THE EFFECTS OF THE "FORMULA"-S OF CONSTITUTIONAL REVISION INTO THE CONSTITUTIONAL TEXT IN RELATION TO THEIR FIRST ADOPTION

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Abstract:

The first formal constitutions were created by "fathers" aiming at the eternity and un-changeability of the constitutional text. The constitutional practice and history told us that a constitution cannot be definitive and it cannot resist to the evolution and changes of the society. The possibility of the constitutions to be adapted to the new needs and requests of the social and political evolution is assured through the special provisions for the respective revision. Thus, the "formula" for the realisation of the constitutional revision is the key that guarantees the sustainability of the constitution, and, in the same time, its evolution in relation to the socio-economic changes. They preview the formal procedures that should be adopted in order to realise the future constitutional changes.

This article stresses that the special formulas of the constitutional revision give a way, through which the fathers of the constitutions give the possibility to the future generations to adopt the constitution to their needs; but they also constitute the possibility for them to influence these changes and an effort to make sure that the "sons" can be the same as the "fathers".

Keywords: Formal Constitution, Constitutional Revision, Procedure.

INTRODUCTION

The "fathers" of the first formal constitutions believed in the eternity of their "creation". They based their belief on the claim that the stability of the constitution means its un-changeability. Although the constitution presents a sustainable text destined to resist time, the constitutional

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practice and history of several countries told us that a constitution cannot be definitive and it cannot resist to the evolution or changes of the society; thus it should be adopted, revised and supplemented. In this regard, the French Constitution of 1791st, article 2, provided that "*The National Constitutional Assembly declares that the Nation has the un-prescriptable right to modify its constitution; however, considering that, it is more conform to the national interest to use, within the means of the constitution itself, the right to modify the dispositions whose application would cause problems, it decrees that the modifications will be examined by a revision Assembly...*".

The possibility of the constitutions to be adapted to the new needs and requests of the social and political evolution is assured through the special provisions for the revision procedure on the constitutional text itself. This special disposition on constitutional revision provides the formal procedure/procedures by which application can be realized the future correction. That is why we call it "the formula of constitutional revision".

1. WHAT DOES IT MEAN TO REVISE A CONSTITUTION?

The idea of the un-changeability of the social-political system, consequently even the constitution, existed as a base for the earlier modern-liberal theories. At the end of the '20es of the XX Century, one of the most known authors of the Dutch jurisprudence, Carl Schmidt stated that "*Every constitution is based on a fundamental decision or compromise, thus it cannot be put into discussion through procedures that aim its revision*" (Cited by: Zaganjori, XH., 2002: 63). However the prevailing idea was that on the variability of the constitution, whose supporting voice in the same period was: Hans Kelzen – the most prominent representative of the *Normative School* – who argued that "*The democracy, by its very nature, is relative, and therefore the plurality has the right to make changes of any kind to which it agrees*" (Cited by: Zaganjori, XH., 2002: 63). The sustainability of the constitution should not mean its immutability, but it should be seen related to its rigidness or its ability to change the constitution in order to adapt it to the new conditions and circumstances.

Despite the possibility to change the constitution is previewed since its drafting process, it cannot and should not be subject of changes by a mere majority of political parties, nor should be changed without reaching a broad consensus across the political spectrum of the parliament. Therefore, there raises the question: how far can go, in achieving constitutional changes, a certain majority in parliament, which is in power either temporarily or for a fixed term?

This question gets essentially the same answer: "A constitution should give us guarantees for longevity and sustainability. Thus, it cannot be modified by the political will of the majority of the moment. The constitutional revision should be characterized and surrounded by prudence and care to highlight the fundamental aspect of the constitutional treaty". This is the reason why the drafters of the rigid constitution – mostly called as the fathers of the constitution – have provided

quite complex procedures within “the formula of constitutional revision”. They also set absolute limits in the revising process.

The concept of constitutional revision consists in a process of filling, changing and replacing certain provisions of the existing constitution, to adopt it to the new realities which could not be previewed during the drafting process. The constitutional revision is realised by following the rules and procedures laid down in “the formula of constitutional revision” within the Constitution in force. It is modified through the enforcement of the procedural provisions, which it contains for this purpose.

The constitutional revision proceeding – in the authentic sense of speech – is a matter of discussion only in the rigid constitutions, because the relevant text modifications in the flexible ones can be made anytime by following the ordinary legislative procedure.

The possibility of revision in the flexible constitutions through the ordinary legislative process makes them appear with a bigger “political” value compared to the other laws, having at maximum a guide-type character to the interpretation of common law, but not more. Actually, flexible constitutions are those of: Great Britain, New Zeeland, Monaco and, partly, Israel (whose constitution is composed of a set of basic laws) (Morbidelli G., Pegoraro L., Reposo A., Volpi M., 2004: 65).

Such constitution had also Luxembourg until 2003rd. The constitution in force in Luxemburg was that of 1868th revised several times in the years: 1919, 1948, 1956, 1972, 1979, 1983, 1988, 1989, 1994, 1996, 1997, 1998, 1999, 2000, 2003 (with amendments in 2003 changed the procedure for the revision of the constitution), 2004, 2005, 2006, 2007, 2008 and 2009 (Ministère d’Etat, Luxembourg, Service Central de Législation, 2009: 9-10). At first it was modified to be adapted to the conditions and needs of the time; this is the reason that explains why it is still into force, despite the revisions made, and is the law with greater legal power within the country. Notwithstanding that it has all the features of an ordinary law and the same legal consequences, it has features and consequences that make her rank upper within the legal system of norms (Prakke, L. and Kortmann, C., 2004: 545-547). Despite these changes, the Constitution is revised according to the rules of competence and procedure to be followed for an ordinary law, and it is equally binding as a common law, and is a written rule of positive law, which can serve as a basis to determine the legal procedures and can be directly applied by the courts (Prakke, L. and Kortmann, C., 2004: 548).

Generally the juridical doctrine considers as flexible even the unwritten constitutions and gives, as typical, the example of the United Kingdom, where the constitution can be changed completely by the parliament by voting a simple law, which would be able to give to the British a brand new written constitution (flexible or rigid one) since the next day. This analysis is completely accurate based on the right. Meanwhile, politically speaking, it will not be so easy to “break” a centuries-old tradition, to which seems to be the people already connected. There

should be quite specific circumstances in order to revise by law the British Constitution in order for it to be accepted without tensions (Ardant, P., 1994: 78). Indeed, if we remind the origins and adaptation of this constitution that did not materialize in a solemn and single text, but in a series of laws, incurred as a result of conflicts and tensions. These laws constitute an expression of the constitutional power seen as a typical will that sets some principles, regulatory of the public higher powers, and also customs, which are an expression of the history and traditions of the country, and to which corresponds the "reputation, honour and respect" of the citizens. This makes understandable how *the British Constitution is more rigid than those of the continent*; in order for it to be modified, there is needed more than formal aggravated procedures. It requires a broad consensus; furthermore, the newly revised dispositions should be accepted by the general spirit of the nation, who believes strongly in its institutions.

If the constitution is the result of a long natural process, it is evident that the same type of process should be followed to modify it. Furthermore, the Constitution British outlines as un-modifiable some main principles, represented by such laws as: *the Habeas corpus of* 1679th and *the Bill of Rights of 1689th* or some habits as *the judicial review* and *the sovereignty of the people* (Morbidelli G., Pegoraro L., Reposo A., Volpi M., 2004: 66). Thus, when we speak about the British constitution as more rigid than the continental-Europe ones, we consider the constitution in its material sense and not in the formal one. In fact, all the above-mentioned arguments constitute the spirit under which is felt and applied the British Constitution, and for which once used to read that the people "idolized" the customs or habits that underlie it.

Even the Swedish Constitution of 1974th [1], until 1979th, could be revised by simple legal procedure: double voting by a simple majority of the parliament; after the 1st voting the parliament was dissolute and there were announced elections for the new parliament. The formula of constitutional revision procedure was aggravated through compromise of parliamentarian political parties in 1979th, because the old revision procedure made possible constitutional changes each time there were general elections (Prakke, L. and Kortmann C., 2004: 808). By analizing this example of Sweedish Constitution, to determine its hardness or elasticity with the criteria of the mere provision of the formula of constitutional revision, we could conclude by mistake that it is a rigid constitution, only because of the fact that the formula of revision provides the distribution of the parliament upon its decision of constitutional revision (after the 1st voting). However, the analysis cannot be that simple, and the above-mentioned procedure of revision cannot be considered isolated. It should be seen in its complexity, especially if we consider the usage of parliamentary elections to enable the earlier planned revision of the constitution; while the request for simple parliamentarian majority in each voting, as in the case of ordinary legislative process, logically leads to the conclusion that the Swedish Constitution of the period 1974-1979 was a flexible one.

The situation of analysis is presented differently in the rigid constitutions, where the "aggravated" procedure of revision is previewed since its first adaption at the time of drafting the constitution, to which in the following we will refer as "the genetic moment of the constitution".

The subjects participating in the drafting of the constitution admit that their product is not permanent, since the moment at which they establish a new constitutional order and agree on the formula of constitutional revision. They accept the future changes, by condition that the future possible modifications must be done according to procedures that request the need of consensus by the same forces that gave birth to the constitution. Through the formula of constitutional revision, the fathers of the constitution really create a space for possible innovations in favour of the "children" for conformity, but their determination in advance for the procedure of the forthcoming revision (or the possibility of the future revision) also represents an attempt of the "fathers" to ensure that their children will be eternally similar to them.

2. REVISION FORMULA-S WITHIN FORMAL CONSTITUTIONS AND POSSIBLE WAY OUTS

Referring to the theory of material constitution, we can say that: the formal constitution in the possibility of relevant revision is placed in a derivation position in relation to the material constitution; it is processed by the dominant political parties in a particular historical moment in order to stabilize and provide legal character for its carrying values. From this stems the need to:

i) make as un-modifiable some aspects of the formal constitution that express the fundamental values that define the identity of the state;
ii) call the same dominant political forces (that were in the basis of the originary constitution or that represent the continuity in time of their expressed will) to participate in the formal constitutional modifications, which, however, aim to increase or maintain the same level of relationship between formal and material constitution (Groppi T., 2001: 28).

Despite accepting the possibility of changing or adapting the constitution to the new realities, the main purpose of the revision formula-s is the defence of the Constitution, the ensuring of its sustainability, which is expressed in hindering the possibility of revision implementation and to achieve the maximum consensus on the content of the aimed or targeted changes.

The provision of special aggravated procedures for the realisation of constitutional revision aims the achievements of the goals of rigid constitutions, and they are mostly seen as rules intended to govern the political struggle and relations between parliamentary majorities and minorities. Thus, the determination of the revision formula seems to be associated precisely with the genetic moment of drafting the constitutional pact and its features. Here we can remind, as example, the workings of the French Constituent Assembly for the French Constitution of 1791. During the discussions of August 31st, 1791, Antoine Barnave succeeded with his speech in defence of the revision formula that he proposed, because it featured effectiveness in relation to a specific objective: the prevention of majority political forces to take control of the game rules. Solutions that are commonly used to create this result usually are three:

i. qualified majority, greater than what is usually required to govern;

ii. exclusion from revision possibility of some parts of the constitution;

iii. a special procedure separated in more legislatures (as proposed by Barnave).

As it is apparent from the revision formula-s of the above three solutions, they are not equivalent ones, because they serve to different purposes[2] (Barnave, A., 1996: 48-49).

i. The first option – which requires a qualified majority to revise the constitution – still remains within the majority variant, but it is slightly "aggravated". This variant is usually associated with a correction of the system, which is the possible submission to referendum of the revision made. Among the negative effects of such a formula may be that a certain majority, which is in power in a certain moment of the history, can change the rules of the games in its favour, even for the future.

ii. The second option concerns the provision of explicit absolute restrictions made in the process of constitutional revision. The question that arises here is to determine which parts are excluded from the review process, and if they are essential or a large number of provisions aiming to ensure a rigid constitution. The revision of such dispositions is prohibited at any time and there is no way to lawfully overpass the prohibition set.

iii. The third option – a special procedure separated in more legislatures – seems aimed at the curbing of any initiative to revise the constitution. In this case, the elections held between the two legislatures take the importance of a referendum. The application of this formula is found in the Netherlands, where the revision procedure is as following: first, it is done the publication of a revised project voted by the Parliament; after the first approval the two chambers of Parliament are distributed; the new chambers approve the revision with a qualified majority of two -thirds vote.

The nowadays formal constitutions, except the above mentioned options, contain other sorts of "aggravated" procedures within respective formula-s of revision:

iv. discussion and approval of constitutional revision by special organs, such as: a Constitutional Convention or a National Assembly created by the union of the two chambers of Parliament;

v. approval by member states in some cases of revision of constitution in several federal states;

vi. final approval of the constitutional revision by facultative or obligatory referendum (Biscaretti di Ruffia, P., 1980: 576; Ardant, P., 1994:80; Crisafulli, V., 2001: 83-84).

Although these revision-formulas are created to prohibit the effortless revisions, they have their way outs found also in the constitutional practice. The simplest one to be over passed seems to be the revision formula that requests a qualified majority. Among the hardest ones are those that require a procedure divided in two legislatures and the imperative referendum.

In cases when it is required a procedure divided in two legislatures, there is always possibility that, whenever there is previewed a constitutional revision, it can be postponed in time till the next elections, such as the example of Luxembourg until 2003rd, that we argued in the first section of this paper.

In some other cases the procedure of obligatory referendum can be over passed if the constitutional amendments are approved by supper-qualified majority. That is the case of the French Constitution, article 89 paragraph 3, and the case of the Italian Constitution, article 138 paragraph 3: in the first case the constitutional amendments does not pass to referendum if the President decides for them to be approved by the Congress (a joint session of both chambers of the Parliament), where is required a majority of 3/5 of the expressed votes; the Italian Constitution previews that there will be no need of referendum if the constitutional amendments are approved by a majority of 2/3 in each chamber of the Parliament.

Analyzing the formulas of constitutional revision, in the light of the forces that lie under the constitution, it seems important the difference between the constitution as a normative act (as unilateral legal act) and the constitution as a contract (as multilateral legal act) (Groppi, T., 2001: 30). In the first case, the influence of the forces that created and defined the constitution is not quite evident, even their request to participate in the future revisions; meanwhile, in the second case, it is easier to identify within the revision formulas the requirements for participation in the next revision procedure by the forces that had consented themselves - through adherence to the fundamental pact at the time of establishment of the certain constitutional legal order – and, indeed, it could be argued that rigidity is a result of the specific characteristics of contemporary contracting.

However, the main issue to be observed is connected to the safeguard of the core of the constitution. On this issue Häberle, a representative of the German School of Law, holds a particularly interesting position "... all citizens are 'guards' of the constitution. This task – which according to the earlier doctrines of state was left to a president or the later ones to the constitutional courts – from the perspective of the constitutional doctrine is not the monopoly of a single person or a single power, but an issue that belongs to everyone: all citizens and groups who, for example, initiate the issues of constitutional legality; all the organs of state, that are related to the constitution, should 'preserve' it in the respective fields of competence, even develop it further (Gambino S. and D'Ignazio G., 2007: 205). Through this argumentation, Häberle connects "*the guarding of the constitution*" with "*its further development*". Thus, he accepts that the concepts of sustainability and guard of the constitution are related to its possibility of development, which is made possible through, and since, the provision of the revision formula within the constitution.

An issue to be mentioned in the contemporaneous constitutional practise of the states is that of the new constitutions of the former communist countries in the post transition period, which are all constitutions of the most recent years. These constitutions are the result of compromises reached between the new political forces and the former regime one. Thus, in the constitution revision procedures generally dominate the request for a qualified majority, because the old regime political forces does not completely disappear, but they continue to participate in the political life of the country and, in some cases, became defining ones for the settlement of the new legal order.

CONCLUSIONS

In conclusion, following the logic of the above treatment, we notice that the chosen revision formulas within the constitutions are created *by* and *for* the subjects that are at the origin of the constitution and are, therefore, linked to the genetic moment of creating the constitution. Meanwhile in practice, it is acceptable to observe any change in phase between the chosen formula and the concrete political reality. The rigidity of the constitution is a relative concept, variable in time and space, although within the same legal order, since it is quite possible that the most qualified and impossible procedures to be achieved in a certain time, can become feasible in another later time, as a consequence of the evolution of the political system or the changes of the electoral system, and, thus, the revision of the constitution is facilitated or has become feasible.

NOTES

1. The sources of Swedish constitutional law are four basic laws: *The Instrument of Government* of 1974th, *The Succession Act* of 1810th, *The Freedom of Press Act* of 1949th, and *The Act of Freedom of Expression through radio, television, film and other contemporary media* of 1991st. Officially there is no hierarchy between these four laws, but *"The Instrument of Government"* acts as the *"Constitution"*.
2. Some of the modern constitutions, because of their respective history, have strongly debated the issue of "guarding" the constitution, and, thus, have adapted a combination of all the 3 solutions proposed by Barnave, such as the example of Greek Constitution of 1975th in article 110.

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