

The End of Binarism in Constitutional Thinking?

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The core of Albert’s article is a suggestive invitation to think—freely and courageously. Remember the days, he says, when the idea of an “unconstitutional constitutional amendment” sounded like nonsense upon stilts. And contrast it with the current scenario, in which review and invalidation of amendments is an ordinary incidence of legal life in many countries, analyzed by an entirely new field of scholarly work. Would there be a similar path towards the normalization of the idea of “unconstitutional constitution”? Can we think of cases where this expression is meaningful? Are the two ideas the same kind of idea? Can we learn something about unconstitutional amendments by looking into the broader, heavier idea of an “unconstitutional constitution”? What can we learn, more generally, from musing around such an idea?

Albert contends his analysis explores different meanings of unconstitutionality, running along “at once competing and complementary axes of constitutional formality, constitutional values, constitutional democracy, and constitutional legitimacy.”¹ Yet, though he certainly presupposes those different meanings in the analysis of the four constitutions—US, South Africa, Canada and Mexico—his piece does not deepen in conceptual decantation. He distinguishes, for instance, between intra-systemic and extra-systemic dimensions of unconstitutionality,² but he does not push hard the analytical carving out, to the benefit of the narrative fluidity he pursues to more effectively trigger reflection.³

I believe more conceptual work along those preliminary lines can be illuminating, and that Albert’s description of the four cases provides, precisely, the basis to advance it. In my view, an exercise in reflective equilibrium between the concept of constitutionality (and unconstitutionality) and the four instances of use he presents delivers a scenario in which this notion is best viewed as a question of degree, of points along a continuum. This is hardly captured by a terminology that invokes a rigid binary opposition: constitutionality/unconstitutionality. And while one could think

† FILL IN BIOGRAPHICAL FOOTNOTE.

1. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT’L L.J. 169 (2017).

2. *See id.* at 19697.

3. *Id.*

this opposition retains a strong grip on our legal imagination, I will suggest that we have actually abandoned binarism in constitutional thinking more deeply and definitely than we might wish to admit. If in some domains discarding binarism still seems hard to swallow, it is because of certain legal and political functions the Constitution fulfills. How to square proper attention to these functions with our unmistakably expanded conceptual usages is something that Albert's piece prompts us to work on.

I. Dimensions of Unconstitutionality

Since Walter Bryce Gallie wrote his hyper-cited article on “essentially contested concepts” we know there are instances where people deeply and permanently disagree not only about the reach or the implications of certain words, but about the very way the description of their meaning should be attempted, and about how the definitional properties of the concept behind them should be appraised.⁴ “Constitution” and the corresponding adjectives—“constitutional” and “unconstitutional”—probably qualify as members of the category. But Albert's exploration of the four cases in which it is in some way meaningful to speak of an “unconstitutional constitution” rather suggests that our usage of the notion should not be pictured as a complete chaos, but as a basket filled with a limited assortment of different kinds of goods. We do not have a single understanding of constitutionality (and unconstitutionality), but neither an infinite number of them. People will not cease to discuss what conception of the constitution should be adopted for one or another purpose, but there are four or five understandings that have sort of “stuck” collectively: we, as a legal community, recognize and operate with them on an ordinary basis.

The first one equates “constitutionality” with *respect for the rules of recognition and change*. From this perspective—of unmistakable Kelsenian and Hartian overtones—the constitution contains the criteria which determine what counts as law (and what counts as the constitution) whenever certain steps are followed. The US Constitution and the Mexican 1917 Constitution can be said to be unconstitutional in this sense, because they did not fully respect the rules of change established by the preceding Constitution—if we sidestep for the sake of the analysis the scholarly debate that Albert recounts in his piece and assume the Articles of Confederation were one. The South African Constitution and the Canadian one, by contrast, did not break the rules of recognition and change—South Africa simply exemplifies a case where the rules of change crafted a two-step process that included judicial review bent on checking whether the principles set down in the founding, politically negotiated document had been respected by the Interim Constitution.

The second one equates “constitutionality” with *respect for certain*

4. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 165, 197–98 (1956). For an interesting analysis of Gallie's argument and its many repercussions in social science debates, see David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, *Essentially Contested Concepts: Debates and Applications*, 11 J. POL. IDEOLOGIES 211, 211–12 (2006).

substantive contents or institutional arrangements—for instance, fundamental rights and the division of powers. This conception is uninteresting for Albert because he explicitly contends that he focuses only on liberal democratic constitutions, and so the four constitutions are obviously constitutional under this understanding. But it is truly central in new areas of constitutional analysis, and therefore very relevant for the point about conceptual usage I am trying to make. In the dynamic domain of “global constitutionalism,” for instance, the constitutionality element in the transnational sphere is tracked down through resort to certain basic principles of justification. The “constitutional frame of reference,” according to the editors of the leading journal in the field, typically includes what Kumm calls “the trinitarian mantra of constitutional faith”: human rights, democracy, and the rule of law.⁵ There are weaker versions of the substantive component, of course—for instance, those that associate constitutionality to the presence of certain structures and parameters, even if they do not match those definitional of democracy and the rule of law).

The third one equates “constitutionality” with the idea of *prospective collective self-rule*. The Constitution must be a framework providing for continued, evolving collective political agency. Present generations must feel the Constitution makes space for them to rule themselves according to their wishes and circumstances, often different from those in the past. This is the sense in which the Canadian constitution seems, as Albert remarks, problematic. A Constitution that explicitly forbids change, or sets an institutional frame that, in interaction with the political and social system, effectively petrifies a text, could not be really said to be a Constitution.

Finally, the fourth matches “constitutionality” with the idea of *popular authorship*, understood in the strongest sense: basic norms that are the product of the *demos*, the will of the People. This is the reason why the Constitutions of the US, Canada and South Africa are said to be “constitutions” after all, and this is the reason why the constitution of the rebels imagined by Article 136 of the Mexican Constitution would not be recognized as such. The extraordinary weight of this element in contemporary constitutional thought is duly underlined throughout Albert’s article.

The four properties target different temporal moments—some sources of unconstitutionality arise when the constitution is born, others only when it is operating—and exhibit two prominent features: they are conceptually distinct from one another, and they present themselves in real cases in different manners and degrees. The concepts of constitutionality/unconstitutionality experience both “combinatory vagueness” and “reference vagueness.” The notion of combinatory vagueness, embedded in the tradition of “family resemblances” and “cluster concepts,” obtains in cases where concepts are

5. Mathias Kumm, *An Integrative Theory of Global Public Law: Cosmopolitan, Pluralist, Public Reason Oriented* (2011) https://www.researchgate.net/publication/265437302_AN_INTEGRATIVE_THEORY_OF_GLOBAL_PUBLIC_LAW_COSMOPOLITAN_PLURALIST_PUBLIC_REASON_ORIENTED; Mathias Kumm, Anthony F. Lang, James Tully & Antje Wiener, *How large is the world of global constitutionalism?*, 3 GLOBAL CONSTITUTIONALISM 1, 1–8 (2014).

associated to a weighted set of criteria, no single one of them being either necessary or sufficient for its proper application.⁶ The notion of reference vagueness draws attention to the fact the properties associated to the concept are present in different measures or degrees in reality; disagreements may therefore arise not about what the property means, but about whether a situation of the world can be considered an instantiation of the property. As Moreso contends in an article that inspires next section's title, far more concepts are subject to incommensurate multidimensionality and reference vagueness than we might think.⁷

II. Constitutionalize Me a Little: Non-Binary Conceptual Backdrops

The combinatory feature both confirms and qualifies Albert's contentions. It is true that in the four cases it is meaningful to speak of a "constitutional constitution" because of its democratic foundations. But under prevailing usages, I contend, we would be prepared to do the same as soon as a sufficient number of dimensions obtain. The constitution of the US does not respect the rules of change, but derives from an extraordinary exercise of popular engagement and its contents match the constitutional trinity—more than enough. The South African Interim Constitution infringed certain substantive principles set down in the political negotiations advanced in the name of the people, but endured the Court's review and the corresponding modifications. The 1996 text is therefore constitutional because of its origins, because of its contents, and because it ultimately respected the rules of change—more than enough. The Canadian Constitution frustrates prospective collective self-rule, but preserves the political power of the founding nations (the pluralistic Canadian "people"), its contents are kosher, and it did not come into being by breaking the rules—more than enough. In short: as soon there are enough goodies in the basket, no matter which exact goodies they are, constitutionality obtains. The overall conceptual performance is one in whose context it is meaningful to speak of *strong* or *weak constitutionality*, and of different *qualities* of constitutionality, more generally.

Non-binarism is sort of reinforced by the second feature: the vagueness of the concept's reference. Consider respect for the pre-established rules of change in the US or the Mexican cases. While the Querétaro Convention gathered to amend the 1857 constitution, the process did not follow the

6. FREDERICK SCHAUER, *THE FORCE OF LAW*, 38–39 (2015); *see also* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2009) (discussing family resemblances); MAX BLACK, *PROBLEMS OF ANALYSIS: PHILOSOPHICAL ESSAYS* (1954); and JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969) (discussing cluster concepts).

7. José Juan Moreso, *Marry Me a Little. How Much Precision is Enough in Law?*, DROIT ET PHILOSOPHIE, https://www.academia.edu/23375579/Marry_me_a_little_How_much_Precision_is_enough_in_Law. See the original distinction between degree (or soritical) vagueness and combinatory vagueness in William Alston, *Vagueness*, *THE ENCYCLOPAEDIA OF PHILOSOPHY* (1967).

established amendment rules and delivered a qualitatively different product.⁸ The US story, on its part, is spelled out in detail by Albert. Cases of procedural perfection or utterly new beginnings are rare. What we found most often are intermediate, gray-zone cases, where the constitution is a product of a formalized process disciplined by law, though not exactly the one pre-designed by the rules of change.

Consider Colombia. Under the 1886 Constitution, constitutional changes could only come from a special law, adopted after several turns by consecutive legislatures; but students successfully distributed a slip asking for a constitutional assembly, which many people included in the next ballot. The president then agreed to include an official slip in the presidential election and, after the option gained majority support, he set the constitutional process in motion in an emergency decree. And the Supreme Court, on review, declared the decree valid—except for the limits it tried to impose to the constitution-making body.⁹ Or consider the 1853 Constitution of Argentina, which set in the original version of its Article 30 a ten-year amendment moratorium. Yet the text was reformed in 1860, and most people now speak of “the 1853/60 Constitution,” while debate remains on the extent to which the rules of change were violated—without such a debate putting in question, in any case, the undisputable constitutional character of the resulting document.¹⁰

The same occurs with the degree of popular authorship, the degree of dynamic collective self-rule, the degree of procedural correction, and the degree of respect for substantive principles and institutions. There will be central cases of constitutionality and unconstitutionality and many peripheral ones where we will not be certain as to whether and to what extent the conditions for the concept to apply obtain. Note, however, that if reference vagueness were the only problem, there would be no reason to abandon binarism. Reference vagueness is extremely common, and it may perfectly accompany concepts whose defining properties we can identify crystal clear. If there were only reference vagueness under way, we would not feel we the need for an intermediate concept. We do feel this need here because of the combinatory element, and also—and importantly—because each of the properties that combines or alternates (“prospective self-rule,” “rule of law”) is often hard to grasp or profoundly contested.

8. IGNACIO MARVÁN, *CÓMO HICIERON LA CONSTITUCIÓN DE 1917* 60–67 (2017).

9. I follow here Juan F. González Bertomeu’s account of the Colombian events. See Juan F. González Bertomeu, *Relying on the Vibe of the Thing: The Colombian Constitutional Court’s Doctrine on the Substitution of the Constitution*, 2–3 (working paper on file with author).

10. The 1860 constitutional reform was done when the province of Buenos Aires, which had remained outside the 1853 constitutional pact, finally joined the rest of the country. Some authors contend that 1860 represents a breaking of the rules set in 1853, while others argue that the 1853 constitutional process was not actually completed until 1860 (for this reason, they call the Constitution “the 1853/60 Constitution”). For references of views on each side of the debate, see Juan F. González Bertomeu, *The Constitution of Argentina* in CONRADO HÜBNER MENDES AND ROBERTO GARGARELLA, *THE OXFORD HANDBOOK OF LATIN AMERICAN CONSTITUTIONAL LAW* (forthcoming, 2018). The ten-year moratorium provision was eliminated from Article 30 in 1860.

III. Is Gradualness in Constitutional Thinking a Problem?

Constitutionality and unconstitutionality no longer evoke, in sum, a binary scenario. Albert's exploration of the different ways in which speaking of an unconstitutional constitution is meaningful suggests the time might have come to imagine the notion as continuum. The process strikes me as analogous to the one other important notions have undergone. Briefly reviewing these other processes may help better visualize what is going on here.

Take democracy and its associated adjectives—also classic *personages* in talk about essentially contested concepts. While the debate among different conceptions of democracy will never fade away, and scholars will continue to stipulate their preferred definitions, there is a multidimensional image of the concept that has definitely stuck up in the collective and prompts conversation about levels and degrees. Consider “democratic decay” as an emerging field in constitutional theory and politics,¹¹ or the prominence of “quality of democracy” studies in political science. For Diamond and Morlino, for instance, there are eight dimensions to democratic quality: five procedural (rule of law, political participation, electoral competition, and vertical, and horizontal accountability), two substantive (respect for civil and political freedoms, and the progressive implementation of greater political equality), and one (responsiveness) that focuses on results.¹² As these authors remark, “[t]he multidimensional nature of our framework . . . implies a pluralist notion of democratic quality . . . [T]here are not only dense linkages but also trade-offs and tensions among the various dimensions of democratic quality, and democracies will differ in the normative weights they place on these various dimensions . . . There is no objective way of deriving a single framework of democratic quality, right and true for all societies.”¹³

Or take, well, the notion of “unconstitutional constitutional amendment.” The booming of scholarly work in the area has increased our sensitivity for the shadows of grey. Although we recognize as *prima facie* sound the distinction between procedural and substantive flaws in amendment-making, for instance, we know that the decision as to how deep we will scan procedural correction is, inescapably, a substantive one, and we face hypothesis hard to classify. What does it mean, to take something as “discussed and approved by a legislature”? What sort of procedural

11. See Tom Gerald Daly, *Time to View Democratic Decay as a Unified Research Field?*, INT'L J. CONST. L. BLOG (Sept. 30, 2016) <http://www.iconnectblog.com/2016/09/time-to-view-democratic-decay-as-a-unified-research-field/> [<https://perma.cc/C2XW-HZPW>]; Tom Gerald Daly, *Democratic Decay in 'Keystone' Democracies: The Real Threat to Global Constitutionalism?* INT'L J. CONST. L. BLOG, (May 10, 2017) [<https://perma.cc/CW8L-XZ47>]; and Tom Gerald Daly, *Public Law and the Puzzle of Democratic Decay in Brazil*, Panel on Law and Policy in Latin America (Jun. 20–23, 2017) [<https://perma.cc/7YWF-HYXN>].

12. Larry Diamond & Leonardo Morlino, *The Quality of Democracy: An Overview*, J. DEMOCRACY 15 (5), Oct. 2014, 22. See also GUILLERMO O'DONNELL, JORGE VARGAS CULLELL & OSWALDO M. IAZZETTA (eds.), *THE QUALITY OF DEMOCRACY: THEORY AND APPLICATIONS* (2004); DANIEL BRINKS, MARCELO LEIRAS & SCOTT MAINWARING (eds.) *REFLECTIONS ON UNEVEN DEMOCRACIES: THE LEGACY OF GUILLERMO O'DONNELL* (2014).

13. See Diamond & Morlino, *supra* note 12.

infirmities should amount to a procedural infraction? Is the famous “substitution” doctrine of the Colombian Constitutional Court procedural or substantive? In the context of this doctrine, procedural regularity includes both respect for the rules of competence and for the rules of procedure—not only the latter—and inquiry into competence leads to inquiry into which authorities have jurisdiction to “amend” the Constitution and which ones to “substitute” it, something the Court operationalizes through a “substitution test” whose substantive components are unmistakable. Against a background marked by the binarism that opposes formal and substantive flaws, the substitution doctrine makes a *tertium genus* suddenly imaginable. Amendment irregularities can be now imagined as organized along a first continuum that calibers the relative seriousness of the irregularity, in combination with a second one marking the transit from procedure to substance. Consider, finally, the concept of constitutional “dismemberment,” as different from both “amendment” and “new constitution,” coined precisely by Richard Albert in view of the shortcomings of trying to describe contemporary realities with the traditional terminology, which therefore emerges as a truly paradigmatic third, in-between concept.¹⁴

In my view, burying binarism and embracing the idea that constitutions may be strongly or weakly constitutional is promising. It may help, for instance, sharpen our sensitivity for things that are already salient in contemporary constitutional practice, and trigger new strands of analysis around them. Take for instance what David Landau calls instances of “abusive constitutionalism,” defined as situations where democratically elected actors use legitimate constitutional tools—notably amendment and replacement of constitutions—to erode democracy.¹⁵ Or think about the sort of phenomena behind recent warnings against “de-constitutionalization” in Turkey.¹⁶ Or think of poor Mexican constitution, which in Article 136 identifies the enemies of the past—attacks by rebels, by extra-systemic agents—but fails to protect itself from intra-systemic attacks like the one implied in a pattern of hyper-reformism—700 amendments and counting—which seriously compromises the legal and political functions of the Constitution.¹⁷ An additional advantage of conquering the middle terrain is that we gain tools not to give the constitutional “pass” so easily: “constitutional” is an adjective with high positive emotive charge and a badge

14. Richard Albert, *Constitutional Amendment and Dismemberment*, 42 YALE J. INT’L L. 4 (forthcoming 2018, available at papers.ssrn.com). For Albert, an “amendment” is “an adjustment made to better achieve the purpose of the existing constitution. An amendment continues the constitution-making project.” A “dismemberment” by contrast “is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose . . . [It] alters the identity, the fundamental values or the architecture of the Constitution.”

15. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

16. Ali Acar, *De-constitutionalism in Turkey?*, INT’L J. CONST. L. BLOG (May 19, 2016), <http://www.iconnectblog.com/2016/05/deconstitutionalism-in-turkey/> [<https://perma.cc/9JXV-HCHA>].

17. Francisca Pou Giménez & Andrea Pozas-Loyo, *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition while Blocking Democratic Consolidation*.

of legitimacy, and it should be administered with care. Other advantages are those that naturally accompany our struggling with vague words: we deliberate and think! As has been remarked, “incommensurate multidimensionality” and operating with soft-boundary law is often valuable, since it triggers (and guides) practical deliberation, and helps us apply the law with flexibility and adaptability.¹⁸

For sure, binarism has played an absolutely crucial function in the legal system: identifying what is (valid) law and what is not. And this may be a source of difficulties. But contemporary debates on legal pluralism—in both its infra- and its supra-national manifestations—the increasing futility of efforts at signaling a single institution as holding the “final word” in adjudication, and the associated concepts of pluralist or “multilevel constitutionalism,”¹⁹ are all developments that erode binarism even at that level. At any rate, the dilemma for constitutional lawyers is probably the option between sticking to a uni-dimensional concept of constitutionality, associating it with respect for the rules of recognition and change, but foregoing participation in a number of wider discussions that are of profound relevance to contemporary constitutionalism, or rather entering these discussions at the prize of dealing with multidimensional complexity. The research agenda that Richard Albert’s piece helps us catch sight of is, therefore, truly complex and far-reaching. It is, however, a complexity that must be addressed, not ignored.

18. See Moreso, *supra* note 7.

19. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutionalism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM, 53–90 (2012); Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter American Court of Human Rights: A Rejoinder to Paolo Carozza and Pablo González Domínguez*, 15 INT’L J. CONST. L. 443–46 (2017).