

On the Concept of Constitutional Liquidity¹

Sobre el concepto de liquidez constitucional

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ABSTRACT: This paper analyses constitutional liquidity clauses (CLCs), as characterized by José María Sauca. On the structural features, firstly, it argues that it is difficult to reconduct the examples of CLCs to a single model, hence, once the distinction between prescriptive and constitutive rules has been introduced, there are six possible reconstructions. Secondly, it states that the principle of prevalence, far from assuming that there are no contradictions between the rules that may emanate from CLCs and constitutional norms, presupposes them. Thirdly, it argues that maintaining that CLCs imply a transfer of sovereignty can only be due to an ambiguous use of the term "sovereignty". As far as functions are concerned, and contrary to Sauca's argument, it shows that CLCs can lead to constitutional mutations and can feasibly be seen as mechanisms of last resort.

Keywords: Constitutional Liquidity, Constitutive Rules, Sovereignty, Constitutional Mutations, Evolutive Interpretation.

RESUMEN: En este trabajo se analizan las cláusulas de liquidez constitucional (CLC), tal como han sido caracterizadas por José María Sauca. Sobre los rasgos estructurales, se sostiene, primero, que es difícil reconducir los ejemplos de CLC a un solo modelo, por cuanto, una vez introducida la distinción entre reglas prescriptivas y constitutivas, caben seis posibles reconstrucciones; segundo, que el principio de prevalencia, lejos de suponer que no hay contradicciones entre las normas que puedan emanar de las CLC y la normativa constitucional, las presuponen; tercero, que mantener que las CLC implican una transferencia de soberanía solo puede obedecer a un uso ambiguo del término "soberanía". Por lo que hace a las funciones, y en contra de lo sostenido por Sauca, se muestra que las CLC pueden conducir a mutaciones constitucionales y es factible considerarlas mecanismos de última palabra.

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Palabras clave: liquidez constitucional, reglas constitutivas, soberanía, mutación constitucional, interpretación evolutiva.

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I. INTRODUCTION

José María Sauca's work "Estabilidad y cambio en la constitución: la liquidez constitucional" (Stability and change in the constitution: constitutional liquidity) is a major reference piece when one addresses some of the main problems of constitutional dynamics. The question that resonates throughout the text is whether both the philosophy of law and the constitutional theory have an conceptual apparatus adequate to deal with such problems or, quite the contrary, whether it is appropriate to introduce a new category (constitutional liquidity's) that would highlight some of the mechanisms with which constitutions are endowed—whose specificity is not sufficiently reflected in the usual classifications, such as the one distinguishing between rigid and flexible constitutions.

The text of this commentary is divided into two clearly differentiated parts. In the former, the author addresses the concept of constitutional stability reviewing some of the distinctions that jurists usually employ in their analysis. In the latter, he explores the possibilities that the concept of constitutional liquidity offers to show relevant phenomena that would not entirely fit into the traditional concepts.

Certainly, there are some good points found throughout the study. As for the first part, it is worth mentioning the attempt to clarify the notions revolving the idea of constitutional stability. It is particularly noteworthy the treatment of the distinction between flexible and rigid constitutions, which shows some ambiguities and paradoxes caused precisely by the lack of conceptual clarity. Furthermore, the way the author approaches this first part reveals his vast legal knowledge and the elegance of his style. As for the second part, the treatment of constitutional liquidity blends a double perspective, namely a structural and a functional one. In my opinion, this is also a wise move because neglecting either of these two approaches in the study of a subject with as many aspects as that of constitutional dynamics would lead to an image that is not only incomplete but distorted. Based on this dual perspective, Sauca proposes to take into consideration four examples extracted from the Spanish Constitution of 1978 (hereinafter

SC), which he designates as “constitutional liquidity clauses” (hereinafter CLCs).

From this point forward I will focus my attention on this second part. This dual structural-functional perspective will be the reference for my analysis. Thus, in section II I will deal with three issues concerning the structural features that the author assigns to CLCs, while I will reserve section III to discuss other issues concerning the functions that the author assigns to such clauses. Finally, the paper will end with a section that summarizes the conclusions. I shall warn you that I will take an analytical approach, although, to a greater extent, of an internal nature. By this I mean that the questions I am going to raise are mainly aimed to promote a constructive debate in hope of contributing to clarify, as far as possible, the author's own thesis. Only in a few cases, which I will opportunely remark, accepting the criticism in question could lead to disregard the fundamental thesis defended by Sauca. However, even in such cases, I will not provide an alternative view.

II. OBSERVATIONS ON THE STRUCTURE OF CONSTITUTIONAL LIQUIDITY CLAUSES

Sauca identifies in four precepts of the SC other examples of CLCs. The structural features he eventually attributes to them emerge from an induction process based on such models. The precepts are the following:

- a) art. 10.2: “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).”
- b) art. 65.2: “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).”
- c) art. 93: “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 titu-

lares 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)."

- d) First Additional Provision: "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)."

Sauca extracts from the precepts five structural features that would distinguish CLCs:

- 1) They are formulated in an express way.
- 2) They are structured as a rule, not as a principle.
- 3) They confer normative powers by attributing rules of jurisdiction.
- 4) They determine a relation of precedence of constitutional regulation: any incompatibility is solved by the principle of prevalence.
- 5) They imply partial transfer of sovereignty.

In the following, I will arrange my critical contributions in three subsections. The first one concerns features 2 and 3, the second, 4, and the third, 5.

1. *Relevance of constitutive rules*

Sauca argues that a CLC takes the form of a rule, not of a principle (feature 2). I believe this choice is right since all the precepts specify conditions of application which they would lack if they were principles. Now, within the category of rules, we would be talking about rules that confer powers (feature 3), but this statement deserves further development.

The author claims that CLCs are, and I quote, "reglas que confieren poderes normativos (...), que habilitan un poder de creación de normas mediante la atribución de normas de competencia (rules that confer normative powers [...], which enable a rule-making power by attributing

rules of jurisdiction)”. However, this formulation is confusing. Is it a single rule of jurisdiction or rather a rule of jurisdiction that enables another rule of jurisdiction? Does this formulation preclude the possibility of the CLC as an obligation to follow what an authority conferred with jurisdiction agrees to?

Faced with these doubts, it may be useful to distinguish between two meanings of “rule” that may be relevant. We can speak of “rule” as a prescriptive rule, in other words, as one that establishes that—in explicit circumstances (the conditions of application that would distinguish rules from principles)—a certain content (i.e., type of actions) is associated with a deontic operator (obligatory, prohibited, or optional). This use of “rule” is usually expressed through the form of a conditional in which the antecedent consists of the conditions of application and the consequent of the respective deontic operator, and the type of actions in question. Describing it in a more precise way, the norm expressed by a prescriptive rule associates a general case (types of actions, states of affairs or subjects) with a normative solution (formed by the deontic operator and its corresponding action) (Alchourrón and Bulygin, 1971). The other use of “rule” is that of a constitutive rule which obeys the standard form once coined by John Searle: “X counts as Y in context C” (Searle, 1997). Although there are several ways of understanding this different use of “rule” (Ramírez and Vilajosana, 2022), for the purposes of the present discussion, it will suffice to conceive it in this way: a constitutive rule lacks a normative solution and, instead, associates two general cases (Moreso and Vilajosana, 2004, p. 65 et seq.).

If we introduce the above distinction between rule in the prescriptive sense and rule in the constitutive sense, then the possibilities of structurally characterizing CLCs increases. Provided that they could be understood as the expression of a single norm or the combination of two, there would be six scenarios for CLCs:

- a) A CLC expresses a single norm that takes the form of a prescriptive rule.
- b) A CLC expresses a single norm that takes the form of a constitutive rule.
- c) An CLC expresses a combination of norms, so that its structure is that of a rule which prescribes the use of a constitutive rule.
- d) An CLC expresses a combination of norms, so that its structure is that of a constitutive rule which refers to another constitutive rule.
- e) A CLC expresses a combination of norms, so that its structure is that of a constitutive rule that refers to a prescriptive rule.

- f) An CLC expresses a combination of norms, so that its structure is that of a rule that prescribes the use of another prescriptive rule.

Whether or not all CLCs fit into the same possible case is one of the issues to be clarified. Initially, we cannot discard that each proposed example can fit better in one case than in another and may not have to coincide with the rest.

To clear the way, we must first determine whether Sauca uses two synonymous expressions when he speaks of “rules that confer normative powers” and “rules of jurisdiction”. This is likely to be the case. In this case, as is well known, there have been several ways of characterizing the rules of jurisdiction, some of which can be associated with prescriptive rules and others with constitutive rules. Nowadays, it seems that we have reached some consensus in legal theory to better understand them in the latter sense (Ferrer, 2000).

If so, case d) would best fit the idea of Sauca’s text: a structure in which two constitutive rules are combined. Once the above clarification has been made, we could infer this from the definition the author provides, according to which the CLCs are “reglas que confieren poderes normativos (...), que habilitan un poder de creación de normas mediante la atribución de normas de competencia (rules that confer normative powers (...), which enable a rule-making power by attributing rules of jurisdiction)”. Even this form of “chaining” constitutive rules would find its theoretical basis in Searle himself when he proposes the idea of the iteration of constitutive rules as the typical way “institutional reality” is generated (Searle, 1997, p. 93 et seq.). The way of doing so would be, in simple terms, that all which has taken the place of Y in a first constitutive rule, in the formula “X counts as Y in context C”, moves to the position of X in the following constitutive rule, and so forth. For instance, provided the first constitutive rule as: “Giving consent (X) counts as acquiring an obligation (Y) in our society (C)”; the second constitutive rule would be: “Acquire an obligation (X) counts as entering into a valid contract (Y), according to the Civil Code (C)”, and so on. I therefore venture to say that this would be an approach that could be explored to grasp the intuition behind Sauca’s definition. However, when we contrast the definition with the examples of CLCs, it seems as though case d) does not reflect them very well.

Thus, this choice is poorly reconciled with the exact wording of the CLC contained in art. 10.2 SC. When this precept uses the expression “shall be interpreted”, it is hard not to associate it with a rule of a prescriptive nature (specifically one of obligation). Neither does the precept accurately reflect the CLC under art. 93 SC when it says, “By means of an

organic law, authorization may be granted [...]”, which can be reconstructed as a prescriptive rule (in this case, of an optional nature). Therefore, the most appropriate way to understand these examples of CLCs is to consider them as cases c), i.e., as prescriptive rules that require or authorize the use of a constitutive rule.

On the other hand, the scenario contemplated in art. 65.2 is nothing but the expression of a single rule of jurisdiction, hence, an example of case b). Indeed, “The King freely appoints and dismisses the civil and military members of his Household” can be reconstructed like this: “Appointments and dismissals made by the King (X) are considered as valid acts (Y) according to the SC (C).”

Finally, the CLC illustrated in the first additional provision appears to be an addition of case a) and b). Indeed, a reasonable way to understand its content require to distinguish the first part (“The Constitution protects and respects the historic rights of the territories with *fueros* [local laws]”) from the second (“The general updating of the *fuego* system shall be carried out, when appropriate, within the framework of the Constitution and of the Statutes of Autonomy.”). The first part can be reconstructed as a constitutive rule: “The historic rights of the territories with *fueros* (X) are considered as valid rights (Y) according to the SC (C).” On the other hand, the second part could be better reconstructed as a prescriptive rule: “If you want to update the *fuego* system, it is mandatory to do so in accordance with the SC and the Statutes of Autonomy.”

Therefore, we have seen that, once the appropriate distinctions have been made, there are six possibilities for the reconstruction of the CLCS from a structural perspective. Although one of these possibilities would fit into the definition given by Sauca, after having analyzed the four examples of CLCs provided by the author, it becomes difficult to reduce them all to the same structure and, moreover, to regard this structure as the one suggested by the definition.

2. *The principle of prevalence and antinomies*

The fourth structural feature that Sauca associates with the CLCs is that they establish a certain “precedence” of the norms resulting from the exercise of powers incompatible with the SC. The paragraph that summarizes the authors’ standpoint on this matter is the following:

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 (Configuring the CLCs in this manner avoids that the norms produced due to each one of

them, and that may have contents disrupting from the constitutional regulation come into a relation of contradiction).” 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.

I would like to address three comments in relation to this point. First, we must clarify the idea of normative contradiction. While the author admits that the norms produced from the use of CLCs may have “*contenidos discrepantes* (discrepant contents)” regarding the norms of the SC, he goes on to clarify that these same clauses avoid the relation of contradiction. However, it is not clear from what the text says what would be the difference between “*contenido discrepante* (discrepant content)”, which Sauca recognizes as possible, and “*contradicción* (contradiction)”, whose existence Sauca denies. Moreover, it is worth recalling that the relation of contradiction between norms is a purely logical matter. Rule N is contradictory to rule N’ if both regulate the same general case but with mutually incompatible normative solutions. For example, N states that provided C, p would be possible, whereas N’ states that provided C, p is prohibited. Since it is a logical relation, any factual circumstance, such as the different legal system in which they appear, does not affect whether there is a normative contradiction between them. Thus, unless it is argued that “discrepant content” is something significantly different from contradiction, we must conclude that we are faced with two synonymous expressions or that, at least, they share relevant defining properties.

In second place, the reason Sauca claims that there is no contradiction in these cases is the fact that the principle of prevalence is used instead of the typical criteria for resolving antinomies (*lex posterior*, *lex superior*, *lex specialis*). But that is not a good reason. As I just said, the relation of contradiction occurs regardless of everything else. Thus, using the “principle of prevalence” in these cases to resolve the normative “discrepancy” would not prove that there is no contradiction. In any case, we should bear in mind that, if “discrepant content” and “contradiction” are synonyms or share a relevant semantic field, then the “principle of prevalence” would be one more of the criteria used by jurists to resolve antinomies.

This is not that surprising. We only need to recall that another way of resolving possible normative contradictions is the use of the criterion of jurisdiction (for example, when resolving disputes between norms issued by the Autonomous Communities and those of state jurisdiction, if they are in contradiction with each other).

On the other hand, a positive law argument can be added to this conceptual argument. Thus, the scope given to the example of CLC contained in art. 93 SC should be supplemented by the provisions of art. 95.

1 SC: “La celebración de un tratado internacional que contenga estipulaciones contrarias a la CE exigirá la previa revisión constitucional (The conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior constitutional review)”. We can say from what is set forth in this precept that, firstly, it assumes there may be normative contradictions between the provisions of international treaties and those regulated by the SC and, secondly, that it mandates a constitutional review for these cases. The latter would question whether the CLC contained in art. 93 complies with one of the basic functions that Saucá attributes to this type of clause, which is to contribute to constitutional stability and avoid continuous formal reform. But I will address the functions the CLCs fulfill later.

In third place, as Saucá argues, a proper understanding of the functioning of the principle of prevalence requires a distinction between rules pertaining to the system and rules applicable according to the system (for this distinction, see Moreso and Navarro, 1998). However, this approach leads to counterintuitive results.

The distinction between pertaining and applicability works well in some assumptions since it helps to explain issues that would otherwise be paradoxical. Therefore, for example, a rule in a period of *vacatio legis* may be conceived as a rule pertaining to a legal system, but which is not applicable in accordance with the system itself. Likewise, a foreign rule, which by definition does not pertain to a given legal system, may be applicable under such system if there is a rule within it that provides so (i.e., that compels or authorizes the judges of said system to use it to resolve a case). This emblematically happens in private international law with the referrals arose from the rules of conflict (these do pertain to the system, but the rules that must or may be applied by the judge do not, although they may be considered applicable).

But employing this distinction for other cases does not seem convincing. For instance, this happens when it is used to account for the reception of rules through successive legal systems pertaining to the same state legal system. In these cases, it is said that the receptive rules do not pertain to the current legal system, but they are only applicable in terms of it (Moreso and Navarro, 1998). However, if this were so, we should conclude that, hypothetically, after the promulgation of the Spanish Constitution of 1978, the rules of the previous Spanish legal system that do not contradict the SC are receptive rules; thus, they are applicable but not pertaining to it. This conclusion is clearly counterintuitive (as argued in Vilajosana, 2022), since we would have to conclude, for example, that the rules contained in the Spanish Civil Code, based on the system inaugurated by the SC, are ap-

plicable although not pertaining to it. The conclusion that the rules of the Civil Code do not pertain to the legal system currently in force in Spain does not seem to be a fortunate conclusion, but, if it is not, then we must reconsider the use of that distinction for these cases.

The same *mutatis mutandis* can happen in certain scenarios of CLCs. Sauca explains the use of this distinction for the case at hand in this way:

[...] la Constitución faculta mediante la CLC la existencia de una norma habilitante de la aplicabilidad externa de las normas que puedan ser producidas mediante el ejercicio de dicha competencia. 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 (the Constitution authorizes through the CLCs the existence of an enabling norm for the external applicability of the norms that may be produced through the exercise of such power. The norms generated by the CLCs will have, in addition to the characteristic of external applicability, their validity as pertaining to the Spanish legal system in the cases of the CLCs of art. 65 and the first additional provision (AP), while in the cases of the CLCs of art. 10.2 and 93 their external applicability is not accompanied by the fact that they can be considered 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 disrupting from 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).

The counterintuitive nature of what is said regarding the provisions of the CLCs formulated in articles 10.2 and 93—the only ones in which the distinction between pertaining and applicability is decisive—seems obvious. As for art. 10.2, it is a rule that imposes a certain interpretation in case of discrepancy and is therefore unrelated to the distinction between pertaining and applicable rules. It seems that the apparent possibility of applying such distinction to CLCs lies in art. 93. Nonetheless, the counterintuitive nature in this case is reinforced by a key provision of the SC itself, such as art. 96.1: “Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España, forman parte

del ordenamiento interno (Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order).” If this were the case, any reasonable interpretation of this precept would lead to the conclusion that the rules contained in the treaties referred to in art. 93, if they are not contradictory to the SC, will be rules pertaining to the Spanish legal system once officially published. And, if they are contradictory, the SC should be amended (former art. 95.1 SC) so that they end up being rules pertaining to said legal system. Certainly, and unlike what happens in the private international law scenarios, there is no room in this case for admitting rules that are applicable but not pertaining to the system.

3. *Two concepts of sovereignty*

Sauca states as the fifth structural feature that “las CLC implican una transferencia parcial de soberanía, la misma soberanía que legitima a la propia Constitución (CLCs imply a partial transfer of sovereignty, the same sovereignty that legitimates the constitution itself.” However, defending this thesis is rather difficult.

For the time being, it seems more of a functional feature since it is not stated that we can derive it from the scrutiny of the structure of a precept without further ado that the transfer of part of its sovereignty. But, even admitting that it is a structural feature, the doubt remains as to whether such transfer of sovereignty happens in the cases referred to by Sauca.

Most certainly the clearest candidates are those in which an element of foreignness is involved. Thus, art. 10.2 could be understood as a transfer of sovereignty when it comes to interpreting the constitutional precepts that recognize fundamental rights and freedoms. For example, it could be said that the Constitutional Court (hereinafter CC) would lose part of its “soberanía interpretativa (interpretative sovereignty)” in favor of the European Court of Human Rights (hereinafter ECHR) regarding the rights and freedoms contained in the European Convention on Human Rights. More clearly, the provisions of art. 93 entail the possibility of transferring sovereignty (in this case, “political”), as evidenced, for instance, by the fact that the Spanish State signed the treaties that bind it to the provisions of the European Union institutions.

However, it is very doubtful that a transfer of sovereignty occurs in the other two cases of CLCs. In this regard, it is particularly shocking to say that art. 65.2 implies a partial transfer of sovereignty because the King can freely appoint and dismiss the civilian and military members of his Household.

It seems, rather, a case of distribution of jurisdiction (we could also understand the first additional provision in the same way). Indeed, we should not forget that in both cases —both that of the King and that of the institutions pertaining to the territories with *fueros* (local laws) and historic rights— we are talking about organs of the Spanish State. If this is true, there is no transfer of sovereignty from Spain to other States, but rather a distribution of jurisdictions within the same legal system.

Perhaps an ambiguity in the use of the term “sovereignty” explains why in the four cases of CLCs we see a partial transfer of sovereignty. At the very least, we can discern two different concepts of sovereignty in these cases. In articles 10.2 and 93 there is an affection of sovereignty understood as “state sovereignty” —although in the former it is limited to interpretative organs, while in the latter it may also include legislative and executive institutions—. Here, thus, we are dealing with a State that transfers part of its sovereignty to external organs. On the other hand, when we argue that art. 65.2 and the first additional provision transfer sovereignty, we should understand the term “sovereignty” not as state sovereignty, since, as it has been said, we are dealing with organs pertaining to the same State, but as “popular sovereignty”. The case provided by art. 65.2 is illustrative on this matter: the power attributed to the King subtracts his actions in this field from the scrutiny of democratic decisions, but within the State itself. Hence, the words of Sauca, quoted at the beginning of this subsection, make sense when he indicates that the transferred sovereignty is “la misma soberanía que legitima a la propia Constitución (the same sovereignty that legitimates the Constitution itself)” for it is the “popular sovereignty” that confers its legitimacy as a democratic system.

III. OBSERVATIONS ON THE FUNCTIONS OF CONSTITUTIONAL LIQUIDITY CLAUSES

As I said at the beginning of this paper, one of the virtues of Sauca’s study is that it combines the structural analysis of CLCs with a functional perspective. Although in contemporary legal theory the structural approach often prevails when categorizing legal rules, we must recall that prominent authors such as Hart have given preponderance to the functional perspective when classifying the normative material with which jurists work. Hart does nothing else, for example, when he formulates his well-known distinction between different secondary rules. As is well known, the rules of change, adjudication and recognition come to compensate, respectively, for the defects that a legal system with little evolution

would have, namely, static character, diffuse social pressure, and uncertainty (Hart, 1961, chap. V). It seems to me that some of the recurrent discussions on the best characterization of such types of rules have prioritized the structural analysis (see, for example, that sustained by Bulygin, 1991 and Ruíz Manero, 1991) at the expense of the functional one, which was precisely the one at the basis of Hart's distinction. It is true that when we give priority to function over structure, we should admit that the rules in question do not necessarily share the same structural features. This happened to Hart, emblematically with the rule of recognition (Vilajosana, 2019) and this may also explain some of the difficulties that Sauca's proposal must face—which I have already referred to in the previous section.

Nevertheless, the functions that Sauca assigns to CLCs are the following:

- 1) They contribute to constitutional stability and avoid continuous formal reform.
- 2) They moderate tensions due to eventual antinomies between domestic and international commitments.
- 3) They moderate the need to resort to constitutional mutations.
- 4) They help integrate different constitutional dynamics.
- 5) Encourage institutional cooperation and favor dynamics of deference.
- 6) They avoid mechanisms of the last word and open deliberative spaces.
- 7) They help to set up a multilevel sovereignty.

I will now make a few comments on two issues related to these functions. Firstly, I will highlight the problems of differentiating “normal” changes of interpretation—with which the CLCs seem to be associated in some cases and which would avoid formal reform—from those changes involving a constitutional mutation. Secondly, I will challenge the sixth function ascribed to the CLCs since it is difficult to differentiate these types of clauses from the usual mechanisms for granting the last word.

1. *Constitutional mutations and evolutionary interpretation*

As stated, Sauca assigns to the CLCs the functions of, on the one hand, preventing continuous formal reform and, on the other, moderating the need to resort to constitutional mutations. It seems to me that this is a crucial point in the framework proposed by the author because if the CLCs fulfill both roles, there is justification for treating them as a resource halfway between reform and mutation, without being identified with either of them. Hence, before making any judgment as to whether this

is the case, we must first analyze what we mean by “formal reform” and by “constitutional mutation”.

Of course, drawing the distinction between reform and mutation requires differentiating between the text of a constitution and its meaning. Only then, we will be able to say that the change that affects the text supposes a reform, while the mutation is related with the modification of its meaning. However, even if it is true from the outset, there remain problems to be solved, especially regarding the scope we must grant to the concept of constitutional mutation.

To begin with, accepting the distinction between text and meaning implies also acknowledging that we can alter the text without changing the meaning, and we can change the meaning without changing the text. The first case, more of an experimental nature, would occur if the “formal reform” were to modify a normative statement within a constitution and replace it with another synonymous statement. This is what would happen, for example, if art. 11.2 SC, “No person of Spanish origin may be deprived of his or her nationality,” was replaced by “It is prohibited for any person of Spanish origin to be deprived of his or her nationality.” The text would have been changed but its meaning would have remained the same. The second case, the variation of meaning without alteration of the text, is the foremost relevant for the issue at hand because it should lead us to understand the difficulties when it comes to differentiating between scenarios of constitutional mutation and those produced by interpretative activity.

There have been undoubted cases of constitutional mutation throughout history, which have precisely demonstrated the need to use this category as opposed to that of formal reform of the constitution. The most emblematic one in this regard is perhaps that of Hitler’s accession to power. As is well known, by taking advantage of the opportunity provided by the provisions of the Weimar Constitution in terms of exceptions (mainly Article 48), Hitler managed to modify the institutional design of the German state without touching a single comma of its constitutional text. Considering that the changes brought by this procedure were undoubtedly significant but did not fit into the concept of constitutional reform, some people spoke of mutation (Boldt, 1971).

Indeed, cases like this show that an analysis based on purely formal criteria is not convincing when the determination of the identity of a legal system is at stake. However, we cannot say that any non-formal change of a constitution produces a constitutional mutation either. If this would be the case, then we must establish a criterion of relevance to distinguish between those variations that lead to mutation and those that do not.

The criterion of relevance must be of a political nature and the best candidate is the one related to the elements that define the type of political regime (Vilajosana, 1996). The changes produced in Hitler's time originate a constitutional mutation because they imply a change of political regime without formally modifying the constitutional text.

Perhaps Sauca could consider this idea to establish a distinction between CLCs and constitutional mutation: the former do not seek to modify the political regime that is associated with the constitution. Nevertheless, there is still a not minor problem to be solved. If the mutation does not occur through a change of institutional structures—for instance, when a head of state or government legislates behind Parliament's back in a formally democratic system—but through an interpretative endeavor, then specific setbacks associated with such activity arise.

Interpreting a text is attributing a meaning to it. Could we reach constitutional mutation by an interpretative way? Initially, yes. We might conceive that its interpreter, for example, a certain Constitutional Court or the judiciary as a whole (according to the type of legal system involved), can produce through this activity profound changes in the meaning of constitutional texts without their formal reform—or, rather, a variation in the meanings originally associated with the texts because it makes no sense to speak of texts devoid of meaning in this context. Here again we would have the problem of either accepting that any change in the interpretation of a precept of the constitution implies a constitutional mutation or else providing a criterion of relevance for the interpretative change, which might well be the aforementioned one. A constitutional mutation would only occur through interpretation if the changes in the meanings associated with the constitutional texts entail a change of political regime. However, this may be an overly demanding criterion. Thus, some authors seem to claim, sometimes implicitly, that the changes must be relevant to fit into the category of constitutional mutation, but they must not necessarily entail a change of political regime.

This case raises an interesting and difficult problem to solve, which is clearly highlighted when we use hermeneutic principles such as the so-called evolutionary interpretation, whose use admits and justifies that changes in the interpretation of constitutional texts, and not just minor ones, must occur to keep pace with the social changes that are taking place. Both the ECHR and the CC have used this resource. It makes sense in both cases, partly due to some of the reasons that Sauca wields to justify the presence of CLCs. When formal reforms are elusive, the resource of evolutionary interpretation becomes an interpretative mechanism capable of achieving transformations that would otherwise be very onerous.

As for the ECHR, it occurs because it is not easy to achieve formal consensus to modify international treaties that affect many States; and as for the CC, because of the expensive procedure of formal reform regulated by Title X of the SC.

The practice of evolutionary interpretation has a long tradition in international jurisdiction and, more specifically, in the ECHR when interpreting the European Convention on Human Rights. The International Court of Justice,² Court of Justice of the European Union,³ the Inter-American Court of Human Rights⁴ and the Human Rights Committee,⁵ among others, have also used this resource.

The ECHR, at least since the Tyrer⁶ resolution, has been developing the doctrine whereby human rights must be interpreted in an evolutionary manner. This means that we cannot limit its content and scope on the grounds that the law itself was interpreted in a restricted manner or with certain connotations at the time of the enactment of the legislation at hand (in the case of this Court, the Convention). What is relevant in these cases is not the will of the individual who approved the regulation at the time, but the connotations and scope that the concept may have acquired over time (Cf. Helmersen, 2013).

With greater or lesser rigor and consistency, the CC has also used this hermeneutic principle in pronouncements on such diverse subjects as the protection of fundamental rights against the environmental noise that may result from the technological society,⁷ the fight against gender

² Some of the cases where it can be found are: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971], ICJ Reports 16, <https://www.icj-cij.org/case/53> for 53. Aegean Sea Continental Shelf (Greece v. Turkey), [1978], ICJ Reports 3, <https://www.icj-cij.org/case/62>, for 77. Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), [2009], ICJ Reports 213, <https://www.icj-cij.org/case/133>, for 64-66.

³ Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, [1982], ECR 3415, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0283>, for 20.

⁴ The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion, [1999], OC-16, Inter-American Court of Human Rights Series A No 16, https://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf, for 114.

⁵ Roger Judge v. Canada, Human Rights Committee, [2003], Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998, <https://www.refworld.org/cases,HRC,404887ef3.html>, for 10.3.

⁶ Tyrer v. The United Kingdom, [1978], Series A n. 26, judgment Application no. 5856/72, <https://hudoc.echr.coe.int/fre?i=001-57587>, for 31.

⁷ Constitutional Court Judgment (CCJ) 119/2001, of May 24, 2001.

violence,⁸ same-sex marriage,⁹ sex-based discrimination,¹⁰ the impact of social media on the balance between the right to honor and privacy and the freedoms of speech and information¹¹ or as the legality of abortion.¹²

Furthermore, the High Court adds that the constitutional suitability of this type of interpretation is guaranteed by article 10.2: “the hermeneutic rule of article 10.2 SC has an associated rule of evolutionary interpretation.”¹³ We can reconstruct the argument leading to this conclusion as follows. As we know, article 10.2 SC establishes that the rules relating to fundamental rights and freedoms recognized by the Constitution must be interpreted in accordance with the Universal Declaration of Human Rights and both the international treaties and agreements on these matters ratified by the Spanish State. In the view that this appeal to the international sphere includes, pursuant to the Constitutional Court¹⁴ own doctrine, the interpretation of said Declaration and treaties made by the pertinent organs, and bearing in mind that evolutionary interpretation plays a decisive role in the hermeneutic process of these organs, we can conclude, therefore, that when the Constitutional Court applies this resource, it does nothing more than comply with the mandate of article 10.2.

If that were true, would not article 10.2 (one of the examples of CLCs provided by Sauca) lead to the possibility of a constitutional mutation, which is something that CLCs would help to avoid? Of course, an appropriate answer to this question requires the clearest possible criterion to distinguish the cases in which certain interpretative activities (emblematically those of evolutionary interpretation) lead to constitutional mutations from those that are merely the expression of interpretative changes of no greater significance. While I have previously paint the path whereby we could address such distinction, to admit the suggested criterion (relating mutation to political regime change) or any other, we must accept that, at least as far as art. 10.2 SC is concerned and based in its interpretation by the CC, the use of the evolutionary interpretation can lead to constitutional mutations.

⁸ CCJ 59/2008, of May 14, 2008.

⁹ CCJ 198/2012, of November 6, 2012.

¹⁰ Second Division of the Constitutional Court Judgment (SCCJ) 233/2007, of November 5, 2007, 108/2019, of September 30, 2019, and 153/2021, of September 13, 2021.

¹¹ CCJ 8/2022, of January 27, 2022.

¹² CCJ 44/2023, of May 4, 2023.

¹³ CCJ 198/2012, of November 6, 2012, ground 9.

¹⁴ CCJ 116/2006, of April 24, 2006, and CCJ 38/2011, of March 28, 2011, among many others.

2. Mechanisms of last word and the dilemma of constitutional liquidity

One of the functions that Sauce attributes to CLCs is that they avoid mechanisms of last word and instead provide deliberative spaces. However, from the analysis of the four CLCs proposed examples, we can fairly suspect that CLCs may be mechanisms of last word.

Since, as I already said, the contradiction between two statements is a logical relation, we cannot discard the possibility that resolutions issued by the CC may be contrary to the SC. These resolutions, moreover, may become final despite being unconstitutional because either they are not subject to appeal or, even if they are, the period of limitation for appealing them has elapsed. These are well-known organs granted the last word, risking unconstitutional rules in the legal system. It highlights a more specific problem of the general problem of the so-called irregular rules. As we know, Kelsen offered a solution to this contradiction: the tacit alternative clause.

This resource appears in Kelsen as a solution to the problem of normative contradictions between rules with different hierarchical status. Kelsen's stance in this regard is precisely to deny that such a contradiction may occur. For the author, claiming that a valid rule is "unconstitutional" constitutes a *contradictio in adjecto* (Kelsen, 1960, p. 277). However, he cannot ignore the fact that in the day-to-day practice of law certain legal norms are deemed unconstitutional and, nevertheless, are considered "valid". Confronted with this practice, Kelsen develops the following solution: the constitution empowers the legislator to make general legal rules also through a procedure different from that directly determined by the rules of the constitution, thus providing them with a different content from that directly determined by the constitutional rules. The latter formulates only one of the two possibilities that the constitution provides. The other possibility is provided by the constitution when it delegates to none but the legislative branch the decision on the question of whether a law enacted by that branch is a law in the constitutional sense. The constitutional provisions which regulate legislation have the status of alternative provisions. Hence, we can conclude, based on Kelsen, that the constitution contains a direct and indirect regulation of the law and that the legislative branch has the choice between both (Kelsen, 1960, p. 279).

Therefore, the fact that a norm is valid despite not complying with the conditions expressly established for its creation —and is hence called by some "unconstitutional" or simply "illegal"— can only be explained, according to Kelsen, by the hypothesis that the higher norm tacitly contains an open authorization that empowers the organ involved —not only

the legislative branch, since Kelsen broadens it to the other organs— to issue norms through the procedure and content that said organ determines, even in contradiction with the text of the higher norm itself. In this way, every legal rule would coincide with a higher norm, either with its express formulation or with the tacit empowering clause. Thus, we may conclude that there is no possibility of conflict between rules of different hierarchical levels. The difference between both alternatives of legal enactment lies only in the fact that, if the latter is chosen, i.e., the one that tacitly grants full autonomy in the choice of procedure and content, the organ risks the avoidance of the rules it issues and eventually to be sanctioned.

The tacit alternative clause has received several criticisms. Suffice it to quote one of the earliest and most devastating. Kelsen's thesis implies the assumption that every rule in the legal system is tautological since it would authorize both a normative conduct and its opposite (Vernengo, 1960, p. 17). This means, in sum, that the system in question would not determine any pattern of behavior: saying "you must do *p* or not *p*" makes little sense for a normative system that claims to regulate the conduct of individuals and to do so as a "specific social technique" —which is Kelsen's own understanding of law.

We cannot deny that CLCs, as conceived by Sauca, share a certain resemblance with the idea underlying the use of the tacit alternative clause, although there are certain differences between them. On the one hand, the tacit alternative clause postulated by Kelsen is a hypothesis of knowledge, as it was his renowned *Grundnorm*. We can put it this way, resorting to this category is an attempt by the theory to account for some element of legal practice. On the other hand, Sauca has stressed enough that CLCs are precepts of positive law, thus the four examples he offers regarding articles of the SC.

However, there remains a certain resemblance between both figures. It lies in incorporating into the legal system rules that may be unconstitutional but can no longer be the subject of legal discussion. And this situation makes us, once again, wonder if CLCs do indeed avoid constituting mechanisms of last word or not.

At this point, we are heading towards a form of dilemma. On the one hand, aware of the problem that may arise from the admission of unconstitutional rules issued by the organs to which "normative powers" are attributed through CLCs, Sauca resorts to the distinction between pertaining and applicability. Other authors have applied this distinction precisely to the so-called "irregular rules" (Moreso and Navarro, 1998): These eventual unconstitutional rules would not pertain to the Spanish legal system but would be applicable in accordance with it, thereupon a rule (con-

tained in the CLC at hand which does pertain to the legal system) would oblige or empower its use by a judge to resolve a case. I mentioned at the time that this could lead to counterintuitive results in some cases, but what I wish to emphasize now is that, by using this distinction to solve a problem such as that of irregular rules, we are admitting the possibility that there is indeed such a contradiction since it is its presence that causes the problem. On the other hand, if the general cases of irregular rules as well as the more specific one of unconstitutional rules that may result from the exercise of powers granted by the CLCs occur, then we are admitting that the organs that exercise those powers function as institutions of last word.

Therein lies the dilemma to which I refer. If the assumptions contemplated in the CLCs institute mechanisms of last word (as it seems evident in the example of the powers granted to the King by art. 65.2), they cannot be distinguished from other “normal” mechanisms for granting the last word. Therefore, avoidance of this type of mechanism could not be a characteristic function of the CLCs. If, by contrast, the resolutions taken by the organs to whom the CLCs grants power are resolutions susceptible of review by other institutions, then indeed the CLCs would not establish mechanisms of last word. Therefore, this functional feature could be postulated as a distinctive feature of the CLCs, but consequently other characteristics that Sauca attributes to them would decline. Specifically, it ceases to make sense to say both that the incompatibilities between what is said by these organs and constitutional regulation can be resolved by resorting to the principle of prevalence of the former over the latter (fourth structural feature) and that CLCs imply a transfer of sovereignty (fifth structural feature). Likewise, it is hard to see from this corner of the dilemma how the fourth and fifth functional features would be fulfilled, i.e., to what extent CLCs would help to integrate different constitutional dynamics or would encourage institutional cooperation, favoring deferential dynamics.

IV. CONCLUSIONS

What I have argued throughout this paper can be summarized into the following conclusions:

1. Sauca made a wise move when he combined a structural and functional analysis of CLCs, however there is still room for possible critical remarks regarding both types of analysis in his study.

2. In section II I focused my attention on three aspects of the structural features that would characterize CLCs: that they be rules that confer normative powers, that the discrepancies that may result from their applica-

tion regarding constitutional regulation be resolved through the principle of prevalence, and that they entail a partial transfer of sovereignty.

3. About the fact that CLCs be rules that confer normative powers, I have argued that it may be useful to introduce the distinction between prescriptive rules and constitutive rules. From there and depending on whether CLCs express one or two rules, there are six diverse ways of reconstructing them. Although, based on Sauca's definition for CLCs, it would seem feasible to reduce CLCs to a unitary model, namely, as a constitutive rule referring to another constitutive rule. A detailed examination of CLCs shows the difficulties of this endeavor.

4. About the principle of prevalence, I have stated that, if we understand that "discrepant contents" and "contradiction" are (at least partially) synonymous expressions and we admit that the relation of contradiction between two rules is of a logical nature, then the use of the principle of prevalence, far from assuming that there are no contradictions between the rules that may emanate from CLCs and the Constitution, presupposes them. Furthermore, I have stressed that the use of the distinction between pertaining and applicability in this case leads to counterintuitive results, as art. 96.1 SC highlights.

5. About the claim that the CLCs imply a partial transfer of sovereignty, I have shown that it is doubtful this to be the case in some instances and I have proposed that its eventual plausibility would be due to an ambiguity in the use of the term "sovereignty". Thus, while we could understand that "state sovereignty" is transferred by means of arts. 10.2 and 93, this is not the case with art. 65.2, which would refer rather to a matter of democratic legitimation, closer, therefore, to the idea of "popular sovereignty".

6. In section III I focused my attention on the scrutiny of three functions that Sauca attributes to the CLCs: avoid continuous formal reform, moderate the need to resort to constitutional mutations, and avoid mechanisms of last word.

7. About the possibility of CLCs contributing to constitutional stability by distancing themselves from complex constitutional reform mechanisms but without falling into constitutional mutation, I have stressed the need to establish a clear distinction between constitutional mutation and changes of meaning in the constitutional text because of interpretative activity. It is particularly clear that this is not an easy task in the so-called evolutionary interpretation. Moreover, because the highest interpreter of the SC has held in some rulings that art. 10.2, precisely one of the cases of CLC highlighted by Sauca, contains the mandate to interpret it in this way when we are dealing with fundamental rights and freedoms recognized in the SC.

8. Finally, as for the thesis whereby the presence of CLCs avoids resort to mechanisms of last word, I have stressed that the way of understanding such clauses shares a certain resemblance with the tacit alternative clause proposed by Kelsen to address the problem of irregular rules. The use here of the distinction between pertaining and applicability saves Sauca from falling into certain self-defeating results to which the Kelsenian clause leads, but does not spare him from having to face a dilemma: either CLCs are mechanisms of last word (which contradicts the function we discussed) or they are not (which would affect certain structural features and other functions that Sauca attributes to CLCs).

Notwithstanding these conclusions show some disagreements with Sauca's thesis, they also attest to the interest they caused in me. We are witnessing a study that addresses decisive issues of great complexity with great academic expertise. That is why, as with every fine intellectual work, the highest praise we can possibly give is to discuss it in depth.

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