INFORMAL CONSTITUTIONAL CHANGE: TOWARDS A SOUTH AFRICAN THEORY OF UNCONSTITUTIONAL CONSTITUTIONAL CHANGE

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MFRDAN001

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in fulfilment of the requirements for the degree LLM

Faculty of Law

UNIVERSITY OF CAPE TOWN

Date of Submission: 17 February 2025

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DECLARATION

I, Dan Mafora, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

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ACKNOWLEDGMENTS

'I am confident of this, that he who began a good work among you shall bring it to completion'.

This dissertation was three years in the making. It was difficult to complete. I am grateful for all the support I received. My first thanks go to Dr Leo Boonzaier, who steered me through it until the end. It was not an easy journey, and I am grateful for his patience and mentorship. I hope the work reflects, even if just a little, the effort he put in. The project would not have been possible without the support of Mfundo Salukazana, who funded all three years of my study. I cannot put into words just how grateful I am. Thank you. My academic community at UCT was a steady source of friendship and intellectual stimulation and for that I thank them. To my dear friends, too numerous to name here, who carried me over the finish line: *this is for you*.

ABSTRACT

The Constitution of the Republic of South Africa, 1996 has changed more times than it has been amended. In this dissertation, I explore the phenomenon of informal constitutional change. In particular: I focus on how courts are able to change the content, scope and meaning of a constitution without its text ever changing. Drawing on work in constitutional theory, I explore whether such change can be legitimate outside of the scope of formal constitutional amendment and develop a framework for its identification. I also explore the constitutional difficulties engendered by this mode of constitutional change insofar as it implies an illegitimate use of judicial authority. I offer a South African case study of this phenomenon and conclude that the Constitution has been changed unconstitutionally at least once.

TABLE OF CONTENTS

CHAPTER 1

PART I: INTRODUCTION

> 'Constitutional interpretation, as it is practised in many present-day states, has the effect of an amending process that is constrained only by the costs and the adventitious nature of litigation, the interpretive doctrines of the courts, the self-restraint of judges and whatever political pressures they may be under not to go too far.'[1]

1 INTRODUCTION

On 14 February 2018, in a televised national address, Jacob Zuma resigned from his position as President of the Republic of South Africa. Previously thought invincible, Zuma's premature (some may say overdue) departure from office had been written in the stars some four years earlier, with the release of a report by the Public Protector of South Africa into allegations of improper conduct and irregular expenditure relating to security upgrades at his private residence in Nkandla, KwaZulu-Natal.[2]

In her report, the Public Protector concluded that the President had breached his constitutional and ethical obligations by knowingly deriving undue benefits from irregular state expenditure.

Her remedial action, as it related to the President, was that he should pay a reasonable percentage of the cost of the upgrades. The Public Protector's report would lead to an avalanche of media reports, parliamentary enquiries and a line of Constitutional Court cases that ultimately led to Zuma's demise.

In the excitement and high drama of that era, unfortunately, a questionable body of jurisprudence developed. All of which had been preoccupied with Zuma as a singular danger to the flourishing of a democratic South Africa that needed to be neutralised.

[1] T Endicott 'Constitutional Interpretation' in J King and R Bellamy (eds) *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press, 2025) 361, 370-371.

[2] 'Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province', Report No 25 of 2013/14 available at: https://www.pprotect.org/sites/default/files/Legislation_report/Final%20Report%2019%20March%202014%20.pdf (accessed 18 September 2024).

In *Economic Freedom Fighters v Speaker of the National Assembly*,[3] the Constitutional Court had to decide whether the Public Protector could issue binding remedial action. It held that she could, breaking with the prevailing orthodoxy that hers was merely an ombud's office with limited investigatory powers but no coercive powers at all.

The *Nkandla* decision was largely welcomed, presumably because of the scandals that had characterised much of Zuma's tenure as President. Some in the academy lauded the decision.[4] What remained puzzling, however, was what the source of these binding powers was, since neither the Constitution nor the Public Protector Act 23 of 1994 provided for them. Had the court created them *ex nihilo*? And if so, was that a constitutional exercise of its judicial authority?

This dissertation joins the small but bourgeoning scholarship critical of the *Nkandla* judgment and its implications for South African constitutional law.[5] I do not, however, seek to tread common ground. Instead, I use *Nkandla* as a case study to investigate the phenomenon of informal constitutional change.

Since the Constitution does not provide for the Public Protector's remedial action to be binding, the question at the centre of this dissertation is whether the court's decision in *Nkandla* effectively amended the Constitution. If it did, a secondary question is whether the court had the lawful authority to do so. That question goes to the heart of the nature and extent of judicial authority under the Constitution and whether, under any plausible theory of the Constitution, such authority includes the power to amend the Constitution.

To answer these questions, one must grapple with the nature and limits of both the amendment power and judicial authority, and the proper allocation of constitutional authority. I do so in the chapters that follow.

[3] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC) ('*Nkandla*').

[4] S 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.

[5] M Tsele '"Coercing Virtue" in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) 8 *Constitutional Court Review* 193; M Tsele 'Constitutional principles and two overlooked problems with the Nkandla judgment: A brief comment' (2018) 135(2) *South African Law Journal* 220; M Tsele "Observations' on the State Capture judgment' (2021) 138(3) *South African Law Journal* 477 and M Mhango and N Dyani-Mhango 'The Powers of the South African Public Protector: A Note on *Economic Freedom Fighters v Speaker of the National Assembly*' (2021) 13 *African Journal of Legal Studies* 23.

2 Methodology

This is primarily a work of constitutional theory. It puts forth a theory about the nature of the South African Constitution and how it ought to be interpreted and applied by judges.[6] It is a qualitative desktop study that uses both theoretical and doctrinal research methods. As a work of theory, it relies heavily on secondary sources, and primary sources where doctrinal questions are dealt with.

3 Structure

The dissertation is structured as follows. Part II of this chapter sets out the *Nkandla* judgment in some detail without pre-empting any of the critiques that will later emerge. Chapter 2 introduces and defines the concept of informal constitutional change, discusses how and why it occurs, and situates it in the South African context.

Chapter 3 introduces the concept of unconstitutional constitutional change which concerns the legitimacy of informal changes to a constitution and sets out the framework for determining whether a given informal constitutional change is legitimate.

Chapter 4 begins the work of critiquing *Nkandla*. It does so by setting up the parameters for what should be considered legitimate constitutional interpretation.

Chapter 5 discusses whether *Nkandla* was decided based on the application of neutral principles of constitutional law.

Chapter 6 draws together the theoretical framework developed over the preceding four chapters and applies it to *Nkandla* to determine whether (1) it amounted to an informal constitutional change and (2) it amounted to an unconstitutional constitutional change.

Chapter 7 is the conclusion.

[6] R H. Fallon Jr. 'How to Choose a Constitutional Theory' (1999) 87 *California Law Review* 535, 537.

PART II: THE NKANDLA JUDGMENT

1 THE FACTS

The Public Protector investigated allegations of improper conduct and irregular expenditure relating to security upgrades at then President Jacob Zuma's private residence in Nkandla, KwaZulu-Natal.[7] Several of the upgrades to the residence consisted of non-security features. The Public Protector concluded that the President had breached his constitutional and ethical obligations by knowingly deriving undue benefits from irregular state expenditure.[8]

Her remedial action, as it related to the President, was that he should pay a reasonable percentage of the cost of the non-security upgrades to his private residence that was proportionate to the undue benefit accrued to him. In addition, the President was to reprimand certain cabinet Ministers involved in the project.[9]

A year after the Public Protector's report was submitted to the President and the National Assembly, the remedial action had still not been complied with. The National Assembly had in the meantime convened two ad hoc committees, which considered the Public Protector's report as well as reports by the Special Investigating Unit, the Joint Standing Committee on Intelligence and the Minister of Police.[10]

The second ad hoc committee cleared the President of any wrongdoing. The National Assembly endorsed this recommendation of the ad hoc committee and voted to absolve the President of liability in relation to the upgrades at his Nkandla residence.[11] As a result, two

[7] Report No 25 of 2013/14: 'Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province', available at: https://www.pprotect.org/sites/default/files/Legislation_report/Final%20Report%2019%20March%202014%20.pdf last accessed 18 September 2024.

[8] *Nkandla* (n 3) para [7]. The Public Protector found several violations of s 96 of the Constitution, as well as the Executive Ethics Code promulgated under the Executive Members' Ethics Act 82 of 1998.

[9] *Nkandla* (n 3) para [10].

[10] *Nkandla* (n 3) para [12].

[11] *Nkandla* (n 3) ibid.

opposition parties, the Economic Freedom Fighters and the Democratic Alliance, applied to the Constitutional Court for an order directing the President to comply with the Public Protector's remedial action. The matter raised squarely the question of the legal effect of the Public Protector's remedial action.

2 Reasoning

2.1 *Effectiveness of the Public Protector*

The court held that the constitutionally guaranteed independence and impartiality of Chapter 9 institutions, and the requirement that they exercise their powers without fear, favour or prejudice suggest that the decisions of these institutions must be effective.[12] The Public Protector's impartiality would be irrelevant, the court said, if the implementation of her decisions was up to those over whom she exercised oversight.[13] Further, the expenditure on the office's investigative capacity would be incomprehensible if the decisions of the Public Protector were not meant to be effective.[14] The court noted that it is of significance in interpreting the role and powers of the Public Protector that the institution was created by the Constitution, rather than legislation.[15]

The Public Protector, the court said, has 'very wide powers'.[16] In the court's view, in order to effectively execute the office's mandate, the Public Protector must have the necessary resources and capacities.[17] The court also reasoned that since unfavourable findings by the Public Protector are unlikely to be well-received by the public officials concerned, if compliance with her remedial action was optional, very few impugned officials would comply. This would render the Public Protector ineffective.[18]

[12] *Nkandla* (n 3) para [49]. Mogoeng CJ says of the requirements of independence and impartiality: 'I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual.'

[13] *Nkandla* (n 3) ibid.

[14] *Nkandla* (n 3) ibid.

[15] *Nkandla* (n 3) para [50].

[16] *Nkandla* (n 3) para [53].

[17] *Nkandla* (n 3) para [54].

[18] *Nkandla* (n 3) paras [55]-[56].

2.2 *Relationship between the Constitution and the Public Protector Act*

The National Assembly had argued that the Public Protector Act 23 of 1994 narrowed the scope of the Public Protector's constitutional powers.[19] The court rejected this argument as irreconcilable with the supremacy of the Constitution. Section 182(1) lists the powers of the Public Protector and provides that they are to be exercised 'as regulated by national legislation'. Section 182(2) on the other hand provides that 'the Public Protector has the additional powers and functions prescribed by national legislation'. The court held that the Public Protector Act plays a 'regulatory and supplementary role' in relation to the provisions of the Constitution that concern the Public Protector.[20]

For national legislation to 'regulate' the powers of the office as envisaged in s 182(1), the court said, is merely to create an enabling framework for the correct exercise of the constitutional powers set out therein.[21] So understood, the legislation acts merely as a 'functional aid' that details how those powers should be exercised.[22]

Further, the court held, the 'additional powers' referred to in s 182(2) cannot substitute, remove or limit the Public Protector's powers under the Constitution. The court pointed to s 6 of the Public Protector Act, which expands on the Public Protector's constitutionally conferred powers, as an illustrative example.[23]

2.3 *The legal status of the Public Protector's remedial action*

For the Public Protector to exercise her mandate and meaningfully address complaints lodged with her office, remedial action must be 'difference-making and responsive'.[24] In

[19] *Nkandla* (n 3) para [57].

[20] *Nkandla* (n 3) para [59]. It is worth noting an anomaly in the relationship between the Public Protector Act and the Constitution: The Act preceded the adoption of the Constitution and significantly widened the scope of the office's powers and the provision in s 182(2) was presumably meant to regularise the relationship by providing a constitutional source for the additional powers. It is unclear whether Parliament, then, is ordinarily possessed of the power to add even more powers by amending the Act or if those additional powers are frozen in time as at the adoption of the Constitution.

[21] *Nkandla* (n 3) para [60].

[22] *Nkandla* (n 3) ibid.

[23] *Nkandla* (n 3) para [61], fn 61.

[24] *Nkandla* (n 3) para [65].

addition to its reasoning on the independence of the institution as provided for in s 181(2), the court said that the duty imposed by s 181(3) on other organs of state to protect and assist Chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness suggested that the Public Protector's powers are of a potentially intrusive nature, with the obligation imposed on other organs of state being an indication of 'how deep the remedial powers are expected to cut.'[25]

Crucially, the words 'take appropriate remedial action' in s 182(1)(c) pointed to an expectation that the Public Protector may take binding and enforceable remedial steps in most cases.[26] The court reasoned that the word 'action' gestured towards the Public Protector's ability to take 'concrete or meaningful steps' herself and not merely to refer her findings to other institutions for them to take the remedial action.[27]

Relying on *dicta* from *Fose*,[28] and in reference to the Public Protector's remedial action, the court held that 'an appropriate remedy must mean an effective remedy'.[29] It did so noting that the *dicta* were made 'admittedly in a different context', that being the question whether a court could grant punitive constitutional damages over and above the usual delictual claims for damages, with the court in *Fose* having ultimately decided not to do so.[30]

Having concluded that '[r]emedial action must therefore be suitable and effective', the court sought support for its conclusion in *South African Broadcasting Corporation SOC Ltd v Democratic Alliance*,[31] where the Supreme Court of Appeal held that the language, history and purpose of s 182(1)(c) made it clear that the Public Protector may both determine a remedy and direct its implementation.[32]

The court further held, one might say contradictorily, that the legal effect of the Public Protector's remedial action depends on the nature of the issues under investigation and the

[25] *Nkandla* (n 3) para [66].

[26] *Nkandla* (n 3) para [67].

[27] *Nkandla* (n 3) para [71].

[28] *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC).

[29] *Nkandla* (n 3) para [67]. The reference in *Fose* is to para [69] of that judgment.

[30] See *Fose* (n 28) para [69].

[31] *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156, 2016 (2) SA 522 (SCA). This judgment is discussed in greater detail in chapter 5.

[32] *Nkandla* (n 3) para [68].

findings made. For instance, where the remedial action refers a matter to other dispute resolution mechanisms, the legal effect may be that the parties to whom the remedial action applies must properly consider the remedial action in determining what course to follow.[33] The Public Protector's power to take remedial action is 'wide but certainly not unfettered' and, in any event, open to judicial scrutiny.[34] In respect of the fetters on the Public Protector's remedial powers, the court noted that the Public Protector may only exercise such powers against those whom she is empowered to investigate and her remedial action must be 'appropriate', i.e. it must be 'effective, suitable, proper or fitting' to redress or undo the ill in question.[35]

In the course of its reasoning, the court rejected the High Court's holding in *Democratic Alliance v South African Broadcasting Corporation Limited* that the Public Protector's remedial action is not binding and enforceable, but the decision as to whether to comply with the remedial action must not be irrational.[36] The 'worrisome' effect of this holding, the court held, is that the person against whom remedial action is made may reject it due to its perceived irrationality, which would be at odds with the rule of law.[37] Instead, the Public Protector's remedial action 'might at times' have a binding effect and determining this is 'a matter of interpretation aided by context, nature and language'.[38]

Relying on the court's decision in *Kirland Investments*,[39] the court held that if a party wishes to lawfully ignore the Public Protector's remedial action, it must obtain a court order setting

[33] *Nkandla* (n 3) para [69].

[34] *Nkandla* (n 3) para [71].

[35] *Nkandla* (n 3) para [71] subpara (c).

[36] *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* [2014] ZAWCHC 161, 2015 (1) SA 551 (WCC) paras [72]-[74].

[37] *Nkandla* (n 3) para [72].

[38] *Nkandla* (n 3) para [73].

[39] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC). *Kirland Investments* was itself an extension of the rule in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48, 2004 (6) SA 222 (SCA), which states that subsequent administrative acts founded upon an initial invalid administrative act, whose validity does not rely on the substantive validity of the initial act, exist in fact and have legal consequences until they are set aside by a court on review. The corollary of the rule is that such subsequent administrative acts only exist while the initial invalid administrative act itself exists, i.e. until it is set aside. In *Kirland Investments*

the remedial action aside. In this case, the court held that the remedial action taken against the President had binding effect because 'concrete', 'specific', and 'definite' steps were laid out for the President to take.[40] The remedial action required no further investigation. However, the court held that parallel investigations were not prohibited. Because the President had reason to doubt the correctness of the Public Protector's report, it was open to him to make inquiries into its correctness.[41] The President commissioned a report from the Minister of Police to test the correctness of the Public Protector's identification of non-security features. This report was at odds with the Public Protector's report. The court held it was insufficient for the President to content himself with the report that he commissioned. Instead, the proper course of action for the President would have been to approach the courts to set aside the Public Protector's report.[42]

The court concluded that the Public Protector's remedial action was binding and that the President was under a constitutional obligation to implement it. *Nkandla*, then, stands for the general proposition that the Public Protector's remedial action is binding until or unless it is set aside by a court on judicial review.

3 Conclusion

In this chapter, I have introduced the key concepts that this dissertation will explore: informal constitutional change, unconstitutional constitutional change, the nature and limits of constitutional interpretation and the theory of neutral principles. I have also set out the facts of the *Nkandla* case and the reasoning underpinning the court's decision. I now proceed with the argument as set out in Part I above.

the court extended the rule to mean that any invalid administrative act exists in fact and continues to have legal effect until set aside by a court on review. It is often misunderstood to mean that the otherwise invalid administrative act is *valid* until set aside. That is not so. See D M. Pretorius 'Oudekraal after fifteen years: the Second Act (or, A Reassessment of the Status and Force of Defective Administrative Decisions Pending Judicial Review)' 2020 (1) *Stellenbosch Law Review* 3; L Boonzaier 'Good Reviews, Bad Actors' (2017) 7 *Constitutional Court Review* 1; and D Freund and A Price 'On the legal effects of unlawful administrative action' 2017 (1) *South African Law Journal* 184.

[40] *Nkandla* (n 3) para [77].

[41] *Nkandla* (n 3) para [78].

[42] *Nkandla* (n 3) paras [81]-[82].

Chapter 2

The Concept of Informal Constitutional Change

'Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.' — Frankfurter J in *Ullmann v. United States*, 350 U.S. 422, 428 (1956).

1 Introduction

The focus of this dissertation, informal constitutional change, presupposes that such change is possible in the South African legal system. This chapter attempts to provide a definition of the concept of informal constitutional change, which will then underlie the development of a theory of 'unconstitutional constitutional change' in South African law.

First, I will identify the sources of South African law. Second, the agents and mechanisms of legal change in the South African legal system with reference to the Constitution will be discussed. Third, a distinction between formal and informal constitutional change will be drawn. Finally, a definition of informal constitutional change will be provided and situated in the South African context.

Before that, however, it behoves me to say something briefly about the theoretical underpinnings of this thesis. In seeking to develop a South African theory of unconstitutional constitutional change, this dissertation finds a comfortable home within the legal positivist jurisprudential tradition, drawing principally from the work of the legal philosopher H. L. A. Hart,[43] as developed and refined by his successors.

The cogency of my theory, however, does not depend on the wholesale adoption of Hartian legal positivist assumptions, nor is it meant to be purely grounded in legal positivism as a theory about the nature of law. Rather, legal positivism of the Hartian kind offers the best analytical tools for explaining the theory expounded herein. Any departures therefrom should not be read as confusion as to the methodology or aims of contemporary legal positivism but should be viewed from the vantage point of Hartian legal positivism's utility for someone engaged in constitutional theory, which this dissertation attempts to do. The

[43] H. L. A. Hart *The Concept of Law* 2nd ed (Clarendon Press, 1994).

success of my theory of unconstitutional constitutional change, then, must be determined solely on its merits as a theory of constitutional law.

Hart's account of the nature of law and, in particular, his account of the foundations of a legal system are the building blocks of the theory that will emerge in later chapters. According to Hart, law is best understood as 'a union of primary rules of obligations with … secondary rules'.[44] Primary rules 'are concerned with actions that individuals must or must not do' while secondary rules are concerned with 'the primary rules themselves'; they are rules 'about such rules'.[45]

According to Hart, secondary rules 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'.[46]

These secondary rules are: (1) rules of recognition which provide the criteria of validity for the laws (or legal norms) of the system; (2) rules of change which empower officials of the legal system – typically legislatures – to change or eliminate existing laws and to introduce new laws and which stipulate the procedures by which such change may occur;[47] and (3) rules of adjudication which empower officials of the legal system – typically courts – to authoritatively determine what the law is in any given case and to determine, when called upon, whether there has been a breach of primary rules.[48]

Of these, Hart identifies the first, rules of recognition, as the most important. According to Hart, rules of recognition constitute the fundamental rule of any legal system because they stipulate the criteria for the validity, and in turn for the identification, of laws in that legal system. However, unlike the other two secondary rules, rules of recognition cannot be said to be valid or invalid, because they themselves determine the validity of all other rules, and

[44] Hart *The Concept of Law* (n 43) 94.

[45] Hart *The Concept of Law* (n 43) ibid.

[46] Hart *The Concept of Law* (n 43) ibid.

[47] In the area of private law, rules of change endow individuals with the power to generate new rights and obligations through legal instruments such as contracts, wills, etc. and stipulate the requirements for the validity of the legal relationships of the kind mentioned above (such as, for instance, requiring contracts for the sale of immovable property to be reduced to writing and countersigned by the parties to the contract).

[48] Hart *The Concept of Law* (n 43) 95.

instead consist of practices of acceptance by a legal system's officials, i.e., judges and legislators, of their existence.

With reference to the accepted constitutional rule in the United Kingdom that 'what the Queen in Parliament enacts is law,'[49] Hart suggested that the use of that rule, by courts in their adjudicative function, to identify what was law and what was not, was sufficient to establish its existence as a rule of recognition.[50] Notably a rule of recognition may provide multiple criteria for legal validity in a single legal system which criteria, according to Hart, may be categorised into a hierarchy of rules, with one criterion being the 'supreme criterion' or an 'ultimate' rule of recognition whose validity cannot be determined by reference to another rule.[51]

As I will argue, to the extent that the South African constitutional law consists of primary and secondary rules of the kind identified by Hart, such secondary rules would not only regulate how primary rules may be changed, eliminated or introduced, but would also regulate the changing of secondary rules, including the Constitution itself.[52] The secondary rules I am concerned with in this dissertation are, of course, rules of the latter kind: the rules that regulate the amendment of the Constitution.

[49] Hart *The Concept of Law* (n 43) 107.

[50] Hart *The Concept of Law* (n 43) 107-108. See also A Tucker 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31(1) *Oxford Journal of Legal Studies* 61, 63.

[51] Hart *The Concept of Law* (n 43) ibid:

> '[W]hen the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which … provides criteria for the assessment of the validity of other rules; but … unlike them[,] … there is no rule providing criteria for the assessment of its own legal validity'.

[52] Here, Hart's conception of secondary rules as being on a different level to primary rules is important for it carries with it the implication that whatever rules of change exist for the variation of secondary rules must at least be on the same level as the secondary rules which they seek to change. See T M. Benditt 'On "Levels of Rules and Hart's Concept of Law"' (1974) 83(331) *Mind* 422:

> 'For example, constitutionally required rules of adjudication can be changed only by methods provided by the constitution; rules of adjudication which are legislatively authorized (but not constitutionally required) can be changed by methods provided by legislatively authorized rules; but a legislature cannot, as a matter of ordinary legislation, establish rules for changing constitutional requirements.'

Finally, a note on terminology. When used in this dissertation, 'Constitution' refers to the constitutional text as adopted by the Constitutional Assembly (and subsequently duly amended by Parliament) and encapsulated in the document known as the Constitution of the Republic of South Africa, 1996; while 'constitution' and 'constitutional law' on the other hand refer to more than just the constitutional text, to encompass the authoritative interpretations of that text by the courts, and all other doctrines, rules, principles and tests developed by courts and grounded in the Constitution.

I draw this distinction to clarify that my concern is not necessarily the question of the written-ness (for, constitutional change may also occur through convention, which I have omitted from my definition of 'constitution' and 'constitutional law' since it is not relevant in our context) or the formality of changes to the Constitution (formality in the narrow sense of following prescribed procedures as opposed to formality as rule-following[53]), but about the sorts of changes that we are to regard as unconstitutional in the sense of violating the existing constitution. I discuss this in more detail in the section dealing with the distinction between formal and informal constitutional change.

With this background in mind, we can now proceed with the argument as set out above.

2 Sources of South African law

Before we can discuss the possibility of legal change in general, we must first identify those sources of law that may be subject to such change. These are:

(a) the Constitution of the Republic of South Africa, 1996;
(b) legislation, including any regulations made pursuant to an Act of Parliament, and any other legislative instrument authorised by legislation;
(c) the common law;[54]

[53] For an account of formalism as rule-following in judicial decision-making, see generally F Schauer 'Formalism' (1988) 97(4) *Yale Law Journal* 509.

[54] L Boonzaier 'Common-law avoidance' (2024) 141(2) *South African Law Journal* 213, 214-215 at fn 6 defines the common law as 'that part of a country's substantive law that has always (or almost always) been considered to be under the primary custodianship of our courts, which have sought to regulate that area comprehensively, and have devised associated techniques of law-creation and development'. I gladly adopt this definition and use it to mean the same thing throughout this dissertation.

(d) African customary law; and

(e) case law or judicial precedent.[55]

The Constitution is the supreme law of the Republic and all law and conduct that is inconsistent with it is invalid.[56] Legislation is the primary source of law and is superior to both the common law and African customary law. Case law as a source of law is closely linked to legislation as a source of law: judicial pronouncements give content and meaning to legislative enactments which, due to their general nature, tend to be vague and unclear and whose meaning requires authoritative determination.[57]

These sources are sorted into a hierarchy of rules with the Constitution sitting at the apex of the hierarchy, followed by legislation, and then the common law, customary law and case law, all as co-equal sources of law subsidiary to legislation and the Constitution.

3 Legal change in general

The Constitution recognises various ways in which legal change may take place. In relation to legislation, s 44(1)(a)(ii) of the Constitution empowers the National Assembly to 'pass legislation with regard to any matter'. This invariably includes the passing of legislation which amends or repeals existing legislation, and such amending legislation must comply with the general legislative procedures set out in s 75 of the Constitution. Here, the principal agent of legal change is the National Assembly. The National Council of Provinces is also an agent of legal change insofar as any legislation under consideration either amends the Constitution per s 74 or affects the interests of the provinces per s 76 of the Constitution.

Legislation, however, may be subject to change in other ways. Section 39(2) of the Constitution provides that 'when interpreting any legislation … every court … must promote

[55] See J Gardner *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 74-75: '[I]n some legal systems, some judges also have the power to change legal rules *solo*, and instantaneously, by making legal rulings. […] This type of law is known as case law. […] It is to be found in the judgments that judges give when they decide the cases brought before them.'

[56] Constitution s 2.

[57] L M. Du Plessis 'Statute Law and Interpretation' in W A. Joubert (ed) *The Law of South Africa* 2 ed Vol 25(1) (LexisNexis, 2021) at § 291: '[c]ase law therefore augments statute law and directs its application in practice'.

the spirit, purport and object of the Bill of Rights'.[58] Plainly, this provision envisages that the wording of legislative text may not necessarily promote the spirit, purport and objects of the Bill of Rights and requires courts to modify such text to ensure conformity with said spirit, purport and objects.

This should, however, not be confused with the power of a court to strike down legislation as unconstitutional. In this way, s 39(2) assumes that the legislative text in question meets the criteria of validity (i.e., it was enacted in accordance with the provisions of the Constitution that relate to lawmaking and is law *qua* law), and is not patently unconstitutional (e.g., it does not infringe or unjustifiably limit any rights in the Bill of Rights or offend the principle of legality[59] in some other way), but nonetheless falls short of the constitutional 'spirit' in some other way. Here, courts are empowered to effect changes not to the legislative text but to the norms underlying the text – the meaning which courts must attribute to the text.

An appeal is made to the idea of the purpose of the legislation, which can be ascertained by looking beyond the text (for instance, by looking at the legislative context and history) as opposed to simply looking only at the text as enacted. The interpretation that is finally settled on by a court following a s 39(2) harmonisation exercise thus becomes the authoritative meaning of the legislative text and is law *qua* law from that point onwards.

Another way that legislative change may occur is through the remedies imposed by courts, such as reading words into or severing words from statutes in order to remedy their constitutional invalidity. Such changes occur at the textual level and entail the insertion, or deletion, of words or phrases in the enacted text.[60]

[58] Omissions for brevity and clarity.

[59] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para [58]: 'It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.'

[60] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para [74]: 'The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with

The common law and African customary law are equally subject to legal change by Parliament. As noted above, Parliament's plenary power to legislate is limited 'only by the Constitution'.[61] It is therefore conceivable that Parliament may pass legislation which modifies the common law or African customary law in some way or another. Of course, any such legislative intervention in those areas would transform the law concerned into statutory as opposed to common or customary law. However, it is equally conceivable that such an intervention would inspire the development or modification of rules in those areas of common or customary law that are untouched by legislation, for the purposes of coherence and uniformity, for instance.

The common law and African customary law are also subject to the lawmaking power of the courts. In terms of s 39(2), as with legislation, the courts must, 'when developing the common law or customary law', promote the spirit, purport and objects of the Bill of Rights. This would entail the development of common or customary law rules for conformity with the Constitution, or the application of established rules to new concrete factual scenarios in ways which achieve the ends set out in s 39(2).[62]

In relation to the common law, s 8(3) of the Constitution also empowers courts, when applying provisions of the Bill of Rights, to develop the rules of the common law either to give effect to a right in the Bill of Rights or to limit such a right in accordance with the limitations clause.[63] This power to develop the common law is found elsewhere in the

the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible.'

[61] Constitution s 44(4).

[62] See generally N Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30(1) *South African Journal on Human Rights* 63.

[63] A Price 'The influence of human rights on private common law' (2012) 129(2) *South African Law Journal* 330, 336: '[S]ince common-law rules are judge-made, some courts (depending on local doctrines of precedent) could in principle have the power to alter offending common-law rules to ensure compliance with the relevant human rights. The undemocratic character of judicial alteration of legislation is not shared, at least to the same degree or in the same way, by judicial development of common-law rules.'

Constitution, for example s 173,[64] and is a creative lawmaking power that the Constitution vests upon judges.

In both instances of legal change, both courts and Parliament are granted explicit powers to effect legal change within the South African legal system. This position is a manifest departure from the antiquated idea of the role of a judge as being limited to law-application only.[65] So far, changes to the Constitution have been discussed only tangentially. I turn to consider those now.

4 Constitutional change in particular

4.1 Modes of constitutional change

Constitutions – specifically written or codified constitutions – can change in a variety of ways. They can change through special constitutionally prescribed amendment procedures,[66] through the development of constitutional conventions that are not consonant with the constitutional text,[67] and even through judicial interpretations of the constitutional text.[68]

[64] It provides: 'The Constitutional Court, Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[65] N MacCormick *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) 187-188.

[66] Y Roznai *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017) 2.

[67] R Passchier (2017) *Informal Constitutional Change: Constitutional Change Without Formal Constitutional Amendment in Comparative Perspective* (Doctoral Thesis, University of Leiden) 50-54. Retrieved from: https://hdl.handle.net/1887/57133.

[68] Roznai *Unconstitutional Constitutional Amendments* (n 66) 2. See also P Craig 'Written and Unwritten Constitutions: The Modality of Change' in S Bookman, E Willis, H Wilberg and M Harris (eds) *Pragmatism, Principle, and Power in Common Law Constitutional Systems: Essays in Honour of Bruce Harris* (Intersentia, 2022) 263, 270-272; J Fowkes 'Informal Constitutional Change in Unlikely Places: The Case of South Africa' in X Contiades and A Fotiadou (eds) *Routledge Handbook of Comparative Constitutional Change* (Routledge, 2020) 421, 425-429; Y Roznai 'Unconstitutional Constitutional Change by Courts' (2017) 51(3) *New England Law Review* 557; J Marshfield 'Respecting the Mystery of Constitutional Change' (2017) 65(5) *Buffalo Law Review* 1057, 1058 and R Albert 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38(2) *Dublin University Law Journal* 388, 389.

Another way in which constitutional change can occur is through the enactment of ordinary legislation, for instance legislation that concretises constitutional provisions.[69] Such statutes may bring about what Richard Albert calls 'quasi-constitutional amendments'.[70] A quasi-constitutional amendment is:

> a sub-constitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance—making it just as durable as a constitutional amendment.[71]

This form of constitutional change is of particular relevance to the South African context, where the constitutional text mandates the enactment of certain legislation.[72] On this score, James Fowkes has argued that:

> When important legislation is enacted … this is usually seen as a matter of giving effect to the constitution, not changing it. There may be a sense in which informal change can happen only when a certain set of understandings become settled under a constitution and then some different understandings or pressures intrude, such that one can speak of change from one to the other. But if so, South Africa is still establishing that first set of understandings. It is still largely acting out something close to the original thinking, in something close to the original context.[73]

This argument, however, overlooks an obvious instance of such constitutional change in South African law. In determining the scope of the s 33 right to just administrative action, the Constitutional Court in its early judgments declared that such a right did not apply to

[69] Passchier (n 67) 49. See also F Ahmed and A Perry 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461.

[70] R Albert 'Quasi-Constitutional Amendments' (2017) 65(4) *Buffalo Law Review* 739.

[71] Albert (n 70) 740.

[72] See for instance sections 3(3), 32(2) and 33(3) of the Constitution.

[73] Fowkes (n 68) 423.

decisions of an executive,[74] legislative,[75] or judicial nature.[76] Any definition of 'administrative action', then, had to exclude these decisions from its ambit. Cora Hoexter has argued that when Parliament eventually enacted the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as required by s 33(3), it 'severely circumscribed the realm of administrative action by means of an elaborate statutory definition',[77] going far beyond what administrative action was understood to encompass, having regard to the exclusions recognised in the Constitutional Court's jurisprudence. PAJA, therefore, significantly curtailed the reach of the right to just administrative action in a way arguably not contemplated by the Constitution nor as the provision was understood and applied by judges prior to its enactment, thereby changing and narrowing the content of the s 33 right outside of the stipulated procedure for amending Bill of Rights provisions in s 74 of the Constitution.

This diversity of avenues for constitutional change raises questions about the nature and scope of the power to amend a constitution, a topic to which I will now turn.

4.2 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. These include special majorities, quorum requirements and the like, that only apply to constitutional amendments.[78] One explanation for this difference is that the power to change a constitution presupposes the power to create a constitution in the first place.[79] That is, the amendment power is derived from the *constituent* power to make a constitution, while the legislative power is a *constituted* power created by a constitution and is thus subsidiary to the constituent power. Let me explain.

[74] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para [142].

[75] *Fedsure* (n 59) paras [33]-[45].

[76] *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para [24].

[77] C Hoexter '"Administrative Action" in the Courts' (2006) *Acta Juridica* 303.

[78] Roznai *Unconstitutional Constitutional Amendments* (n 66) 6.

[79] Roznai *Unconstitutional Constitutional Amendments* (n 66) 7.

Constituent power is 'the power to establish the constitutional order of a nation'.[80] The source of the constituent power is 'the political will of the "people" to act as a constitutional authority.'[81] It is both pre-legal and pre-constitutional, meaning that it is 'independent of any constitutional forms and restrictions.'[82] The people, as sovereign, have the unlimited power to bring a constitution into being.[83]

Constituted power on the other hand finds its origin in the constitution and is an ordinary, limited, legal power.[84] Unlike the constituent power, the constituted power can only operate within the bounds of the provisions of the constitution and other positive law.

[80] Roznai *Unconstitutional Constitutional Amendments* (n 66) 105. See also J Colón-Ríos *Constituent Power and the Law* (Oxford University Press, 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".'

[81] Roznai *Unconstitutional Constitutional Amendments* (n 66) 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 Law Journal* 1, 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).

[82] Roznai *Unconstitutional Constitutional Amendments* (n 66) ibid.

[83] D Grimm 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 *National University of Juridical Sciences Law Review* 15, 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 added).

[84] Roznai *Unconstitutional Constitutional Amendments* (n 66) 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 political community. 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. All this to say that the constituent power is not ordinarily exercisable but is often temporally constrained. This is not true of the constituted power which is the everyday power wielded and exercised by the state and its functionaries.

The binary classification between constituent and constituted powers also creates a hierarchy in which the constituted power is subordinate to the constituent power. The constituent power establishes the constitution, while the constituted power is then regulated by that constitution. In domestic legal systems, the ordinary constituted powers are the legislative, executive and judicial powers of the state.[85] 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 may only exercise the lawmaking or legislative power 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*. This is because it straddles the constituent power to change – and therefore re-*make* – the constitution and the constituted power to make such changes through the legislative power – itself a constituted power.[86] The amendment power cannot therefore 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.

[85] Roznai *Unconstitutional Constitutional Amendments* (n 66) 110.

[86] Roznai *Unconstitutional Constitutional Amendments* (n 66) ibid.

On Roznai's account, 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 power in nature and a constituted power in function'),[87] are inadequate because they do not explain its uniqueness and instead try too hard to force it into either one of the categories. Instead, he says, we should accept its *sui generis* nature as our starting point.

'[T]he amendment power', Roznai says, 'is a special power, weaker than the constituent power but greater than the ordinary legislative powers.'[88] On his account, the constituent power exists in two forms: primary constituent power and secondary constituent power.[89] 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.[90] The secondary constituent power 'is a constraint power that acts according to the formal procedures and rules that were established by the constitution.'[91] It cannot, unlike the primary constituent power, be exercised in a legal vacuum[92] and is for that reason limited in nature.

[87] Roznai *Unconstitutional Constitutional Amendments* (n 66) 111-112.

[88] Roznai *Unconstitutional Constitutional Amendments* (n 66) 113.

[89] Roznai *Unconstitutional Constitutional Amendments* (n 66) 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 in *Constituent Power and the Law* op cit (n 80) 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 analog to the South African constitution-making process discussed below).

[90] Roznai *Unconstitutional Constitutional Amendments* (n 66) 115.

[91] Roznai *Unconstitutional Constitutional Amendments* (n 66) 116.

[92] 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 *Constituent Power and the Law* op cit (n 80) 7.

Thinking of constituent power in this way, as 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 between 'the people' as the repository of the supreme constituent power and the legislature as the repository of the subsidiary amendment power.[93] On this construction, the holder of the amendment power owes a fiduciary duty to 'the people' to exercise the amendment power 'for *certain ends*'[94] (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.[95]

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 or cannot 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 the current study. 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.[96] 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;[97] 'a

[93] Roznai *Unconstitutional Constitutional Amendments* (n 66) 118-119.

[94] Roznai *Unconstitutional Constitutional Amendments* (n 66) 119.

[95] Roznai *Unconstitutional Constitutional Amendments* (n 66) ibid.

[96] Roznai *Unconstitutional Constitutional Amendments* (n 66) 120-122.

[97] Roznai *Unconstitutional Constitutional Amendments* (n 66) 121.

power found outside the dominion of law and therefore incapable of legal regulation'.[98] The Constitutional Assembly was established in terms of s 68(1) of the Interim Constitution, 1993 comprising the National Assembly and the Senate, sitting jointly.[99] First, the Constitutional Assembly was under an obligation to adopt a new constitution that complied with the Constitutional Principles contained in Schedule 4 of the Interim Constitution.[100] Second, 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 it could substantively deal with in the process of creating the new constitution and how; 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).[101]

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 to the one 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.

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

[98] Colón-Ríos *Constituent Power and the Law* (n 80) 4.

[99] Constitution of the Republic of South Africa Act 200 of 1993. It provided in relevant part: 'The National Assembly and the Senate, sitting jointly … shall be the Constitutional Assembly.'

[100] Section 71(1)(a) of the Interim Constitution.

[101] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC).

than what 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 said constitution since that is a power that belongs to 'the people' proper.

Second, the delegation is to a constituted body that most closely resembles 'the people' acting as the constituent authority. The legislature, as the agent, mirrors how the constituent authority itself functioned when making the constitution in almost perfect detail. The choice of a legislature as the repository of the amendment power is thus not the result of a mere choice between multiple plausible options but a reflection of its 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 of 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) the participation of both the successor Houses of Parliament (the National Assembly and the National Council of Provinces), 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, etc.

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 shortly. Before that, however, I first need to define what counts as informal constitutional change and situate this phenomenon in the South African legal context.

5 Formal and Informal Constitutional Change

5.1 Formal constitutional change

Since the focus of this dissertation is informal constitutional change, I will not expend much time or energy on *formal constitutional change*. A brief exposition of the term as used in this dissertation and the phenomenon it describes is, however, necessary. A feature of written constitutions is often their rigidity. This rigidity is not rigidity for its own sake but is instead

aimed at securing certain normative ends. One of these ends is durability. Durability is 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. 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 (i.e., *formal* constitutional change) is legitimate, I have shown earlier in this chapter that change outside the prescribed formula occurs regardless and 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.[102]

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 (i.e., unamendability[103] or entrenchment),[104] 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.[105]

Formal amendment rules achieve, among others, two things: distinguishing constitutional amendments from ordinary law and rendering amendments that fall afoul of the rules susceptible to judicial review.[106]

[102] R Albert 'The Structure of Constitutional Amendment Rules' (2014) 49 *Wake Forest Law Review* 913, 913-914.

[103] R Albert 'Counterconstitutionalism' (2008) 31(1) *Dalhousie Law Journal* 1, 37-44.

[104] Roznai *Unconstitutional Constitutional Amendments* (n 66) 6 and 15 et seq.

[105] Roznai *Unconstitutional Constitutional Amendments* (n 66) 5.

[106] This is where the idea of 'unconstitutional constitutional amendments' comes from, see Roznai *Unconstitutional Constitutional Amendments* (n 66) 179-183.

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* comply with those same rules, including any procedural or substantive limits placed on the exercise of the amendment power. Second, such an amendment process must be undertaken by the constitutionally empowered amending authority and not any other.[107] Third, such an amendment process must result in a change to the text of the constitution.

For purposes of this dissertation, we can thus define formal constitutional change as: (1) constitutional change by means of the procedure set out in s 74 of the Constitution; (2) by the National Assembly and National Council of Provinces as the amending authorities, fulfilling their respective roles; and (3) which results in a change to text of the Constitution.

5.2 Informal constitutional change

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

While this dissertation concerns informal constitutional change broadly, it also 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.'[108]

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[107] R Albert 'Nonconstitutional Amendments' (2010) 22(1) *Canadian Journal of Law and Jurisprudence* 1, 13.

[108] F 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(7) *Yale Law Journal* 331, 341.

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 and, in turn, to the constitutional order itself.[109]

A constitution has changed 'if it requires today what it did not require yesterday'.[110] How one determines whether a constitutional change has occurred is a separate, and even trickier, matter.

Stephen 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 'ordinary' judicial interpretation.[111] First, such changes must 'relate to the subject matter of the Constitution', which is to say they must relate to a constitutional right or the exercise of a constitutional power. Second, they must be 'fundamental to governance in some sense', i.e. they must alter the vertical relationship between the state and its subjects or the horizontal relationship between state organs or institutions. Third, they must have the same legal status as the constitution itself, that is, be regarded as binding supreme law.[112]

For Reijer 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."[113] A more straightforward restatement of this thesis is that '[i]nformal constitutional

[109] C Bernal 'Informal Constitutional Change: A Critical Introduction and Appraisal' (2014) 62 *American Journal of Comparative Law* 493, 494-495. 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.

[110] Endicott (n 1) 367.

[111] S M. Griffin 'Understanding Informal Constitutional Change' (2015) 1 *Journal of Institutional Studies / Revista Estudos Institucionais* 1, 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).

[112] Griffin (n 111) ibid.

[113] Passchier (n 67) 60.

change takes place where the meaning of formal constitutional precepts change[s], though not the constitutional text itself."[114]

Mikołaj Barczentewicz on the one hand defines constitutional change, generally, as 'a change in the content of a constitution' which occurs 'if the constitution gains, loses or suffers modifications of any of its rules, legal or non-legal, written or unwritten."[115] Informal constitutional change – or what Barczentewicz 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."[116]

Albert on the other hand says an informal constitutional change has occurred 'where the enforceable meaning of the constitution changes without altering the constitutional text."[117] 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'."[118]

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. Such change equally 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

[114] Passchier (n 67) 205.

[115] M Barczentewicz (2019) *Constitutional Change and the Rule of Recognition* (DPhil Thesis, University of Oxford) 232. Retrieved from: https://ora.ox.ac.uk/objects/uuid:03968b09-fc4a-44fb-b47a-08b4b61f44b0.

[116] Barczentewicz (n 115) 123. Barczentewicz here draws on the work of constitutional economist Stefan Voigt, who, in S Voigt 'Positive Constitutional Economics: A Survey' (1997) 90 *Public Choice* 11, 34 described 'explicit [constitutional] change' as occurring 'when the text of the constitutional document is modified', and in S Voigt '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, 198 where he said implicit constitutional change 'implies that the meaning of the constitution changes although the constitutional document itself remains unchanged.'

[117] Albert (n 68) 388-389.

[118] Roznai (n 68) 558-559.

Jonathan Marshfield, for whom '[i]nformal constitutional change happens when binding constitutional rules are modified without any corresponding alteration to the constitutional text.'[119] Albert and Roznai on the other hand emphasise that such change must be to the 'enforceable meaning' of a constitution.

While not strictly a definition, Griffin's three criteria 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: (1) 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); (2) fundamental to governance in the sense of altering the relations between the state and the bearers of constitutional rights, or altering the relationships between constitutional institutions; and (3) 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.

This of course brings us to the question of whose authority it is 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 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 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'.[120] For Joel Colón-Ríos, informal constitutional change is typified by changes occurring through constitutional

[119] Marshfield (n 68) 1058.

[120] Fowkes (n 68) 434.

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.'[121] 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.'[122]

Emmett 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.'[123] By calling it 'judicial amendment' Macfarlane seeks to emphasise that 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.'[124] For Macfarlane, a judicial decision that 'effectively adds to, removes from, or modifies the constitution in a manner that is inconsistent with, or not 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.[125]

Relatedly, Alec 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

[121] J Colón-Ríos 'Judge-Made Constitutional Change' in X Contiades and A Fotiadou (eds) *Routledge Handbook of Comparative Constitutional Change* (Routledge, 2020) 217, 217-218.

[122] Colón-Ríos (n 121) 218.

[123] E Macfarlane 'Constitutional Retconning: History in Judicial Reasoning and Changes in Constitutional Meaning' (2023) 61(1) *Alberta Law Review* 1, 12.

[124] Macfarlane (n 123) ibid. Macfarlane, like Stone Sweet *infra*, defines judicial amendment of the constitution negatively, i.e., 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 addressed in the next chapter.

[125] E Macfarlane 'Judicial Amendment of the Constitution' (2021) 19(5) *International Journal of Constitutional Law* 1894, 1896.

constitutional lawmaking of a court."[126] By 'normative foundation', Stone Sweet refers to the 'precept of a system's higher law' conceived either in terms of the Kelsenian *Grundnorm*[127] or the Hartian 'rule of recognition' (discussed in section 1 of this chapter).

For a 'fundamental transformation' to occur, the following criteria must be met: (1) a reasonable inference that 'the constitutional law produced by the transformation would have been rejected by the founders' must be capable of being drawn; (2) the decision must alter the functioning of the legal system in ways not intended by the founders; and (3) the decision must be an instance of constitutional lawmaking, which is 'the modification of the constitution through adjudication (interpretation and application)'.[128]

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 its substance might not have been authorised, or was forbidden, by the 'Basic Norm' pre-*coup*.[129] This of course presupposes that the constitutional grant of judicial authority by the founders 'includes substantive constraints on the judge's decision-making (lawmaking).'[130]

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 that closely resembles the nature, form, and function of the constituent authority exercising the primary constituent

[126] A Stone Sweet 'The Juridical *Coup d'État* and the Problem of Authority' (2007) 8(10) *German Law Journal* 915.

[127] H Kelsen *The Pure Theory of Law* (University of California Press, M Knight transl. 1967). See also A Marmor 'The Pure Theory of Law' in E 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'.

[128] Stone Sweet (n 126) 916.

[129] Stone Sweet (n 126) ibid. Stone Sweet's definition of a *juridical coup d'état* reaches beyond the mere explication of it as a mode of informal constitutional change, with which I am presently concerned, by implying that informal constitutional change is per se illegitimate, and hence, a *coup*. This is a point I tackle more fully in the next chapter.

[130] Stone Sweet (n 126) ibid.

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 delegated to another, more appropriate, constituted body.[131] 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 section 4 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.[132] 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.[133]

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;[134] (3) which alters the content or scope of a constitutional right, power, or duty, or the relationship between state institutions; (4) in a manner not reasonably countenanced by the text or contemplated by the constitutional drafters; and (5) which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme).

[131] G J. Jacobsohn and Y Roznai *Constitutional Revolution* (Yale University Press, 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.'

[132] The temporal limits on the exercise of this power would remain the same as in the case of the constituent authority itself.

[133] See *Certification of the Constitution of the Republic of South Africa, 1996* (n 101) above.

[134] 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 '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*. I begin with a brief exposition of what I think does not constitute informal constitutional change.

6 Informal constitutional change in South Africa

6.1 Why informal constitutional change occurs

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. Heather Gerken offers one such theory.[135] Explaining that her theory 'rests upon a hydraulics metaphor', Gerken argues that 'by blocking most formal amendments, Article V [of the U.S. Constitution] effectively redirects those constitutional energies into different, potentially more productive channels.'[136]

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 for change will find alternative routes for relief, culminating either in some irregular form of constitutional modification or in an altogether new constitution.*'[137]

Melissa 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.[138]

[135] H K. Gerken 'The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*' (2007) 55 *Drake Law Review* 925.

[136] Gerken (n 135) 927.

[137] R Albert 'Constitutional Change Without Constitutional Amendment' (2022) 59(3) *Alberta Law Review* 777, 778 (emphasis added).

[138] M Schwartzberg *Democracy and Legal Change* (Cambridge University Press, 2007) 177-178.

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.'[139] Indeed, informal constitutional change is often touted 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.'[140]

It is often assumed, and this is foundational to the hydraulic theory, that constitutions that have eternal or unamendable clauses[141] or onerous procedural requirements for amendment inevitably invite informal constitutional change as a means of avoiding constitutional obsolescence. To a large extent, it is true that informal constitutional change has been propelled by the difficulty of amending certain constitutions, like the U.S. Constitution.[142] 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.[143]

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.[144]

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.'[145] The Constitution has been amended on eighteen

[139] Gerken (n 135) 933.

[140] Schwartzberg *Democracy and Legal Change* (n 97) 5.

[141] Albert (n 103) 37-38.

[142] Albert (n 137) 778. See also E J. Segall 'Constitutional Change and the Supreme Court: The Article V Problem' (2013) 16(2) *Journal of Constitutional Law* 443.

[143] Fowkes (n 68) 424.

[144] Marshfield (n 68) 1060-1061.

[145] Fowkes (n 68) 423.

occasions.[146] Only one amendment, to my knowledge, has failed, and for the sole reason of a lack of political support.[147]

But if the unavailability of amendment avenues cannot explain the turn towards informal constitutional change, what can? Perhaps I am getting ahead of myself here. First, I should establish whether informal constitutional change *has* indeed occurred in South Africa.

6.2 Fowkes' account of informal constitutional change in South Africa

As intimated in the introductory chapter, there is little to no scholarship on informal constitutional change in South Africa. Apart from Fowkes, only Koos Malan has written extensively on informal constitutional change.[148] For his part, Fowkes has identified the African National Congress's post-1994 dominance of the legislature and its attendant ability to block any constitutional change as the key driver of informal constitutional change. Informal constitutional change, then, has been in response to the need to check 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.'[149] Fowkes' account then views informal constitutional change in the limited context of one party dominance, including the cases he chose as illustrative examples.

Fowkes identifies the Constitutional Court's judgment in *Glenister II* as an instance of informal constitutional change.[150] 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

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

[147] 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 27 December 2024).

[148] K Malan *There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (African Sun Media, 2019). His work is however not relevant for this current project.

[149] Fowkes (n 68) 424.

[150] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

Prosecuting Authority.[151] It would be replaced by a less independent unit within the South African Police Service.[152]

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."[153] 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 like the courts and the National Prosecuting Authority. As Fowkes notes, a five-judge majority did hold that such an obligation existed and invalidated the two statutes on the basis that they failed to meet that obligation.

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."[154] 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'.[155] 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 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*.[156]

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

[152] The replacement, the Directorate for Priority Crime Investigation, was established by the South African Police Service Amendment Act 57 of 2008.

[153] Fowkes (n 68) 425.

[154] Fowkes (n 68) 426.

[155] Fowkes (n 68) ibid.

[156] Fowkes (n 68) ibid. Own emphasis.

He notes that *Glenister II* extended the Constitution's independence protections to the DSO 'in a way the drafters did not.'[157] Drawing a comparison between *Glenister II* and *Nkandla*, 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.'[158]

Contrary to the argument in this dissertation, however, Fowkes argues that *Nkandla* 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.'[159] Despite numerous areas of agreement between us, I hope to show that Fowkes' treatment of *Nkandla* is mistaken in the course of my argument.

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

> 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.[160]

He postulates that were the facts of *Glenister II*, for instance, to be presented to a hypothetical constitutional drafter, they would not be able to conceive of s 7 as admitting of an interpretation that the court gave it but would instead see the case as revealing a gap that requires filling.[161] Fowkes concludes by urging us to look at what courts do and not merely what they say they are doing and that '[t]he use of the interpretative power to the degree that

[157] Fowkes (n 68) ibid.

[158] Fowkes (n 68) 427.

[159] Fowkes (n 68) ibid.

[160] Fowkes (n 68) 433.

[161] Fowkes (n 68) ibid.

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.[162]

7 Conclusion

In this chapter, I have sought to provide a working definition of informal constitutional 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 state institutions; (4) in a manner not reasonably countenanced by the text or contemplated by the constitutional drafters; and (5) which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme).

It is this definition that sketches out the parameters of the argument that will follow. I have also put forth 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 mine is a different kind. I have also shown how judges can be agents of informal constitutional change and have sought to draw out some broad distinctions between what counts as judicial interpretation in the ordinary sense on the one hand, and informal constitutional change on the other hand. In the following chapter, I explain what makes certain kinds of informal constitutional change illegitimate, in the sense of constituting *unconstitutional constitutional change*.

[162] Fowkes (n 68) ibid.

Chapter 3

Unconstitutional Constitutional Change

1 Introduction

In the previous chapter, I explored the concept of informal constitutional change and provided a working definition which this dissertation will explore further. In some of the scholarship surveyed in the previous chapter, 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, however, was 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 interpretive process. 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 said limits, they do more than just interpret the constitution and instead 'amend' it or, put otherwise, they engage in 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 suspicious because of its informal nature, that is not the case. In this chapter, I will attempt to further refine our understanding of such informal constitutional change by explaining when such change is illegitimate. That is, 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 unconstitutionality of constitutional change by judges. I will conclude by drawing up a framework for understanding unconstitutional constitutional change.

2 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. And 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 matters a great deal to the interpretive enterprise, such that any interpretation eventually settled upon by a court must be consistent with the language adopted by the legal text.

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 chapter is not about the nature and limits of legal interpretation. That I leave for the next chapter. 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 interpretive enterprise.

By distinguishing between ordinary constitutional interpretation and what in the previous chapter was described variously as 'judicial amendment' of the constitution,[163] 'implicit constitutional change'[164] or even 'juridical coup d'état',[165] I draw attention to those judicial decisions that stray beyond the limits of acceptable judicial lawmaking. 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).[166]

As explained previously, it is not my contention 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 of amending authorities is ordinarily sourced directly in the constitutional text and contained in amendment formulas, questions about their authority

[163] Mcfarlane (n 125).

[164] Barczentewicz (n 115).

[165] Stone Sweet (n 126).

[166] S Levinson 'How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change' in S Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 13, 33.

to undertake such change are easily answered by reference to the amending formula, and disputes about the limits of that authority can be similarly resolved.[167]

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,'[168] then we must also accept that judges do indeed have the authority to change the meaning of the constitution. Yet, changes in constitutional meaning of, say, a supplementary kind[169] – 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.[170] 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.[171]

Rather, it is when judges, for instance, insert into the constitution rules or norms not previously recognised as part of the constitution that they transgress the limits of their

[167] See G J. Jacobsohn and Y Roznai *Constitutional Revolution* (n 131) 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.'

[168] Gardner *Law as a Leap of Faith* (n 55) 119.

[169] J Goldsworthy 'Raz on Constitutional Interpretation' (2003) 22(2) *Law and Philosophy* 167, 171: 'in some cases a limited power to *supplement* the constitution must be permissible' (emphasis in the original).

[170] See J Goldsworthy 'Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, "Constitutional Reasoning in Constitutional Courts—A European Perspective."' (2013) 14(8) *German Law Journal* 1279, 1281-1282. A formulaic rendering of a supplementary interpretation could look something like this: If provision *A* of the Constitution only applied to scenarios 1, 2, 3 and 4 at time (*T*) before its interpretation by court *X*, a new meaning of provision *A* would apply to scenarios 1, 2, 3, 4 and 5 at time (*T+1*) after court *X*'s interpretation, without radically altering the scope or content of the provision so as to transform it into provision *A1* distinct from provision *A*.

[171] Gardner *Law as a Leap of Faith* (n 55) 122.

authority. This transgression occurs in two ways: (a) through the exercise of the constituent power and (b) through the disregard for the authority of the constitution's framers.

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: 'How can a constituted organ possessing only a limited legal competence be the bearer of constituent power and bring about a constitutional revolution?'[172] It is for that reason that 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.[173]

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.[174] 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 …',[175] while Article 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."[176]

[172] G J. Jacobsohn and Y Roznai *Constitutional Revolution* (n 131) 242.

[173] Macfarlane (n 125) 12.

[174] This is a live controversy in U.S. constitutional law scholarship, see generally Segall (n 142) 444.

[175] Own emphasis. See also the judgment of McHugh J in *Al-Kateb v Godwin* [2004] HCA 37, 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.'

[176] Own emphasis.

Contrast these with s 74(1) of the South African 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 case in relation to South Africa.[177] However, 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.

That 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 (i.e., Parliament). Second, the amending formula provides for its own amendment which suggests a foreclosure of avenues for amendment beyond s 74 itself.[178] This also means that courts may not interpret amending formulas to empower themselves as amending authorities *qua* the constituent power.[179]

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.[180]

[177] A K. Abebe 'The Substantive Validity of Constitutional Amendments in South Africa' (2014) 131(3) *South African Law Journal* 656, 679.

[178] R Albert 'Amending Constitutional Amendment Rules' (2015) 13(3) *International Journal of Constitutional Law* 655, 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.'

[179] E Macfarlane 'The Unconstitutionality of Unconstitutional Constitutional Amendments' (2022) 45(1) *Manitoba Law Journal* 21.

[180] Hart *The Concept of Law* (n 43) 153 (emphasis in the original).

On this view, a court obtains the legal power to change the constitution *ex post facto*. This is a species of what Barczentewicz 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.[181] He contrasts it with 'the abilities view' of constitutional change, one to which he subscribes, in terms of which 'legal changes are law-governed if they take place according to pre-existing rules of recognition."[182] According to Barczentewicz, '[i]f somebody's actions are recognized as having a law-changing effect, that agent has … a legal ability (quasi-power) to change the law, even if they do not have a legal power to do so."[183]

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.[184] Where an apex court has pronounced itself on what the constitution is or what it means, for better or for worse, that is the authoritative meaning of the constitution thenceforth.

The implication of 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 authority-focused. How, then, are we to determine the legitimacy of informal constitutional change?

3 The Legitimacy and Constitutionality of Informal Constitutional Change

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 section will consider in general terms the legitimacy and constitutionality of informal constitutional change.

[181] Barczentewicz (n 115) 215.

[182] Barczentewicz (n 115) 214.

[183] Barczentewicz (n 115) 216.

[184] Hart *The Concept of Law* (n 43) 146. See also M N. de Beer 'Invalid Court Orders' (2019) 9 *Constitutional Court Review* 283, 288: 'where 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.'

In this chapter and 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, say, that the absence of public involvement in judicial deliberation, and therefore judicial decision-making, renders such decisions illegitimate in the sense I've just defined. That would, in fact, impugn all judicial decisions as illegitimate and not only those that result in the kind of constitutional change I am presently concerned with.

Instead, following Walter Murphy, I take legitimacy to refer 'not to popular support but to grounding in the existing system's fundamental normative principles."[185] Richard Fallon has similarly developed a taxonomy of constitutional legitimacy along three lines: legal, sociological, and moral legitimacy.[186] Legitimacy in this chapter refers to legal legitimacy. Legal legitimacy relates to the lawfulness of constitutional change, i.e., its adherence to the valid and recognised *legal* norms of a legal system.[187] This understanding of legitimacy dovetails with Barczentewicz'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.[188]

[185] W F. Murphy 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in S Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 163, 173.

[186] R H. Fallon Jr. 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1789.

[187] Fallon (n 186) 1794: 'That which is lawful is also legitimate'.

[188] Barczentewicz (n 115) 234.

Importantly, a constitutional change is unconstitutional if 'there was nothing in the law as it was before the change to ground the change.'[189] 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? And if so, what constraints exist upon the power of such a court to do so?[190]

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). Second, in deciding the case, the court must have 'rested its decision only on considerations that it had lawful power to take into account'. Third, the court must have 'reached an outcome that fell within the bounds of reasonable legal judgment'.[191]

The corollary of those criteria is that a court which decides a matter where (1) it has no jurisdiction, (2) its decision rests on considerations it has no lawful authority to take account of, and (3) the decision displays 'egregiously bad judgment' and amounts to an abuse of its authority and 'not a mere error in its exercise', acts illegitimately (or unconstitutionally).

Some caveats are appropriate at this stage. First, it is clear 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

[189] Barczentewicz (n 115) 235. To 'ground' in this context means to 'obtain entirely in the virtue of [(sth)]' or to arise as a result of (sth), see 238.

[190] This is the focus of chapter 4.

[191] Fallon (n 186) 1819.

adjudication of disputes. In the course of this dissertation, 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 prior to 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.[192]

For Goldsworthy, there are four categories of legitimate informal constitutional change by judges.[193] 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.[194]

Second is change through the development of doctrine to supplement indeterminate constitutional provisions by courts, granted that such supplementation is consistent with the constitution itself.[195]

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.[196]

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.[197]

[192] Criteria (1) and (2) are drawn from Macfarlane's work (n 125) 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 (n 186) 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.

[193] Goldsworthy (n 169) 177.

[194] Goldsworthy (n 169) ibid.

[195] Goldsworthy (n 169) ibid.

[196] Goldsworthy (n 169) 178.

[197] Goldsworthy (n 169) ibid.

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.

4 Conclusion

We can thus define an unconstitutional constitutional change as one which, when compared to the law prior to 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*).[198]

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;
> (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.

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

[198] '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.

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. As explained in the introductory chapter, I will take the Constitutional Court's decision in *Nkandla* as my central case and will develop over the next three chapters the argument for why it should be considered an instance of unconstitutional constitutional change.

Chapter 4

Adjudication, Interpretation and The Failures of Nkandla

'[A] constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.' — Kentridge AJ in *S v Zuma*.[199]

1 Introduction

The Constitutional Court in *Nkandla* held that s 182(1)(c) of the Constitution grants the Public Protector the power to issue binding remedial action following an investigation. In doing so, the court interpreted the phrase 'take appropriate remedial action' in s 182(1)(c) to mean 'take binding remedial action'. This, it said, was because 'an appropriate remedy must mean an effective remedy'.[200]

In this chapter, I argue that this interpretation is an illegitimate one that resulted in an unconstitutional constitutional change. I begin first by clarifying the distinction between constitutional adjudication and interpretation as modalities of constitutional change. I then offer four accounts of constitutional interpretation, all of which identify, in some way, the limits of legitimate constitutional interpretation.

After that, I offer a brief overview of the South African courts' approach to constitutional interpretation. In the last section, I critique *Nkandla* as an instance of a court venturing beyond the limits of legitimate constitutional interpretation. I will then offer some concluding remarks.

2 Adjudication and Interpretation

Constitutional adjudication includes, but is not limited to, constitutional interpretation. Adjudication is the activity of resolving disputes by resort to the application of law. This does not always involve the interpretation of legal instruments. Constitutional change, then, can occur through adjudication without a court having fashioned a new interpretation of the constitution.

[199] *S v Zuma and Others* [1995] ZACC 1, 1995 (2) SA 642 (CC) para [18].

[200] *Nkandla* (n 3) para [67].

Courts deciding constitutional cases are often asked to apply abstract evaluative standards, resolve indeterminacies, or to act equitably,[201] none of which, according to Endicott, are interpretive questions.[202] But that these are not interpretive questions does not mean courts do not create law when not engaged in the interpretive enterprise.

An example Endicott offers is of a court faced with the question whether a form of punishment is 'cruel' in the face of a constitution that prohibits cruel punishment. Determining whether a particular punishment is cruel, and therefore unconstitutional, however, would not be interpretive because the court would simply be applying the constitution's express prohibition against cruel punishment. This, Endicott says, is a creative lawmaking endeavour despite not being interpretive:

> If the constitution outlawed cruel punishments, it conferred on the court . . . the remarkable, open-ended authority that with the responsibility for giving effect to the provision . . . But it is not interpretation in the primary mode. It [the court] does not reach its conclusion by working out the meaning of the constitution. In the primary sense of 'interpretation', the role of deciding what counts as a cruel punishment is fundamentally non-interpretive.[203]

Colón-Ríos similarly offers six ways in which constitutional adjudication may be used as a mechanism for constitutional change: through (1) interpretation; (2) changes in review standards; (3) augmenting the relationship between the branches of government; (4) attributing a new status to certain norms; (5) the recognition of new rights; and (6) triggering or prompting formal constitutional change by the relevant actors.[204] Bar the first, these too do not involve interpretation but can nonetheless produce constitutional change.

[201] A court that exercises an equitable jurisdiction may, for instance, depart from what the constitution requires if it is in the interests of justice to do so. Such a court may readily settle an interpretive question and still decide the case contrary to what the constitution would ordinarily dictate. See for instance Madlanga J's judgment in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23, 2018 (2) SACR 442 (CC) paras [68]-[81] and the authorities cited therein.

[202] Endicott (n 1) 371.

[203] Endicott (n 1) 372.

[204] Colón-Ríos (n 121) 24.

Interpretation, on the other hand, can be defined as the process through which a court gives meaning to the semantic content of a legal text, or the process by which the linguistic meaning of a legal text is discovered.[205] It involves the reading of the words and phrases used in the legal text in accordance with the rules of ordinary grammar and syntax in order to make them intelligible when read as a whole. The purpose of interpretation is to resolve common challenges that arise from the indeterminacy of language, such as vagueness and ambiguity, to give a legal text a meaning that is neither vague nor ambiguous.[206]

A closely related concept is that of construction: the application of the linguistic meaning of a legal text. In other words, construction is concerned with the legal effect of the linguistic meaning as discovered through interpretation.[207] This involves the creation, expansion, or even narrowing of legal rules and doctrines derived from the text's linguistic meaning.

This does not however mean that the linguistic meaning of a constitution is discoverable only in one way. Indeed, there are many theories of constitutional interpretation – a fact illustrated by the intractable debate about originalist and non-originalist approaches to constitutional interpretation in the United States.[208]

Both processes are employed in constitutional adjudication, although judges do not always appear to appreciate the differences between them and often conflate them in the process of deciding cases. Importantly, the linguistic meaning of a legal text may not always be identical to the legal content of that text, in that the rules or doctrines constructed from a legal text's linguistic meaning cannot be found in the semantic content of the legal text itself.[209]

In defiance of the distinction just drawn, I will use 'interpretation' to cover both interpretation proper and construction. 'Constitutional interpretation', then, is both the process by which the linguistic meaning of the provisions of a constitution is discovered and the process by which the constitutional text is rendered determinate through the imputation of a legal effect to its linguistic meaning. An important point to make at this stage is that

[205] L B. Solum 'The Interpretation-Construction Distinction' (2010) 27 *Constitutional Commentary* 95, 96.

[206] Solum (n 205) 97-98.

[207] Solum (n 205) 98.

[208] L B. Solum 'What is Originalism? The Evolution of Contemporary Originalist Theory' (2011) *Georgetown Law Faculty Publications and Other Works* 1353 (available at: https://scholarship.law.georgetown.edu/facpub/1353).

[209] Solum (n 205) 99.

interpretation is a rule-governed activity, it is not an exercise in discretionary 'all things considered' reasoning. I will return to this in the next section.

Since this chapter is concerned with constitutional change that arises from constitutional interpretation, I turn now to discuss four accounts of constitutional interpretation, which also identify the limits of the phenomenon. I do not, however, marry myself to any one of them.

3 Four Accounts of Constitutional Interpretation

3.1 Endicott

According to Endicott, constitutional interpretation properly understood is the 'nexus between the factual aspect of constitutional law … and its normative aspect'.[210] The factual aspect concerns the process by which a constitution was adopted, the nature of the powers of the body that adopted it, its function and the historical context in which the constitution-making body existed, while its normative aspect concerns the rights, powers, duties and liabilities created by the constitution.[211]

Constitutional interpretation, then, is a means through which meaning can be ascribed to the law-making act, to 'determine what the [constitution-maker] did, in the exercise of its power'.[212] Interpretation 'must give effect to the allocation of constitution-making power'.[213] This means that judges cannot arrogate to themselves the constitution-making power by ascribing to a constitution a meaning that they think it should bear.

3.2 Ribeiro

Gonçalo de Almeida Ribeiro argues against the view of constitutional interpretation as a form of special legislative interpretation which he regards as 'a mischievous encroachment of the ontology of legality on the realm of constitutionality.'[214] Unlike statutory interpretation,

[210] Endicott (n 1) 365.

[211] Endicott (n 1) ibid.

[212] Endicott (n 1) ibid. This is what Endicott calls the 'primary mode of interpretation'.

[213] Endicott (n 1) ibid.

[214] G de Almeida Ribeiro 'What is Constitutional Interpretation?' (2022) 20(3) *International Journal of Constitutional Law* 1130, 1131.

constitutional interpretation 'presupposes the *a priori* category of the constitution'[215] which is a substantive, and not merely formal, category and is 'the condition of the possibility of objects such as texts and practices having constitutional meaning.'[216] The basic content of a constitution is thus determined *a priori* and is not 'contingent upon policy choices' unlike legislation.[217]

Like statutory interpretation, however, 'it is the language that sets the boundaries of legitimate interpretation.'[218] Ribeiro proposes four main principles of constitutional interpretation.

First is the principle of unity according to which 'constitutional law … must possess an intrinsic coherence'.[219] This means that a constitution cannot be interpreted to contain 'irreconcilable commitments' or 'contradictory judgments'.[220] An instance of the failure to adhere to the principle of unity is where a court interprets a constitution to provide 'substantially different levels of protection to rights and interests of comparable content and weight'.[221]

Second is the principle of balancing (or proportionality) which ensures that there are no 'disproportionate outcomes that sacrifice unilaterally come of its values'.[222] This principle requires the balancing of competing principles and that any sacrificing of any one principle is *ceteris paribus* justified.

Third is the principle of integration which requires that bills of rights be interpreted flexibly as containing standards and principles as opposed to rules that foreclose the balancing required by the second principle, while those aspects of the constitution that govern the institutions and powers of government must be regarded as foreclosure rules.[223] The latter category of rules are 'required to make the machinery of government work' and

[215] Ribeiro (n 214) ibid.

[216] Ribeiro (n 214) 1132.

[217] Ribeiro (n 214) 1149.

[218] Ribeiro (n 214) 1138.

[219] Ribeiro (n 214) 1153.

[220] Ribeiro (n 214) 1153-1154.

[221] Ribeiro (n 214) 1154.

[222] Ribeiro (n 214) ibid.

[223] Ribeiro (n 214) 1155.

this approach to their interpretation respects the democratic legitimacy of the allocation (and separation) of powers chosen by the constitutional framers.[224]

Fourth is the principle of stability which requires mechanisms for constitutional change to maintain political stability. This principle, like the third, treats fundamental rights and principles as flexible and therefore open to incremental change over time – whether through legislative or judicial decisions – while the norms governing the structure of government are to be interpreted as relatively rigid rules that ought to change primarily through constitutional amendment procedures to avoid instability.[225]

3.3 Bobbitt

According to Philip Bobbitt, constitutional interpretation is a form of interpretation according to law, which requires the construing of the constitutional text through several modalities of constitutional argument.[226] These modalities 'determine whether a proposition of constitutional law is true from a legal point of view, and thus they also show whether reliance on that proposition to support a legal decision is legitimate.'[227]

He identifies six modalities that have come to be accepted as standard in constitutional interpretation: (i) history, which identifies the original intentions of constitutional framers; (ii) text, which gives meaning to the words used in the constitution; (iii) the structure of the constitution from which rules about the relationships between the institutions created by the constitution can be inferred; (iv) doctrine which both creates new and applies existing rules through precedent; (v) traditions derived from constitutional practice; and (vi) prudence, 'which balances the costs and benefits of a proposed rule'.[228]

Straying beyond these and resorting to some other 'external theory' to construe constitutional text, Bobbitt contends, renders any judicial decision illegitimate.[229]

[224] Ribeiro (n 214) ibid.

[225] Ribeiro (n 214) 1156.

[226] P Bobbitt 'Constitutional Law and Interpretation' in D Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* 2 ed (Blackwell, 2010) 133.

[227] Bobbitt (n 226) ibid.

[228] Bobbitt (n 226) ibid

[229] Bobbitt (n 226) 134.

3.4 Greenawalt

According to Kent Greenawalt, it is an undisputed feature of constitutional interpretation that judges fashion specific doctrines from the generally formulated constitutional language, even where those are more specific than the constitutional text itself.[230] Another is the interpretation of principles as applying in contexts and to circumstances beyond those contemplated by constitutional framers.[231]

Likewise, the framers may choose to leave some constitutional norms deliberately vague and general with the expectation that judges would supply their content over time.[232] Since constitutional interpretation does not take place in a vacuum, existing constitutional doctrine equally constitutional meaning since courts are generally expected to adhere to, or work within, the law as decided in prior cases.[233]

Lastly, constitutional interpretation should yield decisions that rest on neutral principles of constitutional law. Such decisions are ones that 'honestly state the grounds of decision' and are not based on some other concealed reason; rest on generally applicable legal principles beyond the instant case; and announce legal principles that judges should be willing to follow in future cases.[234]

4 Constitutional Interpretation in South Africa

It is generally accepted that South African courts take a purposive approach to constitutional *and* statutory interpretation. According to Anton Fagan, the thrust of the purposive approach is the proposition that when faced with constitutional indeterminacy, a court ought to render a decision on the basis of the principles and values that are said to underlie the constitutional text.[235]

[230] K Greenawalt 'Constitutional and Statutory Interpretation' in J L. Coleman, K E. Himma and S J. Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004) 268, 298.

[231] Greenawalt (n 230) ibid.

[232] Greenawalt (n 230) ibid.

[233] Greenawalt (n 230) 298-299.

[234] Greenawalt (n 230) 299. This is the focus of the next chapter.

[235] A Fagan *Constitutional Adjudication in South Africa* (1997) DPhil Thesis in Law (Oxford University) 86. The thesis is on file with the author.

Murray Wesson and Max du Plessis justify this approach with reference to the work of Ronald Dworkin.[236] They argue that s 39 of the Bill of Rights requires that all law be interpreted in light of the purpose of the Bill of Rights.[237] This approach, they say, bears striking resemblance to Dworkin's theory of constructive interpretation, in terms of which the duty of a court is to interpret law 'in its best light when viewed from the perspective of political morality.'[238]

The best interpretation of the Bill of Rights, they argue, is one which both fits the Bill of Rights and best illustrates its purpose, which requires the identification of its goals.[239] Disagreements about the meaning of constitutional provisions, by extension, are disagreements about the purpose of the Constitution and about which interpretation best illustrates that purpose.[240]

Fagan is quite critical of the purposive approach, which he says 'collapses into the all things considered approach' which is inconsistent with the idea that courts deal with indeterminate rules by interpreting them.[241] This is because to require a court to decide cases based on the principles that fit and justify the constitutional law is to require it to decide cases based on its own moral judgment.[242]

Principles 'fit' the law if a person following those principles could have, by following those principles, produced the law in question. Thus, once a court has identified ***x*** as a correct moral principle it has also identified ***x*** as part of the constitutional law since it is not possible for ***x*** to be a correct moral principle, and thus fit the constitutional law, but not be a principle underlying the constitutional law.[243] This means that each case decided on the basis of the constitutional law's underlying principles is one which is decided on the basis of a court's moral judgment. This makes nonsense of the idea of constitutional interpretation.

[236] M Wesson and M du Plessis 'Hart, Dworkin and The Nature of (South African) Legal Theory' (2006) 123 *South African Law Journal* 700.

[237] Wesson and Du Plessis (n 236) 721.

[238] Wesson and Du Plessis (n 236) ibid.

[239] Wesson and Du Plessis (n 236) 722.

[240] Wesson and Du Plessis (n 236) 728-729.

[241] Fagan (n 235) 124.

[242] Fagan (n 235) 125.

[243] Fagan (n 235) ibid.

Fagan is a proponent of the idea that constitutional rules should be identified by giving constitutional text its ordinary meaning.[244] For the limited purposes of this chapter, I agree with Fagan's critique of the purposive approach to constitutional interpretation, and his preference for ordinary meaning approach for the identification of constitutional rules.

I now turn to my argument for why *Nkandla* amounted to an unconstitutional interpretation of the Constitution.

5 Nkandla as Unconstitutional Interpretation

5.1 Introduction

Let us recap. The court in *Nkandla* held that s 182(1)(c) of the Constitution granted the Public Protector the power to issue binding remedial action. It did so by interpreting the phrase 'take appropriate remedial action' to require an effective remedy and reasoned that such a remedy could only obtain if the remedial action was binding.

In this section, I argue that this interpretation is not an interpretation at all, but an exercise of naked judicial power that transgressed the acceptable limits of legitimate constitutional interpretation. To do so, I draw from the various theories propounded in the preceding sections.

5.2 Text cannot bear the meaning

As I discuss in greater detail in the next chapter, s 182(1)(c) cannot bear the meaning the court attributed to it. The court held that the word 'appropriate' in that provision meant 'nothing less than *effective*, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case'.[245]

The ordinary meaning of 'appropriate' admits of similar words such as 'suitable', 'proper', 'fitting' but not 'effective'. 'Appropriate' is not a legal term of art, and therefore, it ought to

[244] A Fagan 'In Defence of the Obvious – Ordinary Meaning and the Identification of Constitutional Rules' (1995) 11 *South African Journal on Human Rights* 545.

[245] *Nkandla* (n 3) para [71], own emphasis.

have been given its ordinary meaning.[246] Nowhere does the court explain why 'effective' was included in its list of adjectives to give meaning to the phrase 'appropriate remedial action'.

The court's interpretation also violates yet another of its constitutional duties, that of construing constitutional provisions in a harmonious way. As Ribeiro reminds us, a constitution may not be interpreted to contain irreconcilable commitments or contradictory judgments.[247]

In *S v Rens*, the court held that:

> It is not to be assumed that provisions in the same constitution are contradictory and the two provisions should, if possible, be construed in such a way as to harmonise with one another.[248]

Section 38 of the Constitution provides in relevant part that '[a]nyone has the right to approach a competent court … and the court may grant *appropriate* relief …'.[249] In *Fose*, the court held that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution.'[250] In other words, relief that best redresses a violation of the Constitution. There is no reason to assume that the word 'appropriate' in s 182(1)(c) means anything different.

If one were to apply the *Nkandla* court's interpretation of 'appropriate' to s 38, an absurdity would result. The court held that 'an appropriate remedy must mean an effective remedy'[251] and that for a remedy to be 'appropriate' it had to be effective and therefore binding. Does s 38, in requiring courts to grant appropriate relief, require that they grant binding relief? I would suggest not. Section 165(5) of the Constitution provides that: 'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

[246] *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC) para [76]: 'This accords with the ordinary meaning of the words. "Dealt with" is not a term of art. The phrase is part of colloquial English usage.'

[247] Ribeiro (n 214) 1153-1154.

[248] *S v Rens* [1995] ZACC 15, 1996 (1) SA (CC) 1218 para [17].

[249] Own emphasis.

[250] *Fose* (n 28) para [19].

[251] *Nkandla* (n 3) para [67]

To read 'appropriate' in s 38 as 'effective' would be to render s 165(5) superfluous, something a court may not do.[252] Yet, to not do so would be to create an internal inconsistency in the meaning of the word as used in the Constitution. It would be to render the Constitution intrinsically incoherent; a violation of Ribeiro's principle of unity. The court, in so doing, violated the rule against intrinsic incoherence.

More to the point, the court's interpretation of s 182(1)(c) violated its own rules of interpretation by ascribing to the provision a meaning that is unduly strained and cannot be reasonably ascribed to it.[253]

5.3 Historically strained interpretation

Adam Perry argues that an interpretation is strained 'relative to another when it is less probable that we would see the evidence we do if the legislature intended the first interpretation over the second.'[254] Put otherwise: *A* would be a strained interpretation relative to *B* if *B* accounts for the text, context and other evidence of legislative intent better than *A* does.[255]

What does this have to do with *Nkandla*? Well, the court held that the Public Protector has the power to issue binding remedial action. It did so without any recourse to the background material that informed the formulation of s 182(1)(c). In South African law, the intention of the drafters is not determinative of constitutional or statutory meaning: 'courts need not look at the drafter's intention when engaging in constitutional (or statutory) interpretation.'[256] Rather, documentary evidence of the drafters' intent, where it exists, will be treated as evidentiary material in the normal course and assessed ordinarily: 'where the background material is clear, is not in dispute, and is relevant to showing why particular

[252] *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421, 436 holding that a legal text 'should be construed so that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant'.

[253] See generally *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) paras [23]-[24].

[254] A Perry 'Strained Interpretations' (2019) 39(2) *Oxford Journal of Legal Studies* 316, 325.

[255] Perry (n 56) ibid. This is a rephrased version of Perry's rendering in the same paragraph.

[256] *Mansingh v General Council of the Bar and Others* [2013] ZACC 40, 2014 (2) SA 26 (CC) paras [26]-[28].

provisions were or were not included in the Constitution, it can be taken into account by a court in interpreting the Constitution."[257]

However, as Endicott states above, interpretation engages both the normative and factual dimensions of the constitution. I turn briefly to consider the factual background against which s 182 was drafted.

In the minutes of the proceedings of the Constitutional Assembly, evidence of the drafters' intentions abounds. Several proposals as to the powers of the Public Protector were mooted, including the power to investigate maladministration and the like, the power to 'refer any matter to the appropriate authority, person or institution', and the power to 'make recommendations to the appropriate authority, person or institution."[258] There were further debates about whether the office should have the power to litigate,[259] to direct disciplinary hearings,[260] to request the publication of reasons by a person or institution that declines to follow his or her recommendations,[261] or even the power to review laws for constitutionality and make recommendations for law reform.[262]

A later report by the Subcommittee on the Public Protector included a draft provision that would have given the office the power to 'resolve any disputes' or 'redress any act or omission' by mediation, conciliation or negotiation, referring the matter to an appropriate authority, giving advice on appropriate remedies or by 'any other means that may be expedient in the circumstances'.[263]

Crucially, at no point did the drafters consider vesting binding powers in the office, nor did any of the other proposed changes make it into the final text. It is clear, then, that the *Nkandla* court's interpretation of s 182(1)(c) as doing what the drafters never considered doing

[257] *S v Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 391 (CC) ('*Makwanyane*') para [18].

[258] See 'Report on the Public Protector' (26 May 1995) Theme Committee 6.3, Specialised Structures of Government (available at: https://shorturl.at/uimxU) at para 5.3.1.

[259] Report on the Public Protector (n 258) para 6.5.3.

[260] Report on the Public Protector (n 258) para 6.5.5.

[261] Report on the Public Protector (n 258) para 6.5.6.

[262] Report on the Public Protector (n 258) para 6.5.7.

[263] See draft Clause 2(1) fn 8 of the 'Draft formulations on the Public Protector' (19 June 1995) Constitutional Committee: Subcommittee on the Public Protector (available at: https://shorturl.at/voFNl).

is a strained interpretation in the sense defined by Perry because it does not account for the text of the provision, its context and the evidence of the Constitutional Assembly's intentions.

The court here failed to regard both constitutional history and the drafters' intentions as constraints on its interpretive exercise.

5.4 Disregards constitutional structure

As discussed above, when engaged in an interpretive exercise, a court must have regard to the structure of the constitution and the various relationships between its institutions. This necessarily implicates the principle of the separation of powers, which aims to ensure both the dispersal of power to different arms of the state and the separation of functions between them. Here, the *Nkandla* court fared no better.

First, the court offered no justification for endowing an office like the Public Protector, located outside the three traditional arms of state, with binding powers. As we will see in the next chapter, this has led to instability in the institutional arrangements created by the Constitution, violating Ribeiro's principle of stability as an aim of constitutional interpretation.

What's more, the court failed to heed its own previous ruling that interpretation requires that close attention be paid to 'the structure and design of the Constitution'.[264] The court failed to infer from the constitutional structure, in which all of the institutions that wield the coercive power of the state fall under one of the three arms, the rule that such power rightly belongs there as a matter of constitutional design.

Second, the court, again in violation of the principle of unity, created a hierarchy of institutions within Chapter 9 of the Constitution, which is not grounded in the constitutional text. The office of the Public Protector is of a class of 'institutions supporting constitutional democracy'. The court did not declare that all such institutions possess binding powers. To the contrary, it neglects to even mention them.

This has led to the anomalous situation where only the Public Protector has the power to issue binding orders, while the rest do not. Two recent decisions of the Supreme Court of

[264] *South African Police Service v Public Servants Association* [2006] ZACC 18, 2007 (3) SA 521 (CC), (2006) 27 ILJ 2241 (CC) ('*SAPS*') para [19].

Appeal illustrate this. In the *Electoral Commission* case,[265] the court was called upon to decide whether the Electoral Commission – a Chapter 9 institution – had the power 'to make a finding that a provision of the Code of Conduct … has been contravened and to impose a sanction for the contravention."[266]

The Commission had sought to rely on s 190 of the Constitution as the source of this power. The court held that only courts were empowered to sanction violations of the Code and that the Commission's powers did not include 'powers of determining complaints and granting remedies."[267] The Electoral Commission, then, cannot make determinations regarding breaches of the Code, nor can it sanction such breaches. This is despite it being a Chapter 9 institution like the Public Protector.

In the second case, the South African Human Rights Commission sought a declaration that it had the power to issue binding directives following an investigation.[268] Here, the commission relied squarely on *Nkandla* as authority for the proposition that it had binding powers, drawing parallels between s 184(2)(b) which governs its powers and s 182 which governs those of the Public Protector.[269]

The court rejected this argument, holding that the language of s 184(2)(b) was 'exclusive' to the commission and that the comparison drawn between its powers and the Public Protector's powers was inapt, since the latter was 'expressly empowered to directly take appropriate remedial action."[270]

While one may appreciate the court's position here, there is no reason in principle why – if the proposition on which *Nkandla* rests is correct – other Chapter 9 institutions could not also be said to have binding powers. In truth, the Constitutional Court's illegitimate interpretation of s 182 invented the power, which no other institution has, in order to reach

[265] *Electoral Commission of South Africa v Democratic Alliance and Others* [2021] ZASCA 103, 2021 (5) SA 476 (SCA).

[266] *Electoral Commission* (n 265) para [1].

[267] *Electoral Commission* (n 265) para [27].

[268] *South African Human Rights Commission v Agro Data CC & Another (Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae)* [2024] ZASCA 121, 2024 (6) SA 443 (SCA).

[269] *Agro Data* (n 268) paras [26]-[27].

[270] *Agro Data* (n 268) para [44].

a desired outcome and in the process it augmented the institutional relationships set out in the Constitution. In doing so, it created an inequality of authority and standing within the class of institutions created by Chapter 9 which is irreconcilable with the structure of the Constitution.

6. Conclusion

In this chapter, I have sought to argue that *Nkandla* was not an instance of legitimate constitutional interpretation but instead an illegitimate exercise of the judicial power. I began first by setting out the difference between constitutional adjudication and interpretation, while acknowledging both as mechanisms for constitutional change.

Thereafter, I provided various accounts of constitutional interpretation, with a view to developing a set of principles that can both describe the process and identify its limits. I then provided a brief overview of the approach to constitutional interpretation in South Africa, identifying purposive interpretation as the dominant approach.

Finally, I drew on the work expounded in the first four sections to argue that *Nkandla* was an instance of a failure of interpretation in that it disregarded the text of the Constitution and failed to give it its ordinary meaning, it failed to account for intention of the framers and it ignored the structure of the Constitution in the process. Each of these, I argued, was a failure to understand both the nature and limits of constitutional interpretation.

In the next chapter, I argue that *Nkandla* was not decided upon neutral principles of constitutional law.

Chapter 5

Nkandla and Neutral Principles of Constitutional Law

1 Introduction

In this chapter, I pick up on one of the constraints on constitutional interpretation set out in the previous chapter. That is, the obligation that courts have to decide cases based on the application of neutral principles of constitutional law. I begin first with an exposition of the theory of neutral principles and apply it to *Nkandla*.

I then illustrate the correctness of my assessment with reference to the cases that have sought to apply it. After that, I discuss the theoretical implications arising from those cases for our understanding of neutral principles. The penultimate section is a reconstruction of *Nkandla* if it had been decided based on neutral principles. A short conclusion then follows.

2 Situating *Nkandla*

While deciphering the *ratio decidendi* of *Nkandla* can at times be a difficult task, it appears uncontroversial that the court reached its holding through either an interpretation or construction of s 182(1)(c) of the Constitution – the *meaning* or *legal effect* of the phrase 'take appropriate remedial action' as it relates to the Public Protector's powers.[271] The court held that the word 'appropriate' as used in that provision meant 'nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case'.[272]

It is important to note that the ordinary meaning of the word 'appropriate' does not include 'effective' in any of the authoritative dictionaries consulted.[273] The question that arises

[271] See *Nkandla* (n 3) paras [67]-[69].

[272] See *Nkandla* (n 3) para [71](e).

[273] The Oxford English Dictionary defines 'appropriate' (adj.) as 'specifically fitted or suitable, proper, *to or for*' something in Oxford English Dictionary s.v. "appropriate (adj.), sense 5" (December 2024) (available at: https://doi.org/10.1093/OED/1138179999, last accessed 27 December 2024). While the Cambridge English Dictionary (available at: https://dictionary.cambridge.org/dictionary/english/appropriate, last accessed 27 December 2024) defines it as 'suitable or right for a particular situation or occasion', and its synonyms are listed as 'suitable, apt, fitting, right, perfect, in keeping with'.

is whether the court's preferred meaning can reasonably be borne by the text of the provision. Ordinarily, for something to be appropriate is for it to be suitable, proper, apt, or relevant in a given context.

That is to say that the contemplated measure must have some rational relation to the complaint, or the transgression said to have been committed. Yet the court incorporates 'effective' into the list of adjectives as though it were simply reiterating an accepted linguistic convention.

Not so. The inclusion of 'effective' in the list of adjectives that can help clarify the meaning of what constitutes 'appropriate remedial action' serves only to justify the court's conclusion on the merits, without fully accounting for that choice. Since the court took the decision to accord to the phrase a meaning other than its ordinary meaning, the inquiry must begin with ascertaining whether, if given its ordinary meaning, that ordinary meaning gives rise to any ambiguity or vagueness.

Given that the ordinary meaning of 'appropriate' does not seem to give rise to any such ambiguity or vagueness, the second step is to enquire into whether the ordinary meaning of the provision would give rise to an absurdity were it to be applied such that it gave us reason to depart from the ordinary meaning.[274] That is also not the case.

Next, we consider whether the text of the provision is indeterminate, or silent, as to require the creative powers of judges to give legal meaning to it. Here, we need not settle on any one interpretation or construction of the provision. We will accept, for the sake of argument, that the text is indeed indeterminate.

To recap, the question we are concerned with is whether the text of s 182(1)(c) confers on the Public Protector the power to issue binding remedial action. Assuming that the text is silent on this, one must determine whether, if there is a gap in the law, judges are empowered to fill that gap, and secondly, what constraints are placed upon judges in the process of filling that gap.

[274] See MacCormick *Legal Theory and Legal Reasoning* (n 65) 208 and G E. Devenish 'Teleological evaluation: a theory and *modus operandi* of statutory interpretation in South Africa' (1991) *SA Publiekreg/Public Law* 62, 64. See also K Perumalsamy 'The Life and Times of Textualism in South Africa' (2019) 22 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 65 and V Dougherty 'Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation' 1994 *American University Law Review* 127.

Again, *arguendo*, we shall accept that such a gap exists and ought to be filled. For our purposes, we need only accept that if judges do have the power to create new constitutional law where a gap in the law has been identified, they ought to do so without violating the legal constraints placed upon the very activity of constitutional interpretation. One such constraint is the idea that a judge who is filling this gap ought to create such law guided only by neutral principles of constitutional law.

Herbert Wechsler argued that adjudication 'must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result'.[275] This, Wechsler argued, is what distinguishes the judicial role from the executive or legislative role, both of which prioritise *fiat* over reason since '[n]o legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation' that is intrinsic to the judicial process.[276]

Courts must decide cases 'on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply'.[277] This is more so in the case of constitutional interpretation, where in so-called hard cases a court is required to choose 'among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone."[278]

Importantly, in cases where the law is indeterminate, where 'the language of the Constitution, of history and precedent … do not combine to make an answer clear', the court must strive to determine them 'by neutral principles'.[279] This principled adjudication 'is one that rests on reasons, with respect to all the issues in the case, that in their generality transcend any immediate result that is involved."[280] It eschews *ad hoc* adjudication that focuses too intently on a judge's desired outcome in a particular case, but creates general principles to which regard may be had in future like cases.

Robert Bork's conception of neutral principles goes further than Wechsler's, which at its simplest merely requires that judges decide cases on the basis of principles capable of

[275] H Wechsler 'Toward Neutral Principles of Constitutional Law' (1959) 73(1) *Harvard Law Review* 1, 15.

[276] Wechsler (n 275) 15-16.

[277] Wechsler (n 275) ibid.

[278] Wechsler (n 275) 16.

[279] Wechsler (n 275) 18.

[280] Wechsler (n 275) 20.

application to future cases, in that for a principle to be 'neutral' under his theory it must not only be capable of neutral application but must also be *derived* and *defined* neutrally.[281] For Bork, it was not enough that judges purported to apply principles across diverse cases: such principles had to be neutrally derived and defined.[282] For the derivation requirement, one could imagine a principle derived from (or entailed by) the text of a constitution. For the definition requirement, Bork envisaged a principle that would be general enough to encompass not only the specific facts in the case before the judge but all other reasonable permutations of that case.[283]

Bork illustrated his theory through a critique of *Griswold v. Connecticut*[284] where the U.S. Supreme Court struck down a general prohibition on the use of contraception by married couples. For Bork, before striking down such a prohibition a court must first explain, (at the highest level of abstraction), the following:

> (a) what constitutionally sourced principle this prohibition offends (the principle could be couched in as wide terms as 'there shall be no state interference with private acts between two consenting adults');
> (b) if such 'private acts' are limited to *sexual acts* (to the exclusion of e.g., drug use), why such a limitation would be justified;
> (c) if the prohibition was only objectionable insofar as it applied to married couples, why such a prohibition on the private consensual sexual acts of unmarried couples would be less constitutionally offensive than to that of married couples; and
> (d) if no less objectionable as regards unmarried couples, why the *use of contraceptives*, excluding all other plausible sexual activity which does not include the use of contraceptives, would be subject to a special prohibition.[285]

[281] R H. Bork 'Neutral Principles and Some First Amendment Problems' (1971) 47(1) *Indiana Law Journal* 1, 7. For a critique of Bork and Wechsler's theories of neutral principles see M V. Tushnet 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96(4) *Harvard Law Review* 781.

[282] Bork (n 281) ibid.

[283] Bork (n 281) ibid.

[284] *Griswold v. Connecticut* 381 U.S. 479 (1965).

[285] Bork (n 281) 7.

On Bork's theory, unless a principle could be extrapolated from its most specific form to its most general, it could not be regarded as a neutral principle. It was because the court in *Griswold* was unable to show how a right to privacy could be sourced from the relevant constitutional provisions and how 'zones of privacy' where married couples could use contraceptives could be inferred from such a right that Bork regards the decision as unprincipled.[286]

To better understand how a decision can be said to be based on neutral principles, Kent Greenawalt offers a useful breakdown. First, the basis of such a decision must be one that a court 'would be willing to follow in other situations to which it applies'.[287] The reasons for the decision must be ones that a court would be willing to apply to future similar cases and their application to those cases must be defensible.[288] Second, the principles advanced in support of a decision must be adequately general to 'reach out beyond the narrow circumstances of the case'.[289] For it to be general, such a principle must provide adequate guidance as to how related or similar situations are to be treated. It cannot be narrowly tailored to the specific facts of the case.[290]

Third, such a principle must be of law – a court is not free to adopt any moral principle capable of neutral application to a case. The principle must be both found and justified in law; it must be legally relevant.[291] Fourth, the grounds on which a decision is made must be fully explicated by the court. In other words, it cannot rely on reasons other than its explicitly stated reasons for decision.[292] Greenawalt summarises Wechsler's thesis as follows:

> Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other

[286] Bork (n 281) 9.

[287] K Greenawalt 'The Enduring Significance of Neutral Principles' (1978) 78 *Columbia Law Review* 982, 985.

[288] Greenawalt (n 287) 987.

[289] Greenawalt (n 287) ibid.

[290] Greenawalt (n 287) 988.

[291] Greenawalt (n 287) 989.

[292] Greenawalt (n 287) 990.

> situations that they reach; and the opinion justifying the decision should contain a full statement of those principles.[293]

Like Bork's critique of *Griswold*, the Constitutional Court has been similarly criticised for failing to undertake principled adjudication in the *Nkandla* decision. Michael Tsele has argued that the court in *Nkandla* fashioned a standard applicable only to the facts in that case while at the same time dismissing a lower court ruling that reached a contrary conclusion on the same legal question based on the application of neutral principles.[294] In particular, he argues that the court 'failed *adequately to justify* that the "binding standard" had been neutrally *derived*, having proper regard to the intention of the framers of our Constitution read with the text of the Constitution.'[295]

Tsele rightly points out that the source of the binding force of the Public Protector's remedial action is difficult to discern from the judgment itself. The court's vacillation between several plausible but competing justifications makes it difficult to discern any neutral principle that can be applied in a later case. This is important, given that the Public Protector is a so-called 'Chapter 9 institution' and other Chapter 9 institutions have now begun claiming the power to issue binding orders based on *Nkandla* arguing chiefly that *because* they are Chapter 9 institutions, they are entitled to coercive powers.[296] Yet, nothing in *Nkandla* justifies this conclusion. Indeed, the basis for the decision is itself unclear.

But, Tsele continues, if it were true that the *ratio* in *Nkandla* is (as the court alleges) that the rule of law requires that 'no statutorily sourced decision may be disregarded willy-nilly [as it has] legal consequences and must be complied with or acted upon'[297] until or unless set

[293] Greenawalt (n 287) ibid.

[294] M Tsele '"Coercing Virtue" in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) 8 *Constitutional Court Review* 193, 205.

[295] Tsele (n 294) 209-10 (emphasis in original).

[296] See *South African Human Rights Commission v Agro Data CC and Another* (1448/2021) [2022] ZAMPMBHC 58. The Supreme Court of Appeal rightfully rejected this argument on appeal in *Agro Data* (n 268), holding that the language used in s 184(2)(b) was different to that used in s 182(1)(c) and conferred on the South African Human Rights Commission powers that are distinct from those of the Public Protector (see paras [43]-[45]).

[297] *Nkandla* (n 3) paras [73]-[75].

aside by a court on review, then on the basis of the generality principle, the decisions of all other Chapter 9 institutions ought to be binding based on the *ratio* of *Nkandla* as a neutral principle.[298]

To develop the point a little bit more, we ought to ask: what neutral principle justifies the creation of the rule that the Public Protector's remedial action is binding? If no such neutral principle is apparent, a court filling an identified gap in the law can be said to have transgressed the limits of its powers since there exists no neutral principle that justifies the creation of a particular rule.

Cass Sunstein has argued that Wechsler's conception of neutrality is best understood as an appeal to conformance with the *status quo*, or what he called 'the baseline'.[299] In determining whether a principle is a neutral one, Sunstein says, we take as our baseline that such a principle ought to conform to the *status quo* – the law as we understand it up to that point. Here, we must note two things: first, that the remedial action of the Public Protector was not binding prior to *Nkandla* and second, that *Nkandla* violates the constitutional separation of powers by clothing an institution that falls outside of the three arms of state with binding powers. These two aspects of the decision clearly upend the *status quo,* and the decision could thus be said, at least *prima facie*, to not be based on neutral principles.

The settled law in relation to the legal effect of the remedial action of the Public Protector prior to *Nkandla* was that it was not binding. Indeed, Bishop and Woolman put it thus:

> One of the most common criticisms levelled against the Public Protector, and ombudsmen generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively — without making binding decisions — is the real measure of its strength.[300]

[298] Tsele (n 294) 211.

[299] C Sunstein 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)' (1992) 92 *Columbia Law Review* 1.

[300] M Bishop and S Woolman 'Public Protector' in M Bishop and S Woolman (eds) *Constitutional Law of South Africa* (Juta & Co., 2005) Original Service 12-05, Ch 24A-p 3.

The office was understood to be a type of an ombudsman, albeit with some *sui generis* features, whose functions were purely investigative in nature.[301] But in the cases that led up to *Nkandla*, the incumbent at the time began to advance an alternative interpretation of the powers of that office.

The first of these cases was the *SABC I* decision,[302] which concerned the appointment, by the South African Broadcasting Corporation (SABC) board of directors, of one Hlaudi Motsoeneng as the chief operating officer of the company. This appointment was made following, and despite, a report by the Public Protector,[303] which had found that Motsoeneng had, *inter alia*, misrepresented his qualifications, made irregular appointments, and unilaterally raised salaries for certain employees while he had been acting in the position he was ultimately appointed to.[304]

In her remedial action, the Public Protector directed, among other things, that the Minister of Communications take steps to fill the vacancy of chief operating officer in which Motsoeneng was acting and that the board institute disciplinary action against Motsoeneng for misrepresenting his qualifications, abuse of power and improper conduct in appointing staff and increasing certain employees' remuneration.[305]

Instead of taking the recommended remedial action, the SABC board instead proceeded to appoint Motsoeneng as the chief operating officer in a permanent capacity after having obtained an attorneys' opinion clearing Motsoeneng of the wrongdoing identified in the Public Protector's report.[306]

The Public Protector raised the question of the legal effect of her reports squarely, arguing that 'it ha[d] broader and significant implications for the working of our democracy and the

[301] cf. *Public Protector v Mail and Guardian Ltd & Others* [2011] ZASCA 108, 2011 (4) SA 420 (SCA).

[302] *Democratic Alliance v South African Broadcasting Corporation Limited and Others* 2015 (1) SA 551 (WCC).

[303] Report No. 23 of 2013/2014: 'A Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)' available at: https://www.pprotect.org/?q=content/report-no23-20132014-investigation-allegations-maladministration-systemic-corporate (accessed 17 February 2024).

[304] *SABC I* (n 302) para [10].

[305] *SABC I* (n 302) para [11].

[306] *SABC I* (n 302) para [14].

independence and effectiveness of the institution'.[307] She argued that a proper construction of s 182(1)(c) of the Constitution read with s 6 of the Public Protector Act could only lead to a conclusion that her findings and remedial action were binding and enforceable, and that a contrary construction would render her office 'toothless'.[308]

Schippers J was not convinced, holding that the Public Protector's powers were 'not adjudicative' and that unlike courts, she did 'not hear and determine causes'.[309] Unlike s 165(5) of the Constitution, which provides that an order issued by a court binds all persons to whom and organs of state to which it applies, 'a finding by the Public Protector is not binding on persons and organs of state' and if it were meant to be so, then the Constitution would have made provision therefor.[310]

Importantly, Schippers J held that 'the power to take remedial action in s 182(1)(c) of the Constitution is inextricably linked to the Public Protector's investigatory powers in s 182(1)(a)'.[311] In his view, the plain wording and context of the provision meant that the power to take appropriate remedial action 'means no more than that the Public Protector may take steps to redress improper or prejudicial conduct,' which was to say neither that the findings were binding and enforceable nor that the Public Protector was ineffective without the power to bind.[312]

Relying on the Constitutional Court's *dicta* in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996,*[313] to the effect that the Public Protector was modelled on the institution of the ombudsman, Schippers J drew two salient conclusions: first, that much like ombudsmen elsewhere, the Public Protector was independent of the executive and the public service and second, that 'in contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of

[307] *SABC I* (n 302) para [45].

[308] *SABC I* (n 302) para [49].

[309] *SABC I* (n 302) para [50].

[310] *SABC I* (n 302) para [51].

[311] *SABC I* (n 302) ibid.

[312] *SABC I* (n 302) ibid.

[313] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) para [161].

legal enforcement' and thus, ditto the Public Protector.[314] The Public Protector was to rely on her 'intellectual authority' and 'powers of persuasion' for the effectiveness of her office.[315]

Crucially, still, neither the Constitution nor the Public Protector Act contained any 'provision that the findings and remedial action required by the Public Protector are binding and enforceable, as in the case of a court order'.[316] This, however, did not mean 'that these findings and remedial action are mere recommendations, which an organ of state may accept or reject'.[317] Any person who chooses not to comply with such recommendations 'must have cogent reasons for doing so, that is, for reasons other than merely a preference for [their] own view'.[318]

Schippers J's view was based on the English case of *Bradley*,[319] where, on a similar point of law, the Court of Appeal held that any decision to reject an ombudsman's findings by an adversely affected party had to be rational.[320] Because a decision to reject the findings of the Public Protector was undoubtedly an exercise of public power, such exercise of power had to be rational:[321]

> the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational.[322]

The court then proceeded to test the SABC board's rejection of the Public Protector's findings, holding that the board had advanced no grounds for the decision and had therefore acted irrationally, and that the Minister's decision to approve Motsoeneng's permanent

[314] *SABC I* (n 302) para [55].

[315] *SABC I* (n 302) para [56].

[316] *SABC I* (n 302) para [58].

[317] *SABC I* (n 302) para [59].

[318] *SABC I* (n 302) para [66].

[319] *R (on the application of Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116 (CA).

[320] *Bradley* (n 319) para [51].

[321] *SABC I* (n 302) para [71].

[322] *SABC I* (n 302) para [74].

appointment was equally irrational, having not shown that she had considered seriously the Public Protector's findings against him.[323]

Unsatisfied with the outcome, the SABC took the matter on appeal to the Supreme Court of Appeal, which rendered its decision in *SABC II*.[324] At the outset, the court stated that its interpretation differed from that of the High Court.[325] Its analysis began with a detailed interpretation of s 181[326] and like the Constitutional Court, it recognised historical roots of the institution as firmly planted in the ombudsman tradition.[327] Having surveyed the other constitutional provisions governing the office, the court moved on to consider the Public Protector Act and the Public Protector's powers under that statute.[328]

The court noted that while under the Interim Constitution, the Public Protector was merely empowered to '"endeavour" to resolve a dispute, or to "rectify any act or omission" by simply "advising" a complainant of an appropriate remedy,' the Constitution of 1996 couched the Public Protector's powers in stronger terms (in its view) by empowering the office to 'take appropriate remedial action'.[329] The s 182(1)(c) powers, the court said, 'far exceeded those of similar institutions in comparable jurisdictions'.[330]

The SCA took a dim view of the High Court's reasoning on the legal effect of the Public Protector's remedial action. First, it held that the comparison between the Public Protector and a court when considering whether the former's findings were binding and enforceable was 'inapt' and confusing. The court's preferred route was to consider the question from the standpoint of established principles of administrative law, in terms of which 'until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked'.[331]

[323] *SABC I* (n 302) paras [78]-[82].

[324] *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA).

[325] *SABC II* (n 324) para [22].

[326] *SABC II* (n 324) paras [23]-[25].

[327] *SABC II* (n 324) para [26].

[328] *SABC II* (n 324) paras [33]-[41].

[329] *SABC II* (n 324) para [42].

[330] *SABC II* (n 324) para [43].

[331] *SABC II* (n 324) para [45]. The court here relied on *Oudekraal* (see the explanation of the rule op cit n 39).

Dismissing an objection that the principle only applied to administrative functionaries, the court held that if it does apply to the decisions of administrative functionaries, then 'given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or greater force to the decisions finally arrived at by that institution'.[332] This was because the rationale behind the principle – that the proper functioning of the state would be imperilled if administrative acts could simply be ignored by a party affected by them – could 'at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports'.[333]

Second, the SCA took issue with Schippers J embrace of *Bradley* which, in its view, was 'not of any assistance in the interpretation and understanding of our Public Protector's remedial powers' because of how limited the powers of the ombudsman in question were.[334]

Concluding its analysis, the court noted that the Public Protector 'cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations'.[335] Section 182(1)(c) then means:

> The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation.[336]

It was this latter holding to which the court in *Nkandla* clung. It did so, however, without fully engaging with the High Court's reasoning and holding in *SABC I*. Tsele argues that rationality, on which Schippers J relied for his reasoning in *SABC I*, 'ought to have been the principle that guided the court in *Nkandla*'.[337] Tsele argues further that the court's dismissal of the *SABC I* judgment did not rest on a principled foundation and was motivated by

[332] *SABC II* (n 324) ibid.

[333] *SABC II* (n 324) ibid.

[334] *SABC II* (n 324) para [46].

[335] *SABC II* (n 324) para [52].

[336] *SABC II* (n 324) ibid.

[337] *SABC II* (n 324) ibid.

nothing 'other than a desire to achieve an outcome viewed as noble'.[338] This is because rationality is a 'prime neutral principle' in the sense defined by Wechsler.

This is because, Tsele continues, 'it is the *only* legal standard that applies in every instance where there is an exercise of public power'.[339] Because it applies to all instances of the exercise of public power, rationality 'limits the power of a court to fashion or invent a principle in order to decide a particular case in a particular way'.[340] Tsele's argument appears to be correct; rationality as a legal standard satisfies Greenawalt's three criteria for neutrality. First, the test for rationality – whether there is a rational link between the exercise of the power and the purpose for which that power was conferred – is one that the courts have developed and followed in a long line of cases.[341] It is thus a principle that courts have been willing to apply in like cases – i.e., where the exercise of public power has been impugned.[342] Second, it is sufficiently general in that its application is not limited to specific facts but covers every instance of the exercise of public power.[343] Thirdly, it is undoubtedly a legal principle stemming as it does from the principle of legality as sourced in s 1(c) of the Constitution.[344] As Chaskalson P made clear in *Pharmaceutical Manufacturers*:

> What the Constitution requires is that public power [...] be exercised in an objectively rational manner. [...] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other

[338] Tsele (n 294) 208.

[339] Tsele (n 294) 209.

[340] Tsele (n 294) ibid (emphasis in original).

[341] Greenawalt (n 287) 985. See, *inter alia*, *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) paras [85], [89]-[90]; *Law Society of South Africa v Minister of Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC) para [32]; *Democratic Alliance v President of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC) paras [27]-[37] and *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51, 2019 (3) SA 30 (CC) para [61]. See also M Tsele 'Rationalising judicial review: Towards refining the "rational basis" review tests' (2019) 136(2) *South African Law Journal* 328.

[342] Greenawalt (n 287) 987.

[343] Greenawalt (n 287) 987-988.

[344] Greenawalt (n 287) 989. See also *Fedsure* (n 59) paras [56]-[58].

> functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful.[345]

Turning to the *Nkandla* decision, Tsele argues that because the Constitution is silent on the legal effect of the Public Protector's remedial action,

> [i]n the *absence of a standard set forth in the Constitution* [...] the *Nkandla* court could only have exercised one of the following options: the first option was to develop and apply a standard that would equally apply to all Chapter 9 institutions, in line with the generality requirement of neutrality. The alternative option was to use a default (or baseline) principle in respect of how the exercise of public power must be governed or guided. That default position is the principle of rationality.[346]

He argues that having failed to follow either of the two approaches, the *Nkandla* decision fails the test of neutrality.[347] It is worth examining his reasons. First, the court's holding that the Public Protector's powers are binding does not appear to extend to other Chapter 9 institutions. This is only so, Tsele says, if the court's decision hinges on the proper interpretation of s 182(1)(c), whose wording does not appear anywhere else in Chapter 9, indicating that the power to take appropriate remedial action, and thus the source of the binding power, is applicable only to the Public Protector.[348] This internal differentiation between the Public Protector and other Chapter 9 institutions is not explained by the court, nor is it readily identifiable from a reading of the text of the chapter, its structure, or the context in which it appears. In other words, no justification is provided for treating one institution differently from the others if they are all of the same *genus*, i.e., institutions supporting constitutional democracy.[349]

[345] *Pharmaceutical Manufacturers* (n 341) paras [89]-[90].

[346] Tsele (n 294) 209 (emphasis in original).

[347] Tsele (n 294) ibid.

[348] Tsele (n 294) 210.

[349] Tsele (n 294) 211-213.

Second, Tsele argues that the court reasoned that 'public officials are generally prone to act in bad faith or are averse to corrective counsel'.[350] In adopting a 'presumption that public officials are inherently correction averse', the court fashioned a legal standard that could only be applicable to the facts in *Nkandla*, where the public officials had been so averse, but contrary to established principle which takes the *bona fides* of public officials as a given.[351] This kind of reasoning directly offends the idea that a court should not fashion a legal rule to suit particular facts. It also gives the impression, Tsele argues, that *Nkandla* was 'an "ad hoc improvisation" fashioned to achieve a preconceived outcome'.[352]

Third, the court failed to properly engage with Shippers J's holding that rationality was the applicable standard when determining whether the Public Protector's remedial action was binding. In so doing, Tsele argues, it conflated the principle of rationality with unlawful self-help by aggrieved parties. In other words, the court failed to adequately justify its conflation of the two concepts: why was a rational refusal to comply with the Public Protector's remedial action tantamount to self-help when rationality is a principle of our constitutional law? The court's failure to explain – to proffer reasons to which one could have regard – was a failure not only to ground its decision upon reasons, but to ground it upon *legal reasons*.[353]

Finally, the court's reasoning that the Public Protector's remedial action must be binding because 'it is incomprehensible just how the Public Protector could ever be effective' if it were not binding,[354] and that the constitutional injunction to act 'without fear, favour or prejudice' would be equally vacuous if it were not backed by the power to issue binding remedial action also failed to meet the test for neutrality.[355] This is because, as Tsele points out, the Public Protector had been shown to have been effective without binding powers,[356]

[350] Tsele (n 294) 213.

[351] Tsele (n 294) ibid.

[352] Tsele (n 294) 214.

[353] Tsele (n 294) 215. See also F Schauer 'Giving Reasons' (1995) 47(4) *Stanford Law Review* 633, 635: 'When lawyers argue and when judges write opinions, they seek to *justify* their conclusions, and they do so by offering reasons. The reasons they provide, however, are broader than the outcomes they are reasons for.'

[354] Tsele (n 294) 216-217.

[355] Tsele (n 294) 217.

[356] Tsele (n 294) 217-218.

therefore the court's contrary conclusion was not supported by any factual evidence. Likewise, the requirement of impartiality did not, without more, mean that the Public Protector's powers were binding. The requirement of impartiality is aimed at securing fair process and 'insulat[ing] an institution from improper influence'.[357] The court's conclusion on the legal effect of impartiality on the Public Protector's powers was thus also equally bad in law, given that the requirement that functionaries act impartially does not necessarily, or even ordinarily, vest them with the power to make binding decisions.

It is thus clear that *Nkandla* cannot be said to have been decided on any principle that was neutrally derived from the Constitution; nor can it be said to have laid down a general principle capable of application to cases other than *Nkandla*; nor can it be said to be based on any cognisable legal principle. To illustrate this, the next section examines the cases that followed *Nkandla* and sought to apply its central holding.

3 Appraising *Nkandla*

3.1 The doctrinal developments

The cases that followed *Nkandla* demonstrate the force of the argument in this chapter: that the decision was not arrived at through the application of neutral principles of constitutional law. As the ensuing discussion will illustrate, the courts have had to grapple with *Nkandla*'s lack of neutrality, largely through crafting a laundry list of exceptions and carve-outs, all of which undermine its central holding.

3.1.1 The power to bind Parliament: the case of the Reserve Bank

The first case came hot on the heels of *Nkandla* and offered an opportunity to explore the legal principles enunciated therein. In *South African Reserve Bank v Public Protector*,[358] the central bank sought to set aside a report by the Public Protector in which she had, among

[357] Tsele (n 294) 218.

[358] *South African Reserve Bank v Public Protector and Others* [2017] ZAGPPHC 443, 2017 (6) SA 198 (GP) ('*Reserve Bank*').

other things, directed the National Assembly to amend s 244 of the Constitution, which deals with the mandate of the Reserve Bank.[359]

The report followed an investigation into allegations that the central bank had failed to recover a 3.2 billion Rand loan made to Bankorp Limited (which was later succeeded by ABSA Group Limited) in 1985, which loan was advanced by the Reserve Bank acting in its capacity as lender of last resort.[360] The investigation itself stemmed from a 1997 report compiled by CIEX, a now-defunct asset recovery firm based in London, which had found that the loan to Bankorp had not been lawfully made, and which recommended that both the central bank and the South African government recover the funds.[361]

Having found that both the government and the Reserve Bank had acted to the prejudice of the general South African public, the Public Protector stated that '[t]he Republic has an obligation in terms of the Constitution and international instruments to improve socioeconomic conditions of its citizens through legislative and other measures to alleviate poverty and ensure social justice for all' and that government 'must realise economic rights to its people' (*sic*).[362]

To that end, she directed the chairperson of the National Assembly's portfolio committee on justice to initiate a process to amend s 244 thus:

> The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of s 224 of the Constitution, in pursuit of improving socioeconomic conditions of the citizens of the Republic, by introducing a motion in terms of s 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of s 74(5) and (6) of the Constitution.

[359] Report No. 8 of 2017/2018: 'Report on an investigation into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank' (2017) (available at https://www.pprotect.org/sites/default/files/legislation_report/Report%208%20of%202017%262018%20Public%20Protector%20South%20Africa.pdf, last accessed 18 September 2024).

[360] *Reserve Bank* (n 358) para [20].

[361] *Reserve Bank* (n 358) para [14].

[362] See para 5.3.27 of Report No. 8 of 2017/2018 quoted in *Reserve Bank* (n 124) para [34].

Section 224 of the Constitution should thus read:

> (1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socioeconomic well-being of the citizens are (*sic*) protected.
>
> (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socioeconomic transformation.[363]

Murphy J held that the remedial action was unconstitutional as it sought to usurp the exclusive authority of Parliament 'to initiate or prepare legislation and to consider, pass, amend or reject legislation.'[364] As to the Public Protector's powers, the court held that she did not have the power 'to prescribe to Parliament how to exercise its discretionary powers', she had 'no power to order an amendment of the Constitution', and since it provided a procedure for its own amendment, that was the only avenue open for Parliament to take.[365]

Further, the remedial action transgressed the boundaries of the separation of powers 'by seeking to fetter in advance the legislative discretion vested in Parliament.'[366] Its effect was to deny members of Parliament the right to exercise independent judgment and to force the National Assembly 'to adopt an amendment to the Constitution which may circumvent the constitutional procedures enacted for that purpose.'[367]

The remedial action was duly reviewed and set aside for its constitutional invalidity.

[363] See para 7.2 of Report No. 8 of 2017/2018 quoted in *Reserve Bank* (n 124) para [35]. The Chairperson of the Portfolio Committee on Justice and Correctional Services was directed to submit an action plan for the implementation of the remedial action to the Public Protector within 60 days of the report being released (see para 8.1).

[364] *Reserve Bank* (n 358) para [43].

[365] *Reserve Bank* (n 358) ibid.

[366] *Reserve Bank* (n 358) para [44].

[367] *Reserve Bank* (n 358) ibid.

3.1.2 The power to direct the appointment of a commission of inquiry

A few months after *Reserve Bank* was decided a new case came before a differently constituted court of the same division. *President of the Republic of South Africa v Public Protector*[368] concerned the question whether the Public Protector could direct the President to appoint a commission of inquiry under s 84(2)(f) of the Constitution and, relatedly, whether she could direct that the Chief Justice, and not the President, should select the chair of said inquiry.

The President sought to review the Public Protector's report and remedial action arising out of an investigation into allegations that then President Zuma had contravened provisions of the Executive Members' Ethics Act and the Ethics Code in his dealings with the Gupta family, an Indian family that conducted business in South Africa.[369] In particular, it was alleged that the Guptas exercised substantial influence over state affairs, including the appointment of cabinet members – a power reserved for the President alone.[370]

It appears that the Public Protector was only able to investigate these allegations partially, citing resource constraints as a factor. In lieu of concrete findings, she made what she styled 'observations' about the functionaries and institutions she was investigating.[371] Following her observations, the Public Protector issued, in relevant part, the following remedial action:

> The President has the power under section 84(2)(f) of the Constitution to appoint commissions of enquiry (*sic*) however, in the [*Nkandla* case] the President said that: "I

[368] *President of the Republic of South Africa v Public Protector and Others* [2017] ZAGPPHC 747, 2018 (2) SA 100 (GP) ('*State Capture judgment*').

[369] Report No. 6 of 2016/2017: 'State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' (2016) (available at: https://www.pprotect.org/sites/default/files/legislation_report/State_Capture_14October2016.pdf ('State of Capture Report'), last accessed 18 September 2024).

[370] *State Capture judgment* (n 368) paras [12]-[13].

[371] This approach has been criticised. It is not clear, for instance, whether concrete findings are a jurisdictional fact for the issuing of remedial action. See M Tsele '"Observations" on the State Capture judgment' (2021) *South African Law Journal* 138(3) 477, 484-485. cf. *Reserve Bank* (n 358) paras [41]-[42] and *State Capture judgment* (n 368) paras [99]-[113].

could not have carried out the evaluation myself lest I be accused of being judge and jury in my own case".

The President [must] appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.[372]

The President took issue with this and sought to have it reviewed and set aside. His argument was that only the President could exercise the power to appoint a commission of inquiry, and that the Public Protector's remedial action was unconstitutional for seeking to interfere with the exercise of that power.[373] He argued further that it would be unlawful to delegate the power to appoint the chair of the commission to the Chief Justice, since that power was vested in the President alone, just as it was the President, and not the Public Protector, who was alone empowered to set the terms of reference for such a commission.[374] Finally, and crucially, the President argued that it was an affront to the separation of powers for the Public Protector to instruct the President to exercise a purely executive power.[375]

The court framed the issue as whether the Public Protector's remedial action could limit the President's power to appoint a commission of inquiry.[376] In the court's view, s 84(2)(f) which provides that the President is 'responsible for … appointing commissions of inquiry', was not an 'untrammelled' power and the use of the phrase 'responsible for' was a textual indicator that 'the power to appoint a commission of inquiry is a power coupled with a duty'.[377]

The court noted that although the President was vested with the power to appoint a commission of inquiry, such a power had to be exercised *within the constraints that the Constitution imposes* and 'will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under the Constitution."[378]

[372] State of Capture Report at paras 8.3-8.4, p 353.

[373] *State Capture judgment* (n 368) para [59.1].

[374] *State Capture judgment* (n 368) paras [59.2]-[59.4].

[375] *State Capture judgment* (n 368) para [59.6].

[376] *State Capture judgment* (n 368) para [60].

[377] *State Capture judgment* (n 368) para [68].

[378] *State Capture judgment* (n 368) para [71]. My emphasis.

Regarding the Public Protector's powers, the court noted that they were 'of the widest ambit'[379] and included 'directing or instructing members of the executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question.'[380]

Finally, the court was of the view that if the Public Protector was to discharge the functions of her office ably, she would have to possess the power to 'direct the President to appoint a commission of inquiry and to direct the manner of its implementation.'[381]

3.1.3 The power to order criminal prosecution: the CR17 case

In the *CR17* case,[382] the Public Protector sought an appeal against a High Court judgment setting aside the report,[383] findings and remedial action flowing from an investigation into the affairs of President Cyril Ramaphosa's campaign for election as president of the African National Congress.[384] Initially, however, the complaints laid with the Public Protector dealt with an allegation that the President had breached the Ethics Code in that he had misled the National Assembly when responding to a question about the nature of his son's relationship with one Mr Gavin Watson, a donor to the CR17 campaign.[385]

In her report, the Public Protector found that the President had indeed violated the Ethics Code: first, in misleading the National Assembly in his answer to the question posed about his family's relationship with Watson and, further, in failing to declare the donations made

[379] *State Capture judgment* (n 368) para [76].

[380] *State Capture judgment* (n 368) para [82].

[381] *State Capture judgment* (n 368) para [85].

[382] *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC 19, 2021 (6) SA 37 (CC) ('*CR17*').

[383] Report No. 36 of 2019/20: 'Report on an investigation into allegations of a violation of the Executive Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as BOSASA' ('CR17 Report') (2019) (available at: https://www.pprotect.org/sites/default/files/legislation_report/REPORT%20BOSASA.pdf, last accessed 26 September 2024).

[384] *President of the Republic of South Africa and another v Public Protector and others (Information Regulator as amicus curiae)* [2020] 2 All SA 865 (GP) ('*CR17 HC*').

[385] *CR17* (n 382) paras [27]-[36].

to the CR17 campaign as donations made to him as Deputy President, which payments she also concluded established a reasonable suspicion of money laundering.[386]

In her remedial action, the Public Protector directed the Speaker of the National Assembly to refer the President's breach of the Ethics Code to the Joint Committee on Ethics and Members' Interests and to demand publication of all the donations received by the President, including the CR17 campaign donations. She also directed the National Director of Public Prosecutions to 'conduct further investigation into *prima facie* evidence of money laundering as uncovered during [her] investigation' and to submit an implementation plan for how the remedial action (the further investigation into money laundering) would be carried out.[387]

Although the court did not deal specifically with the remedial order directed to the NDPP to conduct a further investigation, it did not upset the High Court's holding in that regard. That court emphasised the importance of the NDPP's prosecutorial independence and the constitutional and statutory proscription of interference with the work of the National Prosecuting Authority.[388] The court held that the Public Protector's remedial action went 'much further than is permitted' by the powers of her office:[389]

> The Public Protector has no power to direct the NDPP when or how to carry out her functions. Nor does she have powers to monitor the NDPP's conduct. That would be to undermine the very essence of prosecutorial independence. The [Public Protector Act] makes this clear by limiting the options open to the Public Protector if she uncovers evidence of a possible crime. She may 'bring the matter to the attention' of the prosecuting authority.[390]

Crucially, however, the court addressed an argument advanced by one of the parties supporting the Public Protector which pointed out that the principle established by the same court in the *State Capture judgment* meant that the Public Protector had the power to direct

[386] *CR17* (n 382) para [41].

[387] See paras 8.2.1 and 9.4 of the CR17 Report.

[388] *CR17 HC* (n 384) para [177].

[389] *CR17 HC* (n 384) para [178].

[390] *CR17 HC* (n 384) para [182].

any state functionary to take remedial steps and 'to do so in a manner that impinges on their ordinary discretionary powers.'[391] The court rejected this argument on the basis that unlike in the *State Capture judgment*, there were no credible allegations of corruption against the person to whom the remedial action was directed that would warrant interfering with their discretionary powers.[392] For its part, in addressing the supervisory orders issued against the Speaker and the NDPP, the Constitutional Court stated that '[i]t is also not clear that the Public Protector has the power to order the relevant entities to report to her.'[393]

3.2 The theoretical implications of the doctrinal developments

It is best to begin with a recap of how the rule in *Nkandla* was applied in the three cases discussed above. Before that, however, we can briefly state the rule as follows: the Public Protector's remedial action is binding and no person against whom remedial action is taken may simply disregard it without recourse to a court to review and set it aside.

In *Reserve Bank* the rule could not apply to the remedial action issued against the National Assembly, directing its members to amend the Constitution since that would fetter Parliament's original and discretionary legislative power.[394] The *State Capture judgment* on the other hand, held that the rule included the power of the Public Protector to direct the exercise of purely discretionary powers and to determine how they should be exercised.[395]

While in *CR17* it was held that the rule did not entail the power to direct the NDPP to institute an investigation or a criminal prosecution, nor did it entail the power to monitor the conduct of the NDPP in performing her functions.[396]

None of the three cases represents a consistent and neutral approach to applying the rule. Neutral application goes hand in hand with the neutral derivation and definition of a principle. A principle that is not neutrally derived or defined cannot be capable of neutral application.[397] To illustrate this, Bork draws our attention to the U.S. Supreme Court decision

[391] *CR17 HC* (n 384) para [183].

[392] *CR17 HC* (n 384) paras [184]-[187].

[393] *CR17* (n 382) para [136].

[394] See the discussion in 3.1.1 above.

[395] See the discussion in 3.1.2 above.

[396] See the discussion in 3.1.3 above.

[397] R H. Bork *The Tempting of America: The Political Seduction of the Law* (Sinclair-Stevenson, 1990) 146.

of *Shelley v. Kraemer*[398] where the court struck down private property owners' racially restrictive covenants, which white property owners used to prevent black renters from taking occupancy of their properties, as falling afoul of the equal protection clause of the U.S. Constitution.

The difficulty however was that the equal protection clause only prohibited racial discrimination by the state and not private individuals. To overcome this, the Supreme Court held that the state courts that enforced and upheld the covenants transformed those covenants into action by the state, thus bringing the Shelleys' case within the ambit of the equal protection clause.[399]

Bork argues that if it were to be neutrally applied, the rule in *Shelley* would transform most other private conduct into state conduct and in the process create entirely new rights and impose entirely new duties than those enumerated in the Constitution. The result, he says, would be 'that the Supreme Court will make rules for all allowable or forbidden behaviour by private individuals.'[400]

He makes the example of an individual chasing out a rowdy dinner guest who upsets the other guests by expressing his political views at the dinner table. Once chased out, he sues the host for violating his right to free speech and, in response, the host would assert his right to choose who can be in or on his property. The lower courts who rule for the host would, on the logic of *Shelley*, transform his private act of chasing out an unwelcome guest into state action supressing free speech. The Supreme Court, then, would have to either accept that *Shelley* indeed governs the case, in which case the guest should win, or devise an exception or carve-out from the principle that state court enforcement of private acts transforms them into state action.

Neutral application, then, is only possible with a principle that is truly neutral. Returning to the three cases discussed above, it is clear that the rule in *Nkandla* cannot be neutrally applied. In the *Reserve Bank* case, the National Assembly could not comply with remedial action that interfered with the exercise of its constitutional authority and was therefore not bound by it. So too in the *CR17* case could the NDPP not institute an investigation into the

[398] *Shelley v. Kraemer* 334 US 1 (1948).

[399] Bork *The Tempting of America* (n 397) 152.

[400] Bork *The Tempting of America* (n 397) 153.

President on the *ipse dixit* of the Public Protector, because that would be inimical to her constitutionally guaranteed prosecutorial independence, and so she too was not bound by that remedial action.

The *State Capture judgment*, however, stands on a different footing. There, the court took the rule in *Nkandla* and extended it by declaring that the Public Protector could direct the exercise of discretionary powers and could determine the manner in which they could be exercised (contrary to existing jurisprudence on the issue[401]). When called upon to apply that same rule in *CR17 HC* the court distinguished the *State Capture judgment* on purely factual grounds, evading the obvious import of its own decision.

These three cases illustrate that *Nkandla* created a rule so bound to the specific facts of the case that it is unworkable in any other context and thus incapable of neutral application.

4 Redeeming *Nkandla*

Until now, I have argued that *Nkandla* is the product of a court that had a preconceived outcome in mind and reasoned its way to said outcome with no recourse to neutral principles of constitutional law. Taking that as the starting point, I now wish to test whether the court in *Nkandla* could have reached the same outcome through the application of neutral principles.

First, I define the outcome of *Nkandla* as the court's order that President Zuma pay back a reasonable portion of the cost of the unlawful upgrades made to his residence.[402] Second, I

[401] See generally *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11, 2000 (1) SA (CC) 1 paras [38]-[41] and [146]-[147] and *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33, 2014 (1) SA 1 (CC) para [44].

[402] The order provided in part:

> '5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.
>
> 6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.
>
> 7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.
>
> 8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.'

will take the rationality principle as the legal principle governing the case. An inquiry into the nature of the Public Protector's powers would need to begin with the text of the Constitution given its ordinary meaning. In the case of the Constitution being silent, as we have granted is the case here, resort may be had to the drafting history and the context in which the provisions appear.

As a starting point, it is important to consider the text of the provision in question. Section 182(1) provides that the Public Protector has the power: (a) 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;' (b) 'to report on that conduct;' and (c) 'to take appropriate remedial action'.

According to the interpretive canons set out in *Endumeni*,[403] this provision should be interpreted in light of the ordinary rules of grammar and syntax, having regard to the context in which it appears, the purpose to which it is directed, and the material known to those who drafted it.[404] The last of these is contested, given its originalist flavour, and the court in *Mansingh*[405] cautioned that 'courts need not look at the drafter's intention when engaging in constitutional (or statutory) interpretation.'[406] However, where documentary evidence as to the drafter's intention exists, it is to be treated as evidence in the ordinary course and weighted accordingly.

Applying these canons to s 182(1)(c), the text in its context conveys no more than the idea that following an investigation into conduct in state affairs that is alleged to be improper the Public Protector may 'take appropriate remedial action'. That is, she may 'take' 'action' that is 'appropriate' to 'remedy' the conduct complained of. Here, as previously mentioned, the court in *Nkandla* interpreted the provision to mean that the Public Protector has the power to provide 'a proper, fitting, suitable and *effective* remedy' (own emphasis) for the complaints she investigates.

[403] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA).

[404] *Endumeni* (n 403) para [18].

[405] *Mansingh* (n 256).

[406] *Mansingh* (n 256) paras [26]-[28].

This interpretation calls into play another cannon of construction from *Hyundai*,[407] that a provision must be given a meaning that can be 'reasonably ascribed' to it and that such an interpretation should not be 'unduly strained'.[408] In *SAPS*,[409] the court also held that when undertaking an interpretive exercise, a court must pay close attention to 'the structure and design of the Constitution' and the 'institutional context in which a provision under examination functions'.[410]

An interpretation of s 182(1)(c) must not only ascribe a meaning to it that its text can reasonably bear when read in context in accordance with the ordinary rules of grammar and syntax, but such a meaning must also be consonant with the constitutional structure and design and be institutionally sound. As previously mentioned, the court's interpretation of the phrase 'to take appropriate remedial action' equated 'appropriate' with 'effective', an unexplained choice which is not ordinarily how those two words are grammatically understood.

In so doing, the court disregarded the institutional context in which the Public Protector functions. The court's reliance on *Fose*, to shore up the interpretation of the office's remedial powers as binding because 'an appropriate remedy must mean an effective remedy',[411] begs the question. The *lis* in *Fose* was not whether a court had the power to issue binding orders for constitutional damages to vindicate Bill of Rights violations. That much was clear from s 165(5) which provides that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies'. Instead, it was about whether such an order was appropriate in the circumstances of the case.

Fose then was of no interpretive assistance insofar as determining whether the power to take appropriate remedial action entailed the Public Protector's power to issue binding orders. With this appreciation in view, it is clear that the court's interpretation of s 182(1)(c) is wrong (a) because it ascribes a meaning that cannot be reasonably borne by the text and

[407] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC).

[408] *Hyundai* (n 407) paras [23]-[24].

[409] *SAPS* (n 264).

[410] *SAPS* (n 264)paras [19]-[20].

[411] See (n 29) above.

(b) it does so on a misreading and misunderstanding of *Fose*.

A proper interpretation of s 182(1)(c) is simply that the Public Protector, upon investigating and reporting on alleged misconduct, may take remedial action appropriate to the circumstances of the complaint. No reasonable construction of the provision yields the conclusion that the Public Protector's remedial action is binding.

Does this conclusion mean that the court was powerless to reach its desired outcome (i.e., ordering Zuma to repay the money)? No. Here, it appears relatively clearly that Schippers J's approach in *SABC I* was correct.[412] The President, having been issued with the report, was made aware of state conduct in relation to the upkeep of his private residence which placed him in direct conflict with s 96(2)(b) and (c) of the Constitution.[413] Further, the Public Protector's report included steps to be taken to remedy the breaches identified by her investigation.

Bearing in mind his obligation to 'uphold, defend and respect the Constitution as the supreme law of the Republic',[414] the President was not entitled to simply ignore the report and to not comply with it. At the very least he had an obligation to provide reasons to both the National Assembly and the Public Protector for his non-compliance. Such reasons would have to be: (i) more than a mere preference for his own view of the remedial action[415] and (ii) rational.[416] If unpersuaded by such reasons, the Public Protector would be entitled to approach a court to compel his compliance with the remedial action.

Here, the court merely had to undertake the exercise of determining whether, in light of the applicable constitutional principles set out above, his non-compliance was rational. If, as

[412] See (n 302) above.

[413] The section provides in relevant part: 'Members of Cabinet … may not … act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.'

[414] Constitution s 83(b).

[415] See *SABC I* (n 302) para [66]. Interestingly, the court alludes to this in *Nkandla* (n 3) para [81]: 'If not [complying with the remedial action], then much more than [the President's] mere contentment with the correctness of his own report was called for.'

[416] See *SABC I* (n 302) para [74].

he sought to do by directing the Minister of Police to prepare a separate report,[417] the President had simply declared that the non-security features were in fact security features, that would not be a rational basis on which he could refuse to comply with the remedial action.

Having declared the President's reasons for non-compliance irrational, the court would then be entitled to order the President's compliance with the Public Protector's remedial action – with whatever amendments it would be entitled to make – without first having declared the Public Protector's powers to be binding.

In sum, the court failed to take proper stock of the case before it, rushing instead to reach its desired outcome, and considering no argument put before it other than the one advanced by the Public Protector, to achieve that outcome. In doing so, it acted as a naked power organ, eschewing neutral principles for *ad hoc* considerations, chiefly, the identity of the litigants and the political zeitgeist.

5 Conclusion

In this chapter, I have argued that *Nkandla* was not decided on the basis of neutral principles of constitutional law; that it was instead an instance of *ad hoc* adjudication by a court intent on reaching a predetermined outcome.

I have shown that the judgment cannot be said to establish a principle of law that is entailed by or derived from the text of the Constitution. Nor can the principle it established be defined or applied neutrally to cover cases other than the specific facts in issue in *Nkandla*.

The latter conclusion I established by surveying the three cases that followed it, starting with the *Reserve Bank* case, followed by the *State Capture* case and ending with the *CR17* case. In all but one case, the courts declined to apply the rule in *Nkandla* – that the Public Protector's remedial action was binding until set aside. The exception in this regard being the *State Capture* case, where the rule was extended but later distinguished, by the same court, on factual grounds in *CR17*.

Instead, through the application of Greenawalt's four criteria that a principle must meet to be truly neutral, I demonstrated that it was the *SABC I* judgment that had correctly resolved the conflict at the centre of *Nkandla*.

[417] *Nkandla* (n 3) paras [12] and [77].

First, the principle in *SABC I*[418] – that while the Public Protector's remedial action was not binding, a party seeking to evade compliance would need to have rational reasons for non-compliance – was based on an accepted principle of our law: the rationality principle. This principle has been followed by courts in almost all cases concerning the exercise of *any* public power, which necessarily includes the Public Protector's powers.

Second, the rationality principle is adequately general to cover facts and scenarios not contemplated by the court in *Pharmaceutical Manufacturers*[419] where it was first established and not narrowly tailored to the facts of that case.

Third, the rationality principle is a legal principle – both sourced and justified in law. It is sourced in s 1(c) of the Constitution, as a core aspect of the rule of law and the principle of legality.

Fourth, the principle articulated by Schippers J in *SABC I* fully explained and justified his conclusions in that judgment, and it cannot be said that he relied on any other reason to reach that outcome.

In contrast to *SABC I*, my argument has sought to highlight the following. First, *Nkandla* has not been followed in its fullness by subsequent courts, which have sought to carve out exceptions when faced with the implications of following it *tout court*. Second, the difficulty of applying *Nkandla* to facts that are not identical to its own has exposed the judgment as having been tailored to fit the specific facts of that case and thus as not being sufficiently general to be grounded in a neutral principle.

Third, the lack of clarity about the source of the 'bindingness' of the Public Protector's powers as set out in *Nkandla* has meant that it is a principle without a *clear* legal basis, both constitutionally and statutorily.[420]

Fourth, the reasons advanced in support of the *ratio* in *Nkandla*: effectiveness, impartiality and independence, do not justify the conclusion that the Public Protector's remedial action is binding. I have shown that the Public Protector has historically been effective without binding powers, that impartiality and independence serve to protect the institution itself

[418] *SABC I* (n 302).

[419] *Pharmaceutical Manufacturers* (n 341).

[420] As we know, clarity is one of Lon Fuller's desiderata of the rule of law, see generally L Fuller *The Morality of Law* (Oxford University Press, 1968).

from outside interference, and that these reasons can thus, taken cumulatively, not serve as an independent source of the 'bindingness' of her remedial action.

Finally, I have argued that the court could have reached the same outcome in *Nkandla* without declaring the Public Protector's powers binding and that this was in fact the only route open to the court to take without violating the court's obligation to decide cases based on neutral principles of constitutional law.

In the next chapter, I will argue that *Nkandla* was a paradigmatic case of unconstitutional constitutional change.

Chapter 6

Nkandla as Unconstitutional Constitutional Change

1 Introduction

At the beginning of this dissertation, I made the bold claim that the Constitutional Court's decision in *Nkandla* amounted to an unconstitutional constitutional change. In this penultimate chapter, I will defend that claim.

I begin with a brief recap of the theoretical frame work developed over in Chapters 2,3 and 4 and then apply it to the *Nkandla* decision. In doing so I hope to show that *Nkandla* was an instance of informal constitutional change and not an instance of innovatory constitutional interpretation.

I will then show that it was also an illegitimate or unconstitutional informal constitutional change. For that, I will draw on the critiques in Chapters 4 and 5, and expand briefly on some of the other ideas introduced in Chapter 1.

2 Theoretical Framework

2.1 Informal Constitutional Change Redux

We begin first with the definition of informal constitutional change, the concept at the heart of this dissertation. Informal constitutional change is: (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 state institutions; (4) in a manner not reasonably countenanced by the text or contemplated by the constitutional drafters; and (5) which has the status of supreme law (or alters the precepts of a legal system such that its meaning becomes supreme).

Let me briefly explain how each element works. Elements (1) and (3) are inextricably linked. The first identifies when a change has occurred and the second identifies the extent of that change. Recall that a constitution has changed 'if it requires today what it did not require yesterday'.[421] If a court proclaims a new right, or endows a new power, or imposes a new duty that previously did not exist, element (1) helps us identify that decision as having changed the content of the constitution and (3) helps us determine what this new right,

[421] Endicott (n 1) 367.

power or duty entails, what its limits are, or what our new correlative entitlements or duties are.

Element (2) identifies the mode of change: was it legislative, executive, or judicial? Element (4) requires substantive knowledge of the constitutional law. What does the text say and can the new change be reconciled with the text? As discussed in Chapter 4, it may be that the drafters of a constitution crafted the text in such a way as to exclude the possibility of such a right, power or duty being recognised. This is the most demanding of all the elements of the definition.

Finally, element (5) speaks to the constitutional status of a particular change. With quasi-constitutional amendments, the legislation in question must deal with constitutional law as a substantive matter (it might affect the nature of a constitutional right, power or duty) and must be so important as to gain constitution-level reverence and observance over time.[422]

In the case of constitutional change by courts, such a change must be brought about by a court with the power to bind the entire judicial system (where there is some form of strong judicial review). A change by a lower court could simply be dismissed as an erroneous departure from accepted constitutional doctrine subject to correction by a higher court. The upshot being that informal constitutional change will likely, if not always, flow from the decisions of a supreme or apex court – one able to fundamentally and authoritatively alter the constitutional law of a legal system.

2.2 Unconstitutional Constitutional Change

Much has been said about unconstitutional informal constitutional change. In Chapter 3 I defined it as an informal constitutional change which, when compared to the law prior to 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. For an informal constitutional change to be unconstitutional it must (1) violate an existing constitutional rule or (2) create a new norm not previously recognised as part of the constitutional law of a legal system or remove an existing one.

[422] Albert (n 70) 740. See too Ahmed and Perry (n 69). We can think here about legislation like PAJA, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 or the Promotion of Access to Information Act 2 of 2000 that is sometimes thought of as 'umbilically linked' to the Constitution.

Changes that fall under category (1) must violate some settled constitutional rule, whether textual or doctrinal, including rules about the constraints on constitutional interpretation. I discussed a few in chapters 4 and 5 including, but not limited to, (a) the primacy of constitutional text, (b) constitutional structure and design, (c) original or drafter's intent and (d) the obligation to decide cases based on neutral principles. A judicial decision that produces an informal constitutional change by violating any of these is illegitimate and produces an unconstitutional change.

Changes that fall under category (2) must either remove an existing norm (*negative change*) or insert into the constitutional law of a legal system a norm that previously did not form part of that law (*positive change*). As I explained in Chapter 3, in the case of a *positive change* (i.e., when a court creates a new norm), such a norm must not be compatible with the constitutional law immediately prior to the constitutional change occurring.

If a judicial decision announces a norm that, once accepted, maintains the intrinsic coherence of the constitutional law, such a decision does not produce an unconstitutional constitutional change. If however such a norm requires or prompts a change in some other norm of the system for the constitutional law to have intrinsic coherence after it is accepted, such a decision produces an unconstitutional change.

Whether a particular decision falls into category (1) or (2) can be determined by the application of the factors listed in Chapter 3, which I need not restate here.

3 Legitimate Informal Constitutional Change

Before proceeding to apply the framework set out above to *Nkandla*, it might prove beneficial to have regard to two decisions of the Constitutional Court that I regard as being instances of legitimate informal constitutional change. I do this to show: first, that I do not regard all informal constitutional change as inherently illegitimate and second, to illustrate why *Nkandla* illegitimate by offering contrasting examples.

Since judges are constitutionally required to decide all cases that 'can be resolved by the application of law',[423] even where the Constitution itself does not offer any ready and complete answers, '[j]udges must therefore have authority to resolve gaps and indeterminacies in the constitution' by supplementing its content.[424] This, however, is not a

[423] Constitution s 34.
[424] Goldsworthy (n 169) 171-172.

license to change the Constitution wholesale or to depart from the clear language of its provisions.

Instead, courts are expected to interpret the Constitution in light of the ordinary and accepted methods of interpretation where the Constitution is silent or indeterminate. As Craig Martin has argued: 'The very essence of the concept of legitimate interpretive development is that the proposed interpretation can be explained and justified as falling within a reasonable range of possible meanings for the provision in question, employing accepted principles of constitutional interpretation.'[425]

Some informal constitutional changes are the result of incremental evolution in the meaning of a constitutional provision which track the development of jurisprudence over a long period of time.[426] Others are obvious attempts by courts to fill perceived constitutional gaps. The two cases I discuss are of the latter kind.

3.1 *Makwanyane*

The applicants in *Makwanyane* had been convicted of murder, attempted murder and robbery and sentenced to death for the murder convictions under s 277(1)(a) of the Criminal Procedure Act 51 of 1977.[427] After failed appeals against their sentences, they pursued a constitutional challenge to s 277(1)(a) of the CPA on the ground that it violated s 11(2) of the Interim Constitution, which provided that no person shall be 'subject to cruel, inhuman or degrading treatment or punishment.'

Chaskalson P, writing for a unanimous court, noted that the framers of the Interim Constitution had not specifically outlawed the death penalty as a competent punishment, nor had they declared it permissible 'in circumstances sanctioned by law.'[428] He noted further that the phrase 'cruel, inhuman or degrading treatment or punishment' was not defined and that the court thus had to give it meaning.[429]

In interpreting s 11(2), Chaskalson P said, the court could not construe it in isolation but had to have regard to 'the history and background to the adoption of the [Interim]

[425] C Martin 'The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers' (2017) 40(2) *Fordham International Law Journal* 427, 492.
[426] Martin (n 425) 510.
[427] *Makwanyane* (n 257) paras [1]-[2].
[428] *Makwanyane* (n 257) para [5].
[429] *Makwanyane* (n 257) para [8].

Constitution' and other constitutional provisions, specifically the rights implicated by the imposition of the death penalty, which included the rights to life, dignity, and equality.[430] He concluded that for a punishment to be considered constitutional, it would have to meet the requirements set by those rights, either as standalone requirements or as interpretive aids for determining the meaning of s 11(2).[431]

Discussing the relevance of historical and background material to constitutional interpretation, Chaskalson P referred to the drafting process for the Interim Constitution and, with reference to the reports of the technical committees involved in the drafting, held that '[s]uch background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded.'[432]

Crucially, the court determined, from its examination of the background material, that the debate about whether or not the Interim Constitution should sanction capital punishment had been fraught and was, at the time that the case was decided, ongoing.[433] The court concluded that the constitutional negotiations had not produced a definite answer in either direction and that 'it was left to the Constitutional Court to decide' whether the death penalty was constitutional and if not, to strike it down.[434]

Having surveyed foreign and international law jurisprudence on the constitutionality of the death penalty, Chaskalson P concluded:

> The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of section 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a

[430] *Makwanyane* (n 257) para [10]. The rights to life, dignity and equality were contained in ss 9, 10 and 8 of the Interim Constitution respectively.
[431] *Makwanyane* (n 257) ibid.
[432] *Makwanyane* (n 257) para [17].
[433] *Makwanyane* (n 257) paras [19]-[24].
[434] *Makwanyane* (n 257) para [25].

> narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.[435]

It is indisputable that *Makwanyane* is an instance of a court supplementing the content of a constitution through interpretation. The court here gave meaning to a provision cast in general language to prohibit 'cruel, inhuman and degrading punishment'. It said such a provision must mean that the death penalty is unconstitutional because: (i) it destroys life, a right protected by the Constitution; (ii) it annihilates human dignity, which is also a right protected by the Constitution; (iii) it is arbitrary in its enforcement; and (iv) it is irremediable.

The court held that all of this violated s 11(2) of the Interim Constitution despite the constitutional text itself not having said so. *Makwanyane* is an informal constitutional change because the court achieved, through an interpretation of the constitutional text, something that the constitutional drafters responsible for drafting the constitutional text themselves did not: abolishing the death penalty.

Is it a legitimate constitutional change? First, the court considered the constitutional history, had regard to the intentions of the drafters and weighed them appropriately. Second, its interpretive approach yielded an interpretation that was reconcilable with the constitutional text and arguably achieved its purpose: it concluded that a punishment that violates other constitutional rights, is arbitrarily enforced, and cannot be remedied in the case of mistaken convictions is 'cruel, inhuman and degrading'.

It did so without compromising the coherence of the broader constitutional law, by employing accepted methods of interpretation and without straining the language of the provision. In other words, it did not transgress the limits of acceptable constitutional interpretation and is thus a legitimate informal constitutional change.

But perhaps *Makwanyane* is low-hanging fruit, since the constitutional drafters had explicitly left the question of the constitutionality of the death penalty open for the court to decide at a later stage.[436] Let us consider another case.

[435] *Makwanyane* (n 257) para [95].
[436] Greenawalt (n 230) 298: 'Some provisions of the Constitution may have been designedly left open to changing values.'

3.2 *Grootboom*

In *Grootboom*,[437] the court was asked to determine whether s 26 of the Constitution[438] entitled Ms Irene Grootboom, and the other respondents who had been rendered homeless by an eviction by the City of Cape Town, to a house. Although it ultimately rejected the argument that the Constitution established a concrete right to a house (or shelter), the court gave content to the state's obligation in s 26(2) to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to access to adequate housing.

First, for a measure to be reasonable it must 'clearly allocate responsibilities and tasks to the different spheres of government'.[439] Second, such a measure must be reasonable both in its formulation and implementation.[440] Third, and most importantly, such a measure cannot exclude 'a significant segment of society' and must prioritise those whose needs are most urgent. A measure that is capable 'of achieving a statistical advance in the realisation of the right' would not meet constitutional muster if it did not provide access to housing for the people who are most desperate.[441]

Why does *Grootboom* constitute an informal constitutional change? Because it fashions, from the broad constitutional text, specific guidelines – not found in the Constitution – about how housing policy should be determined. There's nothing in s 26 that says a measure aimed at the progressive realisation of the right must involve all three spheres of government. This, as the court said, is inferred from chapter 3 of the Constitution, which establishes the three spheres.[442] Nor is there anything in s 26 that can be said to require the state to prioritise those whose needs are most in peril. That, the court says, is necessitated by a consideration of 'housing problems in their social, economic and historical context'.[443]

[437] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

[438] Section 26 of the Constitution provides:

> '(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[439] *Grootboom* (n 437) para [39].

[440] *Grootboom* (n 437) para [42].

[441] *Grootboom* (n 437) paras [43]-[44].

[442] *Grootboom* (n 437) paras [39]-[40].

[443] *Grootboom* (n 437) para [43].

Although one may critique the court for having enlarged the power of the courts to review government policies, it is not a power that the court arrogated for itself since the s 26 right was always justiciable.[444] The court, in setting out criteria for what would be considered a 'reasonable measure', created new constitutional obligations for the state to meet in devising housing policy. That too may have expanded the available grounds for challenging said policy, even where a flagrant violation of the right as in *Grootboom*.

Yet, none of the court's innovations are irreconcilable with the text of the provision, the structure of the Constitution, nor do they violate any constitutional rules by which the court was bound. It too represents an instance of legitimate informal constitutional change.

4 Nkandla as Paradigmatic Unconstitutional Constitutional Change

Having set out the theoretical framework and having offered contrasting illustrative examples of legitimate informal constitutional change, it is now time to apply the theory to the *Nkandla* decision to show that it did indeed amount to an unconstitutional constitutional change.

The first question is whether the decision amounted to change in the content of the Constitution. This must be answered in the affirmative. Prior to *Nkandla*, it could not be said that the Constitution vested the Public Protector with the power to issue binding remedial action.[445] To reiterate a point made in the previous chapter, the academic consensus pre-*Nkandla* was that 'the institution lacks the power to make binding decisions.'[446]

Nkandla's recognition of the Public Protector's binding powers, then, constituted an incontestable change to the content of the Constitution. But was this change legitimate, *ergo*, constitutional?

Let's begin with the obvious: there is nothing in the text of the Constitution to suggest that the Public Protector's remedial action is binding, nor did the court articulate a standard account of the powers of Chapter 9 institutions that could be applied to all of them and not just the Public Protector.[447] There is thus no textual or structural basis for the court's decision.

[444] *Grootboom* (n 437) paras [19]-[20].
[445] See R Venter 'The Executive, the Public Protector and the Legislature: "The Lion, the Witch and the Wardrobe?"' (2017) 1 *Journal of South African Law* 176, 177: 'neither the Act nor the Constitution expressly provides for the direct enforcement of the Public Protector's decisions and recommendations in a clear and unambiguous manner.'
[446] See Bishop and Woolman (n 300) 3.
[447] See Tsele (n 294) 209.

Second, there is nothing in the constitutional history or the evidence for intentions of the drafters to show that the Constitution envisaged that the Public Protector would have binding powers, nor was it a question that the drafters left open for the court to decide. To the contrary, the record of observable history shows that the Constitutional Assembly both considered and rejected several proposals relating to the Public Protector's powers and at no point did it consider vesting the office with binding powers.

Third, the meaning the court attributed to s 182(1)(c) cannot reasonably be borne by the provision without creating an internal inconsistency in the language used in the Constitution or without straining the language such that the exercise no longer qualifies as an interpretation but divination as described in *S v Zuma*, or legislation by judicial fiat. When given its ordinary meaning, the phrase s 182(1)(c) does not yield an interpretation that the Public Protector can issue binding remedial action.

Fourth, the court's decision violates the principle of the separation of powers, a bedrock principle entailed by the structure of the Constitution. It endows the Public Protector — an institution outside of the direct control of the executive, legislature and judiciary — with the power to bind individuals and institutions, including institutions guaranteed independence by the Constitution, like the National Prosecuting Authority.[448] What's more, the Public Protector may also issue binding decisions against the President and Parliament. None of this is reconcilable with the text and structure of the Constitution, both of which establish brightline rules for the exercise of executive, legislative and judicial powers.

Fifth, *Nkandla* cannot be said to be a judgment based upon the application of neutral principles of constitutional law. In the first place, as I have argued throughout, the court was motivated by a desire to reach a socially and politically acceptable outcome in the case. For it to do so, it paid more attention to the identities of the litigants before it – President Zuma and advocate Madonsela – and their relative standing vis-à-vis the political climate and not enough attention to the law governing the powers and functions of the Public Protector. Such an *ad hoc* approach to adjudication necessarily requires that a court take into account that which it may not lawfully do, as the court in *Nkandla* did, to reach a conclusion insupportable by law.

[448] See generally B V. Slade 'The implications of the Public Protector's remedial action directing the exercise of discretionary constitutional powers: separation of powers implications' (2020) 24(1) *Law, Democracy & Development* 364, 380: 'More broadly, it appears that the particular High Court has now accepted that it is within the Public Protector's power to direct the other branches to exercise a discretionary constitutional power.'

Applying the theoretical framework set out above, it is clear that *Nkandla* falls into both category (1) and (2). Under category (1), *Nkandla* violates several constitutional rules regarding how the Constitution is to be interpreted. It departs from the constitutional text, ignores the constitutional structure, defeats the original intent of the drafters and was not decided based on neutral principles.

Under category (2), the court in *Nkandla* created a new norm, one which resulted in a fundamental change to the institutional relationships created by the Constitution. Because of *Nkandla*, the President may now be directed by the Public Protector to exercise purely discretionary powers under s 84(2) of the Constitution, unsettling years of jurisprudence that placed these powers firmly within the exclusive domain of the President. The Public Protector can now also issue binding orders against other *independent* constitutional institutions, a power hitherto unimaginable.

This new norm – of the Public Protector's powers being binding – could not have been recognised as part of South Africa's constitutional law prior to *Nkandla*. It conflicts with the broad structure of government established by the Constitution and has proven unworkable, as the cases discussed in the previous chapter show.

From the foregoing, one can only conclude that the change that the norm produced by *Nkandla* is one incapable of being grounded in the law before the change. It is, so to speak, an unconstitutional constitutional change.

I should not be misunderstood. My argument is not that the *Nkandla* court had set out to deliberately change the Constitution. That is something I cannot prove. I cannot, however, rule out the possibility that the court did think that the Constitution ***should*** have made the Public Protector's powers binding.

Regardless of how noble the court's intentions were, it was simply not open to it to change the Constitution in this way. As Goldsworthy reminds us, 'it is the province of the judges *to say what the Constitution is*, and to enforce it accordingly' but, '[t]his reasoning provides no foothold for judicial authority *to say what the constitution ought to be*, and to change it accordingly.'[449]

[449] Goldsworthy (n 169) 170.

5 Conclusion

In this chapter, I have set out the parameters of the theory I sought to develop in this dissertation and have taken the time to apply it to my chosen case study, to show how it could be applied to other cases. I also provided contrasting examples of informal constitutional change that I regard as wholly legitimate, distinguishing them from that which I think is illegitimate.

Chapter 7

Conclusion

This dissertation sought to engage with, for the very first time, the concept of informal constitutional change in the context of South African law. In doing so, it sought to highlight the concept's utility for understanding the trajectory of South Africa's constitutional jurisprudence. Its focus was on informal constitutional change by courts. And in highlighting both legitimate and illegitimate instances of informal constitutional change, it sought to provide some guidance on how to analyse judicial decisions that, on their face, appear to go beyond what is ordinarily regarded as constitutional interpretation.

But it only scratches the surface. First, the cases chosen as case studies for the purposes of this dissertation are not representative of the jurisprudence generally, which means that there may be some more egregious examples of unconstitutional constitutional change out there, waiting to be discovered. Second, the focus on judicial informal constitutional change also neglected informal constitutional change that occurs through legislation, executive action, constitutional practice or a convergence of the three. This should therefore lead others onto fertile research ground. I hope that this work inspires them to undertake similar projects in the near future.

Lastly, a word of caution to the courts. Judges do not have all the answers. In the broader scheme of things, they know and are capable of very little. This is not a weakness, but a strength. We should not burden judges with problems that require of them more than they were appointed to give. Questions of resource allocation, political morality and constitutional design are ill-suited for judicial decision and we should demand that judges say that if it is the case.

When judges venture beyond the acceptable limits of judicial activity, they invite all sorts of attack and vitriol, none of which is necessary, but all of which affects the legitimacy of their constitutional role. That is not good for any of us. I hope that this dissertation inspires some kind of introspection among those few judges who will come across it, and that it helps them reassess their position vis-à-vis the rest of the constitutional system.

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