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ALL THAT SUCCEEDS IS SUCCESS: DEFINING INFORMAL CONSTITUTIONAL CHANGE*

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This article considers whether the Constitution of the Republic of South Africa, 1996 has been informally changed by the courts through constitutional interpretation. To do so, it first provides a working definition of the concept of informal constitutional change and contrasts it with formal constitutional change. It then interrogates the challenges that arise from informal constitutional change by courts, including the question of the legitimacy or constitutionality of such change. To this end, the article develops an analytical framework for identifying both informal and unconstitutional constitutional change. Finally, it offers one likely instance of both informal and unconstitutional constitutional change by courts in South African law.

Informal constitutional change – amendment power – constituent power – constitutional interpretation

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I INTRODUCTION

Constitutions, specifically written or codified constitutions,¹ can change in a variety of ways:² through special constitutionally prescribed amendment procedures,³ through the development of constitutional conventions that are not consonant with the constitutional text,⁴ and even through judicial interpretations of the constitutional text.⁵

Another way in which constitutional change can occur is through the enactment of ordinary statutes; for instance, statutes that concretise constitutional provisions.⁶ Such statutes may bring about what Albert calls ‘quasi-constitutional amendments’.⁷ A quasi-constitutional amendment is a statutory (‘sub-constitutional’) alteration of existing constitutional norms that does not have an equivalent status to a constitutional amendment, and is thus capable of amendment and repeal like ordinary laws, but which ‘may achieve the function ... of constitutional law overtime as a result of its subject-matter and importance’ and, in that sense, be as durable as a formal constitutional amendment.⁸

¹ Constitutions as ‘a conceptual necessity of every legal system’ need not be written to exist: see John Gardner *Law as a Leap of Faith: Essays on Law in General* (2012) 89. In this article, I focus on codified or written constitutions, given that ours is a written constitution. Constitutional change in jurisdictions with unwritten constitutions is a markedly different phenomenon and one with which this article is not concerned.

² See generally Donald S Lutz ‘Toward a theory of constitutional amendment’ (1994) 88 *American Political Science Review* 355.

³ Yaniv Roznai *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (2017) 2.

⁴ Reijer Passchier *Informal Constitutional Change: Constitutional Change Without Formal Constitutional Amendment in Comparative Perspective* (Doctoral thesis, University of Leiden, 2017) 50–4.

⁵ Roznai op cit note 3 at 2. See also Paul Craig ‘Written and unwritten constitutions: The modality of change’ in Sam Bookman, Edward Willis, Hanna Wilberg & Max Harris (eds) *Pragmatism, Principle, and Power in Common Law Constitutional Systems: Essays in Honour of Bruce Harris* (2022) 263 at 270–2; Yaniv Roznai ‘Unconstitutional constitutional change by courts’ (2017) 51 *New England LR* 557; Jonathan L Marshfield ‘Respecting the mystery of constitutional change’ (2017) 65 *Buffalo LR* 1057 at 1058; Richard Albert ‘How unwritten constitutional norms change written constitutions’ (2015) 38 *Dublin University LJ* 388 at 389.

⁶ Passchier op cit note 4 at 49. See also Farrah Ahmed & Adam Perry ‘Constitutional statutes’ (2017) 37 *OJLS* 461.

⁷ Richard Albert ‘Quasi-constitutional amendments’ (2017) 65 *Buffalo LR* 739.

⁸ Ibid at 740. Bernard Bekink takes a contrary view in ‘Balancing constitutional stability and flexibility: An evaluation of the constitutional amendment procedures’ 2004 *TSAR* 657 at 665, where he argues that a distinction ought to be drawn between Bills amending the Constitution and Bills ‘that could have an effect on constitutional provisions’ and that the latter should not be regarded as constitutional amendments (ie Bills that would otherwise fall within Albert’s theory of quasi-constitutional amendments) because ‘the intention was not to effect a constitutional amendment’. As I argue in part III(b), an agent engaged in

This form of constitutional change is of particular relevance to the South African context, where the constitutional text mandates the enactment of certain legislation.⁹ Whether this form of constitutional change has occurred in South Africa is a weighty question that I will not attempt to answer here, but the diversity of avenues for constitutional change discussed above raises questions about the nature, scope and locus of the power to amend a constitution, a topic which this article addresses. Each of the forms of constitutional change detailed here can be classified as informal constitutional change — that is, constitutional change that occurs outside of the formal constitutional procedures for amendment.

Informal constitutional change is an understudied and undertheorised subject in South African scholarship.¹⁰ Elsewhere, diverse scholarship exploring a broad range of topics on the phenomenon accumulates, examining questions about the nature, legitimacy, forms and limits of informal constitutional change.¹¹

Our neglect of this phenomenon is particularly surprising, given the broad interpretative powers that our courts wield over the meaning of all law, but especially the Constitution. The concept of informal constitutional change offers a useful lens, beyond the usual laudatory texts for what are sometimes called ‘transformative’ judicial decisions,¹² through which to analyse decisions that reinvent constitutional provisions or even stretch the meanings of such constitutional provisions to their semantic limits.

But any attempt to grapple with this concept must begin with a definitional account that sets the parameters for the debate and fixes its terms. This article does just that by attempting to provide a definition of informal constitutional change that can serve as a starting point for an

informal constitutional change need not have pre-existing authority to undertake constitutional change, but merely the ability to do so. On this view, the intention of the lawmaker is irrelevant to determining whether informal constitutional change has occurred.

⁹ See for instance ss 3(3), 32(2) and 33(3) of the Constitution.

¹⁰ Notable exceptions are James Fowkes ‘Informal constitutional change in unlikely places: The case of South Africa’ in Xenophon Contiades & Alkmene Fotiadou (eds) *Routledge Handbook of Comparative Constitutional Change* (2020) 421 at 425–9 and Koos Malan *There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (2019).

¹¹ For brief introductory surveys of the scholarship see generally Joel Colón-Ríos ‘The forms and limits of constitutional amendments’ (2015) 13 *International Journal of Constitutional Law* 567 and Carlos Bernal ‘Informal constitutional change: A critical introduction and appraisal’ (2014) 62 *American Journal of Comparative Law* 493.

¹² An illustrative example is Stuart Woolman ‘A politics of accountability: How South Africa’s judicial recognition of the binding legal effect of the Public Protector’s Recommendations had a catalysing effect that brought down a President’ (2016) 8 *Constitutional Court Review* 155.

interrogation of the concept from theoretical, doctrinal, comparative, and other perspectives.

The article is structured as follows. Part II offers a theory of the nature, scope and locus of the amendment power. Part III discusses the relationship between the amendment power and informal constitutional change, beginning first in part III(a) with defining formal constitutional change and drawing a distinction between the two forms of constitutional change. Part III(b) offers a definition of informal constitutional change that is capable of being applied to different modes of informal constitutional change (ie constitutional change by judicial, legislative, or executive means). Part IV narrows the scope of the argument by discussing the lawfulness of informal constitutional change by courts through an interrogation of whether such change may in certain instances be unconstitutional. Here a tentative conceptual framework for the identification of unconstitutional constitutional change is developed. Part V seeks to answer the question ‘why does informal constitutional change occur?’ and discusses the existing limited scholarship on informal constitutional change in South African law. Part VI concludes the article.

II THEORISING THE AMENDMENT POWER

The power to amend a constitution is not an ordinary legislative power. This is evidenced by the special rules and procedures provided for in constitutional texts for the amendment of those very constitutions and which are separate and distinct from the rules that govern the making, changing or repealing of all other ‘ordinary law’. These include special majorities, quorum requirements and the like, which apply only to constitutional amendments.¹³ One explanation for this difference is that the power to change a constitution presupposes the power to create a constitution in the first place.¹⁴ That is, the amendment power is derived from the power to make a constitution — the *constituent power*¹⁵ — while the legislative or

¹³ Roznai op cit note 3 at 6.

¹⁴ Ibid at 7.

¹⁵ The French Revolution-era political theorist Emmanuel Joseph Sieyès is often credited with originating the concept of ‘pouvoir constituant’ in his ‘What is the Third Estate?’ (1789) in Emmanuel Joseph Sieyès *Political Writings* (tr Michael Sonenscher) (2003) and his account continues to be the dominant one in the literature. Other major works on the concept include (controversially) Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), Carl Schmitt *Constitutional Theory* (1928) and Andrew Arato *The Adventures of the Constituent Power: Beyond Revolutions?* (2017). For a general introduction to the concept and a historical overview of its development see Martin Loughlin ‘Constituent power’ in Jeff King & Richard Bellamy (eds) *The Cambridge Handbook of Constitutional Theory* (2025) 208 and Martin Loughlin ‘The concept of constituent power’ (2014) 13 *European Journal of Political Theory* 218.

lawmaking power is a *constituted power* created by a constitution and is thus subsidiary to the constituent power.

The constituent power is ‘the power to establish the constitutional order of a nation’.¹⁶ The source of the constituent power is ‘the political will of the “people” to act as a constitutional authority’.¹⁷ It is both pre-legal and pre-constitutional, meaning that it is ‘independent of any constitutional forms and restrictions’.¹⁸ The people, as sovereign, have the unlimited power to bring a constitution into being.¹⁹

Constituted power, by contrast, finds its origin in the constitution and is an ordinary, limited, legal power.²⁰ Unlike the constituent power, a constituted power can operate only within the bounds of the provisions of the constitution and other positive law.

For a critique of the concept see David Dyzenhaus ‘Constitutionalism in an old key: Legality and constituent power’ (2012) 1 *Global Constitutionalism* 229.

¹⁶ Roznai op cit note 3 at 105. See also Joel Colón-Ríos *Constituent Power and the Law* (2020) 6: ‘Constituent power is thus seen as an original and rudimentary potency that serves as the source of democratic legitimacy, a power that is “capable of creating, sustaining, and cancelling the constitution”’.

¹⁷ Roznai ibid at 106. Some of the earliest evidence of thinking about the people as the constitution-making authority in South Africa can be found in *The State (Orange Free State) v Gibson* (1898) 15 *Cape LJ* 1 at 4: ‘The Volksraad [legislature] of this State ... is everywhere limited by the constitution — that is, the people of this Republic — which is thus a higher power, indeed the only sovereign power, The Volksraad is beyond a doubt the highest *legislative* authority, but still not unqualifiedly *the highest authority*. Above the legislative authority stands *the constitution-giving* authority — that is, the sovereign people, to whom the majesty belongs.’ (Emphasis in the original.)

¹⁸ Roznai ibid. See also Loughlin in King & Bellamy (eds) op cit note 15 at 211, who says that for Sieyès, ‘while the law of the constitution may take effect as fundamental law with respect to the institutions of government, the constitution is established by the higher authority of the nation. Constitutional law is fundamental law with respect to the office of government, but the constitution is itself the product of a higher law, that of the constituent power of the nation.’

¹⁹ Dieter Grimm ‘Constitutional adjudication and constitutional interpretation: Between law and politics’ (2011) 4 *NUJS LR* 15 at 16: ‘Constitutionalism as it emerged in the last quarter of the 18th century was an attempt to re-establish the supremacy of the law, albeit under the condition that there was no return to divine or eternal law. The solution of the problem consisted in the reflexivity of positive law. Making and enforcing the law was itself subjected to legal regulation. To make this possible a hierarchy had to be established within the legal system. The law that regulated legislation and law-enforcement had to be superior to the law that emanates from the political process. Yet, since there was no return to divine law the higher law was itself the product of a political decision. But in order to fulfil its function of submitting politics to law it needed a source different from ordinary politics. In accordance with the theory that, in the absence of a divine basis of rulership, *the only possible legitimization of political power is the consent of the governed, this source was found in the people. The people replaced the ruler as sovereign, just as before the ruler had replaced God.*’ (Emphasis supplied.)

²⁰ Roznai op cit note 3 at 106.

This distinction between constituent and constituted power is crucial to understanding the nature, scope and locus of the amendment power. It is important, too, to understand the temporal conditions under which either the constituent power or constituted power can be exercised.

For instance, the constituent power is often, if not always, exercised following a cataclysmic event in a given polity. This could be following the end of a war of independence, following a coup d'état or a revolution or, as in the South African case, during the peaceful transition from one constitutional regime to another. In sum, therefore, the constituent power is not ordinarily exercisable but is often temporally constrained. This is not true of a constituted power, which is everyday power wielded and exercised by the state and its functionaries in various forms.

The distinction between constituent and constituted powers creates a hierarchy in which the constituted power is subordinate to the constituent power. The constituent power establishes the constitution, while a constituted power is created and regulated by that constitution. In domestic legal systems, the ordinary constituted powers are the legislative, executive and judicial powers of the state.²¹ So, even where the lawmaking power of the state is exercised, it is exercised as a constituted power limited by, and within, the constitution.

Now, what of the amendment power? Since the legislature as a constituted authority — the holder of a constituted power — may exercise the lawmaking or legislative power only as a constituted power, how can we account for the nature of the power to amend the constitution itself, which finds its source in that very constitution? Roznai argues that we ought to think of the amendment power as *sui generis* because it straddles the constituent power to change — and therefore to *re-make* — the constitution and the constituted power to make such changes through the legislative power, which is itself a constituted power.²²

The amendment power can therefore not be said to be a purely constituent power in the sense of being a power to *make* a constitution anew (including the power to replace an already existing constitution), nor can it be said to be a constituted power to make ordinary law since such law would ultimately change the constitution and therefore implicate the constituent power itself.

According to Roznai, existing accounts of the amendment power, which range from regarding it as purely constituent in nature to regarding it as purely constituted, or even some combination of the two ('a constituent

²¹ Ibid at 110. See also Loughlin in King & Bellamy (eds) *op cit* note 15 at 231: 'Th[e] constitution vests authority in the constituted authorities to legislate, adjudicate and govern.'

²² Roznai *ibid*.

power in nature and a constituted power in function’),²³ are inadequate because they do not explain its uniqueness and instead strain to force it into either one of the categories. Instead, he says, we should accept its *sui generis* nature as our starting point.

The amendment power ‘is a special power, weaker than the constituent power but greater than the ordinary legislative powers’.²⁴ On this account, the constituent power exists in two forms: primary constituent power and secondary constituent power.²⁵ The primary constituent power is the superior power to establish a new legal order and includes the power to set out how such a legal order may be changed by, for instance, vesting that power in a particular body and setting the limits for its exercise.²⁶ The secondary constituent power ‘is a constraint power that acts according to the formal procedures and rules that were established by the constitution’.²⁷ The amendment power, so understood, *is* the secondary constituent power. It cannot, unlike the primary constituent power, be exercised in a legal vacuum²⁸ and is for that reason limited in nature.

Thinking of constituent power in this way — as creating an agency relationship in terms of which ‘the people’ delegate the amendment power to, say, a legislature, as a delimited form of the constituent power — allows us to appreciate the fiduciary relationship it creates between ‘the people’ as the repository of the supreme constituent power and the legislature as the repository of the subsidiary amendment power.²⁹ On this construction, the holder of the amendment power owes a fiduciary duty to ‘the people’ to exercise the amendment power ‘for *certain ends*’.³⁰

²³ Ibid at 111–12.

²⁴ Ibid at 113.

²⁵ Ibid at 122; cf the discussion on ‘original constituent power’ and ‘derived constituent power’ at 114. Roznai and Colón-Ríos part ways in how they define ‘original’ and ‘derived’ constituent power. Colón-Ríos op cit note 16 at 9 understands original constituent power as a ‘revolutionary’ form of constituent power, while derived constituent power is ‘legally regulated’. On this view, the amendment power is a form of derived constituent power, contained in the constitution, which may itself authorise the replacement of the existing constitution through an extraordinary or special procedure, marking it distinct from ordinary amendment procedures. (This is a helpful analogue to the South African constitution-making process discussed below.)

²⁶ Roznai ibid at 115.

²⁷ Ibid at 116.

²⁸ A legal vacuum exists where, through a ‘legal revolution’, the formal rules of amendment are violated and ‘the chain of legality between the old and the new constitutional order [is] irreparably broken’, thus displacing the authority of the erstwhile constitutional text and leaving nothing in its stead; or where no positive law regulating constitutional change exists, such as when a state is first founded. See generally Colón-Ríos op cit note 16 at 7.

²⁹ Roznai op cit note 3 at 118–19.

³⁰ Ibid at 119 (emphasis in the original).

‘The trustee, or the amendment authority, has a legal right of possession of the trust corpus, or the amendment power, conditional on its fiduciary obligation to comply with the terms of the trust (procedural or any explicit or implicit substantive requirements) and pursue the end it was established to advance: to amend the constitution.’³¹

So construed, the amendment power cannot be unlimited. It is qualified by the procedural and substantive rules set out in the constitution itself or recognised by the constitutional law of the jurisdiction concerned as placing limits on what can be done in the exercise of the amendment power. Importantly, as with principal–agent relationships generally, the trust construct helps not only to identify the extent of the amendment power, but also the locus: who the agent, the amending authority, is.

It is important at this stage to make a disclaimer for purposes of my present argument. Roznai helpfully catalogues the scholarly debate around the use of ‘original’ and ‘derived’ to describe the two levels at which the constituent power can be exercised.³² As he points out, however, both terms are inadequate to describe properly what the nature of the power is.

In the case of South Africa, for instance, it is not true that the constituent power exercised by the Constitutional Assembly that drafted the Constitution of the Republic of South Africa, 1996 was ‘original’ in the sense of being a pre-legal and legally unlimited power,³³ or ‘a power found outside the dominion of law and therefore incapable of legal regulation’.³⁴ The Constitutional Assembly was established in terms of s 68(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (‘the interim Constitution’) comprising the National Assembly and the Senate, sitting jointly.³⁵ First, the Constitutional Assembly was under an obligation to adopt a new constitution that complied with the Constitutional Principles contained in Schedule 4 to the interim Constitution as agreed by the negotiating parties.³⁶ Secondly, the new constitutional text adopted by the Constitutional Assembly had to be certified for compliance with the Constitutional Principles by the Constitutional Court under s 71(2) of the Interim Constitution.

What this meant was: (a) the source of the Constitutional Assembly’s power was the interim Constitution, and it therefore did not exercise an ‘original’ constituent power, since it was necessarily limited by the provisions of the interim Constitution in terms of what and how it could substantively deal with in the process of creating the new constitution;

³¹ Ibid.

³² Ibid at 120–2.

³³ Ibid at 121.

³⁴ Colón-Ríos *op cit* note 16 at 4.

³⁵ It provided in the relevant part: ‘The National Assembly and the Senate, sitting jointly ... shall be the Constitutional Assembly.’

³⁶ Section 71(1)(a) of the interim Constitution.

and (b) the Constitutional Assembly's exercise of its constituent power was subject to the Constitutional Court's power of certification, which it could decline to exercise if it was of the view that the constitutional text did not conform with the Constitutional Principles (which is exactly what happened with the first iteration of the text of the Constitution of 1996).³⁷

The idiosyncrasies of the South African constitution-making process do not, however, lead to the conclusion that the nature of the constituent power exercised in that process was any different from the kind contemplated in the scholarship cited here. Instead, the South African experience broadens our understanding of the multiplicity of ways in which this power may be exercised.³⁸

Turning back to the amendment power, it is important to point out that the agency construction employed thus far has certain implications. First, because the amendment power is delegated, it cannot be exercised to achieve what 'the people', as the principal — as the repository of the primary constituent power — could themselves not do, but also not more than the terms of the delegation allow. That is to say that the amendment power is exactly and *only* that: the power to amend the constitution as is. It does not entail the power to replace the constitution since that is a power that belongs to 'the people' proper. This is not to say that the amendment power could not be used to remove a fundamental aspect of a constitution — for example, a supremacy clause. Such an amendment would amount to what Albert calls 'constitutional dismemberment', which falls short of constitutional replacement.³⁹

Secondly, the delegation — at least in the case of democracies — is to a constituted body that most closely resembles 'the people' when acting as the constituent authority. The legislature, as the agent, mirrors in almost perfect detail how the constituent authority itself functioned when making the constitution. The choice of a legislature as the repository of

³⁷ *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

³⁸ See Andrew Arato *Post Sovereign Constitution Making: Learning and Legitimacy* (2016) 104–6, who calls the South African constitution-making process an exercise in 'post sovereign constitution making within legal continuity'.

³⁹ See Richard Albert 'Constitutional amendment and dismemberment' (2018) 43 *Yale Journal of International Law* 1 at 4, who defines it thus: 'A constitutional *dismemberment*, in contrast, is incompatible with the existing framework of a constitution because it seeks to achieve a conflicting purpose. It seeks deliberately to disassemble one or more of a constitution's elemental parts. A constitutional dismemberment alters a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution. It is a constitutional change understood by political actors and the people to be inconsistent with the constitution at the time the change is made. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution.' (Emphasis in the original.)

the amendment power, then, is not the result of a mere choice between multiple plausible options but a reflection of its preeminent institutional suitability to the task of making changes to the constitution in the same way that the constitution was first made.

An illustrative example is, again, the South African experience. The Constitutional Assembly was made up of the two Houses of Parliament (the National Assembly and the Senate) sitting jointly. When it delegated the power to amend, it required in s 74(1) of the Constitution the participation of both successor Houses of Parliament (the National Assembly and the National Council of Provinces), each with their own special majorities, to pass a Bill amending the Constitution.

One can infer, therefore, that the amendment power is vested in the legislature because it is primarily a lawmaking power and that the legislature is best suited to the task of lawmaking by reason of its democratic bona fides, its representativeness, the deliberative nature of its proceedings, and so forth.

Since the legislature is explicitly empowered to amend the constitution and its power subject to substantive and procedural limits set out in that very constitution, where do courts fit in? In other words, why does constitutional change outside of the formal rules of amendment occur? I will address myself to that question soon. Before that, however, I first need to define what counts as informal constitutional change and situate this phenomenon in the South African legal context.

III THE AMENDMENT POWER AND INFORMAL CONSTITUTIONAL CHANGE

(a) *Distinguishing formal constitutional change*

Since the focus of this article is informal constitutional change, I will not expend much effort discussing *formal constitutional change*. A brief exposition of the term as used in this article and the phenomenon it describes is, however, necessary.

A feature of written constitutions is often their rigidity.⁴⁰ This rigidity is not rigidity for its own sake but is instead aimed at securing certain normative ends.⁴¹ One of these ends is durability: the idea that constitutions are meant to exist for a long period, or duration, of time. This, in turn, is meant to ensure that the legal system is stable and predictable and that any changes to the constitution occur only when they are necessary.⁴²

⁴⁰ Sebastián Linares Lejarraga 'Constitutional rigidity and the default rule' (2014) 27 *Ratio Juris* 540.

⁴¹ Rosalind Dixon & David Landau 'Tiered constitutional design' (2018) 86 *George Washington LR* 438 at 465.

⁴² Charles Manga Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) 11 *International Journal of Constitutional Law* 382 at 383.

To achieve the latter goal, written or codified constitutions often, if not always, prescribe formulas for their own amendment (although this might suggest that *only* constitutional change that occurs through the prescribed amendment formula (that is, *formal* constitutional change) is legitimate, I have shown earlier that change outside the prescribed formula occurs regardless, and I will show that it may, in certain circumstances, be entirely legitimate).

Such formulas often take the form of rules: rules about what majority is needed to amend a constitution, about what kind of process is to be followed when introducing an amendment to a constitution, about what provisions may or may not be amended, and about who may initiate amendment processes.⁴³

At its most basic, then, formal constitutional change is about channelling and disciplining the process of constitutional change through adherence to the amendment rules as set out in the constitutional text. This adherence demands that the substantive and procedural limits placed on a legislature's ability to amend the constitution be strictly observed. Substantive limits may include the immunisation of certain constitutional provisions from amendment ('unamendability'⁴⁴ or entrenchment),⁴⁵ while procedural limits may include the use of extraordinary procedures for the introduction of Bills amending the constitution, special voting procedures, or special majorities for passing an amendment.⁴⁶

Formal amendment rules achieve, among others, two things: distinguishing constitutional amendments from ordinary law and rendering amendments that fall foul of the rules susceptible to judicial review.⁴⁷

From the foregoing, it is clear that formal constitutional change requires three things. First, an amendment process must be undertaken in terms of the rules set out in the constitution *and* must comply with those same rules, including any procedural or substantive limits placed on the exercise of the amendment power. Secondly, such an amendment process must be undertaken by the constitutionally empowered amending authority and not any other.⁴⁸ Thirdly, such an amendment process must result in a change to the text of the constitution.

Applying these criteria to the South African constitutional context, formal constitutional change may be defined as: (1) constitutional change

⁴³ Richard Albert 'The structure of constitutional amendment rules' (2014) 49 *Wake Forest LR* 913 at 913–14.

⁴⁴ Richard Albert 'Counterconstitutionalism' (2008) 31 *Dalhousie LJ* 1 at 37–44.

⁴⁵ Roznai op cit note 3 at 6 and 15ff.

⁴⁶ Ibid at 5.

⁴⁷ This is where the idea of 'unconstitutional constitutional amendments' comes from: see ibid at 179–83.

⁴⁸ Richard Albert 'Nonconstitutional amendments' (2010) 22 *Canadian Journal of Law and Jurisprudence* 1 at 13.

by means of the procedure set out in s 74 of the Constitution; (2) by the National Assembly and the National Council of Provinces as the amending authorities, fulfilling their respective roles; (3) which results in a change to the text of the Constitution. Although simplified, this definition captures the core of the idea of formal constitutional change and makes it possible to distinguish it from other forms of constitutional change.

(a) *Informal constitutional change*

Informal constitutional change is not as easy to define. As mentioned above, written constitutions can change through convention, legislative reform, and judicial interpretation of the constitutional text. Since such changes do not occur formally, or at the textual level, how can we define the concept of informal constitutional change and by what means can we identify when such change has occurred? Additionally, with regard to judge-made constitutional change, how do we distinguish ‘ordinary’ constitutional interpretation from informal constitutional change?

While this article concerns itself with informal constitutional change broadly, it places a particular focus on informal constitutional change by courts (or by judges) more narrowly. To the extent that the ensuing discussion narrowly focuses on judicial or judge-made constitutional change, my claim here is not that such change is necessarily always illegitimate (or ‘unconstitutional’). Instead, I seek to question ‘how far fundamental institutions should be modified or abrogated by [a] court rather than in the constitutionally prescribed way’.⁴⁹

At this stage, one thing should be clear: the purpose of informal constitutional change is not to change the text of a constitution, for that would require adherence to prescribed amendment procedures, but instead to effect changes to the operation of the constitutional law of a particular jurisdiction and, in turn, to the constitutional order itself.⁵⁰

A constitution has changed ‘if it requires today what it did not require yesterday’.⁵¹ How one determines whether an informal constitutional change has occurred is a separate, and even trickier, matter. Griffin proposes three criteria for this purpose, with a caveat that the constitutional changes in question must be ‘fundamental’ and not merely the result of

⁴⁹ Frederic R. Coudert ‘Judicial constitutional amendment as illustrated by the devolution of the institution of the jury from a fundamental right to a mere method of procedure’ (1904) 13 *Yale LJ* 331 at 341.

⁵⁰ Bernal op cit note 11 at 494–5. In any event, the enactment of new constitutional rules would result in a change in the operation of constitutional law. Informal constitutional change inverts this order and alters the operation of constitutional law without the *textual* constitutional rules having changed.

⁵¹ Timothy Endicott ‘Constitutional interpretation’ in King & Bellamy (eds) op cit note 15 at 367.

‘ordinary judicial interpretation’.⁵² First, such changes must ‘relate to the subject matter of the Constitution’, which is to say they must relate to the content of a constitutional right or duty, or the exercise of a constitutional power. Secondly, they must be ‘fundamental to governance in some sense’, as in altering the vertical relationship between the state and its subjects, or the horizontal relationship between state organs or institutions. Thirdly, they must have the same legal status as the constitution itself — that is, be regarded as binding supreme law.⁵³

For Passchier, ‘informal constitutional change has occurred where, within a particular constitutional order, the evolution of institutional practices and understandings has modified the normative content of one or more formal constitutional norms, without the wording of the formal constitution having been amended before these modifications took effect’.⁵⁴ A more straightforward restatement of this thesis is that ‘[i]nformal constitutional change takes place where the meaning of formal constitutional precepts change[s], though not the constitutional text itself’.⁵⁵

Barczeniewicz, on the one hand, defines constitutional change, generally, as ‘a change in the content of a constitution’ that occurs ‘if the constitution gains, loses or suffers modifications of any of its rules, legal or non-legal, written or unwritten’.⁵⁶ Informal constitutional change — or what Barczeniewicz calls ‘implicit constitutional change’ — occurs where ‘a change of a constitutional rule is not a result of a change in a legal document that is a basis for the rule’.⁵⁷

Albert, on the other hand, says an informal constitutional change has occurred ‘where the enforceable meaning of the constitution changes

⁵² Stephen M Griffin ‘Understanding informal constitutional change’ (2015) 1 *Journal of Institutional Studies/Revista Estudos Institucionais* 1 at 10. By ‘ordinary’ judicial interpretation, Griffin refers to ‘interpretive change by the judiciary [that] is guided by the text, basic doctrines linked to the text such as federalism and separation of powers, and the court’s own precedents’ (at 2).

⁵³ Ibid at 10.

⁵⁴ Passchier op cit note 4 at 60.

⁵⁵ Ibid at 205.

⁵⁶ Mikołaj Barczeniewicz *Constitutional Change and the Rule of Recognition* (DPhil thesis, University of Oxford, 2019) 232.

⁵⁷ Ibid at 123. Barczeniewicz here draws on the work of constitutional economist Stefan Voigt, who, in ‘Positive constitutional economics: A survey’ (1997) 90 *Public Choice* 11 at 34 described ‘explicit [constitutional] change’ as occurring ‘when the text of the constitutional document is modified’, and in ‘Implicit constitutional change — Changing the meaning of the constitution without changing the text of the document’ (1999) 7 *European Journal of Law and Economics* 197 at 198 said that implicit constitutional change ‘implies that the meaning of the constitution changes although the constitutional document itself remains unchanged’.

without altering the constitutional text'.⁵⁸ In the same vein, Roznai argues that '[w]hen the enforceable meaning of the constitution changes outside of the amendment process, this is an informal constitutional change'.⁵⁹

All of the scholars cited above provide a diversity of largely complementary definitions, with the exception of Griffin, to whom I shall return shortly. Briefly, each definition conceptualises informal constitutional change as occurring outside of the established amendment rules contained in a constitution. Equally, such change does not affect the constitutional text, but something else.

For Passchier it is the normative content of constitutional norms ('the meaning of constitutional precepts'), while Barczentewicz views any informal change in *constitutional rules* — which he regards as separate from the *constitutional text* — as constituting informal constitutional change. The same is true of Marshfield, for whom '[i]nformal constitutional change happens when binding constitutional rules are modified without any corresponding alteration to the constitutional text'.⁶⁰ Albert and Roznai, by contrast, emphasise that such change must be to the 'enforceable meaning' of a constitution.

While Griffin's three criteria are not strictly a definition, they help to sharpen our focus onto which changes would constitute informal constitutional change, since some changes will inevitably occur in the course of 'ordinary judicial interpretation' which do not necessarily rise to the level of constitutional change.

To do so, we must ask whether any change to the 'normative content of constitutional norms,' 'constitutional rules,' or 'the enforceable meaning of a constitution' is:

- (i) properly concerned with the subject matter of the constitution (broadly construed as encompassing both the constitutional text and accepted rules of constitutional law anchored in that text);
- (ii) fundamental to governance in the sense of substantially altering the relations between the state and the bearers of constitutional rights, or substantially altering the relationships between constitutional institutions; and
- (iii) regarded as binding or determinative of 'constitutional meaning' in the sense that such a change supersedes any previously accepted meaning or understanding, and is treated as binding on the entire constitutional system.

⁵⁸ Albert op cit note 5 at 388–9.

⁵⁹ Roznai op cit note 5 at 558–9.

⁶⁰ Marshfield op cit note 5 at 1058.

This of course brings us to the question of who has the authority to effect informal constitutional change. In the case of formal constitutional change, the repository of the amendment power is the legislature or lawmaker as determined by the constitutional text. As noted previously, informal constitutional change can be undertaken by the legislature and the executive through legislative or executive action (recalling here Albert's theory of 'quasi-constitutional amendments') and through constitutional conventions that depart from, or repudiate, the constitutional text. But it can also be undertaken by judges through the adjudication of constitutional disputes and the interpretation of the constitutional text.

But how do we define this judge-made constitutional change? Fowkes suggests that informal constitutional change by courts involves '[t]he use of the interpretative power to the degree that it amounts to a new insertion into the constitutional text'.⁶¹ For Colón-Ríos, informal constitutional change is typified by changes occurring through constitutional interpretation, 'where a text remains untouched, but authoritative interpreters assign to it a new or different meaning, with the result that one can say that the content of the constitution has changed'.⁶² Such change may also occur 'when certain extra-textual norms (for example, norms related to the standards of interpretation, to tests used by courts to assess the constitutionality of legislation, or to the relationship between the branches of government) suffer a modification'.⁶³

Macfarlane defines 'judicial amendment' of the constitution as 'a concept employed to suggest that courts sometimes make fundamental changes to constitutional meaning that strain the boundaries of ordinary constitutional interpretation'.⁶⁴ By calling it 'judicial amendment' Macfarlane seeks to emphasise that, in his view, courts 'improperly usurp the amending formula by making changes that should require recourse to [the amending formula] and should be left to those actors empowered by the express amending authority laid out in the constitutional text'.⁶⁵ For Macfarlane, a judicial decision that 'effectively adds to, removes from, or modifies the constitution in a manner that is inconsistent with, or not

⁶¹ Fowkes op cit note 10 at 434.

⁶² Joel I Colón-Ríos 'Judge-made constitutional change' in Xenophon Contiades & Alkmene Fotiadou (eds) *Routledge Handbook of Comparative Constitutional Change* (2020) 217 at 217–18.

⁶³ Ibid at 218.

⁶⁴ Emmett Macfarlane 'Constitutional retconning: History in judicial reasoning and changes in constitutional meaning' (2023) 61 *Alberta LR* 1 at 12.

⁶⁵ Ibid. Macfarlane, like Stone Sweet at note 67 below, defines judicial amendment of the constitution negatively — that is, as something to be deprecated. It should be noted at this stage that my definition attempts some level of neutrality because I do not believe that *all* informal constitutional change is illegitimate or unconstitutional. The question of legitimacy is briefly addressed in part IV.

plausibly contemplated by, the text in its original or modern meaning, the intent or purposes of the relevant provisions, and the expectations of the broader political community as to what the constitution contains' constitutes a judicial amendment of the constitution.⁶⁶

Relatedly, Stone Sweet offers us the concept of a juridical coup d'état, which is 'a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court'.⁶⁷ By 'normative foundation', Stone Sweet refers to the 'precept of a system's higher law' conceived either in terms of the Kelsenian Grundnorm⁶⁸ or the Hartian 'rule of recognition'.⁶⁹

For a 'fundamental transformation' to occur, the following criteria must be met: (a) a reasonable inference that 'the constitutional law produced by the transformation would have been rejected by the founders' must be capable of being drawn; (b) the decision must alter the functioning of the legal system in ways not intended by the founders; and (c) the decision must be an instance of constitutional lawmaking, which is 'the modification of the constitution through adjudication (interpretation and application)'.⁷⁰

What distinguishes a 'juridical' from an 'ordinary' coup d'état is that, while the latter is lawless or not law-governed, the former 'proceeds through the exercise of powers that have been delegated by the Basic Norm to the judicial authority' but whose substance might not have been authorised, or was forbidden, by the 'Basic Norm' pre-coup.⁷¹ This presupposes that the constitutional grant of judicial authority by the constituent power through the constitutional text 'includes substantive constraints on the judge's decision-making (lawmaking)'.⁷²

⁶⁶ Emmett Macfarlane 'Judicial amendment of the constitution' (2021) 19 *International Journal of Constitutional Law* 1894 at 1896.

⁶⁷ Alec Stone Sweet 'The juridical *coup d'état* and the problem of authority' (2007) 8 *German LJ* 915.

⁶⁸ Hans Kelsen *The Pure Theory of Law* (tr Max Knight, 1967). See also Andrei Marmor 'The pure theory of law' in Edward N Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Fall 2021 ed) available at <https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory/>: 'The basic norm is the content of the presupposition of the legal validity of the (first, historical) constitution of the relevant legal system.'

⁶⁹ H L A Hart *The Concept of Law* 2 ed (1994) 48–50. Rules of recognition are rules that provide the criteria of validity for and the identification of the legal norms of a system.

⁷⁰ Stone Sweet op cit note 67 at 916.

⁷¹ Ibid. Stone Sweet's definition of a 'juridical coup d'état' reaches beyond the mere explication of the same as a mode of informal constitutional change, with which I am presently concerned, by implying that judicial informal constitutional change is per se illegitimate, and hence, a coup. This is a point I tackle more fully in part IV.

⁷² Ibid.

As I explained above, the grant of the amendment power to the legislature is not a random choice between several plausible choices. It is a deliberate act of constitutional design that assigns the secondary constituent power to a constituted body whose nature, form and function closely resembles that of the constituent authority exercising the primary constituent power, and that is, for that reason, best suited to the task of lawmaking.

Conversely, the assignment of judicial authority to the courts as constituted bodies cannot therefore also include the amendment power since that power is assigned to another, more appropriate, constituted body.⁷³ That is to say, even if we grant that judges possess lawmaking powers, such powers are necessarily limited, or at least limited to the extent that they exclude the power to amend the constitution through judicial lawmaking.

This should not, however, be overstated as an absolute rule. We have seen, from the South African constitution-making process described in part II above, that there are instances where a constituent authority envisages some role for judges in the constitution-making process, even if in limited terms. In this way, the secondary constituent power may be appropriately delegated to the judicial authority of a state.⁷⁴ It was precisely this type of delegation that enabled the Constitutional Court to withhold its certification of the constitutional text and require its revision by the Constitutional Assembly in the *Certification* judgment.⁷⁵

For our purposes, then, we may define informal constitutional change as: (1) any change to the content of the constitution; (2) outside of the prescribed amendment procedures;⁷⁶ (3) which alters the content or scope of a constitutional right, power, or duty, or the relationship between constitutional institutions; (4) in a manner not reasonably countenanced by the constitutional text or contemplated by the constituent authority; and (5) which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme).

⁷³ Gary Jeffrey Jacobsohn & Yaniv Roznai *Constitutional Revolution* (2020) 245: 'If the scope of the amendment power, which represents the instituted constituent power of the people and confers the ability to change other constituted organs such as the judiciary, legislature, and executive, is limited such that it cannot destroy the constitutional core and replace the constitution, all the more so are these limitations applicable to the court, which is an ordinary constituted organ and does not democratically represent the people.'

⁷⁴ The temporal limits on the exercise of this power would remain the same as in the case of the constituent authority itself. See Arato *op cit* note 38 at 79–82 for a discussion of the role of courts in constitution-making processes.

⁷⁵ *Certification of the Constitution of the Republic of South Africa, 1996* *supra* note 37.

⁷⁶ One might add a criterion (2.a) to the definition pointing out that such change ought to have been undertaken by judges to qualify as an 'informal constitutional amendment'.

With this definition, we may begin the task of critically assessing whether there has been any informal constitutional change in South African law and, if so, whether such change counts as *unconstitutional constitutional change*.

IV IS JUDGE-MADE CONSTITUTIONAL CHANGE UNCONSTITUTIONAL?

(a) *Introduction*

In part III, I explored the concept of informal constitutional change and provided a working definition which this article will explore further. In some of the scholarship surveyed in the previous part, especially as it relates to the definition of informal constitutional change, there were intimations as to the impropriety or illegitimacy of such change. That question was, however, not squarely dealt with.

Taking as a starting point the idea that the text of a constitution does not exhaust the content of a constitution, we accept that judges play an active role in expounding the content of the constitution through adjudication and, especially, the interpretative process — by clarifying the meaning of constitutional text, or the scope of its application, without creating new constitutional obligations. We equally accept, however, that there are limits on the extent to which judges can be creative or innovative when engaged in the interpretation of the constitution and that, once they venture beyond such limits, they do more than just interpret the constitution and instead ‘amend’ it or, put otherwise, engage in informal constitutional change.

Although this distinction between judicial interpretation and judicial amendment of the constitution may, at first blush, present itself as treating constitutional change by judges as inherently suspect because of its informal nature, that is not the case. In this part, I will attempt to further refine our understanding of such informal constitutional change by explaining when it is illegitimate. That is, I will attempt to explain when *informal* constitutional change becomes *unconstitutional* constitutional change.

I begin first with a broad overview of the problems identified with informal constitutional change by judges. Then, I will explain what I mean by ‘legitimacy’ and tie that to an understanding of the potential unconstitutionality of constitutional change by judges. I will conclude by drawing up an analytical framework for understanding and identifying unconstitutional constitutional change.

(b) *Interpretation and amendment*

The bulk of the work that courts do is adjudicative: the resolution of disputes between two or more parties by resort to the application of law. Often, it involves the interpretation of one or more legal instruments, be

it a statute, a contract, a will or, indeed, a constitution. It seems reasonable to suggest, then, that the text of the legal instrument concerned matters a great deal to the interpretative enterprise, such that any interpretation eventually settled upon by a court must be consistent with the language adopted by the text of the legal instrument.

Text, however, is not always determinate, in the sense of enabling judges to extract the correct legal answer to a question therefrom, given the nature of language and the problems it engenders. So, sometimes some words are taken to mean something different to how they would ordinarily be used. But this article does not admit of a comprehensive discussion on the nature and limits of legal interpretation and I cannot do the scholarship justice here. For now, it suffices to say that there are limits to what a legal text can be said to mean and that these limits on meaning also establish the boundaries of what judges can or cannot do when engaged in the interpretative enterprise.

It is necessary here to defend the claim made in this part, which is that there is a red line that distinguishes ordinary constitutional interpretation from informal constitutional change by courts, viewed in light of the definition I developed in part III. According to that definition, any change ‘to the content of the constitution that occurs outside of the prescribed amendment procedures, that alters the content or scope of a constitutional right, power, or duty, or the relationship between constitutional institutions *in a manner not reasonably countenanced by the constitutional text or contemplated by the constituent authority* and which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme)’⁷⁷ amounts to an informal constitutional change.

It is the italicised portion of this definition that needs defending, for it raises a spectre that haunts most South African constitutional lawyers: originalism. It is an appeal to the intentions of the framers, the Constitutional Assembly, when drafting the Constitution. But why should we care about the framers’ intentions when interpreting the Constitution? There are at least two reasons. As Raz forcefully argued, part of why we treat laws as valid and, in turn, obey them is because of the authority of the lawmakers.⁷⁸ And since such laws pursue identifiable goals (or purposes), our interpretation of those laws, and the goals they pursue, must reflect ‘the intentions of the lawmakers in making them’ since ‘the law laid down by [an] authority is that which it meant to lay down, the law it intended’.⁷⁹

The second reason is that an interpretation that is faithful to the intentions of a law’s framers is one that preserves our moral obligation to

⁷⁷ Emphasis supplied.

⁷⁸ Joseph Raz ‘Why interpret?’ in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) 235.

⁷⁹ Ibid.

obey that law by maintaining the continuity of the 'common standards for the guidance of the members of the political society' provided by the law beyond the lifespan of the framers' authority.⁸⁰ Interpretation must therefore secure the continuity of the law's validity and authority for the stability of the polity to which that law applies. As Raz put it:

'To the extent that the law arises out of respect for legitimate authority, legal reasoning must establish the law as laid down by authority, that is it must rest on the interpretation of the decisions of legal authorities which accord with the intentions of those authorities. To the extent that the law arises out of the need to secure continuity, legal decisions are binding even when their authors no longer have authority. The content of these decisions is established by interpreting them as they were interpreted when the reasons for paying them attention were based on respect for the authorities which took them.'⁸¹

Since the object of constitutional interpretation is the constitution, the purpose of interpretation is to gain an understanding of the meaning of that constitution. Therefore, such interpretation must reflect the constitution that the framers intended to create, and not one fashioned by judges unconstrained by such intentions because their task is *interpretative* and not *creative*.⁸² A constitution necessarily has a meaning that pre-exists judicial interpretation, since nothing that has no meaning could be law.⁸³ And such meaning is determined, at least partially, by reference to the intentions of its framers; such intentions always form part of a constitution's meaning.

Although the Constitutional Court had initially resisted this approach to constitutional interpretation in *Mansingh*,⁸⁴ where it stated that courts were no longer required to look to the intention of the drafters when engaged in constitutional interpretation, it also held that where evidence of the drafters' intentions regarding the purpose of a constitutional provision was available, a court may have regard to such evidence in determining the meaning of the provision.⁸⁵ Indeed, in *S v Makwanyane*, the court held that the reports of the technical committees of the Multi-Party Negotiating Process on drafts of the Interim Constitution were the equivalent of travaux préparatoires, that '[s]uch background material can provide a context for the interpretation of the Constitution'⁸⁶ and that 'where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the

⁸⁰ Ibid.

⁸¹ Ibid at 236.

⁸² Ibid at 237.

⁸³ Jeffrey Goldworthy 'Raz on constitutional interpretation' (2003) 22 *Law and Philosophy* 167 at 174.

⁸⁴ *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC).

⁸⁵ Ibid para 27.

⁸⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) para 17.

Constitution, it can be taken into account by a Court in interpreting the Constitution'.⁸⁷

In two recent cases, however, the court has turned to the minutes and reports of committees of the Constitutional Assembly to inform its interpretation of the constitutional text, signalling its concern that the interpretations proposed by the parties before it could not plausibly have been what the constitutional drafters intended. In *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party*,⁸⁸ the court was asked to determine whether former president and Umkhonto Wesizwe Party leader Jacob Zuma was disqualified from standing as a candidate for election to the National Assembly in terms of s 47(1)(e) of the Constitution⁸⁹ on account of his conviction and sentence to fifteen months' imprisonment for the offence of contempt of court. A secondary question was whether a remission of sentence, granted by the President in terms of s 84(2)(j) to a category of prisoners that included Mr Zuma, had the effect of reducing his judicially imposed sentence from fifteen months to three months, thereby placing him beyond the reach of the disqualification clause.⁹⁰

In interpreting s 47(1)(e), the court had recourse to the Constitutional Assembly's 'Draft Framework for the New Constitution', noting that 'it is useful (but not determinative) to consider evidence about how the drafters of the Constitution intended the prerogative powers to interact with section 47(1)(e) of the Constitution'.⁹¹ In the Draft Framework, the Constitutional Assembly had stated that '[w]hether a person is disqualified would depend on the length of the original sentence of imprisonment'.⁹² The court found this evidence of the drafters' intentions to be dispositive of the case, holding that: 'The drafters could not have been clearer that they

⁸⁷ Ibid para 19.

⁸⁸ *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party* 2025 (5) SA 1 (CC). I was involved in this litigation as a senior researcher for the Council for the Advancement of the South African Constitution, which was admitted as the first amicus curiae and was largely responsible for framing the legal argument, specifically the reliance on the reports of the Constitutional Assembly on the drafting of the relevant provisions.

⁸⁹ It provides: '47. Membership (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except — ... (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.'

⁹⁰ *Electoral Commission* supra note 88 paras 66–8. The Electoral Court had held that what mattered was the 'effective sentence' served and not the original sentence imposed: see para 70.

⁹¹ Ibid para 73.

⁹² Ibid para 75.

intended it to be the *original* sentence that would determine disqualification under section 47(1)(e) of the Constitution, not the length of execution. From its inception, therefore, it was understood that remission of sentence was irrelevant to section 47(1)(e).⁹³

In a more recent case⁹⁴ concerning the question whether the South African Human Rights Commission could issue binding orders or ‘directives’ in the exercise of its powers, the court had regard, *inter alia*, to extensive material from the Constitutional Assembly, including the reports of the sub-committee responsible for drafting the relevant constitutional provisions as well as the final report of the Constitutional Assembly itself to inform its interpretation of those provisions.⁹⁵ The drafting history, the court held, ‘demonstrates that the drafters deliberately adopted language in section 13(3) [of the South African Human Rights Commission Act 40 of 2013] that was previously employed in the interim Constitution, suggesting an intended continuity of a facilitative, and not adjudicative, model’.⁹⁶

Responding to an argument that an interpretation that the Commission’s directives were binding was required by s 39(2) of the Constitution, the court held:

‘Section 39(2) of the Constitution requires every Court, when interpreting legislation, to promote the spirit, objects and purport of the Bill of Rights. This injunction *does not allow courts to expand statutory powers beyond what the text can bear*. Section 39(2) cannot be invoked to expand and imbue powers upon a body that the Constitution and statute have deliberately withheld.’⁹⁷

Once again, evidence of the constitutional framers’ intentions was dispositive and moved the court to state categorically that courts may not ‘imbue powers upon a body that the Constitution ... [has] deliberately withheld’.⁹⁸ In both cases, such evidence was able to clarify the meaning of the constitutional text in a manner that reconciled the words used by the constitutional drafters with their intentions.

Not all of the intentions of constitutional framers matter to constitutional interpretation, only what Goldsworthy calls their ‘enactment intentions’ — that is, those intentions the evidence for which is readily available and is capable of clarifying the meaning of the constitutional text as enacted or adopted.⁹⁹ An originalist method

⁹³ Ibid para 76 (italics in the original).

⁹⁴ *South African Human Rights Commission v Agro Data CC* (2026) 7 BCLR 737 (CC) (‘*Agro Data*’).

⁹⁵ See *Agro Data* *ibid* paras 44–9.

⁹⁶ Ibid para 54.

⁹⁷ Ibid para 62 (emphasis supplied).

⁹⁸ Ibid.

⁹⁹ Jeffrey Goldsworthy ‘Originalism in constitutional interpretation’ (1997) 25 *Federal LR* 1 at 20.

of constitutional interpretation, therefore, is not concerned with the private or concealed intentions of constitutional framers, nor is it concerned with the framers' intentions regarding how the constitutional provisions ought to be applied — which remains the sole preserve of the courts.¹⁰⁰ The task of the courts is to say what the constitution means, and by extension, what the constitution is, but not what the constitution *should* be — and the former does not entail the latter.¹⁰¹ Ordinary constitutional interpretation, then, entails the determination of the meaning of the content of the constitution partially by reference to the intentions of its framers, while informal constitutional change entails investing constitutional text with a meaning that was never intended by its framers, thereby changing the content of the constitution.¹⁰²

By distinguishing between ordinary constitutional interpretation and what in part III was described variously as 'judicial amendment' of the constitution,¹⁰³ 'implicit constitutional change'¹⁰⁴ or even 'juridical coup d'état',¹⁰⁵ I draw attention to those judicial decisions that stray beyond the limits of acceptable judicial lawmaking through constitutional interpretation. That is to say, I question the constitutionality of any decision that does not 'follow from any authorized mode of interpretation and is merely a "pretext" for judicially imposed transformation' of the constitution (or at least appears so).¹⁰⁶ After all, '[t]he distinction between identifying the law and changing it is basic to the law, and central to any coherent understanding of judicial decision-making'.¹⁰⁷

As explained previously, it is not my argument that all instances of informal constitutional change by judges are illegitimate or unconstitutional. But it is equally clear, from a reading of the scholarship, that such change poses at least two related but distinct problems for constitutional theory: one of authority and one of legitimacy. I focus presently on the problem of authority.

Since the authority to amend a constitution is ordinarily sourced directly in the constitutional text and contained in amendment formulas, questions about a body's authority to undertake such change are easily answered by

¹⁰⁰ Ibid.

¹⁰¹ Goldsworthy op cit note 83 at 170 and 174.

¹⁰² Ibid at 175.

¹⁰³ Macfarlane op cit note 66.

¹⁰⁴ Barczentewicz op cit note 56.

¹⁰⁵ Stone Sweet op cit note 67.

¹⁰⁶ Sanford Levinson 'How many times has the United States Constitution been amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for constitutional change' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 13 at 33.

¹⁰⁷ Raz op cit note 78 at 239.

reference to the amending formula, and disputes about the limits of that authority can be similarly resolved.¹⁰⁸

If we accept, as we surely must, that '[w]hat is written in the constitution needs to be invested with more determinate meaning, ... at the point of its authoritative application, ... by judges',¹⁰⁹ then we must also accept that judges do indeed have *some* authority to change the meaning of the constitution. Yet, changes in constitutional meaning of, say, a supplementary kind¹¹⁰ — by applying a constitutional provision to new circumstances and thereby generating a new meaning that previously did not exist, for instance — do not raise the suspicions of constitutional theorists in the same way that more transformative 'interpretations' seem to.¹¹¹ As Gardner put it:

'[I]t is no part of the concept of interpretation that the meaning one explains by interpreting must already be part of the text before one interprets it. One may also interpret a text by giving it some meaning, such that it has that meaning from now on in virtue of one's having given it.'¹¹²

In this way, we can understand supplemental changes as being 'normatively irrelevant' constitutional changes in the sense of not altering the 'ought' of the Constitution — that is, not creating new (especially 'extra-textual') constitutional obligations where none previously existed.¹¹³ Rather, it is when judges make 'normatively relevant' constitutional changes, for instance, by inserting into the constitution rules or norms not previously recognised as part of the constitution that they transgress the limits of their authority. This transgression occurs in two ways: (a) through the exercise of the constituent power; and (b) through the disregard for the constituent authority of the constitution's framers.

¹⁰⁸ See Jacobsohn & Roznai op cit note 73 at 242: '[W]hen constitutional revolutions are brought about by using constitutional amendments, the authority is obvious; it is the official constitutional mechanism permitting the constitution to be formally changed.'

¹⁰⁹ Gardner op cit note 1 at 119.

¹¹⁰ Goldsworthy op cit note 83 at 171: 'in some cases a limited power to *supplement* the constitution must be permissible' (emphasis in the original).

¹¹¹ See Jeffrey Goldsworthy 'Clarifying, creating, and changing meaning in constitutional interpretation: A comment on András Jakab, "Constitutional reasoning in constitutional courts — A European perspective"' (2013) 14 *German LJ* 1279 at 1281–2. A formulaic rendering of a supplementary interpretation could look something like this: If Provision A of the Constitution only applied to scenarios S_1, S_2, S_3 and S_4 at time T before its interpretation by court $\mathcal{N}$, a new meaning of Provision A would apply to scenarios S_1, S_2, S_3, S_4 and S_5 at time T_1 after court $\mathcal{N}$'s interpretation, without radically altering the scope or content of the provision so as to transform it into Provision A_1 as distinct from Provision A.

¹¹² Gardner op cit note 1 at 122.

¹¹³ I am grateful to Quentin du Plessis for this formulation.

Courts run into problems of authority in the first instance when they engage in constitutional change because such change requires the exercise of the amendment power, a secondary constituent power. For '[h]ow can a constituted organ possessing only a limited legal competence be the bearer of constituent power and bring about a constitutional revolution?'¹¹⁴ For that reason Macfarlane views judicial amendment of the constitution as a usurpation of the secondary constituent power; a divestment of the amending authority's power to change the constitution as prescribed by the constitutional text.¹¹⁵

Courts engaged in informal constitutional change face yet another problem of authority: that of acting contrary to the constitutional text itself. While amending formulas often identify the repository of the amendment power and specify the manner and form of its exercise, they very rarely proclaim its exclusivity. That is, they do not explicitly say that the amending formula is the only way in which the constitution may be amended.¹¹⁶ There are two exceptions worth mentioning.

Section 128 of the Constitution of the Commonwealth of Australia commences with the words 'This Constitution *shall not be altered except* in the following manner ...',¹¹⁷ while art 79(1) of the Basic Law for the Federal Republic of Germany provides in relevant part: 'This Basic Law *may be amended only* by a law expressly amending or supplementing its text.'¹¹⁸

Contrast these provisions with s 74(1) of the Constitution headed 'Bills amending the Constitution': 'Section 1 and this subsection may be amended by a Bill passed' by three-quarters of the National Assembly and two-thirds of the National Council of Provinces.

Evidently, in the case of Australia and Germany there is a clear stipulation of the exclusivity of the amending formula. That is not the

¹¹⁴ Jacobsohn & Roznai op cit note 73 at 242.

¹¹⁵ Macfarlane op cit note 66 at 12.

¹¹⁶ This is a live controversy in US constitutional law scholarship. See generally Eric J Segall 'Constitutional change and the Supreme Court: The Article V problem' (2013) 16 *Journal of Constitutional Law* 443 at 444.

¹¹⁷ Emphasis supplied. See also the judgment of McHugh J of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562 para 68: 'If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be amending the Constitution in disregard of the direction in s 128 of the Constitution. Section 128 declares that the Constitution is to be amended only by legislation that is approved by a majority of the States and "a majority of all the electors voting". Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the Constitution cannot hide the fact that, if that is done, the meaning of the Constitution is changed whenever that rule changes what would otherwise be the result of the case.'

¹¹⁸ Emphasis supplied.

case with South Africa.¹¹⁹ However, such exclusivity can still be inferred from two things. First, the fact that there is only one amending formula in the Constitution contained in s 74 necessarily means that there is no other textual basis for a grant of the amendment power to a body other than the one identified in s 74 (ie Parliament). In fact, s 44(1)(a)(iii) explicitly provides that the National Assembly has the authority to ‘assign any of its legislative powers, *except the power to amend the Constitution*, to any legislative body in another sphere of government’.¹²⁰ Secondly, the amending formula provides for its own amendment, which suggests a foreclosure of avenues for amendment beyond s 74 itself.¹²¹ This also means that courts may not interpret amending formulas to empower themselves as amending authorities *qua* the constituent power.¹²²

In the final analysis, then, judges lack any authority to amend the constitution by means of the amendment power. But does this want of authority mean that we are to treat all such informal judicial amendments of the constitution, as we identify them, as a nullity? Hart did not think so:

‘One form of “formalist” error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.’¹²³

On this view, a court obtains the legal power to change the constitution *ex post facto*. This is a species of what Barczeniewicz calls ‘the powers view’ of constitutional change, in terms of which all *lawful* constitutional change must flow from the exercise of a legal power to effect such change.¹²⁴ He contrasts it with ‘the abilities view’ of constitutional change, in terms of which ‘legal changes are law-governed if they take place according to pre-existing rules of recognition’.¹²⁵ According to Barczeniewicz, ‘[i]f somebody’s actions are recognized as having a law-changing effect,

¹¹⁹ Adem Kassie Abebe ‘The substantive validity of constitutional amendments in South Africa’ (2014) 131 *SALJ* 656 at 679.

¹²⁰ Emphasis supplied.

¹²¹ Richard Albert ‘Amending constitutional amendment rules’ (2015) 13 *International Journal of Constitutional Law* 655 at 665: ‘Some provisions are subject to the default amendment rule, others are amendable only by an intermediate threshold, and still others — notably the amendment rules themselves — are insulated against amendment by the highest threshold.’

¹²² Emmett Macfarlane ‘The unconstitutionality of unconstitutional constitutional amendments’ (2022) 45 *Manitoba LJ* 21.

¹²³ Hart op cit note 69 at 153 (emphasis in the original).

¹²⁴ Barczeniewicz op cit note 56 at 215.

¹²⁵ Ibid at 214.

that agent has ... a legal ability (quasi-power) to change the law, even if they do not have a legal power to do so'.¹²⁶

Judges, then, even without the authority to do so, have the ability to change the constitution. This is not surprising, for even an erroneous judicial decision — one that strays beyond the acceptable limits of judicial authority — remains a valid one.¹²⁷ Where an apex court has pronounced on what the constitution is or what it means, for better or for worse, that is the authoritative meaning of the constitution thenceforth.

This conclusion, that a lack of authority does not entail an inability to effect constitutional change, has implications for the kinds of change that can be considered legitimate or constitutional. That is, our conception of the legitimacy or constitutionality of informal constitutional change cannot be solely focused on the authority of the actors to effect such change. How, then, are we to determine the legitimacy of informal constitutional change?

(c) *The legitimacy and constitutionality of informal constitutional change by judges*

Having established that judges undertake constitutional change even without the authority to do so, and that all that is necessary is in fact the ability to effect such change, this subpart will consider, in general terms, a question that continues to exercise the minds of many a constitutional theorist: whether informal constitutional change by judges is legitimate or 'constitutional' such that it ought to be accepted as valid law.

In what follows, I use legitimacy and constitutionality to mean the same thing. While 'legitimacy' in constitutional law scholarship is commonly used in reference to 'popular support', 'popular sovereignty', or the democratic pedigree of some or other aspect of a constitution, that is not the sense in which I will employ it. In relation to the work of judges especially, it would be quite a radical proposition to argue that the absence of public involvement in judicial deliberation, and therefore judicial decision-making, renders such decisions illegitimate in the sense just defined. That would, in fact, impugn all judicial decisions as illegitimate and not only those that result in the kinds of constitutional change I am presently concerned with.

Instead, following Murphy, I take legitimacy to refer 'not to popular support but to grounding in the existing system's fundamental normative

¹²⁶ Ibid at 216.

¹²⁷ Hart op cit note 69 at 146. See also Mitchell N de Beer 'Invalid court orders' (2019) 9 *Constitutional Court Review* 283 at 288: '[W]here a court has authority to decide an issue or make an order and errs, such an order must be treated as binding and effective unless overturned in the correct process.'

principles'.¹²⁸ Richard Fallon has similarly developed a taxonomy of constitutional legitimacy along three lines: legal, sociological, and moral legitimacy.¹²⁹ Legitimacy in this article refers to legal legitimacy, which relates to the lawfulness of constitutional change — that is, its adherence to and coherence with the valid and recognised legal norms of a legal system.¹³⁰

This understanding of legitimacy dovetails with Barczeniewicz's definition of unconstitutional constitutional change, in terms of which:

'[A] change of legal constitutional rules is unconstitutional if:

- (1) it is unlawful, ie
 - a. [it] is not recognized by a pre-existing rule of recognition or
 - b. it violates some legal prohibition (legal duty to forbear),
- (2) or if it violates some non-legal constitutional rule.'¹³¹

Importantly, a constitutional change is unconstitutional if 'there was nothing in the law as it was before the change to ground the change'.¹³² This is to say that the change must invent a new constitutional norm not previously recognised as part of that legal system's law by its rules of recognition, which include rules about what kind of lawmaking is within the authority of judges.

Rules of the kind just alluded to are about what judges may lawfully, and thus legitimately, do when the existing law does not provide determinate or dispositive answers to a given case. May a court, where the law 'runs out', create new law to cure an apparent lacuna in the existing law?¹³³ And if so, what constraints exist upon the power of such a court to do so?

Fallon provides three criteria to evaluate the legal legitimacy of judicial decisions specifically. First, the court must have had the legal power to decide the case or issue before it (jurisdiction). Secondly, in deciding the case, the court must have 'rested its decision only on considerations that it had

¹²⁸ Walter F Murphy 'Merlin's memory: The past and future imperfect of the once and future polity' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 163 at 173.

¹²⁹ Richard H Fallon Jr 'Legitimacy and the Constitution' (2005) 118 *Harvard LR* 1789.

¹³⁰ Ibid at 1794: 'That which is lawful is also legitimate.'

¹³¹ Barczeniewicz op cit note 56 at 234.

¹³² Ibid at 235. To 'ground' in this context means to 'obtain entirely in the virtue of' or to arise as a result of something: see ibid at 238.

¹³³ In South Africa, this question has not been authoritatively settled. However, albeit in a statutory context, the Constitutional Court in *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) suggested that a superior court's inherent jurisdiction to regulate its own process under s 173 was purely procedural (paras 48–9) and that it was doubtful 'that the inherent jurisdiction of the court under section 173 is such that it empowers a judge of the high court to make orders which negate the unambiguous expression of the legislative will' (para 52).

lawful power to take into account'. Thirdly, the court must have 'reached an outcome that fell within the bounds of reasonable legal judgment'.¹³⁴

Some caveats are appropriate at this stage. First, it is evident that the first of Fallon's criteria is irrelevant for our purposes: any court that engages in constitutional change is one that has the jurisdiction to try the case from which the change results. Secondly, as I explained above, the problem of authority does not fully explain the illegitimacy of some informal constitutional change by courts since a court's want of amendatory authority does not affect its ability to change the constitution regardless, so focussing on whether or not a decision amounts to an abuse of authority is not particularly helpful.

What remains of Fallon's criteria is the idea that an illegitimate judicial decision is one which rests upon considerations that a judge may not lawfully take into account in the adjudication of disputes. In the course of this article, I will similarly argue, *inter alia*, that for an informal constitutional change to be unconstitutional, it must (1) not be rooted in the text of the Constitution; (2) depart from the prevailing understanding of the relevant law immediately before the time it occurs; and (3) the decision giving rise to it must rest on considerations that a court may not lawfully rely on to reach a decision.¹³⁵

For Goldsworthy, there are four categories of legitimate informal constitutional change by judges.¹³⁶ The first is change through the correction of mistaken judicial precedent as an instance of legitimate constitutional change: where a court has enforced a particular erroneous interpretation of the constitution, it is legitimate for that interpretation to be substituted by a later one by that same court or a court with higher authority.¹³⁷

¹³⁴ Fallon *op cit* note 129 at 1819. The corollary of those criteria is that a court which decides a matter where (i) it has no jurisdiction; (ii) its decision rests on considerations it has no lawful authority to take account of; and (iii) the decision displays 'egregiously bad judgment' and amounts to an abuse of its authority and is 'not a mere error in its exercise', acts illegitimately (or unconstitutionally).

¹³⁵ Criteria (1) and (2) are drawn from Macfarlane's work *op cit* note 66 at 1896, for whom a court's defiance of the constitutional text ('the resulting constitutional change ... must neither be a plausible interpretation of the existing text nor consistent with reasonable understandings of its purpose or the intent of the framers') and deviation from the expectations of the political community as to what the constitution requires are key indicators of its engagement in illegitimate constitutional change. Criterion (3) is drawn from Fallon's criteria *op cit* note 129 at 1819 and stresses the centrality of the lawfulness or legality of judges venturing beyond 'mere interpretation' in constitutional adjudication in determining the legitimacy of their conduct. This third criterion, as I will argue, may require that we investigate whether, beneath the ostensible veneer of judicial neutrality, there lie other (non-legal) reasons for a court's decision, which would ordinarily render such a decision an illegitimate (or unconstitutional) one.

¹³⁶ Goldsworthy *op cit* note 110 at 177.

¹³⁷ *Ibid.*

The second is change through the development of doctrine by courts to supplement indeterminate constitutional provisions, provided that such supplementation is consistent with the constitution itself.¹³⁸

The third is change through the application of settled constitutional meaning to new circumstances which may lead to changes in how and when it is applied generally.¹³⁹

The last is change through the purposive interpretation of a constitutional provision that departs from the literal meaning of constitutional text but preserves the original purpose for which it was intended, apart from the changed circumstances in which it is applied.¹⁴⁰

In each of these cases, the constitution changes legitimately through the discipline of the accepted rules of constitutional adjudication and the bounds of constitutional interpretation which do not admit of radical departures from, or wholesale substitution of, the constitutional text by a court.

(d) Conclusion

We can thus define an unconstitutional constitutional change as one which, when compared to the law before its occurrence, would not be recognised as part of the constitutional norms of a legal system with reference to that legal system's rules of recognition.

If such a change arises from a judicial decision, such a decision will amount to an unconstitutional constitutional change if (1) it violates an existing constitutional rule; or (2) it creates a new norm not previously recognised as part of the constitutional law of a legal system (positive change) or removes an existing one (negative change).¹⁴¹

Some factors to take into account when determining whether a decision falls under category (1) or (2) are:

- (a) whether the decision is an instance of the correction of an earlier erroneous interpretation of the constitution;
- (b) whether the decision supplements constitutional doctrine by settling a debate over an indeterminate norm in the constitution;
- (c) whether the decision is a supplementation of the constitutional norm in (b) and is consistent with the wording of the constitutional text;

¹³⁸ Ibid.

¹³⁹ Ibid at 178.

¹⁴⁰ Ibid.

¹⁴¹ 'Positive' (+) and 'negative' (−) are used here to describe the actions of a court as adding or removing something and not as assessments of the merits of particular norms.

- (d) whether the decision is the application of a settled constitutional meaning to new circumstances; and
- (e) whether the decision serves the purposive, non-literal, meaning of the constitutional text such that it advances the original purposes of the constitution.¹⁴²

These factors are neither exhaustive nor mutually exclusive as between category (1) and (2), and are merely a framework for assessing the constitutionality of informal constitutional change by courts. Ultimately, a constitutional change brought about by adjudication must cohere with the broader constitutional law such that no change in its content (pre-change) is required for it to form part of the constitutional law. Such a change may not insert or remove anything from the body of norms that comprise the constitutional law of the legal system.

With this broad framework in view, I will proceed to outline, with doctrinal examples, the argument as it pertains to informal constitutional change in South Africa.

V INFORMAL CONSTITUTIONAL CHANGE IN SOUTH AFRICA

(a) *The hydraulics of constitutional change*

Any account of informal constitutional change in South Africa must offer an explanatory theory for the conditions that enable such change to be possible in the first place. Gerken offers one such theory.¹⁴³ Explaining that her theory ‘rests upon a hydraulics metaphor’, Gerken argues that ‘by blocking most formal amendments, Article V [of the US Constitution] effectively redirects those constitutional energies into different, potentially more productive channels’.¹⁴⁴ As Albert explains, ‘when political pressure builds in favour of constitutional reform, the outcome is ordinarily to amend the constitution. *But when the path to amendment is blocked, the intensifying pressure*

¹⁴² It is important to point out that these factors draw direct parallels to the court’s own approach to the development of the common law. In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 16–17, the court stated that it will consider the common law to have been developed (or changed): (i) where an existing common-law rule is changed; (ii) where a court introduces a new common-law rule; or (iii) where a court decides that an existing common-law rule is applicable or not applicable to new factual scenarios. (One may argue that the common law also develops where an existing rule is struck down for constitutional invalidity in that such striking down removes a rule from the body of common-law rules.)

¹⁴³ Heather K Gerken ‘The hydraulics of constitutional reform: A skeptical response to *Our Undemocratic Constitution*’ (2007) 55 *Drake LR* 925.

¹⁴⁴ *Ibid* at 927.

*for change will find alternative routes for relief, culminating either in some irregular form of constitutional modification or in an altogether new constitution.*¹⁴⁵

Schwartzberg aptly captures the explanatory force of Gerken's theory as follows:

'[E]ven if formally entrenched, changes [to the constitution] are inevitable through what one might term a "hydraulic" mechanism: if modifications cannot occur through the formal amendment process, changes instead will occur through other means, most notably through the interpretive process, even if it involves completely distorting the meaning of entrenched laws in order to do so.'¹⁴⁶

But this hydraulic theory of constitutional change necessarily assumes the truth of its own priors; chiefly the idea that 'an informal amendment process exists because formal amendment is so difficult'.¹⁴⁷ Indeed, informal constitutional change is often presented in the literature as the natural consequence of the unavailability of formal mechanisms for constitutional change. Schwartzberg, for instance, argues that '[e]ntrenchment, rather than restricting the possibility of amendment, shifts the locus of this change away from legislatures and towards the judiciary'.¹⁴⁸

It is often assumed — and this is foundational to the hydraulic theory — that constitutions that have eternal or unamendable clauses,¹⁴⁹ or onerous procedural requirements for amendment, inevitably invite informal constitutional change as a means of avoiding constitutional obsolescence. Another factor that may contribute to the hydraulic force of informal constitutional change is the lack of political will to champion a campaign of constitutional reform.¹⁵⁰ To a large extent, it is true that informal constitutional change has been propelled by the difficulty of amending certain constitutions, such as the Constitution of the United States of America.¹⁵¹

Yet, as Marshfield rightly points out, the correlation between an onerous amendment formula and instances of informal constitutional change proves the opposite to be true: that even easy-to-amend constitutions were just as susceptible to informal constitutional change as those with high barriers for amendment.¹⁵²

¹⁴⁵ Richard Albert 'Constitutional change without constitutional amendment' (2022) 59 *Alberta LR* 777 at 778 (emphasis supplied).

¹⁴⁶ Melissa Schwartzberg *Democracy and Legal Change* (2007) 177–8.

¹⁴⁷ Gerken op cit note 143 at 933.

¹⁴⁸ Schwartzberg op cit note 146 at 5.

¹⁴⁹ Albert op cit note 44 at 37–8.

¹⁵⁰ Fowkes op cit note 10 at 424.

¹⁵¹ Albert op cit note 145 at 778. See also Segall op cit note 116 at 443ff for a fuller account.

¹⁵² Marshfield op cit note 5 at 1060–1.

In the South African context, the hydraulics metaphor does not seem to carry the same explanatory force. As Fowkes has acknowledged, 'South Africa is far from a system where the formal amendment channels are blocked'.¹⁵³ The Constitution has been amended on eighteen occasions¹⁵⁴ and only one proposed amendment, as a matter of public record, has failed, and for the sole reason of a lack of political support.¹⁵⁵

But if the unavailability of amendment avenues cannot explain the turn towards informal constitutional change, what can? Fowkes' scholarship on this point offers one possible answer.

(b) Fowkes' account of informal constitutional change

As intimated in the introduction, there is very little scholarship on informal constitutional change in South Africa. For his part, Fowkes has identified the African National Congress's post-1994 dominance of the legislature and its attendant ability to block any proposed constitutional amendments it did not support as the key driver of informal constitutional change. Informal constitutional change in South Africa, then, has been in response to the need to check the power of the dominant party, which he says is a difficult thing to do: '[T]he sources of difficulty do not usually include a gap in the text that cries out for a constitutional amendment whose passage will be blocked by the dominant party'.¹⁵⁶ Fowkes' account then concerns informal constitutional change in the limited context of one-party dominance, including the cases he chooses as illustrative examples.

Fowkes begins his analysis by acknowledging that the Constitutional Court's 'interpretative authority means that it has the ability to declare that something has constitutional status, as it were, overnight, in a way that is not true for other constitutional institutions'.¹⁵⁷ He argues that his examples of informal constitutional change arose 'out of institutional

¹⁵³ Fowkes op cit note 10 at 423.

¹⁵⁴ The most recent amendment is the Constitution Eighteenth Amendment Act, 2023, which added South African Sign Language as an official language of the Republic.

¹⁵⁵ The Constitution Eighteenth Amendment Bill, which sought to amend s 25 of the Constitution, the right to property, to allow for the state's expropriation of land without compensation/with nil compensation. See Parliament of the Republic of South Africa (2021) 'National Assembly fails to pass Constitution Eighteenth Amendment Bill' available at <https://www.parliament.gov.za/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill>, accessed on 27 December 2024.

¹⁵⁶ Fowkes op cit note 10 at 424.

¹⁵⁷ Ibid at 425. This is important, as it suggests that Fowkes' conception of informal constitutional change at least incorporates criterion (5) of our definition of informal constitutional change. However, he immediately qualifies this in the next sentence, stating that '[t]hat does not mean a unilateral judicial claim settles the matter' and that 'it was crucial that the ANC government accepted' the changes brought about by the cases he discusses. This contrasts with our

responses to corruption' under one-party dominance and identifies the Constitutional Court's judgment in *Glenister II* as an instance of such change.¹⁵⁸ There, the court had to decide the constitutionality of Parliament's decision to disband the Directorate of Special Operations (also known as 'The Scorpions'), an independent elite anti-corruption unit that was housed within the National Prosecuting Authority.¹⁵⁹ It would later be replaced by a less independent unit within the South African Police Service.¹⁶⁰

The question before the court was whether there was a constitutional obligation 'to ensure the independence of a corruption-fighting body such as the DSO'.¹⁶¹ There is no textual hook for the argument that such a general obligation exists, given that the Constitution is quite explicit about the independence of other institutions such as the courts and the National Prosecuting Authority.¹⁶² As Fowkes notes, a five-judge majority held that such an obligation existed and invalidated the two statutes on the basis that they failed to meet that obligation.¹⁶³

The majority did so by relying 'on a novel use of international law, drawing on treaties that South Africa has ratified but which had not been incorporated into South African domestic law'.¹⁶⁴ The court sourced the obligation in s 7 of the Constitution, which requires the state to protect, respect, promote and fulfil the rights in the Bill of Rights, 'while the international law argument is the source of the detailed content about institutional independence'.¹⁶⁵ He continues:

'We could understand this as merely an act of interpretation, albeit a highly creative one in tense political circumstances. But it is more appealing to understand it as an informal constitutional change. The court is not merely using the international treaties to interpret a provision on government

conception in terms of which no acceptance of an informal constitutional change is required for it to form part of a legal system's constitutional law.

¹⁵⁸ *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) ('*Glenister II*').

¹⁵⁹ The National Prosecuting Authority Amendment Act 56 of 2008 disestablished the Directorate of Special Operations ('DSO').

¹⁶⁰ The replacement, the Directorate for Priority Crime Investigation ('DPCI'), was established by the South African Police Service Amendment Act 57 of 2008.

¹⁶¹ Fowkes op cit note 10 at 425.

¹⁶² For a contrary view, see Firoz Cachalia 'Precautionary constitutionalism: Representative democracy and political corruption' (2019) 9 *Constitutional Court Review* 45 at 77–8, who argues that such an obligation, while not sourced in the constitutional text, can be grounded in the constitutional value of accountability as an anti-corruption principle.

¹⁶³ The *Glenister II* majority comprised Moseneke DCJ and Cameron J with whom Froneman, Nkabinde and Skweyiya JJ concurred, while Ngcobo CJ, joined by Mogoeng and Yacoob JJ and Brand AJ made up the minority.

¹⁶⁴ Fowkes op cit note 10 at 426.

¹⁶⁵ Ibid.

corruption or the police force in an expansive way. *That the decision is rooted in no provision more specific than the hugely general s 7 shows the extent to which the judges are not interpreting an existing textual obligation, so much as creating a new one.*¹⁶⁶

He notes that *Glenister II* extended the Constitution's independence protections to the DSO 'in a way the drafters did not'.¹⁶⁷ Drawing a comparison between *Glenister II* and *EFF*,¹⁶⁸ Fowkes notes that there was no explicit textual source for the court's holding that the Public Protector's remedial powers are binding: 'The result shares with *Glenister II* the sense of inserting something important into the constitutional structure that was not there before, as opposed to reading something that is there in an expansively purposive manner.'¹⁶⁹

Fowkes argues that *EFF* is a weaker instance of informal constitutional change than *Glenister II* and that it might rightly be argued to be an instance of the court 'giving effect to the constitution' while recognising that 'the same impression of amending, of filling in something the drafters neglected to provide for, is present in both cases'.¹⁷⁰ Despite numerous areas of agreement between us, in future work, I hope to show that Fowkes' treatment of *EFF* is mistaken based on the application of the framework set out in part IV above. For now, a brief discussion should suffice.

Fowkes compares *Glenister II* and *EFF* because he sees both as being concerned with 'constitutional gap[s]' that needed filling.¹⁷¹ That may very well be true in the case of *Glenister II* but seems unlikely in the case of *EFF*. He rightly postulates that were the facts of *Glenister II*, for instance, to be presented to a hypothetical constitutional drafter, such a drafter would not be able to conceive of s 7 as admitting of the interpretation that the court gave it, but would instead see the case as revealing a gap that requires filling.¹⁷²

On *EFF*, Fowkes departs from the position that 'the constitutional text does not take an explicit position on either the legal status of a public protector's report or the relationship of the public protector to parliament or to the presidency in this respect'.¹⁷³ But even this is open to doubt for two reasons.

¹⁶⁶ Ibid, emphasis supplied.

¹⁶⁷ Ibid.

¹⁶⁸ *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* 2016 (3) SA 580 (CC). The facts, and findings of the court, in *EFF* are well-known, and space does not permit of a fuller account. My brief discussion here proceeds on the assumption that the reader is well acquainted with that decision.

¹⁶⁹ Fowkes op cit note 10 at 427.

¹⁷⁰ Ibid.

¹⁷¹ Ibid at 427.

¹⁷² Ibid at 433.

¹⁷³ Ibid.

The first is because ‘the legal status’ of the Public Protector’s reports can be determined only with reference to the office’s powers, and those are clearly enumerated in the constitutional text: to investigate conduct in state affairs under its jurisdiction, to report on that conduct, and to take appropriate remedial action.¹⁷⁴ So the real question, it appears, is whether any of these powers necessarily entail the power to issue binding orders — a purely interpretative question — and not whether the drafters left a gap in the constitutional text, assuming that they intended to create the institution as they created it.

The second is because the question of the legal status of the Public Protector’s reports can also be ascertained by having regard to the structure of the Constitution. In this regard, an analysis of the powers of other institutions in chapter 9 of the Constitution would be instructive. As recent judicial debates have shown, no other institutions under chapter 9 have been granted binding powers by the Constitution, as the court asserted in *EFF*.¹⁷⁵ As a result, it appears that *EFF* has itself created an internal hierarchy within chapter 9 — of institutions with binding powers and those without — that is not reflected in the constitutional text.

EFF then appears not to have identified a constitutional gap that needed filling so much as it *transformed* an institution into something that it was not constitutionally designed to be. The change produced by *EFF* is a normatively relevant constitutional change because it created a new obligation on the President to implement the remedial action of the Public Protector, something that the Constitution was not previously understood as requiring. It is thus not a supplemental change of the kind discussed previously.

Importantly for present purposes, Fowkes appears to argue that the constitutional changes that resulted from these two decisions were legitimate because the ANC government accepted them and ‘did not challenge the court’s findings or attack them as illegitimately creative’ and that ‘[t]he government’s acquiescence in both decisions is a final powerful part of the argument that they represent informal constitutional change’.¹⁷⁶ This is yet another point of divergence between Fowkes’ and my conception of informal constitutional change. Whereas his seems to

¹⁷⁴ Section 182(1) of the Constitution.

¹⁷⁵ See eg *Electoral Commission of South Africa v Democratic Alliance & others* 2021 (5) SA 476 (SCA) regarding the Electoral Commission’s power under s 190 of the Constitution to determine whether breaches of the Electoral Code of Conduct had occurred and, if so, to sanction such breaches, and *South African Human Rights Commission v Agro Data CC & another* 2024 (6) SA 443 (SCA) regarding the Human Rights Commission’s power to issue binding ‘directives’ following an investigation under s 184(2) of the Constitution. The latter was confirmed by the Constitutional Court in *Agro Data* supra note 94.

¹⁷⁶ Fowkes op cit note 10 at 427.

suggest that acquiescence by other constitutional actors is a requirement for a decision of the kind discussed herein to constitute an informal constitutional change, I have argued that the phenomenon occurs independently of how those decisions are received by other constitutional actors and that the legitimacy of constitutional changes brought about by informal means can and must be determined objectively.

That is to say that, regardless of the government's compliance with the court's orders in either *Glenister II* or *EFF*, the changes brought about by those decisions — that the Constitution (post-*Glenister II*) now requires the establishment of an anti-corruption agency independent of the police service or that the Constitution (post-*EFF*) now requires that state organs be bound by the decisions of the Public Protector — would still become part of our constitutional law and would continue to bind the entire constitutional system, regardless of any other actor's views on their legitimacy.¹⁷⁷

Finally, on the question of which kinds of informal constitutional changes can be thought of as legitimate, Fowkes notes:

'Any defensible judicial act of informal constitutional change will proceed by interpretation, and any defensible interpretation will have at least some link to what is already in the text. It will accordingly always be possible to argue that nothing more than interpretation is going on.'¹⁷⁸

Fowkes concludes by urging us to look at what courts do and not merely what they say they are doing; he states that '[t]he use of the interpretative power to the degree that it effectively amounts to a new insertion into the constitutional text' should be an indicator that a court is engaged in more than mere interpretation.¹⁷⁹ I turn now to apply the framework developed earlier in the article to *Glenister II*.

(c) *Applying the framework*

Setting *EFF* aside for the moment, let us see how Fowkes' analysis of *Glenister II* squares up against the analytical framework developed in parts III and IV above. Does *Glenister II* amount to an informal constitutional change?

First, we must ask whether it resulted in 'any change to the content of the constitution'. That answer must be in the affirmative: *Glenister II*

¹⁷⁷ In fact, debate rages on about whether or not the government complied with *Glenister II* (and thus whether, contra Fowkes, it has ever accepted it) given that the DPCI continues to exist as a unit of the South African Police Service and continues to be appointed by, and report to, the executive: see Paul Hoffman 'Where do we go from here?' in Paul Hoffman (ed) *Under the Swinging Arch: Perspectives on the Glenister anti-corruption cases by those who fought them* (2023) 173.

¹⁷⁸ Fowkes op cit note 10 at 433.

¹⁷⁹ Ibid.

introduced a specific obligation on the state to establish an independent anti-corruption institution; an obligation which previously did not exist.

Secondly, we must ask whether the change to the content of the Constitution was made ‘outside of the prescribed amendment procedures’. Since the change arose from a judicial decision, that is plainly so.

Thirdly, we must ask whether this extra-procedural change to the content of the Constitution ‘alters the content or scope of a constitutional right, power, or duty, or the relationship between constitutional institutions’. Here, the answer is two-fold.

First, since the court sourced this obligation in s 7(2) of the Constitution, the state’s obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ *now* includes the obligation to establish an independent anti-corruption institution where s 7(2) was previously not understood to require such a thing. Thus, the scope of the duty in s 7(2) has been altered.

Secondly, in using international law to determine the content and scope of the s 7(2) obligation, the court (despite its numerous denials) incorporated into our constitutional law South Africa’s international obligations from treaties that were yet to be incorporated into South African law. In doing so, it appears to have dispensed with the need for Parliament to enact national legislation to incorporate such treaties as part of South Africa’s domestic law in terms of s 231(4).

The result is that Parliament’s exclusive power to domesticate international treaties through the exercise of its legislative authority has been diluted; courts are now able to incorporate treaties into municipal law, ostensibly under the guise of using international law as an interpretative tool under s 39(1)(b) of the Constitution.¹⁸⁰ In this way, the relationship between the courts and Parliament is altered.

Fourthly, we ask whether this extra-procedural change to the content of the Constitution resulted in an alteration to the scope of a constitutional duty or the relationship between constitutional institutions ‘in a manner not reasonably countenanced by the constitutional text or contemplated by the constituent authority’. Here, too, the answer must be in the affirmative.

¹⁸⁰ Although the court makes numerous disclaimers about its use of international law being purely for interpretative purposes (see eg *Glenister II* supra note 158 paras 189, 194 and 195), the result of its interpretative exercise is to transform international obligations, including from unratified treaties, into domestic constitutional obligations — through a sort of incorporation ‘by the back door’ (para 112). For a persuasive critique of the use of international law in *Glenister II* see Juha Tuovinen ‘The role of international law in constitutional adjudication: *Glenister v President of the Republic of South Africa*’ (2013) 130 *SALJ* 661.

As Fowkes himself acknowledges, *Glenister II* ‘extends protections to a body such as the DSO in a way the drafters did not’.¹⁸¹ As he has shown, s 7(2) provides no textual basis for the obligation that the court says the provision imposes on the state, nor is it reasonably plausible that the constitutional drafters deliberately concealed such an obligation behind the very general wording of that provision. Likewise, it is not plausible that the drafters intended for international law to be deployed in constitutional adjudication in the manner that the court did in *Glenister II*.

Finally, we must ask whether this extra-procedural change, in addition to meeting all the other criteria, ‘has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme)’. Since it is a judgment of the apex court in the judicial hierarchy, this too must be answered in the affirmative because decisions of the Constitutional Court bind all courts and all other persons and organs of state to whom they apply, in terms of s 165(5).

In the final analysis, then, *Glenister II* amounted to an informal constitutional change. But was it an *unconstitutional* one? Here, the key question is whether there was anything in South Africa’s constitutional law before the change occurring to ground such a change. In other words, is the change consonant with a pre-existing norm of the legal system? When evaluating this aspect, the ultimate consideration is whether this change either violates an existing constitutional norm, invents a new one, or removes an existing one.

Applied to *Glenister II*, it cannot be argued that there was any understanding — whether popular or institutional — of s 7(2) as imposing an obligation on the state to ‘establish and maintain an independent body to combat corruption and organised crime’.¹⁸² Certainly, I have not found any evidence to that effect. More concretely, the court’s treatment of international law in *Glenister II* departed radically from how the court’s precedents had settled the question of international law’s role in constitutional adjudication.

In *Makwanyane*, the court held that treaties and customary international law provided a framework for evaluating and understanding the Bill of Rights and that the decisions of international law tribunals ‘may provide guidance as to the correct interpretation’ of the Bill of Rights.¹⁸³ Likewise in *AZAPO*,¹⁸⁴ the court clarified that

¹⁸¹ Fowkes op cit note 10 at 426.

¹⁸² *Glenister II* supra note 158 para 163.

¹⁸³ *S v Makwanyane* supra note 86 paras 35–6.

¹⁸⁴ *Azanian Peoples Organization (AZAPO) & others v President of the Republic of South Africa & others* 1996 (4) SA 672 (CC). The matter concerned the constitutionality of the amnesty provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995.

'[i]nternational conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment'.¹⁸⁵

It is thus clear that the law as it stood at the time that *Glenister II* was decided did not conceive of a role for international law in constitutional adjudication of the kind that the latter court created for it, in that it drew on the provisions of unincorporated treaties (which were yet to be made into domestic law) to found a domestic constitutional obligation, effectively incorporating them into the Constitution.¹⁸⁶ The decision, therefore, needed a change to occur for the norm it created to form part of the body of norms recognised as part of South African constitutional law. *Glenister II* then appears, at least *prima facie*, to have been an unconstitutional constitutional change.

VI CONCLUSION

In this article, I have sought to provide a working definition of informal constitutional change and to highlight the difficulties that arise from such change. I have settled on the following definition: (1) any change to the content of the constitution; (2) outside of the prescribed amendment procedures; (3) which alters the content or scope of a constitutional right, power, or duty, or the relationship between constitutional institutions; (4) in a manner not reasonably countenanced by the constitutional text or contemplated by the constituent authority; and (5) which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme).

The parameters of what constitutes legitimate informal constitutional change should be drawn against this definition. To that end, I have developed an analytical framework that might help us to identify instances of informal constitutional change and to determine whether any instance of such change is legitimate.

I have also shown how judges, despite a want of amendatory authority, can be agents of informal constitutional change and have sought to draw out some broad distinctions between what counts as constitutional interpretation in the ordinary sense, on the one hand, and informal constitutional change, on the other hand.

I have argued that to be legitimate or constitutional, a constitutional change brought about by courts through adjudication must cohere with the broader constitutional law such that no change in the content of the constitutional law (pre-change) is required for it to form part of the

¹⁸⁵ Ibid para 26.

¹⁸⁶ See Ngcobo CJ's judgment in *Glenister II* supra note 158 para 112.

constitutional law. That is to say that such a change may not insert or remove anything from the body of norms that comprise the constitutional law of the legal system concerned in order to evolve normative space for itself in the legal system's constitutional law.

I have also proposed tentative arguments as to why existing accounts of informal constitutional change in South Africa do not adequately capture the essence of the phenomenon and why my account is different. In discussing existing scholarship, primarily that of Fowkes, I have shown how the framework, when applied to *Glenister II*, yields no conclusion other than that it was an instance of unconstitutional constitutional change.

I hope that the key contributions of this article — (i) the definition of informal constitutional change; (ii) the framework for identifying when such informal constitutional change is unconstitutional; and (iii) the application of the framework to a particular case — provide a sensible starting point for a rigorous examination of the phenomenon that may one day lend itself to the clear identification of the limits of judicial lawmaking in constitutional cases.

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