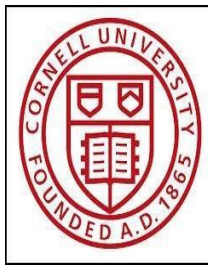
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Comment on Constitutions and their Democratic Foundations—Richard Albert

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Richard Albert's piece on *Four Unconstitutional Constitutions and their Democratic Foundations* makes us take the fascinating question of unconstitutional constitutional amendments to a whole new level. Is it possible for a constitution to be unconstitutional? And if so, could that constitution still be legitimate? Albert presents four case studies to develop four conceptions of unconstitutionality: the second founding of the United States, the South African constitution-making process of the early 90's, the constructive unamendability of the Canadian constitution, and the inviolability of the Mexican constitution. Clearly saying his takeaway is not that these constitutions should be declared unconstitutional, Professor Albert invites us to think about what it might mean to describe a constitution as unconstitutional.[1] In this context, Albert raises different arguments to consider the unconstitutionality of each constitution to then offer reasons why despite their unconstitutionality the four constitutions trace their roots to democratic foundations and therefore are legitimate.

The unconstitutionality of these four constitutions derives from different circumstances. First, the U.S. Constitution of 1789 is unconstitutional from its origin in that the process that generated it was not in observance of the onerous amendment rule established in the Articles of Confederation, but it is still legitimate because the process of popular ratification let the American people express their consent and give the document a higher authority.[2] Second, the unconstitutionality of the South African constitution derives from the intervention of the Supreme Court in certifying the constitutionality of the new draft constitution in that said intervention is inconsistent with the idea of the people as sovereign and its right to self-determination. Nevertheless, the

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1. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 171 (2016).

2. *Id.* at 17576.

constitution is legitimate in that the intervention of the Supreme Court was part of the political agreement for the transition to democracy and therefore can be understood as grounded in the democratic roots of popular sovereignty. In other words, although the court's intervention was unconstitutional, the Constitution is legitimate because while evaluating the constitutionality of the new constitution, the South African court was acting under the instruction and with the authorization of the political parties and ultimately of the people.[3] Third, the unconstitutionality of the Canadian constitution derives from its constructive unamendability, which is "not a legal fact but rather a political reality that prevents formal change"[4]; and, its legitimacy derives from that same political climate preventing constitutional amendments in the sense that it is protecting the constitution from changes that have not previously taken into account all Canada's voices.[5] Finally, the conception of unconstitutionality in the Mexican case is originated from the constitutional prohibition of a new constitution born of rebellion, established in article 136. According to this article, Albert argues, a new constitution would be unconstitutional but still could be legitimate if we interpret the provisions in light of the alternative reading he offers. In his view, although Article 136 denies the sovereign right of the people to revolution and self-determination, the prohibition of a new constitution born of rebellion should be understood as the recognition of the people's right to resist an illegitimate constitution and the urge to restore the legitimate order by all necessary means, including the use of arms.[6]

Although Professor Albert states his takeaway is not that these constitutions should be declared unconstitutional, his method of analysis and focus on the legitimacy of the different constitutions are revealing regarding the implications of describing a constitution as unconstitutional. Had any of these constitutions not been legitimate, would that mean they would have to be declared unconstitutional? As we know, the unconstitutionality of norms has significant implications in positive law. The concept of an unconstitutional but legitimate constitution could serve as grounds to declare the constitutionality of a constitution. But for this to work, it is crucial to have clarity on when we would face an unconstitutional constitution. In this commentary, I would like to focus on that question.

Based on the four examples offered by Professor Albert, the U.S. and South African cases would be clear cases in which a constitution is, in fact, unconstitutional albeit legitimate. The U.S. illustrates a case in which the unconstitutional violation of formal amendment rules is surmounted by the expression of popular consent. And, the South African case shows one in which the unconstitutional intervention of the Court in certifying the constitutionality of the Constitution is overcome by the fact that said intervention was ultimately authorized by the people. Yet, the unconstitutionality and legitimacy conceptions in the Canadian and Mexican

3. *Id.* at 17980.
4. *Id.* at 184.
5. *Id.* at 186.
6. *Id.* at 195.

cases are less clear.

Canada

As mentioned before, according to Professor Albert, the unconstitutionality of the Canadian constitution stems from its constructive unamendability—which is a functional rather than a formal unconstitutionality derived from the political climate that prevents amending the constitution. The question, in this context, is if the political climate can make the constitution unconstitutional.

Although I agree with the problems formal and constructive unamendability entail for democratic constitutionalism, I am not entirely persuaded about the qualification of the Canadian constitution as unconstitutional due to its constructive unamendability. Even though the effects of formal and constructive unamendability can be regarded as the same, its cause it is not. The former is the result of an explicit constitutional provision that forbids amendment while the latter is the product of a political environment that could change at any moment. Distinguishing between these forms of unamendability and its causes is crucial in determining whether a constitutional provision or a constitution itself can be regarded as unconstitutional. Whereas formal unamendability is clearly against principles of democratic constitutionalism, constructive unamendability is not. In fact, the Canadian constructive unamendability could be read in line with democratic principles.

The Canadian constitution does not prohibit constitutional amendments. Quite the contrary, it establishes various procedures to amend different categories of provisions "and each imposing a higher threshold for an amendment where the degree of entrenchment reflects the importance of the amendable matter".[7] That is, in broad terms, the aim of the Canadian constitutional amendment system is to make certain parts of the constitution harder to amend than others.[8] In this context, failed attempts to amend the parts of the constitution with heightened protection could also be understood as the successful functioning of the provisions that are supposed to protect precisely those parts of the constitution. Accordingly, constructive unamendability could very well be understood as the successful functioning of the Canadian constitutional amendment system, where those sections with heightened protection would only be possible to amend in extraordinary circumstances that have not yet been met. Therefore, one could argue, the Canadian Constitution is being protected not by circumstantial factors of the current political climate but by the effectiveness of the constitutional design chosen by the constitutional drafters.

Alternatively, one could argue the thresholds required to guarantee a heightened protection of the constitution are so high that it is virtually

7. *Id.* at 184.

8. For a general overview of the function of amendment rules see generally Donald Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION—THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63–87 (Sanford Levinson ed., 1995*)*; *see also* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, MCGILL L.J. 225 (2013).

impossible to meet them and therefore impossible to amend the constitution. But in this case, we would be arguing a defect on the design of the amendment rules, not a political reality that prevents formal change. In other words, in such a case we would be closer to formal unamendability rather than constructive unamendability. Additionally, note that in this case, we would only be arguing the unconstitutionality of a single provision and not the constitution as a whole.

In sum, none of these readings of the Canadian constructive unamendability would allow saying that the Canadian constitution is unconstitutional. Constructive unamendability could be understood as the success of the entrenchment rules. Even if we argue that the constitutional design of the amendment rules is unconstitutional, that would not make the whole constitution unconstitutional.

Mexico

Regarding the Mexican case, Professor Albert develops the fourth conception of an unconstitutional constitution based on Article 136 of the Mexican Constitution, which prohibits a new constitution born of rebellion as follows:

> This Constitution shall not lose force and effect, even if its observance is interrupted by a rebellion. In the event that a government, whose principles are contrary to those that are sanctioned herein, is established through any public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who have taken part in the government emanating from the rebellion, as well as those who have cooperated with such persons, shall be judged in accordance with this Constitution and the laws derived from it.[9]

In Professor Albert's view, this provision is problematic vis-à-vis a hypothetical new constitution because it creates a presumption against the latter. In short, the constitutional provision denies the right to revolution and self-determination. Still, in light of this provision, a new constitution would be unconstitutional but legitimate based on an alternative reading of Article 136. In Albert's words:

> [w]e should understand the Constitution's prohibition on a new constitution born of rebellion as the Constitution's recognition of the people's right of revolution. Where a rebellion takes control of the government and entrenches a new but illegitimate constitutional order, the Constitution urges the people to restore it by all necessary means, with recourse to arms if necessary.[10]

Unlike the other three cases, this case deals with a constitutional provision that is currently in force. It is neither a formal violation of the amendment rules of a constitution that has been replaced, nor the intervention of a court certifying the constitutionality of a constitution or the political state of affairs preventing the formal amendment of a constitution. The peculiar Mexican provision on the *inviolability of the constitution* poses at least two possibilities of unconstitutionality: the unconstitutionality of a potential new constitution; and, most importantly, the unconstitutionality of the provision

9. MEXICO CONST., tit. IX, art. 136 (1917).
10. *See* Albert, *supra* note 1, at 195.

establishing the prohibition of a new constitution. While the former possibility, in the end, is a matter of fact, the latter is a legal one. To develop the fourth concept of unconstitutionality, Professor Albert mainly focus on the unconstitutionality of a hypothetical new constitution and redeems its legitimacy by offering a reading of Article 136 that reconciles the text of the prohibition of a new constitution with the natural right to revolution.[11] However, in my view, Article 136 cannot be understood as the recognition of the right to revolution and self-determination.

Although we would agree in that a new constitution would be legitimate, it is not for the same reasons. I disagree in that the potential new constitution would be unconstitutional because, in my view, article 136 is unconstitutional. Should my reading be correct, the Mexican case would not fit in Albert's concept of an unconstitutional constitution because the unconstitutionality of Article 136 would neither make the Constitution of 1917 unconstitutional nor the potential new constitution born of rebellion.

The question here is if we can actually interpret Article 136 of the Mexican Constitution is at its core about the right of revolution and, most importantly, about the right to self-determination if the only legitimate outcome is the restoration of the threatened regime. Can we indeed talk about a revolution if the only legitimate aim is the preservation of the status quo? I think the answer is no. In fact, we have reasons to believe this article enshrines the exact opposite aim. This provision illustrates a way in which political actors were trying to preserve the power constellation of that moment in time and deter any form of resistance to the new regime.

As Professor Albert correctly asserts, "rebellion is . . . an historical problem that Mexican political actors sought to address in constitutional design in order to foster stable constitutionalism."[12] The prohibition of a new constitution born of rebellion established in Article 136 reflects Mexico's long-standing constitutional history of political instability due to continuous rebellions. In fact, it seems that Venustiano Carranza, one of the most powerful actors during the revolution, understood this well when deciding to frame the revolutionary movement as one to restore the constitution of 1857 and present the constitution project of 1917 as a set of amendments to the former.[13] Perhaps more importantly, the reason to maintain the prohibition of a new constitution in the constitution of 1917 was the everlasting tension between the different revolutionary factions, which was certainly not going to dissipate with the enactment of the constitution of 1917. For example, the establishment of the constitutional framework for the distribution of land property in Article 27 was a clear victory of the *Zapatista* faction vis-à-vis the interests of the *Carrancistas*;[14] yet, its implementation still remained to

11. *Id.*

12. *Id.* at 192.

13. *See* ULISES SCHMILL, EL SISTEMA DE LA CONSTITUCIÓN MEXICANA (1st ed. 1971).

14. For an in-depth analysis on the origin of this and other provisions of the constitutions of 1917 see Pastor Rouaix, *Génesis de los artículos 27 y 123 de la Constitución política de 1917*, Puebla, 1945; *Diario de los debates del congreso constituyente*, Imprenta de la Cámara de Diputados, 1917; and Emilio Kouri, La Promesa Agraria del Articulo 27, Revista Nexos (Feb. 1, 2017),

be seen. Naturally, social and political conflict was an ever-present threat. Therefore, it seems plausible to conclude the aim of article 136 was to deter any form of resistance against the regime. Enshrining the resistance to rebellion in Article 136 was preemptively delegitimizing any mobilization that could threaten the stability of the regime. Whether the provision was a mere parchment barrier or not would be a different question, but the point is that in such a context it is hard to imagine Article 136 was included to be read in light of the right of revolution and self-determination.

In short, in my view, rather than protecting the right to revolution, the intention of the constitutional drafters was to delegitimize and deter any potential resistance against the regime that was to be settled. In this context, the reading of Article 136 offered by Professor Albert is not plausible for two related reasons. First, because it is hard to sustain that the provision is about the right to revolution when the only legitimate aim is to preserve the status quo; and, second, because there are reasons to believe the intention of the drafters was to deter any form of popular resistance against the new regime.

Should my reading of Article 136 be correct, where would this leave us concerning the question of an unconstitutional constitution? The answer is twofold, one related to the constitution of 1917, and the other related to a potential new constitution out of rebellion.

First, we would necessarily have to conclude that article 136 is incompatible with the natural right to revolution and the right of self-determination established in Article 39 of the Mexican constitution.[15] This would not make the Mexican constitution unconstitutional, but only because of the explicit recognition of the right of self-determination in Article 39. Had this provision not been included in the constitutional text, one could argue the illegitimate and undemocratic character of the Mexican constitution of 1917 for the outright denial of the people's right to choose and change their form government and their right to resist. This denial would make the constitution not unamendable, but irreplaceable.

Second, given the incompatibility of article 136 with the right to revolution and self-determination, the constitutionality of a potential new constitution would not be affected by said provision. The constitutionality and legitimacy of a new constitution would not need to be justified in light of article 136 but rather in its own merits. And even if we wanted to insist in evaluating its constitutionality and legitimacy in light of the constitution of 1917, said evaluation should have to be done based on the right to self-determination recognized in article 39. In light of this Article, a new constitution could not be interpreted as anything else but the legitimate exercise of the constitutional right of the people to choose their form of government.

In conclusion, Professor Albert's analysis opens a fascinating conceptual

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http://www.nexos.com.mx/?p=31269#ftnref4 [https://perma.cc/3Z2Z-ZALK].

15. Article 39 of the Mexican Constitution explicitly recognizes the right to self-determination as follows: "The national sovereignty is vested, originally and essentially, in the people. Public power comes from the people and it is institutionalized for the people's benefit. People, at all times, have the inalienable right to change or modify its form of government." *See* MEXICO CONST., tit. II, art. 39 (1917).

window on the unconstitutionality and legitimacy of constitutions. However, although I agree with this theoretical possibility, I think not all the cases presented in this piece illustrate it well. Specifically, I consider the Canadian and Mexican cases do not quite fit in the conceptual possibility of an unconstitutional constitution. On the one hand, the constructive unamendability of the Canadian constitution makes reference to a particular state of affairs that could change at any given moment. This, in my view, could be understood as the effectiveness of the institutional design chosen by the constitutional drafters rather than an unconstitutional state of affairs that can be extended to making the constitution unconstitutional. On the other hand, in the Mexican case, focused on arguing the legitimacy of a new constitution despite the explicit prohibition established in article 136, Professor Albert offers an alternative reading of the provision that saves its constitutionality. This, in my view, overlooks the possible unconstitutionality of Article 136, which would imply that a potential new constitution could not be unconstitutional.