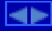

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The Multiple Identities of Constitutions

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Sumarios

According to a widespread view that can be traced back to Carl Schmitt's constitutional theory, constitutional amendments may not alter the "identity" of the constitution – this is so, independently of any positive constitutional provision on the matter, owing to the very concepts of constitution and constitutional amendment. Nonetheless, the identity of the constitution is not easy to grasp. To be sure, at least four different "identities" of the constitution can be distinguished: (a) textual, (b) legal, (c) political, and (d) axiological identity. Legal scholars and constitutional (or supreme court) judges look only to the axiological identity of the constitution, that is to a set of "fundamental" or "supreme" principles and/or values. However, not every existing constitution is necessarily provided with principles and values. What is more, there is no reason for granting priority to the axiological identity of the constitution, which depends by and large on some arbitrary value judgements of interpreters, while disregarding the others (namely, the political value-judgments). From the point of view of legal positivism, constitutional amendments do not have limits other than those expressly stated by the constitution itself.

Key-Words:

Constitution, Constitutional Amendment, Constitutional Identity (Textual, Legal, Political, Axiological)

1. Chasing Identity

2. Textual Identity

3. Political Identity

4. Legal identity

5. Axiological identity

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The Multiple Identities of Constitutions

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1. Chasing Identity [arriba]

Presently, a large number of legal scholars and, above all, constitutional (or supreme courts) judges seem to be obsessed with the problem of the "identity of the constitution" – they wonder when a change in the constitution (in the constitutional text) amounts to a change of the constitution itself.

The issue can be traced back to Carl Schmitt's constitutional theory. According to Schmitt, «the boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change» (Schmitt 1928, 150).

Such limits, it should be noted, are assumed to derive not from the positive legal norms governing constitutional amendment, but from the very concept of "constitutional change". Therefore, according to this view, there would be a legal (meta-constitutional?) norm – "An amendment so-and-so is prohibited" – that springs not from a normative text, but from a concept, technically from a definition. Needless to say, a definition (or any other sentence) can entail a norm if, and only if, it is itself normative, that is, if it includes, explicitly or covertly, normative or evaluative expressions (namely, in the definiens, if we are faced with a definition). In this way, Schmitt offers a straightforward example of the so-called Begriffsjurisprudenz.

This is one of those cases in which legal scholars are not content with developing "legal science", that is, the axiologically neutral cognition of the law in force: they prefer to do legal politics without showing it. In contrast to Kelsen's recommendation, according to which «la science du droit ne peut ni ne doit – ni directement ni indirectement – créer le droit; elle doit se limiter à connaître le droit que créent les législateurs, les administrateurs et les juges. Cette renonciation, incontestablement douloureuse pour le jurisconsulte, parce que contraire à l'intérêt compréhensible de son état, est un postulat essentiel du positivisme juridique, qui, en opposition consciente avec toute doctrine de droit naturel, avouée ou secrète, rejette résolument le dogme que la doctrine soit une source de droit» (Kelsen 1928, 7) [2]

From the standpoint of legal positivism, the very idea of a "conceptual" limit to constitutional amendment – or, indeed, to any other legal act – is senseless. Constitutional

amendment can be legally subject only to legal, not conceptual, limits, and a legal limit can only stem from the positive legal norms that govern the legal act in question. If there are no such norms, the legal limit simply does not exist. The "implicit" limits are a pure dogmatic construction of unexpressed (apocryphal) norms.

Schmitt's definition of constitutional amendment reads as follows: a change in the constitutional text is a mere, genuine, amendment only if «the identity and continuity of the constitution as an entirety is preserved» (Schmitt 1928, 145). A self-proclaimed amendment that does not fulfil this requirement would be, by definition, not a genuine amendment, but the source of "a new constitution", the former being by now tacitly derogated – «That would not be constitutional change. It would be instead constitutional annihilation» (Schmitt 1928, 151).

Schmitt's view – a "substantive" conception of constitutional amendment, which in turn presupposes an equally "substantive" conception of the constitution – seems to be the source of inspiration

for all those constitutional lawyers and judges who tirelessly wonder about the identity of the constitution. They assume that amendment power is implicitly limited "by nature" (Roznai 2017, 156) – constitutional amendment cannot go so far as to alter the identity of the constitution, which would be tantamount to replacing the constitution in force with a new one.

Thus, the concept of constitutional identity is used to frame two unexpressed constitutional (or meta-constitutional) norms allegedly implicit in the constitution. The first norm prohibits any amendment that, while complying with the procedures of constitutional amendment, claims to alter the identity of the constitution. The second norm authorizes constitutional or supreme judges to declare such an amendment unconstitutional. It is worth stressing that we are faced with two separate norms: the first one circumscribes the amendment power; the second one empowers constitutional judges to declare null and void certain amendments. This second norm is clearly not entailed by the first one (the prohibition of amendment could be not supported by any kind of judicial review).

Nonetheless, the problem of the identity of the constitution can be treated as a strictly theoretical, that is, purely conceptual, problem. The first step is to acknowledge that the identity of the constitution can be reconstructed in no less than four different ways.

2. Textual Identity [arriba]

In the first place, each constitution has a "formal" or textual identity.

A constitution is only a normative text. A normative text, in turn, is a set of normative sentences, formulated in a natural language. Now, any set can be modified in three different ways (Bulygin 1984, 332 ss.):

(a) by adding an element (namely, in this case, a sentence);
(b) by subtracting an element (a sentence);

(c) by substituting an element (substitution being a combination of subtraction and addition).

In this respect, adding, subtracting, or substituting one or more words in one sentence is equivalent to substituting that sentence itself.

Now, the appropriate way of defining a set is extensional, to wit: any set is to be defined by listing its component elements. In such a way that each modification of a given set brings about a different set – the original one having diachronically lost its identity (Bulygin 1982, 180 f.).

Identifying a constitution according to its (synchronic) textual identity is an axiologically neutral operation: it does not require any value judgment of any kind. And it does not allow us to infer any conclusion about the limits of constitutional amendment. As paradoxical as it may seem, every constitutional amendment, even minimal, even marginal, gives rise diachronically to a "new" constitution: new, since it is textually different from the pre-existing one [3].

From this point of view, if one wished to set out some limits to constitutional amendment – amendments may not overturn the identity of the constitution – one should certainly prohibit constitutional amendment as such. At the same time, it would sound very odd to consider any, even minimal, even marginal, amendment as the establishment of an entirely new constitution.

3. Political Identity [arriba]

In the second place, each constitution has a "political" identity in the following sense. Any constitution, by definition, cannot not contain a set of norms like the following:

(a) norms concerning the "form of the state" (Staatsform, frame of government), understood as the organization – both horizontal and vertical – of public authorities [4] and in particular

(b) norms regulating legislation (understood in the generic sense of the issuing of general norms).

If a supposed “constitution” did not contain such norms, we would not consider such a document as a genuine constitution. From this point of view, however, the identity of the constitution is somewhat elusive: the form of the state, understood in the way I have said, is vague, since the boundaries between one kind of political organization and another are fuzzy. This is easy to show with some simple examples.

Let us suppose that a constitutional amendment introduces, or alternatively suppresses, the judicial review of legislation: would this change the political identity of the constitution? Or take a constitutional amendment introducing, or alternatively suppressing, parliamentary control over the executive (vote of confidence, vote of censure, and so forth): would it alter the political identity of the constitution? Moreover, suppose a constitutional amendment that introduces, or alternatively suppresses, universal suffrage for the designation of the head of state: would it change the political identity of the constitution?

It is quite evident that any answer to questions like these presupposes some sort of political evaluation. It follows that the defense of the identity of the constitution – possibly entrusted to constitutional judges – is an eminently political, axiologically non neutral, enterprise.

Still, one has to wonder whether it makes sense (from a purely political perspective) to limit the amendment power up to the point of inhibiting any modification of the political organization of the state, which would be more or less equivalent to denying the amendment power as such.

4. Legal identity [arriba]

In the third place, according to a well-known doctrine, some constitutions also have an identity that can be labelled as “legal”. The constitution is the higher source of the legal order. The norm which establishes the procedure of constitutional amendment, however, referring to the constitutional text, is logically higher than the constitution itself – therefore it is the logically “supreme” norm of the legal order. The legal identity of a constitution lies precisely in this logically supreme norm.

This is so, since the norm in question (assumedly) does not apply to itself, in such a way that there is no legal way of changing it – the amendment procedure can be changed only “extra ordinem”, that is, by an illegal, or at any rate non-legal, act, with the consequent alteration of the legal

identity of the constitution (Ross 1958, 78 ff.; Ross 1969) [5].

This thesis, however, rests upon fragile bases. Leaving aside the (dubious) logical thesis according to which no norm can sensibly refer to itself (the amendment rule cannot regulate its own amendment), the issue is the following. Suppose that, in accordance with the amendment norm (N1), a new norm on constitutional amendment (N2) is passed, that serves as a substitute for the original one. The argument claims that this is unconceivable, since the new norm contradicts the previous one from which it draws its own dynamic ground of validity.

Nonetheless, with a more careful look, one can see that the contradiction between the two norms does not exist – except in the diachronic dimension. Let us take the case of a flexible constitution.

The constitution includes, by hypothesis, a norm about legislative procedure N1, which provides that "The procedure for the approval of statutes is X". However, since the constitution is flexible, N1 can legally be replaced by a statutory norm N2 – approved in accordance with procedure X – providing that "The procedure for the approval of statutes (henceforth) is Y".

This may perfectly occur despite the fact that N2 draws its validity precisely from N1, and this is so precisely because the constitution is flexible, in such a way that there is no hierarchical relationship between the constitution and ordinary statutes – which means that ordinary legislation is enabled to amend the constitution.

In other words, the contradiction between two norms, such as N1 and N2, is unacceptable only if one of them is "rigid" with respect to the other or, in other words, stands at a higher level in the hierarchy of legal sources. However, the constitution, including the constitutional amendment norm, is not superior to amendment acts – otherwise, such acts could not bring about a legal modification of the constitution at all. In the absence of any relations of hierarchy, a norm which contradicts another simply derogates the latter – the previous norm is (tacitly) repealed according to the "lex posterior" principle, which regulates the succession in time of equal-ordered norms within the system of legal sources.

Consequently, the old amendment norm and the new one (approved, by hypothesis, in accordance to the old one) are not in force at the same time. The first one was in force before the amendment; the second one is in force after the amendment. At the very same time when the second

norm enters into force, the first one loses its force, being tacitly repealed (Bulygin 1984, 333; Bulygin 1981, 178 ff.).

In this connection, there is a further problem, which seems quite difficult to solve. Let us suppose that, as it happens in the Italian constitution in force, the norm on constitutional amendment (art. 138) is accompanied by a norm that expressly forbids a certain kind of amendment (art. 139: constitutional amendment may not change the republican form of the state [6]).

Which of the two norms is logically supreme and, accordingly, defines the legal identity of the constitution? The norm that regulates the procedure of constitutional amendment, if it is considered to be applicable to the entire constitution (including the norm that limits the amendment power). The norm which limits the amendment power, if it is considered exempt from any possible amendment.

5. Axiological identity [arriba]

In the fourth place, almost all contemporary constitutions – especially Post-War European constitutions – have a "material" or axiological identity, much appreciated by the supporters of the "moral reading" [7]. Some speak in terms of an "ethico-substantive" dimension of the constitution (Luque 2014). This kind of identity is the one that apparently haunts both constitutional legal scholars and constitutional judges nowadays (Roznai 2017).

It is assumed that the axiological identity of a constitution lies in the set of principles and/or values it expresses (Zagrebelsky, 1992, 2008), or more precisely by its fundamental, essential, characterizing, supreme principles. From this standpoint, the constitution is not a simple normative text, a mere set of normative provisions (Häberle 2000, 77) – it is a coherent unity of principles and values.

Therefore, it is assumed (following the footsteps of Schmitt) that constitutional amendments cannot go so far as to touch the principles – or at least the "supreme" principles – embodied in the constitution without breaking the intrinsic (conceptual) limits of the amendment power. In other words, «the constitutional amendment power cannot be used in order to destroy the constitution» or its «fundamental principles» (Roznai 2017, 141 ff.).

In fact, the thesis of the axiological identity is constantly (albeit contingently) accompanied by the idea that constitutional principles are not equally-ordered but axiologically hierarchized (Roznai 2017, 144 ff.), so that some of them play the role of "supreme" principles.

In this regard, a quotation from a judgment of the Italian Constitutional Court is in order: «The supreme principles of the constitutional order» have «a superior value with respect to the other constitutional norms»; therefore, «one cannot deny that this Court is competent to judge the compliance of constitutional amendments and other constitutional acts to the supreme principles of the constitutional order […]. If this were not the case, moreover, there would be an absurdity in considering the system of judicial guarantees of the Constitution as defective or ineffective precisely with regard to its most valuable norms» (Corte costituzionale, decision 1146/1988).

It is timely to underscore that, as I said before, "almost all" the constitutions today in force have an axiological identity in the relevant sense. But not "all" of them: the axiological identity of a constitution is contingent, some constitutions have it, others do not. In fact, there are constitutions that limit themselves to drawing up the organization of the state, but they do not include either declarations of rights or principle-expressing provisions [8].

In this sense, this concept of constitutional identity does not belong to "general" constitutional theory: it is applicable not to whatever present, past, or future constitution, but only to "ethically dense" (so to speak) constitutions.

On the other hand, while ascribing to a norm the value of "principle" is often questionable – the very concept of principle being highly controversial [9] – ascribing to a principle the value of "fundamental", "supreme", or "characterizing" (of constitutional identity) sounds completely arbitrary. Once certain constitutional provisions are identified as principles, why should some of them have a higher value than others? This question cannot be answered by arguing from the positive law: one can only invoke vague ethic political intuitions deprived of any textual foundation.

It happens, by the way, that ascribing to a norm the character of a principle is not always a way of valorizing it. On the contrary, it could be a way of suspending its legal effects (waiting for the so called interpositio legislatoris, that is, the "concretization" of constitutional principles by means of statutory norms) and/or a way of making it defeasible, subject to balancing with other principles that can prevail in case of conflict. This raises doubts as to the intangibility of principles (at least some of them) however fundamental they may be.

At any rate, there are no clearly persuasive reasons for ascribing priority to the axiological identity of a constitution rather than its political identity, however weak this last one may be (Guastini 2017, 308 ff.). In classical constitutional

theory, a constitution is conceived of as a set of “rules” (rules, not principles) concerning the organization of the state and, namely, legislative power – the constitution “in the material sense”, in Kelsen’s language). The supporters of the axiological identity are wrong in picturing the constitution as some kind of moral philosophy, a normative ethics, or a table of values, rather than as the architecture of the political order.

6. Epilogue [arriba]

The preceding remarks simply aim to suggest that from the point of view of written constitutional law – that is, looking at the constitutional text, not to be confused with legal scholars’ and judges’ doctrines and constructions – the constitutional amendment power has no other limits than the procedural ones.

There can be material limits too, of course, but only if they are explicitly stated by the constitution itself (as it occurs with art. 139 of the Italian Constitution or art. 89 of the French one).

Two quotations from Kelsen are in order [10]:

The state remains the same even if its constitution is modified by juridico positive means, that is, in the forms prescribed by the constitution itself. The modification can be as profound as it could be, but – if it takes place according to what is prescribed – there is absolutely no reason to suppose that a new state has arisen with the modified constitution. One could speak of a new state only if the modification constituted a real break in the constitution (Kelsen 1925, 249).

Two cases must be fundamentally distinguished. In the first case, the constitution is modified in accordance with the conditions that the constitution itself has laid down [...]; for example, an absolute monarchy is transformed, by an act of the monarch, into a constitutional monarchy. The continuity of law is guaranteed [...].

The second case, different in principle from the first one, is that of a revolutionary transformation of the constitution, that is, through a break in the existing constitution. This is the decisive criterion, and not whether the constitutional modification is more or less profound (Kelsen 1920, 237).

Following Kelsen, the distinction between a mere constitutional amendment and the establishing of a new constitution does not depend on the normative “contents” of the amendment at stake – it only depends on the “forms” or procedures by which it is accomplished.

Any constitutional amendment accomplished in accordance with the constitutional norms that confer and regulate the amendment power amounts to the exercise of a “constituted” power. While, on the contrary, any amendment accomplished extra ordinem, that is, in illegal or non-legal form, amounts to the exercise of “constituent” power.

It follows that any illegitimate change of the constitutional text – however marginal – is a break in the constitutional order. And, symmetrically, any legitimate change of the constitution – no matter how deeply it affects the existing constitution (the form of the state, fundamental principles, or the procedures of constitutional amendment) – is the exercise of amendment power.

The identity of the constitution – if not perhaps the political one – has nothing to do with all this.

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Notes [arriba]

[1] Tarello Institute for Legal Philosophy. http://istitutotarello.org Riccardo Guastini es profesor emérito de Filosofía del Derecho en la Universidad de Génova y director del Instituto Tarello para la Filosofía del Derecho en el Departamento de Jurisprudencia de la misma universidad. Es co-director de las revistas “Analisi e diritto”, “Ragion pratica” y “Materiali per la storia della cultura giuridica”. Su ámbito de investigación se despliega, entre otros temas, en el análisis del lenguaje normativo, los conceptos jurídicos fundamentales, la estructura de los sistemas jurídicos y las técnicas de argumentación e interpretación jurídica. Entre sus trabajos más recientes se encuentran: Le fonti del diritto. Fondamenti teorici (2010), Interpretare e argomentare (2011), Distinguendo ancora

(2013) y Discutendo (2017).

[2] Legal science is (ought to be, according to Kelsen) a purely cognitive enterprise, and norms cannot logically derive from knowledge: there are no norms without human acts of normative creation ("Kein Imperativohne Imperator": Kelsen 1965)

[3] In fact, the textual identity of a constitution, being intrinsically synchronic, does not even allow for a diachronically rendered distinction between a mere amendment of the existing constitution and the establishment of a new constitution.

[4] I refer to those norms that establish the supreme state organs (the legislative, the executive, possibly a constitutional or supreme court, etc.), define their respective competences, regulate (at least partially) the modes of formation of such organs as well as their mutual relations.

[5] Notice that we are talking about some constitutions, since not all constitutions necessarily include a provision about constitutional amendment (flexible constitutions do not).

[6] No doubt, such a provision contributes to the political identity of the constitution.

[7] Among others Dworkin 1996; Celano 2002.

[8] Just an obvious example: the USA Federal Constitution had no “axiological identity” at all until the promulgation of the Bill of Rights.

[9] See, e.g., Alexy 1994, ch. III; Atienza e Ruiz Manero 1996, ch. I

[10] I am indebted to Stanley Paulson for his help in translating Kelsen’s texts.