Some Thoughts about the Unconstitutional Constitutional Amendment Doctrine, and Constitutional Dismenberment

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Professor Albert is a leading expert in comparative constitutional law, and his paper paints a thoughtful picture of how constitutional courts may police the boundary between legitimate and illegitimate constitutional change by using what is often termed as the "unconstitutional constitutional amendment (UCA) doctrine", also known as the "basic structure doctrine" in some jurisdictions. The increasing acceptance and use of the UCA doctrine in many parts of the world in the past few decades have generated a vast literature in the burgeoning field of comparative constitutional law. For instance, quite a few major articles on this subject matter have been published by a flagship journal in this field—*the International Journal of Constitutional Law*, in which Professor Albert serves as a member of the advisory board (Jacobson, 2006; Roznai and Yolcu, 2012; Bernal, 2013; Jackson, 2015; Dixon and Landau, 2015; Tushnet, 2015; Albert, 2015; Polzin, 2016). And earlier this year, the ICON-S (the International Society of Public Law) just awarded one of its annual book prizes to Yaniv Roznai for his 2017 book on this very subject (Roznai, 2017). Professor Albert is a prominent investigator of the unconstitutional constitutional amendment as a fundamental problem in contemporary constitutional thought. He is currently completing a book on constitutional amendment to be published by the Oxford University Press, and his edited volume entitled "An Unamendable Constitution?: Unamendability in Constitutional Democracies" will soon be published by Springer later this year. So today I think we are very fortunate to have Professor Albert serving as our guide in our pursuit of constitutional wisdom.

I think Professor Albert's paper provides us with a very useful roadmap for understanding what may be considered a renaissance of the UCA doctrine in contemporary constitutional theory and practices. In addition to sharpening the conceptual tools for addressing the persistent puzzle of whether and how the UCA doctrine can ever be justified, Professor Albert also leads us to assess the different uses or applications of the UCA doctrine in numerous real or hypothetical cases. I have the privilege of reading Professor Albert's paper in advance, and I have learned much about constitutional change and the role of constitutional court therein from this paper. I still have some questions and comments for Professor Albert, and I would like to use this great opportunity to learn more from you, Professor Albert, as well as from the other participants of this panel.

Strategies, or Possibilities of the UCA Doctrine

My first question has to do with the eight strategies for the judicial implementation of the UCA doctrine Professor Albert identifies from the comparative constitutional jurisprudence in

his paper (Albert, 2018: 14-19). These strategies differ mainly along two axes: Whereas some of them focus on the process of constitutional change, others look into the substantive content of the constitutional amendment under review. Some of them seek to enforce norms that are explicitly or deeply entrenched in the large-C Constitution, whereas others invoke unwritten or supranational constitutional norms. I think this comparative study is a significant contribution Professor Albert makes to the literature. With this roadmap in hand, we can identify and analyze the jurisprudential moves a constitutional court made in a given UCA case. In the J.Y. Interpretation No. 499, for example, the Taiwan Constitutional Court (TCC) can be said to have combined strategies (3), (4), and (7) in holding the 1999 constitutional amendments as unconstitutional.

But rather than thinking of these approaches as different "strategies" that pursue the same goal, say, defending constitutional democracy, I wonder whether, at certain point, it makes more sense to speak of them as entailing different "possibilities" or different "conceptions" of the UCA doctrine, which may be used to serve different purposes in different contexts. My suspicion comes from Professor Albert's suggestion that the UCA doctrine may be deployed to prevent a presidential system from being transformed into a parliamentary one through the amendment process (Albert, 2018: 17), as I am not sure that, in the event that such a structural change happens in Taiwan, the TCC would choose to do so and invalidate the amendment as unconstitutional. I wonder if we can re-categorize these different approaches into two camps, with the first camp aiming at protecting the existing constitutional order, or, to be more specific, protecting part of its identity that has less to do with the commitment to democracy (such as federalism, secularism, or presidentialism, etc.), and the second camp seeking to prevent liberal democracy (as a way of political life) from backsliding. I suspect that the difference between these two camps is often a matter of emphasis, but it makes sense to make distinction on account of what the UCA doctrine is for, because different orientations of this doctrine may confront different challenges in terms of its justification. On the one hand, we may have reasons to worry that the UCA doctrine aggravates the dead-hand problem if it is geared to protect or entrench what the constituent power had decided at time 1. On the other hand, we may worry less about the rule of the dead and more about the rule of the judges if the UCA doctrine is used to safeguard liberal democracy as an ongoing political project. Some contemporary commentators seem to advocate for the second vision of the UCA doctrine, but they also have some doubts about its efficacy as a means for what is known as militant democracy (Landau, 2013). I would like to know what Professor Albert thinks about this distinction, and, whether we can observe or trace such kind of philosophical/ideological differences in comparative constitutional law. To put it differently, might it be the case that, in applying the UCA doctrine, some constitutional courts are more willing to choose democracy over constitutionalism, or vice versa, when these two normative commitments are separable or even diverge from one another?

The Amendment/Dismemberment Distinction and the UCA Doctrine

My second question is a question of clarification, as I don't know for sure how Professor Albert conceives of the relationship between the amendment/dismemberment distinction on the one hand, and the use of the UCA doctrine on the other. Specifically, I would like to know, under Professor Albert's theory (or your understanding of the prevailing theory), is it still possible for a constitutional dismemberment that was made through the amendment process

be held as constitutional under the UCA review? In a short article published at the *I•CON* in 2015, Professor Mark Tushnet of Harvard Law School suggests that "sometimes ordinary constitutional processes can be used in the service of a revolutionary transformation. The reason […] is that in retrospect those processes should be understood as exercises of the constituent power itself, not an exercise of a delegated constituent power (Tushnet, 2015: 647)." I am not sure if Professor Albert would agree with Professor Tushnet on this point. Some arguments in Professor Albert's paper seem to suggest a "yes" answer. Constitutional dismemberment, after all, is characterized as a descriptive concept, and Professor Albert uses the Civil War Amendments to the U.S. Constitution as examples of dismemberments (Albert, 2018: 7). But Professor Albert also suggests that the task of the constitutional court under the UCA doctrine is to "police the boundary separating amendment from dismemberment (Albert, 2018: 2)." "Courts, in their roles as guardians of the constitution," according to Professor Albert, "must protect the constitution from unconstitutional change by amendment, whether or not the constitutional text sets any limits on the amendment power (Albert, 2018: 22)." This rather sweeping mission statement appears to run counter to the idea that some constitutional dismemberments made through the amendment process could still survive the UCA inquiry, and it seems to me that Professor Albert has sought to dissolve this potential contradiction by trying to further qualify what counts as a unconstitutional (or illegitimate) constitutional dismemberment. To the extent that we need to resort to something other than the distinction between amendment and dismemberment (or the distinction between the constituent power and the constituted power) to determine whether a formal constitutional change is legitimate or not in constitutional terms, I suspect that the conventional wisdom Professor Albert eloquently summarizes in his paper may have overstated the centrality of the conceptual distinction between amendment and dismemberment in the UCA jurisprudence.

By the way, I think the profound identity change of the ROC Constitution from a constitution imposed from China to a constitution based on Taiwan, a peaceful yet revolutionary transformation that has resulted in significant part from the constitutional amendments Taiwan had undergone in the 1990s and the 2000s, can well serve as a contemporary example of how constitutional dismemberment can be legitimately accomplished through the amendment process.

The State and Future of the UCA Doctrine in Taiwan

In the remainder of my time here, I would like to recount the development of the UCA doctrine in Taiwan, with the hope to solicit more comments and suggestions on the TCC's UCA jurisprudence from Professor Albert and from all of you. And since Professor Albert has addressed in detail the story about the J.Y. Interpretation No. 499, I would limit my historical and jurisprudential account to what happened in Taiwan after this landmark decision the TCC made in 2000.

Regardless of how controversial the UCA doctrine is in the constitutional theory, I think it is fair to say that the J.Y. Interpretation No. 499 enjoyed strong popular support at that time. The TCC was widely hailed as a hero that saved the constitutional democracy from the self-dealing of those shameless members of the National Assembly who dared to extend their own terms of office. Under the mounting pressure of public opinion, the National Assembly soon caved in by amending the Constitution again in 2000, to the effect of turning itself into an *ad hoc* constitutional assembly, the member of which would be elected under a list-PR

system, and could only vote as delegates of the political parties on whether to ratify the constitutional revisions/amendments proposed by the Legislative Yuan. Under this revised constitutional amendment rule, the Constitution was amended again in 2005, and it remains the last time the Constitution was formally changed in Taiwan.

The 2005 constitutional amendments essentially did two things: The first was electoral reform. The amendments halved the size of the Legislative Yuan from 225 seats to 113 seats, extended the legislative term from 3 to 4 years, and transformed the legislative electoral system into a mixed-member majoritarian (MMM) system, with 73 legislators elected from single-member districts, 34 from list-PR, and 6 from multi-member districts representing aboriginal voters. The second thing was the reform of the constitutional amendment process. The amendments abolished the National Assembly permanently, requiring instead that constitutional amendment be proposed by a three-fourths vote of the Legislative Yuan and be ratified by an absolute majority of the electorate in a constitutional referendum. The 2005 constitutional amendments were propelled by a bipartisan agreement reached between the DPP and the KMT, the two major political parties in Taiwan. Less than 23% of the voters, however, turned out and voted in the special elections held for the dying National Assembly.

Some people in Taiwan strongly oppose the new legislative electoral system, which has been in operation since 2008. This MMM system, in the critics' view, would worsen malapportionment and skew vote-seat proportionality. The 5% electoral threshold for the list-PR elections, in particular, is criticized as an unwarranted entry barrier designed solely to entrench the duopoly of the two major parties. Two minor parties contested the validity of the 2008 legislative elections to no avail, and their constitutional petition reached the TCC in the late 2011. This led to the J.Y. Interpretation No. 721, which was made by the TCC in June 2014. In this Interpretation, which was the third UCA case in Taiwan (following the J.Y. Interpretation Nos. 261 and 499), the TCC reaffirmed the central holding of the J.Y. Interpretation No. 499 and reiterated that no constitutional amendments could legitimately alter the fundamental order of liberal democracy. That being said, the TCC upheld the constitutionality of the MMM system along with the 5% electoral threshold, while dismissing the other parts of the petition as inadmissible.

One issue presented in this case was whether the Court's prior jurisprudence on the UCA doctrine should be affected by the fact that the process of constitutional amendment had been changed in 2000 so that the National Assembly, as a representative body, no longer had the power to amend the Constitution on its own volition. Both Justice Tang Te-chung and Justice Su Yeong-chin thought it should be, and they wrote separately to argue that the Court's UCA inquiry should henceforth be limited to examining only the procedural constitutionality of the constitutional amendments at issue. In other words, they thought the days for the substantive prong of the UCA doctrine in Taiwan had gone, and in the absence of patent procedural defects, the Court has no choice but to defer to the outcome of the amendment process as expressing the political will of the popular sovereignty. This was not the approach adopted by the J.Y. Interpretation No. 721, however. The opinion of the Court in that case reiterated a list of substantive limitations on constitutional amendments as derived from (or imposed by) the fundamental order of liberal democracy, and the TCC upheld the disputed amendments on substantive grounds. While the Court granted much leeway to the democratic electoral engineers in that case, its reasoning indicates that the TCC considers itself as having the

ultimate and irreplaceable duty to protect the fundamental order of liberal democracy against unconstitutional constitutional amendments, however hard-won they may be.

Has the substantive prong of the UCA doctrine become obsolete in Taiwan? The J.Y. Interpretation No. 721 said, "not yet, and in any event, not entirely." But since the constitutional amendment rules in Taiwan were changed again in 2005, and constitutional amendment/revision now requires a referendum approved by the majority of the eligible voters, I suspect that the TCC might revisit this issue some day in the future. I think Professor Albert is right in suggesting that the strongest justification for the UCA doctrine is to ensure that transformative constitutional changes would not be realized "without sufficient deliberation or popular support (Albert, 2018: 19)." And I think Professor Yaniv Roznai makes a strong argument that "[t]he more the amendment is the product of multi-procedural, inclusive, and deliberative popular amendment powers, which enjoy a very high degree of democratic legitimacy and minimize risks of misuse, the less intense the judicial review of amendments should be, and vice versa (Roznai, 2017: 219-20). But, it is one thing to demand that courts exercise utmost care and self-restraint in reviewing the substantive constitutionality of constitutional amendments that are of strong democratic credentials as measured in proceduralist terms; it is another thing to side with Professor Po Jen Yap of University of Hong Kong and argue that the substantive prong of the UCA doctrine could only work in jurisdictions with malleable constitutions, but should never be tried out in jurisdictions with rigid constitutions (Yap, 2015: 134-135). I tend to think this is a matter of reasonable disagreement. While our choice may depend in part on the extent to which we trust or believe that the procedural safeguards built in the amendment process are sufficient enough to defend a constitutional democracy from destroying itself, my hunch is that this doctrinal choice also has to do with constitutional personae or differences in judicial philosophy. What should I do if my fellow citizens want to go to hell?—Perhaps this is the existential question the UCA doctrine poses to every constitutional judge before it, and his or her answer to this question would determine not only what doctrinal choice he/she would make, but also what kind of Justice he/she would be.

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關於違憲的憲法修正理論與憲法解組的一些想法

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中文摘要

本人就 Richard Albert 教授發表之 The Judicial Role in Constitutional Amendment and Dismemberment 一文，提出三點提問或評論意見。本人首先探問，由 Albert 教授自比較憲法實務經驗指認、歸納出來的 8 項有關違憲的憲政修正的司法審查策略，其間是否存在「保護憲法秩序／認同」與「保護自由民主」這兩種不同目的取向的差異。本人繼而追問，憲法修正與憲法解組（constitutional dismemberment）這組區分，是否真的左右了關於違憲的憲法修正的司法認定。本人最後簡短介紹了我國的違憲的憲法修正理論在司法院大法官釋字第 499 號解釋做成後的發展。本人也推測指出，大法官之間對於實質取向之違憲的憲法修正理論的不同看法，可能在相當程度上可歸因於並反映了不同大法官在憲政人格或司法哲學上的分歧。