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## The theory and phenomenology of constitutional dismemberment

### A teoria e a fenomenologia de desmembramento constitucional

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#### Abstract

One of the most spectacle features anchored in Richard Albert's Constitutional Amendments: Making, Breaking, and Changing Constitutions is the theory of constitutional dismemberment. In his masterpiece, Albert proposes constitutional designers who are interested in preserving legal continuity to codify procedures for not only amendment but also dismemberment, namely, a fundamental break with the core commitments or presuppositions of the constitution. This contribution questions whether the objectivist, third-person perspective of constitutional designers can be a vantage viewpoint to assesses the socially transformative irruption of constitutional dismemberment. Should the phenomenon of constitutional dismemberment be analyzed without the relative-subjective perspective of peoples who are apart from constitutional designs but actually live under the practical interest of daily life? In tackling this question, the first section reveals that the objectively observable quantum of popular support in terms of the mutuality and symmetry between original ratification and constitutional dismemberment does not necessarily corresponds to the phenomenon that is perceived from the first-person plural person perspective of population. The

#### Resumo

*Uma das características mais espetaculares ancoradas no livro de Richard Albert (Constitutional Amendments: Making, Breaking, and Changing Constitutions) é a teoria do desmembramento constitucional. Em sua obra-prima, Albert propõe aos projetistas constitucionais interessados em preservar a continuidade jurídica que codifiquem os procedimentos não só de emenda, mas também de desmembramento, ou seja, uma ruptura fundamental com os compromissos ou pressupostos fundamentais da constituição. Esta contribuição questiona se a perspectiva objetivista dos designers constitucionais pode ser um ponto de vista vantajoso para avaliar a irrupção socialmente transformadora do desmembramento constitucional. O fenômeno do desmembramento constitucional deve ser analisado sem a perspectiva subjetiva-relativa de povos afastados dos designios constitucionais, mas que vivem sob o interesse prático do cotidiano? Ao lidar com esta questão, a primeira seção revela que o quantum objetivamente observável de apoio popular em termos de mutualidade e simetria entre a ratificação original e o desmembramento constitucional não corresponde necessariamente ao fenômeno que é percebido da perspectiva da população de primeira pessoa no plural. A segunda seção, então, instala o princípio relacional*

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second section then installs the relational principle of intentionality, which is synthesized at the static, genetic and generative levels, so that the practice of constitutional dismemberment can be grasped not only from the objectively theoretical viewpoint but also from the inter-subjective phenomenological perspective.

**Keywords:** constitutional design; constitutional dismemberment; phenomenology; legal intentionality; life-world.

*da intencionalidade, que é sintetizado nos níveis estático, genético e generativo, de modo que a prática do desmembramento constitucional possa ser apreendida não apenas do ponto de vista teórico objetivo, mas também da perspectiva fenomenológica intersubjetiva.*

**Palavras-chave:** desenho constitucional; desmembramento constitucional; fenomenologia; intencionalidade jurídica; mundo da vida.

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1. Introduction; 2. The Theory of Constitutional Dismemberment; 2.1. The Distinction between Constitutional Amendment and Dismemberment; 2.2. Legality and Legitimacy of Constitutional Dismemberment; 3. The Phenomenology of Constitutional Dismemberment; 3.1. From Static, through Genetic, to Generative Phenomenology; 3.2. The Static, Genetic and Generative Intentionality of Constitutional Dismemberment; 4. Conclusion; 5. References.

## 1. INTRODUCTION

Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions* beautifully shows us "how amendment works and why it often fails, what we can learn from its various designs around the world, and why amendment matters in constitutionalism."<sup>1</sup> One of the most spectacle features anchored therein is the theory of *constitutional dismemberment*. In sketching a blueprint for amendment design, Albert emphasizes the foundational distinction between constitutional amendment and dismemberment: while the former keeps the constitution coherent with itself, the latter marks a fundamental break with the core commitments or presuppositions of the constitution.<sup>2</sup> In his masterpiece, Albert proposes constitutional designers who are interested in preserving legal continuity to codify procedures for not only amendment but also dismemberment. The reviewer fully agrees with Albert's diagnosis: "We cannot deny that constitutional dismemberment exists as a *phenomenon* today: around the world, we continue to see efforts to make transformative constitutional changes without breaking legal continuity."<sup>3</sup>

However, should the phenomenon of constitutional dismemberment be analyzed without the relative-subjective perspective of peoples who are apart from constitutional designs but actually live under the practical interest of daily life? While

<sup>1</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p. 2.

<sup>2</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p.263.

<sup>3</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**. New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 82 [emphasis added].

acknowledging that Albert's design-based theory contributes to balancing constitutional transformation with legal certainty, the reviewer shares the caveat Tom Ginsburg made a caveat that "design implies a technocratic architectural paradigm that does not easily fit the messy realities of social institutions, especially not the messy process of constitution making."<sup>4</sup> Paul Blokker opines in a similar way: "Constitutions concern then not mere legal-technical questions of the limitations of arbitrary power, but equally concerns questions of self-identity and democratic self-understanding."<sup>5</sup> These opinions pose a question of whether the objectivist, third-person perspective of constitutional designers can be a vantage viewpoint to assesses the socially transformative irruption of constitutional dismemberment.

To tackle this question, the reviewer borrows ideas from phenomenological philosophy to complement the objectivist theory of constitutional dismemberment with the relational concepts of phenomenology. After this introduction, the first section preliminarily reaffirms the central features of the theory of constitutional dismemberment, particularly its way of ensuring legality and legitimacy of fundamental constitutional change. (2) The second section then tries to bring the relative-subjective phenomenological perspective into the objectivist, quantum-based theory of constitutional dismemberment. (3)

## 2. THE THEORY OF CONSTITUTIONAL DISMEMBERMENT

### 2.1. The Distinction between Constitutional Amendment and Dismemberment

The theory of constitutional dismemberment identifies a phenomenon in which the constitution itself might not be replaced in the formal sense but its identity, rights, or structure does not escape the change without substantial modification.<sup>6</sup> Before elaborating this new theory, Albert points out that the conventional theory of constituent power is unhelpful for its lack of operational specificity and does not gives us an applicable practice to translate it into action.<sup>7</sup> To give observable specificity to the theory of constituent power, Albert introduces *the rule of mutuality* that "a constitution may be

<sup>4</sup> GINSBURG, Tom. Introduction. In: GINSBURG, Tom (Coord.). **Comparative Constitutional Design**. New York: Cambridge University Press, 2014. p. 1–14, p. 1.

<sup>5</sup> BLOKKER, Paul. The imaginary constitution of constitutions. **Social Imaginaries**, Bucharest, vol. 3, n. 1, p. 167-193, Oct. 2017.

<sup>6</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p. 84–92.

<sup>7</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 56.

dismembered using the same procedure that was used to ratify it.”<sup>8</sup> One of the essential factors of the rule of mutuality is *symmetry* in that “the original constitutional ratification threshold as creating a default ceiling on the threshold required for constitutional dismemberment.”<sup>9</sup> By focusing on the procedural symmetry that can be objectively observable, what matters in the theory is not whether a given major constitutional change is consistent with liberal constitutionalism but rather the quantum of popular support for the change.<sup>10</sup>

The theory of constitutional dismemberment can propose sound answers to the contemporary problems surrounding the invisible college of constitutional lawyers. The first problem is the so-called *liberal democratic degeneration* with which the new wave of scholarship in constitutional change is concerned principally. According to their claim, political actors around the world are increasingly exploiting the mechanisms of constitutional change to undermine the liberal values of constitutionalism, as is dramatically illustrated by the populist nationalist movement in Hungary.<sup>11</sup> To put a brake on such degeneration, the new wave constitutionalists argue, the tasks of constitutional scholars, judges, and designers are, respectively, to develop theories, apply doctrines, and engineer constitutions to prevent these attacks on constitutionalism. However, given the variety of principles beyond the traditional liberal idea of constitutionalism around the world,<sup>12</sup> Albert criticizes such a strict liberal understanding as “quite another more serious intrusion into a nation’s sphere of sovereignty and the self-determination of its peoples to impose on a national constitution a requirement of conformity with the values of others.”<sup>13</sup> In contrast to the liberalist doctrines, Albert’s theory of constitutional dismemberment “offers a way to quantify the democratic majorities needed to validate a major constitutional change, even where the change runs counter to the existing constitutional framework.”<sup>14</sup>

The second contemporary problem behind the theory of constitutional dismemberment is the *juristocracy* or *judicialization of mega-politics*. According to the doctrine

<sup>8</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 57.

<sup>9</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 58.

<sup>10</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 66.

<sup>11</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 60.

<sup>12</sup> For traditions other than liberalism, see DOWDLE, Michael W.; WILKINSON, Michael A. (Coord.). *Constitutionalism Beyond Liberalism*. Cambridge: Cambridge University Press, 2017.

<sup>13</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 64.

<sup>14</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 65.

of unconstitutional constitutional amendment, the increasing number of supreme or constitutional courts exert their judicial control to procedurally-perfect constitutional amendments.<sup>15</sup> The more extreme doctrine of unconstitutional constitution was allegedly applied in the Honduran Supreme Court's judgment in 2015, in which it held an unamendable one-term limit on presidential term found in the 1982 constitution to be unconstitutional.<sup>16</sup> Albert's theory of constitutional dismemberment is advocated to resist against such minoritarian controls on constitutional change. In the theory of constitutional dismemberment, a court is rather expected to "issue advisory judgments on the nature of the transformative change that amending actors are pursuing, and on the quantum of agreement that the court believes is necessary to legitimate that change."<sup>17</sup>

The third problem concerns imposed, colonial and resilient constitutions, all of which embrace legal discontinuity creating a period of legal vacuity and instability in the absence of the rule of law.<sup>18</sup> In the history of Japanese constitutionalism, there has been a single constitutional dismemberment in the formal sense: the transformation after the World War II from the Meiji Constitution to Showa Constitution according the rules of constitutional alteration prescribed in Article 73 of the old Constitution. A prominent constitutional scholar Toshiyoshi Miyazawa at the time, facing the end of the seemingly ever-lasting Emperor system based on the Devine Revelation, put forward the *August Revolution* theory. According to this theory, the invocation of *pouvoir constituant* as the *kratos* (power) of the *demos* (people) in terms of *popular sovereignty* as the new *Grundnorm* (*Konpon Tatemaie*) is justified.<sup>19</sup> As demonstrated such a revolutionary scene, the theory of constitutional dismemberment recognizes that "a constitution's purpose may change [...] when confronted by a cataclysmic event that cannot help but change the constitution itself and the people whose objectives it is intended to serve."<sup>20</sup>

<sup>15</sup> LANDAU, David E.; DIXON, Rosalind; ROZNAL, Yaniv. From an unconstitutional constitutional Amendment to an unconstitutional constitution? Lessons from Honduras. **Global Constitutionalism**, vol. 8, n. 1, p. 40–70, Mar. 2019.

<sup>16</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 72.

<sup>17</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 72.

<sup>18</sup> NEGISHI, Yota. The constituent power of the "imposed" constitution of Japan: an amalgam of internationalised revolutionary power and nationalist devolutionary power. In ALBERT, Richard; CONTIADES, Xenophon; FOTIADOU, Alkmene (Coord.). **The Law and Legitimacy of Imposed Constitutions**. London: Routledge, 2018. p. 189–207.

<sup>19</sup> MIYAZAWA, Toshiyoshi. Hachigatsu Kakumei to Kokumin Shuken Shugi [The August Revolution and the Principle of Popular Sovereignty]. **Sekai Bunka**, vol. 1, n. 4, p. 64–71, May. 1946.

<sup>20</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 81.

## 2.2. Legality and Legitimacy of Constitutional Dismemberment

Since the theory of constitutional dismemberment invites political actors and the people to take active ownership of their constitution, the post-war Showa Constitution of Japan that has survived for 70 years without any formal changes seems a conundrum thereto. Admittedly, the second formal dismemberment in the history of Japanese constitutionalism has been sought by *Kaiken-ha* (pro-revisionist groups) represented by the right-wing, conservative Liberal Democratic Party (LDP). Nonetheless, such an attempt has been blocked by *Goken-ha* (anti-revisionist groups) including progressive parties, many constitutional scholars and lawyers and major media. *Goken-ha* argues that *Kaiken-ha*'s ambition pursuant to the amendment rule under Article 96 of the current Showa Constitution would change one of the constitutional pillars, the pacifist clause of Article 9.

Despite the fact that a formal dismemberment pursued by *Kaiken-ha* has not been realized yet, the LDP-led Government has ventured two alleged quasi-constitutional dismemberments of the pacifist clause Article 9. First, in parallel to the diplomatic efforts to reengage in the international community under the San Francisco Peace Treaty and to establish the defence framework under the Japan-US Security Treaty, the Government created the Self-Defence Force (SDF) in 1954 and officially stated that Article 9 does not prevent Japan from defending itself.<sup>21</sup> Following the Cabinet Legislation Bureau (CLB)'s interpretive assistance, the Government also introduced the conditions to exercise of the right of individual self-defence under the Constitution in 1972.<sup>22</sup> At that time, *Goken-ha* opposed the first quasi-constitutional dismemberment concerning the SDF and individual self-defence as a politically-manipulated heterodox interpretation of Article 9.<sup>23</sup> Second, the Shinzo Abe Cabinet forcefully modified the traditional narrow-scope interpretation of self-defence under Article 9 in 2014 in order to incorporate collective self-defence due to 'the change of the security environment surrounding Japan' in the 21<sup>st</sup> century.<sup>24</sup> The contemporary *Goken-ha* against the second quasi-constitutional dismemberment on collective self-defence argues that the Abe Cabinet's drastic departure from the interpretation established by the successive governments

<sup>21</sup> Diet Records, the House of Representatives, 21st Session, the Committee on Budget, 22 December 1954, No 2, 1.

<sup>22</sup> Document submitted to the Committee on Audit of the House of Councilors on 14 October 1972. See Bouei Handbook [Handbook of Defence] (Asagumoshinbunsha, 2012), p. 574.

<sup>23</sup> For example, KIYOMIYA, Siro. *Kokka Sayo no Ronri [The Logic of State Operation]*. Tokyo: Yuhikaku, 1968.

<sup>24</sup> Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People July 1, 2014.

and the CLB, albeit the their political nature, cannot be permitted without the procedure of constitutional amendment stipulated in Article 96.<sup>25</sup>

To apply Albert's theory of constitutional dismemberment that stipulates the principle of symmetry and the rule of mutuality to this Japanese constitutional context, "it would be sufficient for amending actors to alter Article 9 [of the Showa Constitution] using the original procedure in Article 73 [of the Meiji Constitution], which calls for only two-thirds approval in the national legislature in order to alter the Constitution."<sup>26</sup> However, Albert does not take such a strictly symmetrical proposition by distinguishing the issue of *legality* from that of *legitimacy*.<sup>27</sup> Given the intent of the Showa Constitution's designers to make any future constitutional alteration more difficult than the Meiji Constitution had previously been, Albert claims that "in order to meet the test of both legality and legitimacy, an effort to alter Article 9 should satisfy the procedure in Article 96, which requires the additional hurdle of a national referendum."<sup>28</sup> In other words, the alteration of Article 9 would not be legitimized by the default line set by Article 73 of the Meiji Constitution in accordance with the principle of symmetry in favor of legal certainty; it would rather asymmetrically gain its legitimacy through the higher criterion of a national referendum prescribed in Article 96 of the Showa Constitution. If the reviewer's understanding is correct, this asymmetrical criteria between legality and legitimacy corresponds to what Albert would call one of "rare cases [in which] the threshold ever [should] rise above the quantum required to ratify the constitution to begin with."<sup>29</sup> Such a rare case may arise "where it is clear that the change is supported by a substantial democratic majority that reflects the considered judgment of the political community."<sup>30</sup>

The "rare" experience of Japanese constitutionalism tells us a lesson that the objective quantum of democratic agreement for legitimizing the validity of constitutional dismemberment is difficult to be measured by the legality of architectural designs. As Jamie Cameron discerns, constitutional legitimacy may be critically diverged from constitutional legality because the former is perceptive in nature and operates at the level

<sup>25</sup> For example, Japan Federation of Bar Associations, 65th General Meeting, Resolution Repeatedly Opposing the Approval of Exercising the Right to Collective Self-Defense, and Confirming the Meaning of Constitutionalism, Reasons for Suggestion, para. 3.2.

<sup>26</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 76.

<sup>27</sup> STERING, Adam N. Implicit limits on amending the Japanese Constitution. *Washington International Law Journal*, vol. 28, n. 1, p. 243–309, Jan. 2019. p. 298, fn 354.

<sup>28</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 76.

<sup>29</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 59.

<sup>30</sup> ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 66.

of belief: legitimacy is an organic part of constitutional culture that is fluid, lacking in concreteness and at least difficult, if not impossible, to measure.<sup>31</sup> Albert is of course conscious of this point that constitutional dismemberment defers to the considered judgment of the people and their representatives to trace and retrace their own path “as long as it satisfies the twin tests of legality and legitimacy, where legitimacy is a sociological measure, not a legal or moral one.”<sup>32</sup> This limit is inherent in the theory of constitutional dismemberment because its core principle of symmetry itself “is intended to neutralize claims about the illegitimacy of the change.”<sup>33</sup>

### 3. THE PHENOMENOLOGY OF CONSTITUTIONAL DISMEMBERMENT

#### 3.1. From Static, through Genetic, to Generative Phenomenology

While elaborating from a third-person perspective the institutional design blueprint for constitutional amendment based on the fundamental distinction with constitutional dismemberment, Albert also apprehends them from the subjective-relative perspective: “[c]onstitutionalism [...] is a culturally-specific sociological principle that concerns *how a constitution is lived*, how its rules are practiced, and how the governed and the governors perceive themselves in relation to it and each other.”<sup>34</sup> Albert’s emphasis on the constitutional life that is correlational between the constitution and the people’s lives resonates with the phenomenological core concept of *intentionality*. This section amplifies the critical point indicated above in terms of phenomenological philosophy whose emphasis is put on the first-person plural, subjective-relative perspective in order to supplement the theory of constitutional dismemberment.

In terms of phenomenology, the universal *a priori* of correlation is to be exhibited by suspending the judgments (*epoché*) on the objective validity of truth. In his early masterpiece *Ideas toward a Pure Phenomenology*, Edmund Husserl, the father of phenomenology, once adopted the so-called Cartesian way that leads to the

<sup>31</sup> CAMERON, Jamie. Legality, legitimacy and constitutional amendment in Canada. In: ALBERT, Richard; CAMERON, David R. (Coord.). **Canada in the World: Comparative Perspectives on the Canadian Constitution**. Cambridge: Cambridge University Press, 2017. p. 98–122, p. 104.

<sup>32</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 81.

<sup>33</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 59.

<sup>34</sup> ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 63. (emphasis added).

“transcendental ego” in one leap, which has been severely criticised as solipsism.<sup>35</sup> In his last work *The Crisis of European Sciences and Transcendental Phenomenology*, Husserl revealed that the gap between the everyday human experience and the world of objectivist science had significantly grown. Against this gap as a backdrop, Husserl attempts a withholding of natural, naïve validities already in effect: i.e. “an *epoché* of all participation in the cognitions of the objective sciences, and *epoché* of any critical position-taking which is interested in their truth or falsity, even any position on their guiding idea of an objective knowledge of the world.”<sup>36</sup>

In this context, the purpose of *epoché* is no longer to directly leap to the transcendental ego (Cartesian way); it rather aims to return from the objective world to the so-called “subjective-relative” *life-world* (*Lebenswelt*), i.e. the world as the ground where we live under the practical interest of daily life.<sup>37</sup> Ulrich Claesges sharply discerns the ambiguous aspects of life-world: the return to life-world through phenomenological reduction contributes to both to *diagnosing* the dangerous situation of academics and to treating *therapeutically* such an academic crisis. To put it in a different terminology, the diagnostic function reveals the *ground* that objective sciences have sweep in oblivion (*Boden-Funktion*), whereas the therapeutics function remedies the crisis of academics by *giving guidance* to transcendental phenomenology (*Leitfaden-Funktion*).<sup>38</sup>

While we are dealing with the multiplicity of manners in the given or situated life-world, the subjectivity in question is not that of the isolated subject (Descartes’ *ego cogito*). It is rather, as Husserl explicates, the entire *intersubjectivity* which is brought together in the accomplishment. Husserl’s contrast with the Cartesian way is now crystal-clear: “[a]ll the levels and strata through which the syntheses, *intentionally* overlapping as they are from subject to subject, are interwoven form a universal unity of synthesis; through it the objective universe comes to be – the world which is and as it is concretely and vividly given (and pre-given for all possible praxis).”<sup>39</sup>

In this regard, Husserl was originally concerned with the level of *static* phenomenology and the most general, *a priori* background presuppositions of an intentional experience: the sense-giving side of intentionality (*noesis*) animates the sensory component of a perception (*hyle*) as a phenomenon of the objective-sense (*noema*) relating

<sup>35</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 156–158.

<sup>36</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 138–140.

<sup>37</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 140–145.

<sup>38</sup> CLAESGES, Ulrich. Zweideutigkeiten in Husserls Lebenswelt-Begriff. In: CLAESGES, Ulrich; HELD, Klaus (Coord.). **Phaenomenologica Perspektiven transzendental-phänomenologischer Forschung, für Ludwig Landgrebe zum 70. Geburtstag von seiner Kölner Schülern**. Den Haag: Martinus Nijhoff, 1972. p. 85–101.

<sup>39</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 170–173.

to an object.<sup>40</sup> Without intentionalities, Husserl argues, the objects and the world would not be there for us; they rather 'exist for us only with the meaning and the mode of being that they receive in constantly arising or having arisen out of those subjective accomplishments'.<sup>41</sup>

The second level of intentional synthesis is called *genetic* in that it uncovers the temporal becoming and the temporal relationship of one experience to the next, thereby revealing a 'temporal depth' of any experience, which cannot be achieved through static analysis.<sup>42</sup> In developing the ontology of life-world in *Crisis*, Husserl emphasizes that every perception has a *horizon* belonging to its object: "[i]n seeing I always 'mean' it with all the sides which are in no way given to me, *not even in the form of intuitive, anticipatory presentifications (Vergegenwärtigung)*": In other words, "a whole horizon of *nonactive and yet confunctioning* manners of appearance and syntheses of validity is implied in a particular perception."<sup>43</sup> Although perception is related only to the present, this present is always meant as having an endless past behind it (a continuity of *retention*), and an open future before it (a continuity of *protention*).<sup>44</sup>

Third, Husserl's late reflections in *Generativität* is inherited and sophisticated as *generative* phenomenology by Anthony Steinbock. As is explicated in Steinbock's *Home and Beyond*, compared to the foregoing static and genetic methods, the generative analysis captures the constitutive duet between home-/alien-worlds: the "co-constitution of the alien through appropriative experience of the home," on the one hand, and the "co-constitution of the home through the transgressive experience of the alien," on the other hand. In characterizing the synergy between home and alien as *co-generative*, Steinbock notes that "neither home-world nor alien-world can be regarded as the 'original sphere' since they are in a continual historical becoming as delimited from one another."<sup>45</sup>

<sup>40</sup> For the concept of intentionality, see MCINTYRE, Ronald; SMITH, David Woodruff. Theory of intentionality. In MOHANTY, J. N.; MCKENNA, William R. (Coord.). **Husserl's Phenomenology: A Textbook**. Washington, D. C.: Center for Advanced Research in Phenomenology and University Press of America, 1989. p. 147–170.

<sup>41</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 163.

<sup>42</sup> DONOHOE, Janet. **Husserl on Ethics and Intersubjectivity: From Static and Genetic Phenomenology**. Toronto: University of Toronto Press, 2016. p. 30–37.

<sup>43</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 159–163.

<sup>44</sup> HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 159–163.

<sup>45</sup> STEINBOCK, Anthony. **Home and Beyond: Generative Phenomenology after Husserl**. Evanston, Ill: Northwestern University Press Evanston 1995, p. 179 [emphasis in the original text].

### 3.2. The Static, Genetic and Generative Intentionality of Constitutional Dismemberment

In the field of legal philosophy, Hans Lindahl borrows phenomenological insights from Husserl and invents the concept of *legal intentionality*. In the static sense, this correlative notion is invoked to elucidate the (constitutive) legal *ordering*, rather than the (descriptive) legal order, from a first-person plural perspective: to act legally is to disclose something as *something*, and to disclose something as *something* is to order, in terms of the subjective (as *someone*), material (as *somewhat*), spatial (as *somewhere*) and temporal (as *somewhen*) dimensions.<sup>46</sup> Lindahl also introduces the genetic concept of *horizon* to legal intentionality whence the members of a legal collective anticipate in a general ways who ought to do what, where and when.<sup>47</sup> This horizon has the *background* of collective action, meaning by such that all collective action is conditioned by a variable range of everyday practices, capacities, and assumptions into which its participants are socialized, yet which are not themselves thematized in the course of joint action.<sup>48</sup> For Lindahl the articulation of the background and horizon of collective action constructs its *Umwelt* as the circumambient world, or *Lebenswelt* in the framework of Husserl's *Crisis*, in which joint action takes place.<sup>49</sup> In the generative analysis, Lindahl grasps the momentum of *a-legality* when the circumambient life-world of collective action becomes conspicuous as a familiar home-world (*Heimwelt*) to its participants in the form of strange behaviors and situations that irrupt from the domain of the unordered as an alien-world (*Fremdwelt*) by challenging the boundaries of (il)legality.<sup>50</sup>

The foregoing phenomenological legal approach is quite useful for reshaping the discourses of constitutional law including the theory of constitutional dismemberment. According to Kim Lane Scheppele, while the existing literature has taken the view of a constitution as a text or as a set of visible and functioning institutions from the third-person perspective, the phenomenological approach focuses our attention on the way that people experience constitutional life from the first-person plural

<sup>46</sup> LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 125–129.

<sup>47</sup> LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 129–133.

<sup>48</sup> LINDAHL, Hans. *Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality*. In: BEDORF, Thomas; HERRMANN, Steffen (Coord.). **Political Phenomenology: Experience, Ontology, Episteme**. Abingdon: Routledge, 2019.

<sup>49</sup> LINDAHL, Hans. *Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality*. In: BEDORF, Thomas; HERRMANN, Steffen (Coord.). **Political Phenomenology: Experience, Ontology, Episteme**. Abingdon: Routledge, 2019.

<sup>50</sup> LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 156–163.

perspective.<sup>51</sup> Put differently, it examines the way that constitutional knowledge comes to be developed, shared and passed on as the result of social interaction, through institutions, across history and as sedimented fact that becomes part of the taken-for-granted world.<sup>52</sup>

Seen from the first-person plural perspective of phenomenology, for example, the legitimacy of the 2012 Hungarian Constitution as constitutional dismemberment can be narrated in a way of complementing the third-person perspective of Albert's architectural theory.<sup>53</sup> After the fall of communism in Hungary, the legal order of liberal constitutionalism based on the 1989 Constitution emerged as an elite project by the strong resolve across the political spectrum to join the European Union and by the celebration of human rights. The project was intersubjectively agreed by the masses as long as it delivered hope and the promise of prosperity and as long as it was associated with the restoration of national sovereignty. Through nearly two decades, the liberal constitutional order quickly became a taken-for-granted life-world, or more concretely, *home-world* for them. However, as an unthematized *background*, the 1989 Constitution that was supposed to create democracy, end corruption, bring economic prosperity and create better lives had already appeared unable to achieve those goals in the eyes of the population. In terms of *horizon*, as was evinced by social survey reflecting a lived experience of getting worse, the evaporation of the support for liberal constitutionalism's premises had already started for years before the 1989 Constitution itself finally failed in 2010, which became affiliated with the rise of counter-constitutional ideas. In that situation, counter-constitutionalists interrupted from an another collective of *alien-world* embracing alternative visions of constitutional ordering, grounded in different understandings that reject the liberal constitutional vision already in effect.

The phenomenological approach also proposes another scenario to narrate the ever-unamended post-war Japanese Constitution which Albert's symmetrical account categorizes as an asymmetrical, rare exception. As noted above, although *Go-ken-ha* once criticized the first quasi-constitutional dismemberment concerning the SDF and individual self-defense as a politically-manipulated heterodox interpretation of Article 9, it has come to recognize the orthodoxy of that interpretation established by the successive governments and the CLB when opposing against the second

<sup>51</sup> SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 55

<sup>52</sup> SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 51.

<sup>53</sup> For this paragraph, see in general SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 59–63.

quasi-constitutional dismemberment on collective self-defence.<sup>54</sup> In other words, the legal intentionality of Article 9 within the familiar constitutional order (*Heimwelt*) has been over generations modified co-generatively through the transgressive irruption from the unordered sphere (*Fremdwelt*) as another way of constitutionalizing pacifism. As the unthematized background of such a modification, Satoshi Yokodaïdo diagnoses that a pathological phenomenon flourishes among ordinary people due to the elitist controversy between *Kaiken-ha* and *Goken-ha*: “the Japanese people have gradually lost trust in the normative forces of the Constitution’s text and have regarded it as so flexible that it can fit almost any changing environment.”<sup>55</sup> This prevailing pathology, reasonably inferred from the result of recent opinion polls, indicates that majority of ordinary people of respondents think Abe’s attempt to change the interpretation of the Constitution is unconstitutional but at the same time do not seem to think the state of unconstitutionality should be solved as soon as possible.<sup>56</sup> This phenomenological focus on the first-person plural perspective of ordinary citizens offers a different reason from the explanations of either the *Kaiken-ha* or *Goken-ha* on the stability of the Constitution: the former bases its reasoning on the asymmetrical strictness of its constitutional amendment procedure under Article 96, and the latter puts an emphasis on the Japanese people’s profound endorsement of the Constitution and its philosophy.<sup>57</sup> The normativity of Article 9 has been gradually dismembered without following procedural requirements of Article 96 but due to the relational irruption to the people’s intentionality.

#### 4. CONCLUSION

The theory of constitutional dismemberment unpacked by Richard Albert in his masterpieces has a great potential to redeem the mysterious concept of constituent power as a technically controllable notion for contemporary constitutional transformations. However, its focus on the objectively observable quantum of popular support in terms of the mutuality and symmetry between original ratification and constitutional dismemberment does not necessarily corresponds to the phenomenon that is perceived from the first-person plural perspective of population. It should be reminded here that the Husserlian concept of *Lebenswelt* does not negate the achievements

<sup>54</sup> YAMAMOTO, Hajime; NEGISHI, Yota. Japan. In: PALOMBINO, Fulvio M. (Coord.). **Duelling for Supremacy: International vs. National Fundamental Principles**. Cambridge: Cambridge University Press, 2019. p. 210–233, p. 224–228.

<sup>55</sup> YOKODAIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 282.

<sup>56</sup> YOKODAIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 273.

<sup>57</sup> YOKODAIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 265–267.

of objective science but rather purports to restore the practical interest of daily life as the essential ground that objective sciences have swept in oblivion. Inheriting this purpose, this contribution installed the relational principle of intentionality, which is synthesized at the static, genetic and generative levels, so that the practice of constitutional dismemberment can be grasped not only from the objectively theoretical viewpoint but also from the inter-subjective phenomenological perspective.

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