From the Paradoxical Clauses of Liquidity to the Virtuous Constitutional Openness[1]

De las paradójicas cláusulas de liquidez a la virtuosa apertura constitucional

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Abstract: This paper addresses the work by José María Sauca entitled "Estabilidad y cambio en la constitución: la liquidez constitucional" (Stability and Change in the constitution: constitutional liquidity). The discussion revolves around constitutional stability, and, along this axis, it debates related issues as continuity, change and resistance to such changes.
Keywords: Constitutional Stability, Continuity, Constitutional Changes, Clauses, Spanish Constitution

Resumen: Este texto se aboca al texto de José María Sauca titulado: "Estabilidad y cambio en la constitución: la liquidez constitucional". La estabilidad constitucional es el eje principal sobre el que gira la discusión y en torno a este eje se discuten temas relacionados como la continuidad, el cambio y las resistencias a dichos cambios.
Palabras clave: estabilidad constitucional, continuidad, cambios constitucionales, cláusulas, Constitución española.

I. Introduction

In this paper I will formulate some criticisms of the well-elaborated work of José María Sauca titled "Estabilidad y cambio en la Constitución: la li-

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

quidez constitucional"[2] (Stability and change in the constitution: constitutional liquidity). First, I would like to emphasize the enormous intellectual and personal affection I feel for this work and clarify that, in my opinion, we are facing an outstanding text from which we can learn a great deal of constitutional theory. However, as you will immediately notice, my disagreements with José María Sauca are not about matters of detail, but rather about fundamental issues such as the conception of the constitution itself.

II. On the concept of "constitutional stability"

The first issue I want to challenge is how Sauca uses the concept of constitutional stability. He assumes that a constitution can be analyzed from three perspectives: the historical (which focuses on the political history of a community governed by a given constitution), the sociological (which studies the web of social interests underlying a certain constitutional order) and the rational-normative (which studies the constitutional document in formal-legal terms). Well, according to Sauca, studying constitutional stability from the latter perspective implies studying the institutional mechanisms that hinder or preclude change in the constitutional text. In other words, the author states that the concepts of immutability, intangibility (express and implicit, temporary, or deferred), rigidity, entrenchment, reform, mutation, and flexibility should be studied as instruments that seek to ensure constitutional stability.

Naturally, we do not have to be a linguist to recognize that everyone may employ the words as they want; however, in my opinion, calling all these clauses or constitutional situations as "mechanisms of constitutional stability" misleads more than it clarifies. And the reason is clear, all these concepts allude to the different "legal dynamics" that the "(legal) form of the constitution" can present as opposed to the "(legal) form of law." On the one hand, there are the so-called "flexible constitutions" which are characterized for being constitutions without a form differentiated from laws (like, paradigmatically, the United Kingdom Constitution). Thereafter, we can graduate —as Sauca does— the formal mechanisms designed to make change difficult or impossible from higher to lower. Thus, from my personal standpoint, the study Sauca makes in the first section of his work is not about constitutional stability, but about the various forms that "constitutional dynamics" can take. As such, it is a formal-legal analysis of the dynamics of constitutional texts.

[2] Sauca, José María. Citar

The concept of "constitutional stability" usually refers to external (sociological) analyses of the constitution, not to merely formal and normative analyses. A constitution is stable to the extent that it generates order; that is, to the extent that it stabilizes expectations of behavior from the relevant subjects. A formal constitution becomes stable when a significant number of relevant subjects place the ultimate source of their legal duties in the constitutional text. The stability of a formal constitution (or legal system) depends on the behavioral expectations generated by the acceptance of the subjects to whom it is addressed, and not by the form of its normative clauses. If all or nearly all the relevant subjects accept the constitution and adopt it as the ultimate source of their duties, then that constitution is stable regardless of the normative provisions related to the constitutional dynamics.

If my analysis is correct, there is room for all possible combinations between the different "constitutional dynamics" clauses, on the one hand, and the social realities in which the constitutional text is accepted, on the other.[3] Spain offers two good examples of how the same constitutional reform clauses have led to different moments of serious constitutional instability. The so-called "Spanish Saber-rattling" which took place between 1978 —year of the approval of the Spanish Constitution— and 1981 —year of the attempted coup d'état "February 23rd"— provides us the first example. The constitutional instability was the result of the fact that some of the generals who came from Francoism did not place the ultimate source of their duties in the Constitution of 1978, but rather in such things as "loyalty to the caudillo", "homeland unity", "anticommunism" or "the catholicity of Spain". The other moment of serious constitutional instability occurred because of the Catalan sovereignty process (procés). In fact, something remarkably similar happened: a significant part of the Catalan authorities stopped placing the ultimate source of their legal duties in the Constitution (i.e., they abandoned the legitimacy of the Rule of Law), to place it in "phantasmagoria" such as "nation", "independence", "right to self-determination", and so forth. In formal-legal terms, the Spanish Constitution remained unchanged during those two critical periods,

[3] Ernesto Garzón Valdés studies the concept of stability of political systems starting from the idea —which I fully share— that stability is not a structural feature (such as, for example, having a constitution with these or those clauses), but a dispositional feature shown by the order it generates (the expectations of conduct) regarding its supreme norms. (Garzón Valdéz, 1992). The capacity of a constitution to be prolonged in time (stability) is not shown in the type of clauses it contains and, thus, cannot be the product of a formal-legal analysis. If it were so, and resorting to the old classification of formal constitutions made by Loewenstein, we could find ourselves with merely semantic constitutions (pure "sheets of paper") that we would have to qualify as "stable" (Loewenstein, 1982, pp. 216-219).

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and although its constitutional clauses were not altered at all, the stability of the Constitution was severely compromised. Both examples clearly illustrate the fact that constitutional stability is not merely a question of form, but of acceptance and stabilization of expectations about a text; when this fails to happen, the text finds itself in crisis. In conclusion, constitutional stability is a variable unrelated to the constitutional reform clauses.

The first epigraph of Sauca's work, entitled "Estabilidad y cambio en la constitución: la liquidez constitucional" (Stability and Change in the constitution: constitutional liquidity) is in fact a legal-formal study of "constitutional dynamics", which analyzes the diverse ways of articulating the criteria of *lex superior* and *lex posterior* in the continuity and change of the constitutional text; but, despite the title, this study has nothing to do with constitutional stability understood in a meaningful and distinct way from the merely formal dynamics of the constitution.

III. Continuity and Change of What?

The second criticism I would like to address to this work is related to the concept of constitution employed by Sauca. As stated on several occasions, the author resorts to a rational-formal or formal-legal concept of constitution. According to this concept, everything within the constitutional text (and only it) is the constitution. Therefore, constitutional continuity must be understood in its essence as a continuity of the constitutional text itself. In my opinion, the so-called "constitutional mutations" show the inadequacy of these approaches. Let us try to explain it. In purely external terms it is obvious that it makes full sense to speak of constitutional mutation. We can observe that the content of the constitutional text changed consequently, for example, of a constitutional court judgment. We observe a product (a result, a fact) of a change in the content of the constitution. So far there is no problem. Now, what role can the notion of constitutional mutation play in internal terms —of constitution acceptance—? If the aim is to justify the change in content, then it makes no sense to resort to the notion of constitutional mutation because any interpretation that tries to justify the change in content must necessarily show (emphasize) the opposite: constitutional continuity. In internal terms, the justification for a change in content should revolve around constitutional continuity, not discontinuity. The emphasis on discontinuity can only have one of two objectives. The first is to disqualify the constitutional past, i.e., regard the interpretation that had been made of the constitution as wrong, as an error that now needs to be revised. The second is to disqualify the new in-

terpretation proposal, i.e., a certain interpretation of the constitution is not valid because it exceeds the interpretative limits of the constitution; thus, it does not constitute an interpretation, but a mutation. Any interpretation of the constitution that aspires to be legitimate must be based on constitutional continuity, not discontinuity. The emphasis on interpretative discontinuity presupposes either the illegitimacy of the past (an interpretative error) or that of the future (an interpretation that exceeds the interpretative limits). In this sense, the normative operability of the concept of constitutional mutation can only be the denouncement of a "constitutional non-compliance" (either of the past or the future). In any case, in my opinion, the conceptual framework chosen by Sauca should be modified since the concept of formal constitution fails to explain all that we jurists envision about the constitution of a constitutional state.[4]

The correct theoretical framework is that of "the constitution of a constitutional state". This change may seem merely superficial or wordy, but it is not, it is much more far-reaching. In the constitutional state the evaluative components of the constitutional text take precedence over the normative components. For example, while with a merely formal concept of constitution it makes perfect sense to state that a right is fundamental because it is protected against change by constitutional intangibility or rigidity, with the concept of the establishment of the constitutional state it is precisely the other way around, fundamental rights are defining of the constitutional state and are therefore protected by intangibility or rigidity. Only if the constitution is endowed with the sense and valuative nerve of constitutionalism, it is possible to speak of constitutional change (non-formal change of some content of the constitution) without the need for it to entail the non-compliance with the constitution or the rupture of its continuity. From the parameters of the constitution of constitutionalism it makes full sense to speak of a change of some constitutional content and of a value continuity of the constitution itself. On many occasions, as you will see, the regulative openness of a constitution of constitutionalism is a virtuous property that allows one to face practical problems. Regulative openness does not mean constitutional indeterminacy because the notion of openness presupposes the notions of constitutional continuity and value coherence.

If we proceed with this modification of the framework and move from a merely formal concept of constitution to that of the constitution of the constitutional state, two things regarding the constitutional liquidity claus-

[4] I have dealt with the concept of the constitutional state constitution on several occasions; probably, the two most relevant are the following: (Aguiló Regla, 2002; Aguiló Regla, 2019).

es studied by Sauca become immediately clear to us. The first one is that there is no way to endow the four examples chosen from the Spanish Constitution with unity and the second one is that none of these examples can be seen as attributions of normative power that authorize the enactment of unconstitutional norms, as Sauca appears to claim.

Let us briefly review the four examples of constitutional liquidity clauses considered. The first example refers to the clause provided in article 10 § 2 of the Spanish Constitution, which establishes that fundamental rights shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties on the subject ratified by Spain. The second is article 65 § 2, which establishes that "the King freely appoints and dismisses the civilian and military members of his Household". The third example is article 93 along with article 135 § 2, which establishes the precedence of European Union Law over Spanish Law. And, finally, the fourth example is the first additional provision which refers to the updating of the historical rights of the territories with fueros (local laws). "The general updating of said foral regime will be carried out, as the case may be, within the framework of the Constitution and the Statutes of Autonomy".

According to Sauca, these four constitutional liquidity clauses would share the properties of a) being express clauses, b) taking the form of a rule, c) vesting normative authority, d) giving normative results precedence over the constitution itself, and e) making their regulatory content potentially incompatible with constitutional regulation.

If we intercross the examples of constitutional liquidity clauses with the general properties that Sauca attributes to them and attentively look at it from the perspective of the constitution of the constitutional state, then some perplexities immediately come to light.

The first cause of perplexity lies in the heterogeneity of these examples. In my opinion, there is no way of finding unity in them. The case of article 10 § 2 (of the interpretation of fundamental rights as human rights internationally recognized) has little to do with the other examples. It is a clear manifestation of the universalist (and by no means idiosyncratic) character of constitutionalism of rights. Constitutions of constitutionalism recognize fundamental rights, but they do not constitute them, and, therefore, are open towards their international, not local, development. There is a leap from there to speak of "superior and eventually unconstitutional normative results" that is only possible by ignoring the idea of "a shared practice of universal recognition of rights". In fact, clauses such as the Spanish´s are quite common in modern constitutions.

The remaining examples have almost nothing to do with this one. Both article 65 § 2 (the King's appointments) and the first additional provision (the updating of foral rights) rather than representing the universalist components of constitutionalism, are strictly idiosyncratic since they are an unequivocal manifestation of "constitutional Spanishness". No matter how hard one tries, it is impossible to find conceptual unity between these strictly idiosyncratic clauses and that of the universality of fundamental rights. Moreover, looking attentively at the latter two examples, it is not easy to find unity between them either. Granting the King authority to freely appoint the civilian and military members of his Household is different as granting him the authority to dictate "general provisions" likely to "assume a regulatory content that may be eventually incompatible" with the Constitution. These appointments by the King may be illegal (in violation of labor law, for instance), but it is hard to see how they could be unconstitutional. This case has nothing in common with article 10 § 2, but neither does it resemble that of the updating of foral rights.

Indeed, the example of the updating of foral rights does recognize a normative competence to dictate "general provisions", but now we cannot see how the "eventual unconstitutionality of the regulatory content" can fit (prevail) for, as it is stated in the additional provision itself, the updating of the foral regime shall be carried out within the "framework of the Constitution and the Statutes of Autonomy". In this example, unlike that of the King's appointments, it is meaningful to speak of "regulatory openness" of the Constitution, although not in terms of "constitutional liquidity".

The establishment of the European Union and the precedence of Union law demonstrate without doubt how the constitutional framework goes beyond the purely domestic sphere. However, we fail to see why this clause makes the constitution "liquid". The constitution is "open" for certain regulatory contents but remains "sovereign" to regain the competences delegated by treaty. Once again, to account for these processes of shared construction, like the European Union´s, it is required to read the constitutional continuity highlights in a more sophisticated way than that proposed by a solely formal reading of the Constitution. The development of the European Union establishment project requires constitutional openness, but not liquidity. To say it in a somewhat provocative way and keeping up with the metaphorical language: without constitutional "solidity" there is no possible European project.

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IV. The Concept of Constitutional "Resistance"

In my opinion, the great absentee in Sauca's work is Francisco Tomás y Valiente. This author coined the expression "resistencia constitucional" (constitutional resistance) and explained it in the following terms:

> The resistance of the Constitution can be understood as adaptability to political dynamics [...] also as its capacity to be interpreted in a flexible and, to a certain extent, changing way in accordance with new problems and awareness or demands regarding the fundamental rights positivized in it, but not defined. And also, as resistance to reform, making it unnecessary [...] If rigidity implies prohibition or difficulty of reform [...] resistance means adaptability to change, making reform unnecessary [...] I believe we can claim that a constitution endowed with appropriate mechanisms to make it resistant in the aforementioned sense, protects its supremacy and achieves an effective validity and prolonged duration, without having to pay the price of aggravated reforms (Francisco Tomás y Valiente, 1994).

In a paper aiming to theorize Tomás y Valiente's (Aguiló Regla, 2003, pp. 289-317) notion of "constitutional resistance", I argued that any drafter of a constitution should operate in a way that relates the rigidity of the constitution —difficulty to change the text— with the regulative openness of the constitutional contents. This would only be possible if the drafter is aware, on the one hand, of the problem of tyranny of past generations —the practical irrationality of merely obeying a past norm that cannot be changed— and, on the other hand, of the problem of both consensus —i.e., of unifying populations around a constitutional text— and commitment —i.e., accepting that one is not fully sure of the normative contents to be consolidated in the future—. Accordingly, practical rationality would establish a relationship of dependence (a function) between the given problems of consensus (acceptance) or commitment (practical insecurity), as constitutional rigidity increases, the regulative openness of the constitution must also increase. Of course, this implies agreeing with the fact that constitutional continuity is due to the continuity of constitutional values, not to the continuity of each of the specific contents of the constitution.

Since that paper, I have been stressing two theses of constitutional legal theory which, in my opinion, are crucial for a correct understanding of constitutional dynamics. The first thesis is the distinction between "interpretation of the law" and "interpretation of the constitution". This thesis states that virtue in the law (for example, regulatory closure) can be vice in the constitution and, conversely, vice in the law (regulatory openness) can be virtue in the constitution. From this point of view, constitution-

al openness does not make the constitution "liquid". The second thesis is that a proper legal theory of the constitution must be able to distinguish and confer meaning to three different perspectives (or moments) regarding a constitution: "to give oneself a constitution", "to have a constitution" and "to practice a constitution". This last thesis is closely related to the previous one because the interpretative difference between constitution and law shares a great deal with the difference between the "rigid dynamics of the constitution" and the "flexible dynamics of legislation".

A corollary of the above is the interpretative maxim that "if it makes sense in substantive terms to reach 'agreements on principles' or 'incomplete theorized agreements' (Sunstein, 2000) (open-ended) at the moment of 'giving oneself a constitution', it must also make sense to interpret them at the moments of 'having' and 'practicing' a constitution." Of course, the acceptance of this maxim presumes having adopted one of the views from one of the most important theoretical discussions of the last few decades. I mean the discussion generated by constitutional openness and the presence of valuative and "essentially controversial" concepts in constitutions, i.e., should they be understood as concepts without content due to the lack of agreement (that is, they merely convey political conflict) or as "interpretative concepts" in search of their best version?[5] Should these concepts be read in merely political (procedural) terms, or does it make sense to do so in legal (substantive) terms?[6]

The significant difference between the virtuous constitutional resistance of Tomás y Valiente and the paradoxical constitutional liquidity of Sauca lies in the notion of "constitutional practice". The continuity of the constitution is not only given by the text nor by the concrete contents, but by the continuity of constitutional values. But to accept this new conceptual framework, it seems to me, we must leave behind some of the assumptions of legal positivism.

[5] I trust that by now it has become evident that, in my opinion, value-based constitutional concepts should not be seen only as "essentially contested concepts" (Gallie, W. B., 1956), but rather as "interpretative concepts" (Dworkin, 1986). In any case, of these issues in Aguiló Regla (2012) and Aguiló Regla (2008).

[6] In the text "Cuatro pares de concepciones opuestas de la constitución" (Four pairs of opposing conceptions of the constitution) he opposed the "mechanical" conception to the "normative", the "proceduralist" to the "substantivist", the "source of the legal sources" to the "source of law" and the "political conception" to the " legal conception". The first terms of each pair emphasize the merely political reading of the constitutions; the second ones, its legal reading. In Aguiló Regla, J. (2007). Cuatro pares de concepciones opuestas de la constitución. In J. Aguiló Regla, M. Atienza, & Ruiz Manero (Eds.), *Fragmentos para una teoría de la constitución* (pp. 18-62). Iustel.18-62.

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