

Editorial Note. Between Constitutional Change and Stability: A Debate on Constitutional Liquidity Clauses¹

Nota editorial. Entre el cambio y la estabilidad constitucional: un debate en torno a las cláusulas de liquidez constitucional

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It is an honor for me introducing the debate on constitutional liquidity clauses that is presented in the journal *Problema*. And it is an honor not only due to the brilliance and expertise of those engaged, but also for introducing the discussion among these excellent constitutional theorists, friends, colleagues and professors.

The debate begins with the work of José María Sauca Cano, a professor (accredited as a full professor since years) at the Universidad Carlos III de Madrid. The central thesis of José María Sauca's work is novel and clear: there are constitutional liquidity clauses in the Spanish Constitution (SC)—and there are no reasons to think they do not exist in other constitutions as well. These constitutional liquidity clauses grant powers to issue norms to organs not subject to control, even if they are topically unconstitutional. Sauca offers four examples of the Spanish Constitution to illustrate this type of clauses: provision of interpretation in accordance with International Human Rights Law (Article 10.2 SC), the norms dictated

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by the Household of the King (Article 65.2 SC), recognition of the primacy and direct effect of European Union Law (Article 93), and the update of historic rights (1st Additional Provision SC). These four examples would show that there are mechanisms to provide stability to our constitutions in our legal systems, which allow to certain subjects, and under certain circumstances, create topically unconstitutional norms but that would avoid burdensome constitutional reform procedures. In fact, Sauca himself compares the different mechanisms by which the Constitution could adapt to the demands for change and distinguishes the features particular to this mechanism.

Sauca's proposal is the theme of multiple questions and criticisms partly because of its novelty, partly because of its prominently polemical character. As for professor Josep Aguiló Regla, Full Professor of Philosophy of Law at the Universidad de Alicante, he starts by questioning the alleged capability for constitutional liquidity clauses to guarantee constitutional stability. The question is nothing but appropriate: in what sense such clauses guarantee stability? What is meant by "constitutional stability"? The reasons Aguiló claims are not minor: a correct understanding on constitutional interpretation shows how all its provisions fall into the existing dilemma between rigidity and the need to reach new consensus. In this way, we are not talking about constitutional liquidity clauses, but rather about a distinction between having a constitution—highlighted by the need to reach agreements that cannot be if not incomplete—and practicing a Constitution, a procedure that would be characterized by the permanent need for adaptation and change.

Regarding the work of professor Josep María Vilajosana, Professor of Philosophy of Law at the Universidad Pompeu Fabra de Barcelona, initially he focuses his criticism towards the lack of homogeneity in the phenomena referred by Sauca under the umbrella concept of constitutional liquidity clauses. Afterwards, based on the distinction between prescriptive and constitutive norms, he shows how the constitutional liquidity clauses can have up to six interpretations. Finally, and particularly related to the revision of historic rights, Vilajosana argues that these clauses imply an authentic transfer of sovereignty, or merely in a very restricted sense of the term.

As for Marcela Chahuán, Professor of Philosophy of Law at the Universidad de Chile, she approaches the analysis of constitutional liquidity clauses through the tacit alternative clause originally formulated by Hans Kelsen. In particular, according to the accredited interpretation of Kelsen by Chahuan, our constitutions would contain "an alternative regulation by virtue of which the so-called unconstitutional norms are, in fact, autho-

rized indirectly by the constitution.” And this is undoubtedly an elegant way of dealing with these constitutional liquidity clauses to dictate irregular norms. Based on the exhaustive analysis of each example and the reconstruction proposed by Sauca, Chahuán brings to light the close relationship between constitutional liquidity and Kelsen’s tacit alternative clause: their express character, their rule structure and their precedence.

Ignacio González García closes this debate, who is Full Professor of Constitutional Law at the Universidad de Murcia and has dealt extensively with the constitutional intangibility clauses. In fact, González amends one of Sauca’s starting theses: that according to which there would be no intangibility clauses in the Spanish Constitution of 1978. More specifically, González García carries out a thorough analysis of article 2 of the Spanish constitutional text to conclude that the indissolubility of the nation would not only be a limitation to the procedure of total reform of the Constitution, but a positive duty of the public authorities. However, the constitutionalist argues that this does not imply a militant reading of the Constitution nor democracy, since they are not an instrument for constitutional defense, but for the very identity of the basic norm.

Both Professor Sauca’s work and his criticisms have at least a double virtue. Firstly, it is a debate that, through a new category —namely the constitutional liquidity clauses— attempts to address a phenomenon that is partly unobserved and known: the presence of topically unconstitutional norms (known) that include rules of jurisdiction that grants certain organs the competence to dictate such norms (new). Secondly, and above all, the debate that the readers will find next necessarily leads to a reflection, a wondering about an original aspect that, although its very existence is debatable, puts into question some of our most basic conceptions about the functioning of our constitutional systems.

