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Amending by interpreting: the Constitutional Jurisdiction as Amendment Power

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Abstract: The way in which the tension between the vocation of endure of the constitutions and the need to adapt to the sociopolitical changes in their environment has been reconciled by the institutionalization of their change through the procedures of constitutional reform. But there is another way to do that: the silent constitutional reform practiced by constitutional courts when they interpret its precepts. This question, not only raises the difficulty of identifying in which cases the constitution interpretation by constitutional judicary is actually a silent constitutional change. In this paper, the author argues that the literal text of constitutional provisions is the only certain border between interpretation and the silent constitutional mutation by judiciary, and the institutionalization of change through formalized processes of constitutional reform is the only democratic way to resolve the tension between durability and change.

Keywords: Constitucional amendment, constitutional reform, constitutional interpretation, constitutional judiciary, constitutional courts, time and constitution.

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I. General Considerations

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The tension between the vocation of durability of the constitutions and the inevitable transformation of their socio-political context over time has been addressed technically by institutionalising the processes of constitutional adaptation to change. We can find two technical-legal forms of adaptation: through the formalised procedures of constitutional amendment and through the interpretation of constitutional precepts[1]. In the second case, the constitutional jurisdiction plays a relevant role in relaxing that tension, since it exercises its function by interpreting the constitution. As its supreme interpreter, then, what is the role of the constitutional jurisdiction in the adaptation of the constitution to change? When does the constitutional jurisdiction's interpretation become a silent reform of the constitution? Is it lawful to do so?

Schulze-Fielitz (2008, p. 229), quoting Häberle (1974, p.130), points out that any change to the constitution is, after all, a matter of constitutional interpretation. To a large extent, the present paper reflects around this powerful idea as a response to those questions. In a way, what we constitutionalists call constitutional "amendment" –both in its most direct sense and in other dogmatic categories such as "mutation", "revision" or the recent "replacement"– can be considered as a partial or total *reinterpretation* of the constitution currently in force[2], which prevails over other interpretations by its form; that is, it enjoys normative "supremacy" because it is established through a certain process –the formal reform of the constitution– and by a certain body –usually, the legislative power in its role

1We leave aside the debate about the convenience of establishing a deadline after which the constitution must be amended, or even of setting a minimum time limit between amendments, since both options have been episodic (Fernández Sarasola, 2019, pp. 60-62; Rubio, 2009, p. 22). We prefer to use the term "interpretation" instead of "adjudication" because it is broader and more appropriate for the aim of this paper (Pfersmann, 2013, p. 44; 2019).

2It is true that a "total" amendment of the constitution is not, strictly speaking, a mere "reinterpretation" of the current constitution, because it does not simply reformulate some of the constitutional dispositions in a different way by means of a textual change, but replaces the constitutional text as a whole by a new one. The latter is thus a total amendment and not a constitutional "rupture", since its cause and legitimacy (not its validity) come from being the successor of the amended constitution, after following the procedures that it sets for its total amendment. This does not happen with the "rupture", where the former constitution is replaced by a new one outside the established procedures; in this way, its cause (and also its validity) derive from the fiction of an original "constituent power". A comprehensive taxonomy of types of constitutional "amendment" (Löwenstein, 1968).

as constituted-constituent power–. But, as we shall argue in the following pages, this "reinterpretation" of the constitution is not always originated in the exercise of the amendment power, but in the constitutional jurisdiction which, by "reinterpreting" the Constitution, reforms it silently. The following pages will try to ascertain when this transition takes place; however, we must warn the readers that the present paper does not provide a definite answer to this question, but rather a reflection on its different facets.

In any case, we must express our doubts regarding the idea that any form of revision, whether total or partial, of an existing constitution can be ultimately resolved as a question of interpretation (Pfersmann, 2019). Böckenförde (1999) expressed the same position, in fact, when he severely criticised the thesis defended by Häberle. If the constitution can be amended silently by the "open community" of its interpreters, or by a constitutional court acting as the ultimate and supreme expression of that community, any discussion about the "amendment power", "constitutional amendment", "amendment process", "constituent power" or "constituted-constituent power" as dogmatic categories would be meaningless. If we accept that everything can be resolved as an interpretative process, expressed in different ways and different degrees, perhaps we would be divesting of their jurisdiction the powers designated by the constitution to review it, thus denying the very democratic process expressed in the attribution of that competence to a specific subject and process. This could lead to the substitution of democracy by a "juristocracy" (Albert, 2017) composed of the constitutional court and the dogmatic community of constitutional interpreters, who would update the constitution alleging that this is required by the "constitutional reality" and its "development", of which they are mere oracles and custodians. The first victim of the conceptual dissolution of constitutional amendment, in an unpredictable and unforeseeable process of reinterpretation such as this, would be constitutional rigidity, since a rigid constitution can become flexible through an interpretative review by a constitutional court.

Ultimately, the tension between these two authors –representatives of two very different ways of understanding the law in general, and constitutional law in particular– is the same that can be detected among those who consider that a legal system is not an open and fluid system, in which any "interpretation" of a normative statement –reduced to the condition of an indicative "pretext" for its application– is valid provided that it satisfies the expectations of the social reality in which it must be "integrated" (in other words, any

interpretation is valid if it is "effective"), and that it is expressed as a "basic constitutional rule" that regulates the interpretation of the "individual constitutional rules" (Böckenförde, 1999, p. 155), so that "legitimacy" results from the interpreting action of the "open community" of interpreters of the law -in the terms of Häberle´s (1975) doctrine- (Blankenburg and Treiber, 1982); and those who do not share this stance. For the former, it is dogmatically irrelevant to discriminate between amending and interpreting. For the latter, this distinction is essential to prevent the legal system from dissolving into the political-social system, thus ceasing to fulfil its proper role in a democratic constitutional state governed by the rule of law (Böckenförde 1999). We belong to the second group.

There is no doubt that the distinction between amending and mutating the constitution through the interpretation of the constitutional normative statements is a question of degree. This distinction, in fact, as well as the limit between the concept of "amendment" in its proper sense and "mutation" –understanding this as a general category that comprises the different variants of non-formalised revision–, lies, in our view, in the recognoscibility and identification of the subject and procedure followed to amend or replace a constitutional text[3], and the evident change of its literalness through a new wording (by substitution, addition or deletion). There are also degrees in mutations; the highest degree takes place when the constitutional jurisdiction establishes an interpretation of the normative statements that is then imposed on all other members of the legal community –and therefore on the entire legal system, due to the effects and the legal and sociological binds *erga omnes* of its decisions–. Many of the articles in this volume focus precisely on the role played by constitutional jurisdictions in amendment processes and on their ability to perform –perhaps spuriously– the role of constituted-constituent power when they review the form and substance of formal amendments. The present paper focus on the role they play in "mutating" the constitution by interpreting its dispositions. A Constitutional Court can "mutate" the constitution when reviewing an amendment, since it assumes a role which is not established by the constitution (unless the constitution provides for it in the same way as it establishes a review on the constitutionality of laws during their legislative process, incorporating the constitutional jurisdiction in the process of constitutional

3We leave aside the case of constitutional systems without a constitutional text because they pose other theoretical challenges that exceed the reasonable limits of this paper, both in terms of its purpose and of its length. Nevertheless, it is clear that, in these systems, amendments are strictly interpretative.

creation), and it can also modify "the content of the constitutional rules, without effecting a change in the constitutional text by the procedure provided for that purpose" (Böckenförde, 1999, p. 144). The difficulty here resides in identifying the limit that separates interpretation from amendment.

The aim of this study is to reflect on this limit and on the role of the constitutional jurisdiction when it seems to exceed constitutional dispositions precisely by interpreting them, and not so much on its role when it decides on an amendment with the aim of reviewing the actions of the constituted-constituent power (Dogliani, 1995; Roznai, 2017; Albert, 2017; Ragone, 2011; 2017; Villaverde, 2012). However, we must note that constitutional interpretation is necessary to resolve the tension between the constitution's vocation of durability, on the one hand, and social change, on the other, by adapting the normative programme (Müller, 1966; 1990; Pfersmann, 2019) of its precepts to the inevitable transformations of the reality they aim at regulating.

In any case, we should remember that the identification of criteria to distinguish between interpretation and constitutional amendment seems dogmatically impossible. Two masters of contemporary constitutional law –Böckenförde (1999) and Hesse (1973) – have attempted to do so, and their conclusions are somewhat frustrating. The constitutionalist may only be able to state that, if a constitutional court goes beyond the rule of evidence when reviewing the laws and acts that make up the legal system, it incurs a judicial activism that transforms the constitutional order to a certain degree.

However, along these reflections we will try to offer a tentative criterion to identify when a judicial review carried out by the constitutional jurisdiction goes beyond "interpreting" –that is, beyond extracting a legal rule from a statement expressed in natural language to transform it into a "mutation" of the statement being interpreted, or even into a total revision of the constitutional text, if the depth of the interpretation and the scope and substance of constitutional disposition under review involve a radical change of the legal system itself[4].

4For example, if it were to affect its structural principles to the extent of stating that the rule of law no longer meant that the executive branch was subject to parliamentary law. The different between "changer de constitution" or "changer la constitution" (Pfersmann, 2019, p.355).

II. The Eternal Constitution. Time, Change and Constitution

Constitutions are created to endure, but their durability depends on their ability to adapt to change. This ability is expressed through processes of formal constitutional amendment, which allow the necessary adaptations to ensure that the constitution endures, and also through the updating of its precepts by the interpretation of the constitutional jurisdiction. In this way, the constitution reaches a balance between its "vocation of eternity" (Vosskhule, 2019, p. 417; 2004) and the need to be attuned to the passage of time, achieving the stability that it requires to effectively fulfil its functions in a democratic state under the rule of law (Kägi, 1945; Wahl, 2001; 2008).

The paradox of state legal systems is that their very positivity entails a tension between the durability of their rules and the structural need for change. If it is only a matter of "the law" being "put in place", nothing prevents successive "rights" from being "put in place" one after the other. This explains why there is no need of express derogatory clauses for such continuity and temporary succession of the law, and why the mere succession of norms of equal rank is enough to invalidate the former in favour of the latter.

The desire for durability becomes more intense the higher up the hierarchy, and so, the constitution can be described as a legal form that is created with a vocation for "eternity", but that –unlike infra-constitutional norms– regulates its own changes in order to be consistent with the positivity and self-referentiality of the legal system, as well as the stability (also in temporal terms) that is essential to fulfil its functions in the social system as a whole (security and trust). Any aspiration can be transformed into a rule in accordance with rule-making procedures; therefore, its durability is a mere consequence of the provisional absence of a potential change. However, not every change is valid at a constitutional level; to be so, it must be recognised as a legally suitable form for amendment (operational closure of the legal system -Aláez Corral, 2000; Pfersmann, 2013-). This, in short, is the so-called "institutionalisation of its own modification" as a guarantee (not a cause) of its legal supremacy and its democratic usefulness (to decrease the potential danger of self-destruction of the system by setting rules, at least procedural, for its review

and modification, thus producing a secure and trustworthy legal system -Aláez Corral, 2000, p. 157-).

Grimm (2012) eloquently explains that the original constitutional programme (establishing laws to protect freedom and equality and subjecting the State apparatus to rules that limit its power), which required the fiction of an original social consensus on those goals, found an adequate solution in Law. Only the Law provided "Dauer und Geltung" to a consensus that, from an empirical point of view, was a historical fact that could fluctuate in time. The Law built and guaranteed that consensus independently of who had participated in it, extending it over time, making it generally binding, and subjecting future generations to its observance (Ragone, 2011; Masing, 2008; Pfersmann, 2019).

This author stresses that the key for making successive generations respect that original consensus is found in the "Ändersbarkeit" of Law itself, that is, its "capacity for change", despite the fact that the rules that make it up have been created with a view to endure (Grimm, 2012, p. 23; Vorländer, 1981). The argumentative circle draws to an elegant close with the following paradox: if the Law was the solution that allowed to put into effect the programme of the seminal constitutionalism in the 18th century (US and France), and that Law was "put in place" or "created" by the State itself, how could the State be subjected to a Law that was its own creation? As Grimm points out, the solution was to divide the legal system into two levels: one would be composed of the Law created by the State, which governs individuals; the other –and this is where the novelty lies– would be the Law "put in place" by the sovereign, to which the State is subject. The latter would henceforth be called "constitution". The next development was to establish that the two levels were not simply separate, but also hierarchical. The constitution regulated how the rest of the Law and its acts of application were "put in place", and guaranteed their endurable subjection to the original consensus. Therefore, "der Vorrang gehört daher begriffsnotwendig zur Verfassung" (Grimm, 2012, p.23). The necessary "Ändersbarkeit" latents in the constitution, to guarantee the continuity of social consensus (its durability) through the promise (expectation) of a change always possible, requires reform mechanisms that also maintain the strict separation between the legal order "of" the State (created by the State) and the legal order "over" the State (the Constitution). Hence the institutionalization of the closed and rigid processes of constitutional reform and the strict difference between

the power of reform and other powers of the State. In our opinion, this is the reason for the theoretical difficulty for a constitutional control of the "matter" of the reform.

The procedures for constitutional amendment are, in fact, the institutionalisation of the "capacity for change" (Ändersbarkeit¨) that the constitution must have in order to endure. This allows constitutions to fulfil their function as the cognitive opening of any legal system (any expectation can be stabilized by introducing it into the processes of rule creation –in this case, by introducing it into the process of constitutional amendment) while establishing its operational closure (this introduction can only be effected by the subject and the procedure prescribed by the constitution). Thus mechanisms of constitutional reform are used to legally balance the continuity and stability of the legal system, allowing an orderly and controlled process of change (Kuriki, 2008).

The political legitimisation of this technique is achieved by a fiction: the amendment, like the constitution, would be the expression of the legislative will of the sovereign people ("We, the People"), concretised in the constituted-constituent power. This power is then considered as the representative of the living generations of citizens, and therefore the best channel to express the will of the real and living "people" of the present (Ferreyra, 2018). The constituted-constituent power is thus the best possibility to legally stabilize the highest expectations of the generational moment of the sovereign people, achieving simultaneously a legitimacy of origin –the reform stems from the "people"– and of result –the constitution ensures its durability by adapting itself through amendments to the new expectations of the majority–. To achieve these objectives –to renew the original consensus on the foundations of the legal and political order–, any modification at this level of the legal system must be formalised and regulated to ensure its legitimacy: changes are decided by the only actor authorised to do so –the sovereign people– and, consequently, are denied to those who are not the people nor represent them. Therefore, for the fiction to fulfil its purpose, it is necessary to identify a subject that is authorised to amend and determine an amendment procedure; the process will only have democratic legitimacy if there is a certainty concerning the "who" and the "how" (Dellinger, 1983, p. 387). The organization of the processes of adaptability of constitutions does not indicate the role that the constitutional jurisdiction must play therein; this is implied in the concept of constitution on which they are articulated. If the constitution is built on a material concept, the constitutional jurisdiction is normally given (or gives itself) the implicit power to review amendments, and to adapt the constitution to change through the creative interpretation of the

constitutional precepts. In this case, the constitutional jurisdiction acts as the guardian and guarantor of the material identity of the constitutional system, which it considers as the parameter to review any constitutional amendment, and uses it to reinterpret the content of the constitutional precepts in order to adapt them to the constitutional "spirit", which may change over time –or not–. However, these "silent" reforms do not include any content linked to the essential architecture of the constitution (whatever it may be), independently of the existence of entrenchment clauses such as the one contained in Article 79 of the Bonn Basic Law. If, on the other hand, the concept of constitution is formal, the constitutional jurisdiction is only expected to ensure that the amendment respects the established procedure, at the risk of incurring an evident excess of competence[5].

The constitutional form provides social systems with the level of permanence and certainty necessary to fulfil their stabilising function, by selecting political options (Aláez Corral, 2002, p. 152) which can only be changed over time (with a *radical* change if it entails a modification of its wording by deletion, replacement or addition) by means of the procedures it regulates within itself (operational closure). However, the constitutional form aspires to effectively programme the essential elements of the legal order and of the political process, framing both aspects within the decisions that express the expectations of the community (legitimacy of origin). In order to fulfil this function and achieve the output legitimacy that makes it valid and socio-politically effective, it must endure in time; only thus will it unfold its potential to programme and regulate the system (an aspect that might be the basis of rigidity). Nevertheless, to comply with its vocation of effectiveness, the constitutional form needs a certain porosity that allows it to adapt its normative programme to the successive changes in the social expectations of the majority, integrating these changes without resorting to formal processes of amendment which may be institutionally complex and traumatic. This delicate balance between the durability of the constitutional form and its permeability to social change is obtained through constitutional openness and through the interpretation of its statements.

[5]In this debate we can also find the latent democratic paradox of the constitutional amendment. Any amendment procedure limits the power of the sovereign people; therefore, perhaps it would be more democratic to allow the people to amend the constitution with no material, formal or procedural hindrances. The distressing perspective opened by this question –since it entails the potential self-destruction of the democratic system by democratic means– is approached in very different ways by the constitutional jurisdiction.

The openness of the constitutional text makes it possible to complete and specify its normative programme, either by resorting to other infra-constitutional legal forms, more ductile in their creation process, such as parliamentary laws (something that the 1978 Spanish Constitution provides by means of instruments such as the "constitutional block" -*bloque constitucional*-), or by interpreting constitutional statements in view of other regulations and their own interpretation (for instance, the mention included in Article 10.2 of the Spanish Constitution about international agreements on human rights as references to interpret the constitution's fundamental rights). This is a form of adaptability that does not require a formal process of constitutional amendment and cannot be considered a constitutional "mutation"; it is a simple "interpretation" of constitutional statements, either to develop and concretise them through laws or to specify their content (Böckenförde, 1999).

The purpose of constitutional interpretation is not only to clarify the meaning and significance of the constitutional text; it is also useful to update it (Häberle, 1974; Schenke, 1978) and adapt the immobility of its literal text to the passage of time. However, constitutional openness and interpretation also put at a considerable risk the methodological rigour that must go together with the application of the constitution in order to avoid the dissolution of the legal system into the political system (Pokol, 2019; Abert, 2017; Vosskhule, 2019; Pfersmann, 2013, p.45; 2019). This risk becomes evident when the constitutional courts intensify their "updating" of the constitutional text to transform it into a "constitutional mutation", using the confusion between the constitution as a legal form and "constitutional reality", appealing to its "sociological" or "evolutionary" interpretation (Saladin, 1972; Häberle, 1974; Pfersmann, 2019). Invoking the "real constitution" involves a paradox, since the material concept of constitution that is behind it appeals inevitably to an immutable and unalterable constitutional "matter" that serves as a parameter for the review of the formal amendments or the interpretations of the constitution. In this way, unconsciously, constitutional courts act in an antidemocratic manner under the pretence of protecting democracy from the abyss of its destruction. This "juristocracy" destroys the operative closure and the cognitive openness of a democratic legal system in which the processes of creation and normative change that allow to materialise the successive expectations of the majority are identified –processes in which the courts, even constitutional courts, do not take part (that is, they are not subjects of the

amendment process[6]) unless the constitution itself expressly confers them that function in its regulation of the process.

III. The "Constituent" Jurisdiction and The Liquefaction Of The Constitutional Text

In his classic work on constitutional mutations, Jellinek (1906) pointed out that constitutional mutation could be performed through the judicial interpretation of the constitution. According to this author, this was an "unconstitutional abuse" that could only be reverted by the judicial review of such interpretations (especially those carried out by the legislator in the development and application of constitutional precepts). The question at stake here is not only the role of the constitutional jurisdiction in controlling such interpretative "abuses" by the legislator or by the courts, or even its role in supporting these alleged abuses by considering constitutional a revising interpretation of the constitution; the question is that there would only be a real constitutional mutation if the constitutional jurisdiction, in its capacity as supreme interpreter of the constitution, causes it in the exercise of its reviewing role. The reason behind it is that, as already stated, this would be the only "supreme" interpretation, binding all the organs of the State and also the members of the political community, without the contingency inherent to the decisions of ordinary courts (Dau-Lin, 1932). If the constitutional jurisdiction mutates the constitution by interpreting it, it would become a "constituent jurisdiction", exceeding its role and competences within the framework of a democratic constitutional state of law and ultimately infringing the constitution it has interpreted. The key question here is to identify the moment in which a constitutional interpretation made by the constitutional jurisdiction becomes a constitutional mutation.

The existence of a constitutional jurisdiction in the democratic and constitutional State raises the debate about the category of constitutional mutation as a simple verification of

[6]Not even in systems with entrenchment clauses to prevent amendments, because in those cases, if the material limits to constitutional reform are infringed, the legal effectiveness of the declaration of unconstitutionality will depend entirely on its acceptance by the political and social systems. Otherwise, there would be a constitutional rupture that would bring about an original constituent process. All of these are factual issues, alien to the legal system.

the facts (the reforms that are actually made to the constitution, outside its formal amendment processes) or as a dogmatic category whose admissibility and effects we should put into question (Böckenförde, 1999, p. 144). As Böckenförde points out, to admit the constitutional validity of the mutation by interpretation, on the basis that it is the only effective way to adapt the formal constitution to the real one without falling into a constitutional crisis, would dissolve the constitution and constitutional law in the political process, which would also exercise the constitutional jurisdictional function, leaving the very content of the constitution in the hands of the interpreter –who would no longer clarify the sense of its dispositions, but would in fact create them ("Verfassungsgebung")–. In Böckenförde's words, "The dogmatic question that arises here is to what extent, in a constitutional legal system that expressly provides for and regulates a specific amendment procedure (of the content of the constitution), is it possible to accept a change of content outside this procedure without the constitution losing its claim to normative validity and positive validity" (1999, p. 154; Rollnert, 2014); with this, the democratic system as a whole would suffer from a lack of certainty in the distribution of constitutional roles among legal-political actors, since the constitutional jurisdiction is not empowered to create new constitutional precepts ("Verfassungsgebung"), nor can it displace the political representatives of the citizens assembled in the legislature (García Roca, 2017).

The constitutional jurisdiction can exercise this "constituent" function both when it controls the amendments undertaken by the constituent power, and when it silently amends by reinterpreting the constitution. Indeed, if the constitutional court controls the substance of an amendment, it acts as a reforming power; not only negative if it rejects it, but positive if it does so by means of an interpretative resolution, which is inevitable because any reform that is not merely an addition is always a contradiction to the one in force and therefore is "unconstitutional". The same happens when, in the exercise of its reviewing function, it rules on the interpretation that the legislator, the executive or the ordinary jurisdiction have made of the constitution by applying it or developing it, and, therefore, rejects or ratifies the interpretations that imply constitutional "mutations" (Rollnert, 2014).

In all of these cases, there are two possible paths for the constitutional jurisdiction: to respect the inevitably diffuse contours of its reviewing function by limiting its interpretation to the canon of evidence of contradiction with the constitutional text (notwithstanding the fact that, in order to do so, it may have to interpret that text to elucidate its meaning); or to exceed these contours appealing to the need to update the constitutional

text, thus entering into "constitution making" ("Verfassungsgebung" [7] or, in Lerche's terms, "Verfassungsnachholung" -Lerche, 2004-)[8] and formulating new constitutional "precepts". The use of this term is intentional, since any interpretation implies the creation of a constitutional rule extracted from the literal enunciation of the corresponding constitutional precept (as done by the Spanish Constitutional Court in SSTC 290/2000 and 292/2000 when Article 18.3 of the Constitution was referred to the legislator, interpreting it in light of Article 10.2 and inferring a new constitutional norm that regulated the right to protection of personal data). This is not the same as formulating a new constitutional "text" where there was none (as the Spanish Constitutional Court did in its decision 198/2012, reformulating Article 32 EC to consider it as a new constitutional precept that defined "marriage" as the stable union of two persons regardless of their sex, when the literal wording of the article was limited to establishing a reservation of parliamentary act –the legislator will define what "marriage" is– with a limitation –it will guarantee equality between the two participants–).

However, these examples of constitutional jurisdiction can be seen from the opposite perspective. It could be argued that, in decisions 290/2000 and 292/2000, the Constitutional Court did not merely interpret Article 18.3 of the Constitution by incorporating into its "normative scope" the new reality of personal data traffic that was included in several international conventions, as well as a European Union directive (we could even maintain that it unravelled and updated the original will of the constituent, expressing it as a mere reference to the law to establish the limits of IT, which already wanted to protect the individual from its digital instrumentation). In fact, we could argue that it "created" a new

[7]This is an extremely complex matter, hard to translate into English. Bryde (1982) defines the "Verfassungsgebung" as the "creation" of constitutional "rules" outside the formal process of creation of constitutional provisions, taking place through various channels such as constitutional interpretation or the political development of the constitution through legislation or administrative activity. The expression "constitution making" is perhaps the most suitable, since "Verfassungsgebung" does not mean, nor is it related only to the idea of the production of law resulting from the exercise of the constituent power. Wahl, however, separates the "Verfassungsgebung" from regular processes, linking it instead to a certain historical moment of revolution or break with a previous political regime. "Verfassungsgebung findet regelmässig in der Situation des Neuanfangs oder eines grössen Umbruchs statt" (2008, p. 35).

[8]This term, also extremely difficult to translate, could be interpreted as a constitutional "make up" of something that is ultimately an interpretation *praetor*, or even *contra*, *constitutionem*.

fundamental right, thus mutating the Spanish Constitution to incorporate a new "precept", namely Article 18.3 "bis". We could say the same about decision 198/2012, where the Constitutional Court's doctrine could be understood as a mere exercise of "evolutionary interpretation" of Article 32 of the Constitution (Matía Portilla, 2013). In view of all this, we could say that the effort to dogmatically and technically draw the line that separates the interpretation of the constitution from its amendment by means of an interpretation is futile.

To paraphrase Justice Potter Stewart in his concurring vote in Jacobellis v. Ohio, 378 U.S. 184 (1964), it is probably not possible or practical –in fact, we could say that it is impossible– to define the boundary between creative constitutional interpretation and a constitutional mutation by the constitutional jurisdiction; however, we do know a mutation when we see it. By this we mean that, although we intuitively distinguish a constitutional adjudication from a mutation of the constitution, it is impossible to dogmatically define the difference, because a constitutional mutation is not a dogmatic category but the simple description of a fact: the silent reform of the constitution through its interpretation by the constitutional jurisdiction. Ultimately it all comes down to a legal argument; it is a question of reasoning, with eloquence and persuasion, if the clarification of the meaning and scope of a constitutional precept is obtained through a constitutionally appropriate interpretation which respects the methodology of legal argument, or by appealing to other reasons and argumentative structures belonging to socio-political or scientific subsystems which are not –or are only vaguely– legal ("legal culture", constitutional-political "reality", the state of public opinion, etc. -Böckenförde, 1999; Vosskhule, 2004; Schulze-Fielitz, 2008-). As we have commented in previous sections, considering constitutional change as a dogmatic category admissible in constitutional law, and deeming it a constitutionally legitimate way of reforming the constitution through its interpretation by the constitutional jurisdiction, is ultimately equivalent to saying that constitutional courts act as custodians of the true constitution, which is not the formal one but the "real" one –that is, the one that is actually valid and integrated into the socio-political reality (Vosskhule, 2019, p. 418).

Faced with this thesis of "constitutional realism", if we may call it this way –which is, in fact, a return of the concept of material constitution–, many believe, like us, that the constitutional jurisdiction is not the custodian of the "essence" or "spirit" of the constitution. For those who defend constitutional materialism, on the contrary, the role of the constitutional jurisdiction is to ensure that the normative form and programme of the constitution, as well as the action (or passivity) of the organs of the State (and, by extension,

of the members of the political community) are appropriate and consistent with the "constitutional ontology" or the "real" constitution (Löwenstein, 1962) –which is, obviously, the one that the constitutional jurisdiction reveals and states through its decisions.

However, in our view, the constitutional jurisdiction –integrated in the processes of normative creation and application in its final part, and acting only (at least, as designed in contemporary constitutional systems) by request of a party– is only competent to review the interpretation of the constitution made by other legal actors, although it is certainly allowed to formulate an interpretation of the constitutional statements and their normative programmes as long as it is faithful to its literal formulation. Paraphrasing Müller (1966), the text sets the final limits of any possible meaning that can be attributed to its words, a statement that applies also to the constitutional jurisdiction. For that reason, when its interpretation of the normative programme ("Normprogram") of a constitutional enunciation is adapted to the changes in the constitutional precept's "normative scope" ("Normbereich"), extending its content to facts, objects, situations and legal relations not foreseen in the original programme, what happens is not a "mutation", but an interpretation modified to suit a new reality.

We can find more examples of this in Spain, in the extension of the rules on freedom of expression and information to cover the new digital media (STC 58/2018) or to new types of family links such as civil unions or same-sex marriages (STC 198/2012). The normative content of the interpreted constitutional statement has not been altered in any of these cases (the freedom to express oneself and inform others also exists in a digital medium, and the new family links are covered by the same constitutional protection as traditional ones). The matter would be drastically different if the interpretation of the precept effectively altered its normative programme. For example, if –despite the strict prohibition of any form of censorship– the Constitutional Court were to consider that, given the new characteristics of digital media and social networks, they could be subject to censorship; or if –despite the express constitutional provision that only defines as marriage the durable union of two persons of different sexes– it were to interpret that same-sex couples must be equally considered and constitutionally protected.

The difficulty lies in identifying the line that separates an updating interpretation of the constitutional text from a reinterpretation of that same text to make it state (that is, regulate)

something it did not state before. If the constitutional or dogmatic jurisdiction does not clearly draw that line, the limit between what is constitutional and what is unconstitutional will be blurred. This would bring about a "mutation" caused by an excess of competence of this constitutional jurisdiction, whose real mission is not to ensure the durability of the formal constitution by recreating a new constitution that does not fit in its statements, or by forcing it or replacing it to fit it into the current "real constitution" (Hesse, 1973; Böckenförde, 1999; Müller, 1990). Literalism must necessarily be that last frontier, which has to be constantly asserted in the exercise of a "self restraint" derived from the systemic function of the constitutional jurisdiction. However, this does not seem to be the current trend.

The question at stake here is the legal subject that is entitled by the constitution (the original constituent power) to express the consensus of change and therefore the opportunity to modify the constitution itself, in part or in whole: is it the parliament or the constitutional court? Ultimately, the best way to tame silent reforms through the interpretation of the constitution by the constitutional jurisdiction is to bring this issue back to the limits of constitutional interpretation, and not to admit constitutional mutation as a constitutionally valid (and even necessary) technique for updating the constitution. All being said, the issue of the relationship between the constitutional jurisdiction and constitutional amendments is another clash between constitutional formalism and materialism; that is, between those who consider that the functions of a constitutional rule discard mutation as a means of updating the constitutional form, so that the tension between durability and change can only be resolved through constitutional interpretation –conceived as a technique for clarifying the meaning of the abstract and open natural language that is used, in general terms, to express constitutional rules– or through formal constitutional amendments; and those who maintain that there is a "real" constitution which is not immutable in time and evolves like any other social process and phenomenon, of which the formal constitution is a mere linguistic expression. This opinion maintains that constitutional mutation through the interpretation of constitutional statements is not an alternative to reform in the strict sense, but a necessary tool for the constitutional jurisdiction (as well as the legislator or any other actor of the legal system) to ensure the adaptation of the formal constitution to the changing reality of the material constitution; that is, an instrument of the "Verfassungsentwicklung" (Kuriki, 2008, p.14; Walter, 2000).

In the first case –even with all the existing difficulties to draw the lines and limits of constitutional interpretation–, the system fulfils its function because it identifies the subjects, distributes competences among them and establishes procedures which are endowed with a reasonable certainty (operational closure). This creates a reliable system where the political community knows what to expect, and allows the recognition of the procedures for the stabilisation of expectations (cognitive openness) while respecting the essential elements of democracy. In the second case, this certainty becomes diluted and law making is left to the will of those who interpret it –in this case, notably, the constitutional jurisdiction–, altering the assignment of functions and dissipating any strict difference between procedures and competent subjects. This ultimately turns the constitutional system (and, by extension, the whole legal system) into a fluid and unpredictable process of contingent decisions on what should or should not happen. We endorse Rollnert's statement when he points out that "constitutional mutation has no place in the theory of the constitution as an alternative category to reform", adding, along the lines suggested at the time by Böckenförde and Hesse, that when we speak of constitutional mutation we are simply describing "a pathological phenomenon that occurs when the semantic reformulation of constitutional rules goes beyond the criteria and canons of constitutional interpretation, but the constitutional jurisdiction allows nevertheless its consolidation by acting in fact as a constituent power or by giving in, by commission or omission, to 'constituent' dynamics that fall outside the reform procedure" (Rollnert, 2014, pp.151 y 152).

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