Constitutional amendment, constitutional delegation and constitutional block - the plurality of the "substantive" constitution

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Abstract:

The article contextualizes the concepts of constitutional amendment, constitutional delegation and constitutional block with the "substantive" constitution. It examines how they communicate and how they contribute to constitutional plurality. The "substantive" constitution often transgresses formal constitutional borders, as the example of the allocation of powers in (particularly) asymmetric federal systems shows. Still, a large gap between the formal and substantive constitution is not desirable in all cases. The quasi-formalisation of "substantive" constitutional law according to the model of the constitutional block is a possible answer given by constitutional courts in defence of constitutionalism.

I. Introduction

Constitutions are usually classified along traditional adjectives such as rigid or flexible, incorporate or fragmented, written or unwritten, formal or substantive.[1] Many of these criteria are in fact intertwined and used rather diffusely.[2] A rigid constitution is unamendable or difficult to amend, while a flexible constitution may be amended more easily. An incorporate constitution consists of one single document, whereas a fragmented constitution of more than one.[3] A written constitution, vested with a formal constitutional rank, may also have a substantively constitutional nature, while an unwritten constitution can be only substantively constitutional in nature. A substantive constitution refers to all pieces of law that can "substantively" claim to be relevant to the fundamental organisation and functioning

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[1] See, for a survey, also Grimm, Types of Constitutions, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (2012) 98 (105 ff).

[2] See already the "ill-expressed and rather confusing distinction" alluded to by Bryce, Flexible and Rigid Constitutions, in Bryce (ed), Studies in History and Jurisprudence I (1980) 145 (148).

[3] See, from comparative perspective, Wiederin, Über Inkorporationsgebote und andere Strategien zur Sicherung der Einheit der Verfassung, ZÖR 59 (2004), 175 (177 ff); Gamper, Änderung und Schranken der Verfassung, in Bußjäger/Gamper/Kahl (eds), 100 Jahre Bundes-Verfassungsgesetz (2020) 64 ff.

of public power.[4] What this or similar definitions mean in detail, is, of course, highly controversial. Without doubt, the Standing Orders of a Parliament, an Electoral Law or a Constitutional Court Act could claim such relevance for many provisions even without being entrenched in the formal constitution of a country. In turn, formal constitutions may include provisions that do not have a substantively constitutional nature. Does, eg, Art 106 of the Austrian Federal Constitutional Act have such a nature when it provides that the departmental director of the office of a regional government must be a lawyer? While, within the unwritten UK constitution, the Scotland Act 1998 would be generally classified as being substantively constitutional, would this assessment extend also to, eg, its Sec 90A relating to the "BBC Trust member for Scotland"? These examples show that the qualification of what a substantively constitutional matter is may be doubtful either in written or unwritten constitutions.

In the following, I will contextualize the concepts of constitutional amendment, constitutional delegation and constitutional block with the "substantive" constitution. It shall be examined how they communicate and how they contribute to constitutional plurality - eg when powers are allocated in federal systems. But is the plurality of the substantive constitution desirable under all circumstances, and how can the authority of the formal constitution be maintained?

II. From Constitutional Delegation to the Constitutional Block

1. Types of Constitutional Delegation

Formal constitutions - either incorporate or fragmented (even though I will refer to the more widely-spread incorporate model for the sake of simplicity) - require a specific rank of constitutional law. Most constitutions across the globe rely on this model. If they are formally amended, this will be done through an amendment as prescribed by the amendment provision[5] entrenched in the same document. Normally, the amendment provision will also be applicable if constitutions are

[4] Similarly, Grimm, Types 104.

[5] Some constitutions distinguish between different amending procedures; see, with more details, Wiederin, ZÖR 59 (2004), 194 ff; Gamper, Hierarchiefragen der Verfassungsänderung, in FS Michael Thaler (2019) 161 (164 ff); Gamper, Änderung 52 ff.

supplemented and not altered in the strict sense of the word, because the constitution will at any rate not be the same as before.[6]

Still, there are other ways how constitutional changes may be made without a formal amendment. One of them is the use of constitutional delegation norms. Here, I will not discuss them with regard to the political intentions that induce a constitutional lawmaker to defer constitutional matters, as Rosalind Dixon and Tom Ginsburg have already done,[7] but with regard to the more theoretical constitutional framework of these norms.

Constitutional delegation means that the constitution refers a matter to another legal source inferior to constitutional law;[8] constitutional provisions that just defer the regulation of an issue until a future constitutional provision is passed require a constitutional amendment[9] and are not considered here. Delegation clauses defer a matter inasmuch as the delegation can only be made after the constitution including that clause was enacted, even though this may be at the very next moment.[10] They strongly resemble sunrise (or conditioned commencement) clauses,[11] but share a specific characteristic: they empower (or even require) another authority to enact law. This enactment of (delegated) law is the condition for the legal validity of a content which issometimes predetermined by the constitution and sometimes not; thus, they do not cover any species of conditional norms such as, eg, a norm that provides that a content will enter into force "if the sun shines on day x".

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[6] Some constitutions carefully distinguish between "amending in the narrow sense" and "supplementing", even though both types are regulated by the same amendment rule; see, eg, Art 79 para 1 of the German Basic Law ("This Basic Law may be amended only by a law expressly amending or supplementing its text."); similarly, Art 140 Constitution of Belarus, Art 79 Constitution of Iceland, Art 147 Constitution of Lithuania.

[7] Dixon/Ginsburg, Deciding not to decide: Deferral in constitutional design, ICON 9 (2011), 636 ff.

[8] Similarly, Salzberger/Voigt, On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe, Theoretical Inquiries in Law 3/1 (2002), 1 (6).

[9] See, eg, Art 120 of the Austrian Federal Constitutional Act which is not a sunrise clause (see further Ranchordás, Constitutional Sunrise, in Albert/Contiades/Fotiadou [eds], The Foundations and Traditions of Constitutional Amendment [2017] 177 [180 f]), though: It is not a clause that defers the commencement of a constitutional issue to a later date, but leaves the issue totally open until the constitutional law-maker regulates it. This option, however, is not different from the general possibility to amend a constitution, with or without such a (legally superfluous) clause.

[10] This is an inherent temporal aspect neglected by Ranchordás, Sunrise 186; certainly, the deferral addressed by Dixon/Ginsburg, ICON 9 (2011), 636 ff may be of very short duration.

[11] Ranchordás, Sunrise 180 ff.

Delegations may be made explicitly or implicitly: in the latter case, the very vagueness of constitutional language[12] or even constitutional silence[13] might be used as an argument that the constitution "obviously" leaves a matter to be dealt with by subconstitutional law. However, constitutions might also omit to regulate a matter just because they neither want to regulate it themselves nor to have it regulated by other pieces of law. In turn, the whole subconstitutional legal system could be considered to be implicitly delegated by the constitution in a wider sense - inasmuch as all legal acts to some extent implement the constitution, even if only regarding the constitutionally prescribed way how they are created.[14]

More relevant here is the fact that constitutions often include explicit delegating provisions according to which ordinary or organic legislation or any other type of legal act is empowered to regulate a certain issue. Where a constitution delegates an issue, the issue most often has at least some constitutional substance. The delegating empowerment may also include a requirement by which the delegated lawmaker is even bound to regulate the respective issue;[15] but while a requirement always implies an empowerment, an empowerment does not always imply a requirement. Further specifications can be made with regard to the delegated issue: in the first category of cases, constitutions just leave a matter to be regulated with whatever content. They do not themselves include substantive directives on the matter, but authorize delegated law to regulate the matter with a full margin of appreciation, even though the general constitutional framework will nevertheless have to be observed impliedly. The second category includes delegations that bind the delegated law to a certain content, eg to regulate a matter in a way that complies with specific goals desired by the constitution. The third category contains those constitutional delegations that permit delegated law even to deviate from the constitution. Here, the constitution itself regulates a certain content and at the same time permits delegated law to deviate from that content, which, without the

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[12] Dixon/Ginsburg, ICON 9 (2011), 646 and 650 consider this as an alternative to explicit delegation clauses; still, a vaguely worded provision could be interpreted as an implicit delegation norm (similarly, Dixon, Constitutional Carve-outs, Oxford Journal of Legal Studies 37/2 [2017], 276 [279]).

[13] Loughlin, The silences of constitutions, ICON 16 (2018), 922 ff.

[14] See, theoretically, Merkl, Das doppelte Rechtsantlitz, JBl 1918, 425 ff.

[15] Dixon/Ginsburg, ICON 9 (2011), 640.

constitutional empowerment, would otherwise be unconstitutional. The result may very much resemble that of a constitutional amendment, but still there are differences: while a constitutional amendment rule authorizes a future constitutional amendment only under the proviso that a certain constitutional law-making procedure takes place, the constitutional delegation rule authorizes the deviation only under the proviso that a certain subconstitutional law-making procedure takes place. A constitutional amendment amends the constitution that is in force and thus constitutes a constitutional lex posterior. The delegated amendment, however, is covered by the current constitution that itself includes a suspensive lex specialis which will only enter into force after the delegated legal act was made. In the latter case, the constitution provides a content x as long as the delegated act is not made and provides content y, z or "any content but x" as soon as the delegated act is made. Such empowerments for deviation could turn out very dangerous, eg in states of emergency. Where the constitution entitles certain bodies (other than the constitutional lawmaker) to declare the state of emergency and at the same time provides that fundamental rights or other constitutional issues might be interfered with by subconstitutional law, strong constitutional limits, such as sunset clauses,[16] approval by parliaments, oversight by courts or non-derogable constitutional provisions, must therefore be requisites in all liberal democracies.[17]

The delegated act may nevertheless not claim to form part of the formal constitution because the delegation rule itself distinguishes formally between constitutional and delegated law. But as long as the delegated norm keeps in line with the empowerment given by the delegating norm it will be implicitly vested with a quasi-constitutional rank - in this case, even a deviation from the constitution by the delegated norm will be legal.

2. The Concept of a Constitutional Block

But even without explicit constitutional delegation clauses, the recognition of a "constitutional block" has become usual in several countries: although the term was not literally used by the French Conseil Constitutionnel in its decision no. 71-44 DC

[16] Ranchordás, Sunrise 177 ff; Dixon/Ginsburg, ICON 9 (2011), 652 and 656.

[17] Empirically, Ginsburg/Versteeg, Binding the Unbound Executive: Checks and Balances in Times of Pandemic, Virginia Public Law and Legal Theory Research Paper 52 (2020), 1 ff.

of 16 July 1971, its reference to "the Constitution and its preamble" is famously connoted with the emergence of that concept. In this decision, the Conseil Constitutionnel understood the preamble to the French constitution not only as a norm but even parallelized it with the constitution itself. In the aftermath of this decision, the concept of a constitutional block became particularly, though with slight differences, used in the Iberic and Ibero-American legal world: it means a substantively constitutional structure consisting of constitutional preambles, fundamental legal principles, organic laws or even international law that do not form part of the formal constitution.[18] Despite the absence of a formal constitutional rank, courts apply this structure together with the formal constitution as a yardstick for judicial review.

This is sometimes also done elsewhere even without reference to the concept of a constitutional block: The Austrian Constitutional Court, eg, severally held that some provisions of the Standing Orders of both chambers of the federal parliament as well as those of the Land parliaments served as quasi-constitutional yardsticks when it came to the question whether ordinary laws had been created "in accordance with the constitution".[19] This quality does, however, not pertain to the Standing Orders as a whole but only to those parts that guarantee that the "true opinion" of the respective parliamentary body is expressed in a bill; "mere organisational rules" in the Standing Orders do not have that quality according to the Constitutional Court. Another Austrian example, which is even based on an explicit delegation, is Art 12 of the State Basic Law on the General Rights of the Citizens of 1867, which, being itself of constitutional rank, binds the exercise of the rights of association and assembly to "specific laws". These are the Austrian Associations Act and Assemblies Act which are ordinary federal laws but since they frame these fundamental rights the Constitutional Court equates their essential content - as far as Art 11 ECHR permits -

[18] See, eg, Favoreu, El Bloque de la Constitucionalidad, Revista del Centro de Estudios Constitucionales 5 (1990), 45 ff; Llorente, El Bloque de Constitucionalidad, Revista Española de Derecho Constitucional 27 (1989), 9 ff; Góngora-Mera, Inter-American Judicial Constitutionalism (2011) 161 ff.

[19] See VfSlg 16.151/2001, 16.733/2002, 17.173/2004, 17.174/2004 and 20.059/2016.

[20] with that of the relevant fundamental rights: accordingly, the Associations Act and Assemblies Act, even though they have not received formal constitutional rank, will be considered as a quasi-constitutional yardstick when a "core"[21] violation of the right of association or assembly is examined.

The same could be said for many other constitutions in which the justiciability of fundamental rights depends on their concretisation by ordinary legislation. Especially socio-economic rights[22] and social policy principles[23] offer very interesting examples in that context:[24] a substantively constitutional content only comes to life when ordinary legislation is passed. Such laws may or must unfold an as yet abstract constitutional programme, and if they do so their legislation will become an integral part of that programme.

But not any constitutionally delegated norm is necessarily part of the constitutional block. The latter quality is, if at all, obviously only associated with certain pieces of the substantive constitution, particularly in the context of judicial review of fundamental rights. In turn, courts have identified pieces of the constitutional block also outside delegated norms, such as, eg, the constitutional preamble in the aforementioned French decision.

III. The Allocation of Powers as Part of the Substantive Constitution

I would like to illustrate the plurality of the "substantive constitution" in a field that has so far received little attention in academia even though it is closely related to the issue of asymmetric federalism on which Roberto Toniatti and others have published

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[20] Both the State Basic Law on the General Rights of the Citizens and the ECHR are part of the formal Austrian federal constitution and entrench fundamental rights; when entrenchments overlap, the more liberal prevails, usually those of the ECHR.

[21] The Constitutional Court has recently been more restrictive inasmuch as not any content of those laws has a constitutional relevance, but only those essential to the respective freedoms of association and assembly (see, eg, VfSlg 19.818/2013 and 19.962/2015).

[22] See, eg, Sec 27 para 2 Constitution of South Africa.

[23] See, eg, Art 45 Constitution of Ireland and Sec 37 Constitution of India.

[24] Davis, Socio-Economic Rights, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (2012) 1020 ff; Dixon, Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited, ICON 5 (2007), 391 ff; Davis, Socio-economic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled?, in Ginsburg/Dixon (eds), Comparative Constitutional Law (2011) 519 ff.

largely.[25] While focus has been laid on the question whether the component units of federal and regional systems are treated unequally in terms of powers, representation and finances, asymmetries in legal sources have been rather neglected in this context.[26]

Indeed, many asymmetric, but even some symmetric federal systems are neither exhaustively dealt with by one single constitutional document nor several constitutional documents[27] - even when it comes to key issues of federalism that everybody would consider as substantively constitutional. Most strikingly, this concerns the allocation of powers. Older, mature and symmetric federal systems usually allocate them en bloc in the federal constitution. But in many cases, especially younger and asymmetric federal systems, powers are allocated in subconstitutional pieces of law - ordinary or specific laws, or even legal acts made outside legislative processes.

A remarkable example is the Belgian Constitution which allocates powers of the communities in Art 127-133, while Art 39 provides that a special law, which must be adopted by special majorities but is no constitutional law, allocates regional powers. Art 35 of the Belgian Constitution, which would provide otherwise, is not in force yet as its enforcement itself depends on the enactment of a law adopted by special majorities.

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[25] See, eg, more recently, Toniatti, Asimmetrie regionali, identità culturale e competitività dei territori: i titoli fondativi dell'autonomia speciale e le incognite della revisione statutaria, in Palermo/Parolari (eds), Il futuro della specialità regionale alla luce della riforma costituzionale (2016) 13 ff; Toniatti, L'autonomia regionale ponderata: aspettative ed incognite di un incremento delle asimmetrie quale possibile premessa per una nuova stagione costituzionale del regionalismo italiano, Le Regioni 4 (2017), 629 ff; Palermo/Kössler, Comparative Federalism. Constitutional Arrangements and Case Law (2017) 9 and 47; Gagnon/Burgess (eds), Revisiting Unity and Diversity in Federal Countries. Changing Concepts, Reform Proposals and New Institutional Realities (2018); Palermo et al (eds), Auf dem Weg zu asymmetrischem Föderalismus? (2007); Burgess, The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective, in Palermo/Zwilling/Kössler (eds), Asymmetries in Constitutional Law – Recent Developments in Federal and Regional Systems (2009) 21 ff; Watts, Comparing Federal Systems[3] (2008) 125 ff.

[26] See, however, Gamper, Föderale Kompetenzverteilung in Europa: Vergleich und Analyse aus verfassungsrechtlicher Sicht, in Gamper et al (eds), Föderale Kompetenzverteilung in Europa (2016) 763 (764 ff).

[27] The extreme case is the Austrian allocation of powers (see Wiederin, Die Kompetenzverteilung hinter der Kompetenzverteilung, ZÖR 66 [2011], 215 [217 ff]; Bußjäger, Die bundesstaatliche Kompetenzverteilung in Österreich, in Gamper et al [eds], Föderale Kompetenzverteilung in Europa [2016] 523 [523 f]).

While, in the Italian case, the autonomy statutes of the five Italian special regions are "particular" constitutional laws, they have subconstitutional rank in the Spanish case. The Spanish Constitution, moreover, also allows for a progressive expansion of autonomous powers as well as a category of regional powers that, within a loose constitutional framework, are shaped by central subconstitutional legislation. The same technique can be found in many federal systems with regard to shared or concurrent regional powers that depend on (subconstitutional) federal laws;[28] even exclusive regional powers can be shaped by ordinary federal legislation, as younger federal constitutions such as those of South Africa[29] or Nepal[30] provide. Art IV Sec 4 of the Constitution of Bosnia and Herzegovina enlists the powers of the national parliament, including "such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities" (para e); in this case, not even a law but an intergovernmental agreement allocates further powers to the federal level.

Still, it is the formal federal constitution in all of these cases that empowers - or sometimes even requires - subconstitutional law to either concretize powers or even to alter a constitutional arrangement by allocating powers in a different manner. Ultimately, therefore, the allocation of powers is rooted in the respective federal constitution, even though parts of it may be delegated. Applying the constitutional block theory to delegated allocating laws, these could indeed be considered as a quasi-constitutional yardstick in power conflicts: if, eg, a regional law transgresses a delegated (ordinary) federal law that limits regional powers in accordance with a federal constitutional empowerment, the ordinary federal law will serve as a superior yardstick against which the regional law could be scrutinized and repealed.

An even further step is taken when the allocation of powers is shaped by the case law of constitutional courts. Normally, constitutional courts interpret powers but do not base their decisions on explicit constitutional delegations (outside general provisions on their reviewing competences). However, their interpretation is

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[28] See, Palermo/Kössler, Federalism 146 ff; Watts, Comparative Conclusions, in Majeed/Watts/Brown (eds), A Global Dialogue on Federalism, vol 2: Distribution of Powers and Responsibilities in Federal Countries (2006) 322 (327 ff); Watts, Systems 90 ff; Gamper, Kompetenzverteilung 767 ff.

[29] Sec 104 para 1 subpara b. iii Constitution of South Africa.

[30] Sec 57 para 2 Constitution of Nepal.

sometimes qualified as a silent alteration (and not just as a concretization) of the constitution, eg when they attribute implied powers to a certain level.[31] In any case, their definitions of powers form part of the substantive constitution. The Austrian Constitutional Court even assumes that its formal constructions of the meaning of an allocated power according to Art 138 para 2 of the Federal Constitutional Act constitute a quasi-authentic interpretation of the federal constitution that has the "effect" of federal constitutional law.[32]

IV. Conclusions

This short outline attempted to show that the substantive constitution often transgresses formal constitutional borders. It is not a monolith, but a mosaic composed of a plurality of different legal sources. Some of them are based on explicit constitutional delegations, while some are not. The identification of the latter is ultimately entrusted to courts whose decisions may sometimes themselves form part of the substantive constitution. Whether a large gap between the formal and substantive constitution is desirable for written constitutions, may be doubted, though: it undermines the concept of a written constitution which seeks to identify, hierarchize and protect certain legal matters not l'art pour l'art, but exactly because they are considered substantively relevant. It should be reflected that every delegation of substantively constitutional matters implicates constitutional outsourcing - a lex fugitiva that weakens constitutional certainty. Especially where a constitution explicitly delegates the possibility to deviate from constitutional law this bears considerable risks. John Locke's warning that the "legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others"[33] ought to apply

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[31] Palermo/Kössler, Federalism 149 ff. Within the European multi-level system, a recent example is the ECJ's judgment of 18 December 2018, Weiss and Others, C-493/17, which has recently been itself criticized as "ultra vires" by the German Federal Constitutional Court (BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15).

[32] VfSlg 3055/1956, 4446/1963, 6685/1972, 7780/1976 and 16.929/2003. See also Zellenberg, Art 138 Abs 2 B-VG, in Korinek/Holoubek (eds), Österreichisches Bundesverfassungsrecht (2005) Rz 28; Hiesel, Art 138 B-VG, in Kneihs/Lienbacher (eds), Rill-Schäffer-Kommentar Bundesverfassungsrecht (2011) Rz 82 f; Gamper, Kompetenzgerichtsbarkeit und Kompetenzinterpretation in Österreich, in Gamper et al (eds), Föderale Kompetenzverteilung in Europa (2016) 575 (578 ff).

[33] Locke, Two Treatises of Government (1690) Book II, Chapter XI.

even more in constitutional context. While it is true that constitutions need not address anything or everything, they should accept their responsibility to decide themselves on fundamental issues. This does not mean that delegations on fundamental matters could not prove politically useful, eg if there was too little time to draft a constitutional text or if political compromises on certain matters could not be found.[34] Still, there might be other remedies to address such problems, eg to entrench a less rigid constitutional amendment rule, to entrench a constitutional content under a sunrise or sunset clause or, in serious cases, even pass an interim constitution until a transitional period has become more stabilized.

As has been shown, however, constitutions sometimes follow other designs, and sometimes omissions to constitutionalize matters may happen even unintentionally. The quasi-formalisation of substantive constitutional law according to the model of the constitutional block is a possible answer given by constitutional courts in defence of constitutionalism.

[34] Dixon/Ginsburg, ICON 9 (2011), 637 ff.