulates, otherwise, it will be the organ with powers of control, if any, who will finally decide on this.

Regarding the closeness between Kelsen's and Sauca's ideas, I will further discuss it in the following section examining the CLCs that Sauca identifies in the Spanish Constitution and their structural features.

III. CONSTITUTIONAL LIQUIDITY CLAUSES IN THE SPANISH CONSTITUTION. A READING THROUGH THE TACIT ALTERNATIVE CLAUSE THESIS

Sauca argues that the Spanish Constitution of 1978 contains some constitutional provisions that enable the possibility of formulating, in the future, norms whose content may eventually be unconstitutional. These clauses, he states, are immune to the corresponding control of the constitutionality. Therefore, constitutional regulation becomes liquid since the constitution itself explicitly enables the conditions for unconstitutional normative creation. These clauses are:

- Provision of interpretation in accordance with International Human Rights Law (Article 10.2)
- The Household of the King (Article 65.2)
- Recognition of the primacy and direct effect of European Union Law (Article 93)
- Update of historic rights (1st Additional Provision)

⁹ On a similar line of thought see Guastini, 2016.

1. *Provision of interpretation in accordance with International Human Rights Law (Article 10.2)*

The first CLC identified by Sauca in the Spanish Constitution is contained in article 10.2 which states 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).

If I understand Sauca's argument correctly, this provision contains a liquidity clause because it empowers state interpreters to interpret normative provisions regarding fundamental rights, in a way that extracts norms that may be not in conformity with the Constitution. This is explained, in turn, because the provisions regarding fundamental rights must be interpreted to be in line with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain. More importantly, because they must comply with the interpretations of the European Court of Human Rights (ECHR) and several committees of the United Nations. However, these interpretations are not necessarily in line with an interpretation complying with the Constitution.

This clause would grant precedence to interpretations based on international normative over interpretations complying with the Constitution. As stated by Sauca, this happens particularly when there are international organs in charge of interpreting such instruments. For instance, in the case of the ECHR and the several committees of the United Nations, state interpreters must follow their interpretations although they may be incompatible with constitutional norms (Sauca, 2023, p. 35).

Sauca explains that the ECHR has progressively become a European constitutional court, mainly due to the doctrine of *res judicata* and its development through pilot judgments, as well as with the entry into force of Protocol 16 of the European Convention on Human Rights. Moreover, as he points out, the possibility of applying a control of conventionality in the scope of Spanish courts action has become more widespread.

We can analyze this constitutional provision (as well as the others discussed by the author) through Kelsen's TAC thesis, which, as I remarked herein above, is related to his notion of authentic interpretation. On the latter, it is worth recalling that, for the author of *Pure Theory of Law*, au-

thentic interpretation is that one carried out by the organs with the powers to interpret. It consists of deciding the meaning of texts that takes precedence over other interpretations. Especially, it is the interpretation made by the higher courts that have the last word on interpretation.

Although Sauca emphasizes that the CLCs are express clauses (not tacit), he points to the same idea as Kelsen: what counts as valid or regular from the legal standpoint is closely related to the institutional design of the mechanisms for the control of constitutional regularity and legality. So, it depends on who has the final word about this.

This idea is reinforced if we consider that, in Sauca's analysis of every liquidity clause, he concludes with an explanation of the mechanisms of control of regularity, whether for constitutionality or regarding international normative. Throughout his arguments he underlines the differences he deems significant between the scenarios with a judicial organ in charge of authoritatively interpreting international normative and the scenarios without such organ.¹⁰ In this framework, Sauca explains that it is currently accepted that the ordinary judges of the Spanish legal system exercise a diffuse control of legality on the criteria for interpreting the judgments of the European Court (Sauca, 2023, p. 37). In other words, they also exercise some control over normative regularity.

In synthesis, a considerable part of the analysis focuses on the design of the mechanisms of control and the judgments of the organs with powers to interpret the normative provisions in question. About the Spanish legal system, it is worth asking who has the last word on interpretation (who is or are the authentic interpreters in the Kelsenian sense): the ECHR (or the alike) or state organs such as the Constitutional Court (CC) that decides to follow or not the interpretations of international courts and to grant them precedence or not.

2. *The Household of the King (article 65.2)*

Sauca identifies a second CLC in article 65.2, which states that: "*El Rey nombra y releva libremente a los miembros civiles y militares de su Casa* (The King freely appoints and dismisses the civil and military members of his Household)."

¹⁰ I quote a fragment whereby Sauca explicitly emphasizes the differences regarding the design for the control of normative regularity "(...) el margen de discrecionalidad que existe para la interpretación de un tratado o un acuerdo internacional es significativamente diferente en el caso de que estos tengan asociados o no un órgano de tipo jurisdiccional encargado de la interpretación de aquellos (the margin of discretion for the interpretation of an international treaty or agreement is significantly different whether or not they have a judicial organ in charge of their interpretation) (Sauca, 2023, p. 35)."

This clause, he remarks, has as antecedent the financial angle contained in the former section thereof, which states: *El Rey recibe de los Presupuestos del Estado una cantidad global para el sostenimiento de su Familia y Casa, y distribuye libremente la misma* ("The King receives an overall amount from the State Budget for the upkeep of his Family and Household and distributes it freely)." In this regard, Sauca argues that, while the members of the King's Household have judicial protection for their rights as members of a singular administration, judicial control does not interfere with the King's free administration. He enjoys "irresponsibility" over this. Thus, Sauca concludes that article 65.2 contains a CLC that empowers the King to perform acts concerning the administration of his Household that are beyond legality and judicial control. He observes that, unlike the previous assumption, this case is likely to decrease since the disposition towards a greater constitutional regulation of the monarchy (Sauca, 2023, p. 39-40).

Here we may comment that there is an antinomy between, on the one hand, this constitutional rule that exempts the King from liability for the internal administration of his Household and, on the other hand, the constitutional norms that subject the acts from the organs of the state or the administrations to legality. Some pages later, Sauca himself dismisses CLCs as antinomies because, as he points out, CLCs enable the production of norms that may be incompatible with other constitutional norms, but they are not incompatible themselves. They are enabling clauses of external enforcement that grant precedence of enforcement to the normative produced by virtue of it.

In my opinion, this is again what Kelsen shows with his TAC thesis. If there is no organ other than the one formulating the norms with the power to control their regularity, then it shall be this organ itself who decides which norms count as regular. In this case, if there is no organ other than the King to control the constitutionality of his acts (judicial control is left out), it is the King who decides without limitations the content of the acts concerning the internal administration of his Household.

Hence, explained through the TAC thesis, this provision would read as follows. Even when the King performs acts concerning the internal administration of his Household that may be interpreted as incompatible with other constitutional norms, they shall proceed as if they were valid. Because it is the King himself who controls the regularity of the acts concerning the internal administration of his Household. Such acts are exempt from control of another organ, in which case it would be the latter who would decide whether they comply with the Constitution.

3. *Recognition of the primacy and direct effect of European Union Law (Article 93)*

Sauca identifies the third CLC in article 93 of the Spanish Constitution, which states that:

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, Sauca mentions, is supplemented by article 135.2 — introduced by the constitutional reform of September 27, 2011— which establishes that: Neither the State nor the Autonomous Communities shall enter a structural deficit beyond the limits stipulated, if applicable, by the European Union for its Member States.

The author acknowledges that he does not seek to address all the complexities of the many issues involved in the interpretation of these provisions. Nonetheless, while he points out that the jurisprudential tendency was initially to deny the constitutional nature of European Law (instead it was regarded as infra-constitutional), Sauca believes that the current trend is to defend the primacy of Union law over Spanish law, including the Constitution, except for some general limits that the CC deems improbable to be transgressed.

Then again it depends on who has the last word on the norms that count as valid in a legal system, just as in the TAC thesis. Herein Sauca examines the jurisprudence of the Spanish CC and notices that this organ is who has decided the status of European law in the Spanish legal system (infra or supra-constitutional). Following this framework, he highlights the judgments of the organ with the power to have the last word in determining what counts as valid or regular in Spanish law and its hierarchy and what does not.

Therefore, Sauca focuses on the same aspects that Kelsen addresses in his explanation about the TAC in the analysis of this CLC. We should recall that Kelsen insists that, when there is a competent organ such as a

constitutional court to review the regularity of a certain regulation, it will be who decides its status in the legal order and whether it complies or not with the constitution. We find the same aspects in Sauca's analysis when he examines the jurisprudential tendencies of the judgments of the organ entrusted with the control of the constitutionality within the Spanish legal system. On this point, it is also interesting to consider the connections between the TAC thesis and the constitutive character thesis of "statutes of constitutionality and unconstitutionality", as well as with the Kelsenian notion of authentic interpreter. If we apply it to Sauca's analysis, I find it interesting mainly due to the comments about the organs that have decided the status of European law in relation to the Spanish Constitution.

4. Update of historic rights (1st AP)

According to Sauca, the fourth CLC within the Spanish Constitution is the rule contained in the first 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 done, when appropriate, within the framework of the Constitution and of the Statutes of Autonomy)."

Sauca argues that this CLC is the most complex and, probably, controversial scenario of the four and believes that it connotes an exceptionality in the Spanish Constitutional framework. Some have claimed that historic rights precede the constitution, that "*are both pre- and para-constitutional, that are immune to constitutional review, and they imply a permanent reserve of self-government* (Herrero de Miñón) (Sauca, 2023, p. 44)."

As I understand, the idea here is that we are dealing with a CLC because, under such an interpretation of this provision, it enables normative production according to historic rights, which could be incompatible with other constitutional norms.

Sauca indicates that the 4th Additional Provision on the statute of autonomy of the Basque autonomous regime and Navarra should be added to this constitutional framework.

About these clauses he highlights, and I quote:

Por demás, el Tribunal Constitucional ha mantenido una posición interpretativa restrictiva en relación con su reconocimiento. Si bien se han mantenido los peculiares sistemas de concierto y convenio económico que ha establecido un régimen fiscal singular que ha sido, por demás, ratificado en el marco

europeo (Moreover, the Constitutional Court has maintained a restrictive interpretative stance towards its recognition. Nevertheless, the peculiar system of the Basque Economic Agreement has been maintained, which has established a unique tax regime that has been ratified in the European context. Transl. Mariana Esparza). (Sauca, 2023, p. 45).

Sauca stresses herein how the Spanish CC has interpreted the normative margins relating to historic rights and their status in Spanish law. In this way, he once again aims at what Kelsen warns with the TAC thesis concerning the institutional design of the mechanisms of control for constitutional regularity. The constitutional margins regarding the content and proceeding to formulate norms depend, in practice, on the judgments that the organs granted with power by the legal system itself to decide on this matter may adopt. Thus, the norms produced by virtue of the CLC that confers power to formulate norms according to historic rights will continue or not to produce legal effects according to the judgment that the competent organs make in this regard to produce an authentic interpretation of the constitution, in the Kelsenian sense.

IV. STRUCTURAL FEATURES OF CONSTITUTIONAL LIQUIDITY CLAUSES. CLOSE RESEMBLANCE WITH KELSEN'S THESIS

At the end of the text, Sauca provides some structural and functional features of CLCs, as well as their theoretical implications. I will make some remarks on the structural features.

1. Express character

Firstly, José María Sauca claims that these clauses have an express character, that is, they are contained in an explicit formulation. In the sense that there is an *"enunciado lingüístico susceptible de contener una proposición inteligible y con grado de univocidad aceptable* (linguistic statement susceptible of containing an intelligible proposition and with an acceptable degree of univocity)", which enables this type of normative production (Sauca, 2023, p. 46).

I presume that Sauca would defend the argument that this is, at least, one of the features that differentiates his analysis on these clauses from Kelsen's thesis. The ones he analyzes are not tacit or assumed clauses, but norms that explicitly confer powers to produce norms that, eventually, may have unconstitutional content.

But what do these provisions explicitly state? In his own analysis, Sauca emphasizes throughout his arguments how the control of the regularity for norms produced in exercise of the power conferred by the CLCs is designed. In some cases, he says, they are exempt from judicial control of constitutionality, so that the organ or subject that formulates the rule is the same one that decides on the regularity of its acts (as the internal administration of the King's Household). Otherwise, it refers to the organ entrusted with control and to what it has decided on the constitutionality or the primacy of other norms (i.e., international law or historic rights). It also examines whether there is another organ with the power to interpret that is "above" the state organs (the ECHR as a constitutional court), namely, that the latter must follow its interpretations or that, in practice, they do follow them.

Just like Kelsen, hence, Sauca derives his thesis from the configuration or design of the mechanisms of control for constitutionality. He draws the structural features, including that of the express character, from the same thing: from norms that confer power to interpret in an authoritative manner whether the normative produced by virtue of the CLCs complies with higher norms. He stresses what such organs have decided on the matter as well. Otherwise, he draws his conclusions from the absence of powers to control the constitutionality of certain acts, which is entrusted to an organ different than the one that formulates them.

2. *Structure of a rule*

Secondly, he attributes to CLCs the structure of a rule. In this regard, he indicates that CLCs do not meet the degree of generality and ambiguity that characterizes principles.

In the case of Kelsen's thesis, he also alludes to the norms that organize the control of constitutionality. Kelsen extracts the TAC thesis from these norms on the design of control, and this is closely related to the following feature.

3. *Rules that confer powers*

According to Sauca, such norms are the kind that confer normative powers, i.e., norms that confer competences for the creation of norms.

What, then, are, precisely, the powers conferred by these CLCs and to which subject or organ are they conferred? I shall endeavor to reconstruct the answer to this question based on Sauca's assertions, although it is not always entirely clear what power is conferred and to whom.

The rule provided by article 10.2 attributes to state organs the power to interpret normative texts in accordance with international human rights law. Or rather, in accordance with the interpretations of international organizations, even when such interpretations lead to norms inconsistent with constitutional norms. Thus, this clause establishes the precedence of the interpretation pursuant to international human rights law, as opposed to an interpretation in compliance with the constitution.

The rule provided by article 65.2 confers normative power upon the King to freely dispose of the appointments of the members of this singular administration and of the distribution of the budget. In other words, the King himself “controls” these acts (there is no other organ to control their regularity).

As to the rule contained in article 93, I am not sure about what power it exactly confers and upon whom. Sauca claims that the normative production recognized by this CLC is of an extraordinary magnitude for it establishes a normative precedence, general effects, and direct application of Union Law, as well as affecting areas of competence.

As I understand it, Sauca argues that the First Additional Provision confers normative powers to create a regulation alternative from the one provided by the Constitution on the competences’ distribution to the Autonomous Communities without his formal reform.¹¹

On this, he states that, indeed, “*las CLC tienen un carácter nomodinámico que, con mayor o menor amplitud [...], genera nuevas normas cuyo contenido no es determinable a priori de los actos de producción normativa* (the CLCs have a nomodynamic character that, in a greater or lesser extent [...], generates new norms whose content is not set a priori of the acts of normative production. Transl. Mariana Esparza) (Sauca, 2023, p.).”

With this feature, he refers, just as Kelsen, to norms that confer powers. As I highlighted before, Kelsen stresses that when constitutionality examination is not entrusted to another organ than the legislature, we cannot but conclude the outcome of the tacit authorization to formulate irregular

¹¹ About this CLC, the author remarks that it is of a higher degree of indeterminacy and “[...] 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 competences, which are subject to the updating through the bilateral proceedings for statute innovation. Such updating, by definition —unless it is a provision lacking of meaning—, exceeds the limitations set forward in art. 149.1 of the SC regarding the competence distribution subject to the principle of disponibility (Sauca, 2023, p. 48).”

norms. Nonetheless, the situation changes if we take into consideration the mechanisms of control since Sauca claims that:

es esencialmente diferente cuando la constitución delega en otro órgano, distinto al legislativo el examen o resolución de la pregunta de si una ley corresponde a las determinaciones constitucionales que directamente regulan la legislación, facultándole a anular la ley que considere "inconstitucional" (is fundamentally different when the constitution entrusts to an organ aside from the legislative the examination or resolution of whether a law corresponds to the constitutional provisions that directly regulate the legislation, and thus, it has the power to annul the norms it deems "unconstitutional." Such a function may be entrusted to a special court, a supreme court or to every court. Transl. Mariana Esparza). (Kelsen, 1960, p. 279- 280).

We can derive the same ideas from the claims of Sauca. Therefore, for example, he emphasizes in the first CLC that the scenario would significantly change if there were a judicial organ in charge of the interpretations regarding the international treaties and agreements on human rights, such as the ECHR. He argues that in this case that organ shall have the last word on the interpretations of the documents thereon. If there is not such an international organ, the state organs shall bear more discretion to interpret them. Even in the first scenario, I consider it worthy to evaluate with more detail if the ECHR is the organ that does have the last word on these matters within the Spanish legal system.

Furthermore, Sauca's ideas are quite close to Kelsen's thesis when he explains about the second clause that the acts of internal administration of the King's Household are beyond judicial control. Likewise, when he provides, on the third and fourth CLCs, the judgments of the Spanish CC regarding the primacy or subordination of European law or historic rights over the Spanish Constitution.

4. Relationship of primacy of enforcement regarding constitutional legislation

On this regard I hold doubts and requests to clarifying them for the author. As Sauca explains:

Las normas generadas por las CLC tendrán además de la característica de aplicabilidad externa, la de su validez como pertenencia al sistema jurídico español en los casos de las CLC del art. 65 y la DA 1ª, mientras que en los supuestos de las CLC del art. 10.2 y 93 su aplicabilidad externa no va acompañada de que puedan reputarse como pertenecientes al sistema. Esta configuración de las CLC evita que las normas producidas en virtud de cada

una de ellas y que puedan tener contenidos discrepantes con la regulación constitucional entren en relación de contradicción. La determinación de condiciones de aplicabilidad diferentes implica que se relacionan mediante un principio de prevalencia y no mediante la aplicación de un criterio de jerarquía o de temporalidad. Finalmente, es conveniente aclarar que las normas dictadas en virtud de la CLC no tienen el carácter de normas delegadas (The norms produced by CLCs shall have, 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 do not entail that they can be deemed as pertaining to the system. Configuring the CLCs in this manner avoids that the norms produced due to each one of them, and that may have contents in dispute with the constitutional regulation, come into a relation of contradiction. The fact that different conditions of applicability must be determined implies that they are related by the principle of prevalence rather than the application of a criterion of hierarchy or temporality. Lastly, we should clarify that the norms issued under the CLC do not have the character of delegated norms. Transl. Mariana Esparza). (Saucá, 2023, p. 49-50).

We can derive from these statements that, besides conferring powers, CLCs are norms or criteria of external applicability, i.e., they command or authorize the application of other norms¹², those produced by the exercise of the power they confer. The latter, although they do not pertain to the legal system at hand, in this case the Spanish system, are applicable. Moreover, CLCs establish a primacy of application for these norms over those with which they may be incompatible.

So, I would ask: are CLCs what Saucá claims do not contradict the constitution, or rather, are the norms produced by virtue of CLCs what does not contradict the constitution, even if its content is incompatible thereon?

I understand that the enabling clauses (the CLCs) do not enter a relation of contradiction with the constitution since they enable the production of future legislation that eventually (may or may not) be incompatible with the constitution. However, if the norms produced by virtue of them have

¹² Moreso and Navarro introduce to the concept of applicability proposed by Bulygin (Bulygin 1982) the distinction between external and internal applicability. The first coincides with the concept of applicability proposed by Bulygin, so that "A rule *Ni* is externally applicable at a time *t* to an individual case *c*, which is an instance of the general case *C* if and only if another rule *Nj*, pertaining to the system *Sj* at *t* time, prescribes (obliges or empowers) to apply *Ni* to the individual cases that are instances of *C* (Moreso and Navarro, 1996, p. 125)." Contrariwise, the internal applicability of a norms refers to the events or states of affairs regulated by its own "sphere of validity". They thus define internal applicability as follows: "A rule *Ni* is internally applicable at a time *t* to an individual case *c* if and only if *c* is an instance of the general case *C*, delimited by the defining properties of *Ni*'s spheres of validity (spatial, temporal, personal and material) (Ibid.: 127)."

an unconstitutional content (if interpreted as such), why do they not enter a relation of contradiction with the Constitution? Because it seems that Sauca is precisely saying that about unconstitutional content. Therefore, we could conclude that, although the norms produced as an exercise of the entrusted competence may be unconstitutional, are nonetheless applicable because another constitutional rule (the respective CLC) authorizes and prioritizes their application.

Another matter. According to Sauca, the norms produced by virtue of the CLCs contained in article 65.2 and the 1st Additional Provision are not applicable but also pertaining to the legal system in question. On the contrary, he states that the norms produced by articles 10.2 and 93 are applicable but not pertaining. In this regard, I am uncertain as to what is the criterion of pertaining assumed by the author. Why do the former two pertain and the latter do not? It would seem as, on the one hand, any rule produced as exercise of the powers conferred by the CLCs pertains to the legal system in question (notwithstanding the fact that its content is incompatible with the constitution) because, for example, the criterion assumed is that of validity. Or, on the other hand, one might say that, when such norms have a content incompatible with the constitution, they do not pertain to the legal system in question but are applicable because another rule (the respective CLC) authorizes their application, as Bulygin states regarding unconstitutional norms (Bulygin, 1982). My intention here is not to defend one criterion of pertaining over another but rather to demonstrate that the criterion of pertaining assumed by Sauca is not clear.

Now, regarding Kelsen's TAC, one might also understand that the norms concerning the design for the control of constitutionality are norms or criteria of applicability. Therefore, the norms produced by normative authorities are applicable to the cases they regulate, so long as they are not expelled from the system by the judgment of the organs entrusted with the control of normative regularity.

As for the fifth structural feature, Sauca claims that the Constitution admits that the norms produced by a CLC may have a content that, eventually, becomes incompatible with its ordinary regulation.

5. CLCs enable the production of legislation that may be incompatible with other constitutional norms

The idea that liquidity clauses enable the production of an alternative regulation to the constitution closely resembles, even in its wording, the CAT thesis. I have nothing more to add than what I already said.

Sauca adds to the end of this description that constitutional liquidity implies the manifestation of a power of the same nature as the constituent one, or the constituted power in the case of reforms. And that is why they involve the use of sovereign power which is the foundation of the Constitution. On that matter, the author argues that:

Las CLC son parte de la Constitución, tienen la misma legitimidad que cualquier otro componente de ella y su peculiaridad radica en que habilita la producción de normas que disfrutaran de preferencia aplicativa sobre las recogidas en el texto constitucional y, evidentemente, las producidas a tenor de la misma". Dicho en breve, las CLC implican una transferencia parcial de soberanía, la misma soberanía que legitima a la propia Constitución (The 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, evidently, those produced under it." To simply put it, CLCs imply a partial transfer of sovereignty, the same sovereignty that legitimates the Constitution itself. Transl. Mariana Esparza). (Sauca, 2023, p. 50).

I also hold both a doubt and request about the idea of transference of sovereign powers, namely, who transfers the sovereignty to whom, or from which organ to which one in every identified CLC? I find, once again, relevant for the purposes of this analysis to determine who has the last word on what counts as law and what is its hierarchy in the Spanish legal system.

V. CONCLUSIONS

Through this paper I aimed to illustrate that the notion of constitutional liquidity proposed by José María Sauca has a close resemblance with the tacit alternative clause thesis held by Kelsen. In other words, it leads to the same idea: some constitutional provisions express norms that authorize the production of norms that may be incompatible with other constitutional norms. In Sauca's analysis, these norms are what he calls "constitutional liquidity clauses", which he studies within the Spanish Constitution of 1978 and therein he identifies four CLCs. Kelsen's thesis alludes to the norms of competence that shape the control of constitutionality. In both analyses, the focus is on the latter, the only difference is that Sauca's proposal refers to a specific normative, the design for the control of the regularity that this normative, in particular, has, and the judgment made by the respective organs entrusted with the control of regularity.

Sauca highlights as one of the structural features of CLCs their express nature and, therefore, not its tacit character like Kelsen's clause. However, the analysis of every clause he identifies is focused either on the idea that the normative produced under the clause is exempt from control of constitutionality, or on the assumption that the state organs that judge on this matter must follow, or in fact do follow, the interpretations of other organs (i.e., international organs). And this is exactly what Kelsen warns with the CAT thesis: both the regularity of a rule and the fact that it can still produce legal effects depend, in practice, on the judgment of the organ with the last word on the control of regularity.

All the other structural features he identifies in these clauses are the same as those in the TAC thesis. Summarizing: it refers to norms of competence that confer powers to certain organs to produce norms that, eventually, may have a content incompatible with other constitutional norms, a question that will be decided by those who have the last word on the regularity of the normative produced.

VI. REFERENCES

- Alchourrón, C. E. and Bulygin, E. (1991). *Análisis Lógico y derecho*. Center of Constitutional Studies.
- Bulygin, E. (1995). Cognition and Interpretation of Law. In L. Gianformaggio, and S. Paulson (Eds.), *Cognition and interpretation of law* (pp. 11-35). Giappichelli.
- Celano, B. (1999). *La Teoria del diritto di Hans Kelsen: una introduzione critica*. Il Molino.
- Comanducci, P. (1997). Taking Kelsen seriously. In E. Garzón Valdés, et al. (Eds.), *Normative Systems in Legal and Moral Theory* (pp.165-182.). Duncker & Humblot.
- Comanducci, P. (1998). *Assagi di metaetica due*. Giappichelli.
- Comanducci, P. (2012). Tomando a Kelsen en serio. In G. A. Ramírez Clevés (Ed.), *Ecos sobre Kelsen* (pp. 439-460). Universidad Externado.
- Chahuán, M. (2018). Sobre la tesis de la cláusula alternativa tácita. Aspectos realistas que rescatar. In *Analisi & Diritto 2017* (pp. 257-299). Marcial Pons.
- Chiassoni, P. (2012). Dos preguntas, una solución. Sobre el realismo radical de Hans Kelsen. In J.J. Moreso, and J.L. Martí (Eds.), *Contribuciones a la Filosofía del Derecho. Imperia Barcelona 2010* (pp. 177- 198). Marcial Pons.

- Chiassoni, P. (2012a). *Desencantos para abogados realistas*, Universidad Externado.
- Chiassoni, P. (2012b). Il realismo radicale della teoria pura del diritto. *Materiali per una storia della cultura giuridica*, (1), (237-262). <https://doi.org/10.1436/36850>
- Chiassoni, P. (2013). Wiener Realism. In L. Duarte D'almeida, J. Gardner, and L. Green (Eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law* (pp.157-160). Hart Publishing.
- Chiassoni, P. (2017). Cuatro etapas en la epistemología jurídica de Hans Kelsen. In C. Bernal, y M. Porciuncula (Eds.), *Kelsen para Erizos: Ensayos en Honor A Stanley L. Paulson* (pp. 85-126). Universidad Externado.
- Gianformaggio, L. (1995). Pure Theory of Law and Tacit Alternative Clause. In L. Gianformaggio and S. Paulson (Eds.), *Cognition and interpretation of law* (pp. 257-273). Giappichelli.
- Guastini, R. (1992). *Dalle fonti alle norme*. Giappichelli.
- Guastini, R. (2002). Cinco observaciones sobre validez y derogación. *Discusiones. Inconstitucionalidad y Derogación*, (2), (59-63).
- Guastini, R. (2016). Kelsen on Validity (once more). *Ratio Juris*, 29(3), sept. 2016, 402-409.
- Kelsen, H. (1960). *Teoría Pura del Derecho. Introducción a la ciencia del derecho*. (Mario G. Losano, trans.) Editorial Universitaria.
- Kelsen, H. (1986). *Teoría Pura del Derecho (2nd Edition)*. (Roberto Vernengo, trans.) UNAM.
- Moreso, J. J. and Navarro, P. (1996). Aplicabilidad y eficacia de las normas jurídicas. *Isonomía: Revista de Teoría y Filosofía del Derecho*, (5), October, 1996, 119-139.
- Nino, C.S. (1985). *La validez del derecho*. Astrea.
- Sauca, J. M. (2023). "Estabilidad y cambio en la constitución: la liquidez constitucional" (in this journal).
- Ratti, G. B. (2015). Un poco de realismo sobre inconstitucionalidad y derogación. *Discusiones*, 14(1), 253-276. <https://doi.org/10.52292/j.dsc.2014.2469>
- Raz, J. (1979). *The authority of Law. Essays on Law and Morality*. Oxford University Press.
- Ross, A. (1991). *El concepto de validez y otros ensayos*. Fontamara.
- Ruiz Manero, J. (1990). *Jurisdicción y normas*. Centros de Estudios Políticos y Constitucionales.
- Troper, M. (1999). Una teoria realista dell'interpretazione. *Materiali per una storia della cultura Giuridica*, XXIX, (2), 473-493.
- Tur, R. (2013). The Alternative Character of the Legal Norm: Kelsen as a Defeasibilist?. In L. Duarte D'almeida, J. Gardner, and L. Green (Eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law* (pp. 245-258). Hart Publishing.