

Research Article

JUDICIAL INTERPRETATION AS INFORMAL CONSTITUTIONAL CHANGES: QUESTIONS OF LEGITIMACY IN THE ASPECT OF THE DOCTRINE OF CONSTITUENT POWER

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ABSTRACT

Background: *Stability is considered a traditional legal value, particularly in relation to the stability of the constitution. This emphasis on stability stems from the need to protect the text of the constitution from frequent and unreasonable changes. However, stability must be combined with dynamism, a task primarily shouldered by the judicial branch of power through constitutional interpretation. Notably, ideas of judicial rule-making and the notion of a living/invisible constitution are only some manifestations of such a phenomenon as informal changes to the constitution. Yet, the potential risks posed by judicial intervention and the legitimacy concerns surrounding such informal changes warrant scrutiny. What is the correlation of informal constitutional changes through interpretation with the traditional doctrine of sovereign constituent power? What should be the limit of the interpretation of the constitution so that such an interpretation is not recognised as abusive? These and other issues are the focal point of research in the article.*

Methods: *The following methods were used to research the main approaches to informal changes to the constitution. The system-structural method was used to characterise the concept of a living and invisible constitution and varieties of informal constitutional changes and to establish the relationship between these concepts. The logical-legal method made it possible to find out the content of the positions of scientists regarding the potential violation of the boundaries of interpretation of the constitution by the courts, as well as arguments for and against the legitimacy of judicial interpretation, an assessment of informal changes in the constitution from the standpoint of modern views on the doctrine of constituent power. Additionally, the comparative method was employed to study the experience of foreign countries in terms of the characterisation of binding interpretation.*

Results and Conclusions: *The study analyses the current state of the concept of informal changes to the constitution through judicial interpretation, its connection with the doctrine of constituent power, as well as the question of the legitimacy of such an interpretation and its limits. The primary conclusion is that judicial activity guarantees the protection of the material constitution, principles and human rights. That is, the judiciary does not allow sovereign decisions made democratically (by the people) to infringe on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights. Questions about the role of the judiciary, the possibility of informal changes to the constitution, and judicial law-making as such can be an indicator for distinguishing between authoritarian/totalitarian countries and democratic ones.*

1 INTRODUCTION

As András Sajó points out, we cannot have illusions: the constitution is carried out by people, not by computers programmed according to the mysterious will of the founders of the constitution.¹ Richard Allen Posner elaborates on hermeneutic reasons for interpreting the constitution, noting that the true meaning does not "live" in the words of the text as words inherently indicate something external. Rather, meaning is what arises when the reader involves their linguistic and cultural understanding, as well as personal experiences, in interpreting the text.²

As James Bryce points out, any question of the content and application of fundamental laws arising from legal proceedings must be decided by a court.³ Judge of the Supreme Court of the USA Charles Evans Hughes (1862–1948) said: 'We are under a Constitution, but the Constitution is what the judges say it is.'⁴

Lon L. Fuller notes that no drafters of a constitution can foresee all the obstacles and difficulties that may arise when the structure they created undergoes tension associated with new and unusual requirements.⁵ Katharina Sobota also speaks in this vein:

'... given the role of constitutional, judicial and academic interpretations, which are mainly in writing, and not as part of systematic codification, participate in determining the application of constitutional law, it is necessary to warn against excessive requirements of the form.'⁶

1 András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European UP 1999) 289.

2 Richard A Posner, *The Problems of Jurisprudence* (Acta 2004) 290.

3 James Bryce, *American Commonwealth*, vol 1 *National Government* (Pub House VF Richtep 1889) 409.

4 James E Leahy, 'The Constitution Is What the Judges Say It Is' (1989) 65(3) *North Dakota Law Review* 491, doi:10.1080/00220973.1938.11017667.

5 Lon L Fuller, *Anatomy of Law* (Sphera 1999) 81-2.

6 Katharina Sobota, *Das Prinzip Rechtsstaat: Verfassungs- und Verwaltungsrechtliche Aspekte* (Jus Publicum Series 22, Mohr Siebeck 1997) 471.

Hence, adopting a purely textual approach to the constitution, divorced from its textual expression outside the practice of application and interpretation, would be overly formalistic. Considering this, it is worth analysing the interpretation factor, which usually affects its content and alters the already formed interpretation - even more so.

Another crucial aspect to consider is the protective role of judicial activity in safeguarding the material constitution, fundamental principles and human rights. The judiciary ensures that decisions made democratically by the sovereign (the people) do not infringe on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights.

As pointed out by Brian Z. Tamanaha, in most Western liberal democracies, the decisive word on the content of rights lies with judges, whether in ordinary courts, constitutional courts, or human rights courts exercising judicial review over legislation. This underscores the belief that the interpretation of human rights is a special prerogative of the judiciary, reflecting an anti-majoritarian design that distrusts democratically accountable bodies.⁷ Moreover, judicial interpretation can also be considered informal changes to the constitution, which will be explored later in the article.

2 INFORMAL CHANGES TO THE CONSTITUTION: PROBLEM STATEMENT

First of all, it is pertinent to raise the question of understanding the constitution beyond its written text, viewing it as a "living" organism, a notion supported by Andrew Arato⁸ and other scientists substantiating the post-sovereign concepts of constituent power. This perspective underscores the increasing significance of the material constitution.

Furthermore, the above-mentioned idea coincides with the approach developed in Western literature, which isolates the so-called informal amendments to the constitution. Traditionally, speaking of amending the constitution, we mean transforming its text. However, as stated in paragraph 18 of the Report on Constitutional Amendment CDL-AD(2010)001, adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009), 'the substantial contents of a constitution may, of course be altered in many other ways – by judicial interpretation, by new constitutional conventions, by political adaptation, by disuse (*désuétude*), or by irregular (non-legal and unconstitutional) means.'⁹

7 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 105.

8 Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia UP 2009) 360; Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (OUP 2016) 308, doi:10.1093/acprof:oso/9780198755982.001.0001; Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (CUP 2017) 482, doi:10.1017/9781316411315.

9 Report of the Venice Commission CDL-AD(2010)001 of 19 January 2010 'On Constitutional Amendment' <[https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad\(2010\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e)> accessed 05 February 2024.

At the same time, paragraph 246 of the same report states that ‘constitutional change should preferably be adopted by way of formal amendment, respecting the democratic procedures laid down in the constitution, and not through informal change. When substantive informal (unwritten) changes have developed, these should preferably be confirmed by subsequent formal amendment.’¹⁰

Additionally, the report’s subsection titled ‘Formal and informal constitutional change’ within sub-section VII ‘Striking a balance between rigidity and flexibility’ delves into the various informal methods of change, including judicial interpretation, constitutional custom and conventionality, and constitutional culture. Notably, the Commission makes interesting differences. Institutional and rights provisions also differ as to the typical mechanism of informal change. The former are complemented by constitutional conventions, while the latter are reinterpreted and specified by courts and other bodies involved in constitutional review (134).

It should be noted that changes to the constitution through informal methods like constitutional customs and judicial practice have historical roots and are not solely a product of exclusive modernity. This collection of practices has evolved, as noted by scientists who have also observed the phenomenon of informal changes.

James Bryce, when describing the changes and development of the American Constitution, particularly in light of its rigid classification, identifies three ways for its adaptation to the ever-changing environment: amendments, interpretation, and changes influenced by customs.¹¹

In 1934, Karl Nickerson Llewellyn, a representative of the sociological school of law, in his work ‘The Constitution as an Institution,’ labelled an element of the orthodox theory of the Constitution as the idea that ‘only amendments to the Constitution are the Amendments.’¹²

Friedrich August von Hayek also noticed that judges and legislators develop constitutions. Operating on his own construction of the ‘rules of fair conduct,’ he points out that such rules, like the order of actions they enable, undergo gradual improvement through the deliberate efforts of judges or other legal experts. They improve the existing system by establishing new rules.¹³

Georg Jellinek noted that constitutional provisions often lack clarity and are vague, requiring subsequent laws issued by the legislator to provide specific meaning. Similarly, only the judge can clarify the content of laws that they are tasked with applying. Court

10 *ibid.*

11 Bryce (n 3) 426.

12 Karl N Llewellyn, ‘The Constitution as an Institution’ (1934) 34(1) *Columbia Law Review* 4, doi:10.2307/1115631.

13 FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, vol 1 *Rules and Order* (Routledge 2003) 100.

rulings interpreting laws can vary depending on the changing views and needs of the person. The legislator is just as dependent on these views when interpreting the constitution. In this way, the constitution is transformed as its interpretation changes.¹⁴

Georg Jellinek distinguished between changes in the text of the constitution, carried out by purposeful volitional acts, and transformations of the constitution, which he understood as occurring without altering its text directly. The latter changes are caused by facts not directly related to the intentions to make such changes or the realisation of inevitable changes.¹⁵

In the modern science of constitutional law, a consensus has more or less formed on changes to the constitution through its interpretation. Constitutions are changed not only through official amendments but also, in most cases, through informal changes made through judicial interpretation, as noted by Gary Jeffrey Jacobsohn and Yaniv Roznai.¹⁶ As David Feldman points out, there may be special, official practices for proposing and deciding on constitutional changes, but changing the practice without formal changes can directly change the constitution.¹⁷ According to Diego Valades, one of the reasons for constitutional instability is related to interpretive processes. This interpretation is carried out by judges and, in general, by all who apply the constitution.¹⁸ Furthermore, the German doctrine also postulates that, like any other law, constitutional law can be developed and even established through interpretation, as advocated by Josef Isensee.¹⁹

We will also express the thesis that the availability of appropriate informal avenues of change is closely connected with the concept of a material constitution. This notion, advocated by Joel Colon-Rios, suggests that the material constitution extends beyond the textual confines of the written text of the constitution, encompassing broader principles from both written and unwritten sources (and in some cases, certain provisions of the written text called constitution may not even belong to the material constitution). Joel Colon-Rios highlights the distinction between ordinary changes in constitutional theory and those related to the material constitution.²⁰

The idea that constitutional change should not solely result from a formal amendment process is a common theme in the informal conceptions of the constitution discussed by

14 Georg Jellinek, *Constitutions, their Changes and Transformations* (Pravo 1907) 12.

15 *ibid* 4-5.

16 Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale UP 2020) 244, doi:10.2307/j.ctv10sm8x0.

17 David Feldman, 'Political Practice and Constitutional Change' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021) 201.

18 Diego Valades, *El control del poder* (UNAM, Instituto de Investigaciones Jurídicas 1998) 425-9.

19 Josef Isensee, 'Legitimation des Grundgesetzes' in Josef Isensee und Paul Kirchhof (hrsg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 12 *Normativität und Schutz der Verfassung* (CF Müller Verlag 2014) 7-8.

20 Joel Colon-Rios, *Constituent Power and the Law* (Oxford Constitutional Theory, OUP 2020) 184.

Marco Goldoni and Michael A. Wilkinson. These conceptions include the ideas of a mixed constitution, living constitution and political constitution.²¹

It is worth recalling that the constitutions of a number of countries have never been formally rigid and have instead relied on current legislation. This practice continues in the UK, where the constitution is determined by material criteria. In addition, there are objective reasons for informal changes (development) of the written (formal) constitution through customs, judicial practice, and other factors.

Xenophon Contiades endeavours to establish the ratio of the concept of constitutional change with other related concepts. In his opinion, unlike the terms 'revision' and 'amendment', change corresponds to images of transformation through the constant interaction of formal and informal mechanisms. It implies smoothness, covering the relationship between political antagonism, judicial identity and the constitution.²²

In science, such a direction as 'comparative constitutional amendment' is also distinguished - this is a study of how supranational, national and subnational constitutions change through formal and informal means, including changes, revision, evolution, interpretation, replacement and revolution.²³

Konrad Hesse identifies 'constitutional deviations' (Verfassungswandel), by which the scientist understands the unchanged text as such - it remains unchanged, but the concretisation of the content of constitutional norms, which, especially given the breadth and openness of many constitutional provisions, can lead to different results under changing circumstances and thus contribute to "deviations".²⁴

Peter Häberle points out that the older the constitutions, the more science and practice complement written texts through unwritten rules. This paradigm does not support the overestimation or underestimation of constitutional texts.²⁵ This perspective is crucial because while judicial practice should independently form interpretations that harmonise with the text, informal changes should not be excessively employed as substitutes for formal changes where necessary.

As for practice, there are quite a few cases where we can see the role of courts in informal changes to the constitution. One of the most striking cases is the implementation of judicial review regarding the laws amending the constitution, where courts form implicit criteria for

21 Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (CUP 2023) 4, doi:10.1017/9781009023764.

22 Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Taylor & Francis Group 2012) 2.

23 Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Bloomsbury 2017) 3.

24 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (CF Müller 1999) 16.

25 Peter Häberle, *El Estado Constitucional* (Universidad Nacional Autónoma de México 2003) 7.

'unamendable provisions'/eternity clauses' (Ewigkeitsgarantie in German, immutable clauses in Spanish) or interpret existing ones.²⁶ Courts also shape the doctrine of militant democracy²⁷ and other aspects of constitutional interpretation.

3 JUDICIAL INTERPRETATION OF THE CONSTITUTION AND CONSTITUENT POWER

Regarding the interpretation of the constitution by constitutional (supreme) courts, an additional problem arises - what justifies the legitimacy of the relevant interpretation if it is qualified as developments or actual changes to the constitution? How does such legitimacy, if any, correlate with the legitimacy of the constituent power?

While we have already partially addressed this issue,²⁸ further arguments and reflection are necessary. Thus, according to Bertrand Mathieu, the judge, the rights watchdog, fits into a logic that competes with the democratic logic.²⁹ As András Sajó notes, 'with the advent of judicial review and constitutional adjudication, a new function was attributed to courts, and apex courts in particular: They have the power to review legislation that is deemed to be the legitimate expression of democratic popular will. This raises new issues of the legitimacy of courts'.³⁰

Instead, the attempt to build a logic of legitimation of interpretation is present in Pierre Rosanvallon by expanding the concept of democratic legitimacy and its inexhaustibility exclusively with an electoral model and a sovereign concept of constituent power. According to Pierre Rosanvallon, the constituent power as the direct existence of the sovereignty of the people cannot be taken as the norm of democratic life.³¹ At the same time, the scientist distinguishes the electoral people, the social people and the people-principle.

26 Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 5(Spec) Access to Justice in Eastern Europe 113, doi:10.33327/AJEE-18-5.4-n000447; Hryhorii Berchenko and others, 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' (2022) 5(4) Access to Justice in Eastern Europe 159, doi:10.33327/AJEE-18-5.4-n000435.

27 Yurii Barabash and Hryhorii Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9(3) Baltic Journal of European Studies 3, doi:10.1515/bjes-2019-0019.

28 Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 4(2) Access to Justice in Eastern Europe 135-6, doi:10.33327/AJEE-18-4.2-n000064.

29 Bertrand Mathieu, *Le Droit Contre la Démocratie?* (LGDJ 2017) 184.

30 András Sajó, 'Courts as Representatives, or Representation Without Representatives: Report' (The European Standards of Rule of Law and the Scope of Discretion of Powers in the Member State of the Council of Europe: Conference, Yerevan, Armenia, 3-5 July 2013) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2013\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2013)008-e)> accessed 05 February 2024.

31 Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Kyiv-Mohyla Academy 2009) 161.

Constitutional courts guarantee the identity of democracy as an institution in temporal fluidity. The function of representing principles thereby acquires enhanced significance.³²

Pierre Rosanvallon proposes refraining from evaluating the legitimacy of constitutional courts or various reflexive authorities in terms equivalent to sovereignty. Thus, we see a clear correlation with post-sovereign constituent power. In his opinion, beyond mere legitimacy of competence, their legitimacy approaches that of an invisible institution's authority.³³

Interestingly, at one time, the inventor of the constituent power, l'abbé Sieyès, put forward the idea of a constitutional jury to prevent any possible future political upheavals coming from below.³⁴ Although the mentioned jury was not a full-fledged court in the full sense of the word, and was not democratically elected, it marked an early attempt to balance sovereign constituent power with a body tasked with interpreting the constitution.

From the outset of the emergence of constituent power, as proposed by l'abbé Sieyès, balancing sovereign constituent power with the role of a court or similar interpretive body appears logical and natural.

According to András Sajó and Renáta Uitz, democracy may be wrong and require judicial correction where self-correction is too slow, costly or nonexistent.³⁵ At the same time, in their opinion, the constitutional legitimacy of higher courts depends on their ability to demonstrate skill and impartiality in observing the constitution.³⁶

The connection between constitutional justice and the constituent power is seen quite clearly in the practice of the Venice Commission.³⁷ We can also recall Woodrow Wilson's statement that the Supreme Court represented 'a kind of Constitutional Assembly in continuous session'.³⁸

Lucia Rubinelli believes that the courts exercise derivative constituent power since all written constitutions are inevitably 'incomplete contracts'. In her view, in liberal societies based on the principle of separation of powers and its polyarchic structure, constitutional courts are subjects exercising limited, gradual derivative power to rewrite the constitution. At the same time, as the scientist emphasises, courts are not omnipotent institutions and rely on the support of public opinion and the decisions of the elected.³⁹

32 *ibid* 170-1.

33 *ibid* 200-1.

34 Marco Goldoni, 'At the Origins of Constitutional Review: Sieyès' s' Constitutional Jury and the Taming of Constituent Power' (2012) 32(2) *Oxford Journal of Legal Studies* 234, doi:10.1093/ojls/gqr034.

35 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 371, doi:10.1093/oso/9780198732174.001.0001.371.

36 *ibid* 353-4.

37 Berchenko, Maryniv and Fedchyshyn (n 28) 135-6.

38 Hannah Arendt, *On Revolution* (Penguin Books 1990) 200.

39 Joel I Colón-Ríos and others, 'Constituent Power and its Institutions' (2021) 20(4) *Contemporary Political Theory* 926, doi:10.1057/s41296-021-00467-z.

Today, it is argued that judicial entities in most countries after 1945 have acquired strong compensatory functions. Moreover, in some cases, constitutions themselves have been gradually developed by judicial institutions, often relying on internationally constructed norms, as noted by Chris Thornhill.⁴⁰ Therefore, courts, from the very beginning of the creation of the constitution, have been integral to the mechanism of constituent power from the inception of constitution-making, aligning with Andrew Arato's concept of post-sovereign constituent power. This is exemplified by the adoption of the constitution in the North African Republic in 1996, where the Constitutional Court played a pivotal role.

Thus, we get a clear idea of the constituent power possessed by judges. According to the appropriate approach, the mouth of the constitutional courts reflects the essence of constituent power, thereby enhancing their legitimacy.⁴¹ Moreover, the public legitimacy of interpretation is very important. Society may either support or contest such interpretations and may have its own interpretation of the constitution.

James Bryce, reflecting on the role of the judiciary in interpreting the constitution, discussed the power of public opinion in the USA. If the people approve of the way in which this government explains the constitution, they continue unhindered; however, if the people respond disapprovingly, then they suspend or at least proceed in slower steps.⁴²

In a truly democratic society, this is exactly what should work. Consequently, the justification of decisions by constitutional courts for their public persuasiveness and perception should come to the fore.

Today, relevant ideas are central to the German doctrine of constitutional law. Josef Isensee posits that citizens collectively act as a society of interpreters of the Constitution.⁴³ Fundamental rights guarantee everyone the freedom to respond to the content and limits of his right and freedom, to express his opinion about them or to conduct scientific research. For the same reason, fundamental rights open the space for social interpretation of the Constitution.⁴⁴ Similar opinions are expressed by Peter Häberle, describing the theory of open society interpreters of the constitution.⁴⁵

40 Chris Thornhill, 'Constituent Power and European Constitutionalism' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021) 281.

41 Hryhorii Berchenko, 'The Development of the Constitution Through its Judicial Interpretation and the constituent Power' (2020) 80 *Actual Problems of the State and Law* 18, doi:10.32837/apdp.v0i88.3051.

42 Bryce (n 3) 422-3.

43 Josef Isensee, 'Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung' in Josef Isensee und Paul Kirchhof (hrsg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 5 *Allgemeine Grundrechtslehren* (CF Müller Verlag 1992) 353.

44 *ibid.*

45 Peter Häberle, 'Die Offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur Pluralistischen und "Prozessualen" Verfassungsinterpretation' (1975) 30(10) *JuristenZeitung* 297, doi:10.2307/20811044.

Beyond the scope of German doctrines, similar ideas are espoused by John Rawls, who considered the Supreme Court a model of public discretion and stressed the pressing need for citizens to achieve practical understanding in judging the constitutional foundations.⁴⁶ Freedom of speech and interpretation of the constitution emerge as important safeguards against abuse.⁴⁷ Lucia Rubinelli also concurs, emphasising that the scope of the derivative constituent power wielded by the courts largely depends on the cultural and political conditions of each particular society.⁴⁸

4 ARGUMENTS FOR AND AGAINST THE LEGITIMACY OF JUDICIAL INTERPRETATION

Renowned authoritative researcher of democracy, Robert Alan Dahl, adopts a rather critical opinion about the role of courts. He believes that judging by the history of judicial review of laws in the United States, judicial guardians (a term he coined) do not really offer noticeable protection of fundamental rights in the face of the threat of their constant violation by the entire demos or its individual representatives.⁴⁹ Here, the issue of politicisation of constitutional proceedings cannot be overlooked.⁵⁰

Furthermore, András Sajó and Renáta Uitz point to the strong temptations of judicial rewriting of constitutions under the guise of interpretation. This practice poses high risks, including a lack of legitimacy, honesty, information, elitism and serving special interests to the detriment of democracy.⁵¹

András Sajó, in analysing the question of legitimacy, presents arguments for and against. Arguments against include the following: Amendments to the constitution under the pretext of interpretation occur without authorisation and call into question the foundations of constitutionalism. By doing so, they deprive the constitution of its legitimacy, which comes from the power of the founder, and its strong integrity and peremptory. This erosion of legitimacy makes the legal system unpredictable and helpless.⁵²

46 John Rawls, *Political Liberalism* (Osnovy 2000) 224, 226.

47 The formation of such traditions is extremely important for Ukraine. On the constitutional tradition of freedom of speech in the context of Ukraine, see: Tatiana Slinko and Olena Uvarova, 'Freedom of Expression in Ukraine: (Non)sustainable Constitutional Tradition' (2019) 9(3) *Baltic Journal of European Studies* 25, doi:10.1515/bjes-2019-0020.

48 Colón-Ríos and others (n 39).

49 Robert A Dahl, *Democracy and Its Critics* (Yale UP 1989) 189.

50 Berchenko and others (n 26) 165; Dmytro Vovk and Yurii Barabash, "Justices Have a Political Sense". The Constitutional Court of Ukraine's Jurisprudence in Politically Sensitive Cases' (2021) 2(18) *Ideology and Politics Journal* 312, doi:10.36169/2227-6068.2021.02.00014.

51 Sajó and Uitz (n 35) 342.

52 Sajó (n 1) 240.

As Brian Tamanaha writes, appointing judges who are not elected grants a group of individuals unaccountable to democracy the power to veto democratic legislation.⁵³ The main risk is that the rule of law can turn into the rule of judges.⁵⁴ The expression 'government by judges' was first proposed in 1914 by the President of the Supreme Court of North Carolina, USA.⁵⁵ Today, there is a growing discourse advocating to 'remove the constitution from the courts' (Mark Tushnet),⁵⁶ pointing to the rule of the courts, which threatens democracy (Jean-Éric Schoettl),⁵⁷ and coining the term 'juristocracy' to describe the dominance of judge in governance (Ran Hirschl).⁵⁸

One should not forget the concept of abusing constitutionalism and the Abusive Judicial Review, as outlined by David Landau and Rosalind Dixon, wherein would-be authoritarian leaders may seek to seize courts for abuse as part of a broader project of democratic erosion.⁵⁹

Now, let us delve into the arguments in defence of the legitimacy of the judicial interpretation of the constitution. Richard Allen Posner presents several counterarguments against sceptics, offering eleven such points in defence of judicial interpretation within American law. In his opinion, the possibility of judicial interpretation protects the essence of the Constitution from encroachments, as the Supreme Court considers disputes at the frontiers of law, among them mainly those on which the Constitution lacks clarity.⁶⁰

While acknowledging the risk of judges making wrong decisions, Ronald Dworkin cautions against exaggerating this danger.⁶¹ In interpreting the constitution, Ronald Dworkin prefers the American method: to assign judicial responsibility to judges whose decisions are final, except in cases of constitutional amendment or a subsequent judicial decision.⁶² In his view, adding to the political system a process that is institutionally structured as a debate over principles rather than a competition for power is nevertheless desirable, and it is considered a valid basis for allowing judicial interpretation of the foundations of the constitution.⁶³

Bertrand Mathieu argues that the legitimacy of judges hinges on their impartiality, with independence from political power being just one condition; true impartiality implies that

53 Tamanaha (n 7) 105.

54 *ibid* 124.

55 Rosanvallon (n 31) 185-6.

56 Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton UP 1999) 242.

57 Jean-Éric Schoettl, *La Démocratie au péril des prétoires: De l'État de droit au gouvernement des juges* (Gallimard 2022) 256.

58 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard UP 2004) 286.

59 David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53(3) UC Davis Law Review 1313.

60 Richard A Posner, *Frontiers of Legal Theory* (Harvard UP 2004) 1.

61 Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 148.

62 Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3(1) European Journal of Philosophy 10, doi: 10.1111/j.1468-0378.1995.tb00035.

63 *ibid* 11.

judges refrain from engaging in the political field.⁶⁴ Nassim Nicholas Taleb proves that the judicial interpretation fits into his idea of anti-fragility. Choosing a court can be a lottery - nevertheless, this approach avoids large-scale mistakes.⁶⁵

András Sajó presents an argument in favour of the legitimacy of the judicial interpretation, suggesting that it represents a new form of constitutional legislation capable of adapting to more complex conditions without compromising basic constitutional values or even aiding their realisation.⁶⁶ According to András Sajó, entrusting the task of constitutional development to the "least dangerous" judicial branch instead of a valid legislative body susceptible to political influences and personal and political interests may result in less biased changes and a less radical deviation from previous constitutional concepts.⁶⁷ Notably, the idea of the "least dangerous" branch of government was even reflected in the decision of the Constitutional Court of Ukraine of October 27 2020 № 13-p/2020⁶⁸ and was drawn from the ideas of Alexander Hamilton as articulated in the famous 'The Federalist Papers' (No. 78).⁶⁹

The role of judicial practice in shaping constitutional rights is significant. Constance Grewe, on the example of Italy, Germany, France, Norway and Switzerland, showed how the supreme or constitutional courts (in France - the Constitutional Council) supplemented the constitutional catalogue of rights.⁷⁰

A more radical opinion is offered by French scientist Michel Troper, who noted that the supremacy of the constitution over the acts adopted for their execution should be considered a legal fiction: the bodies issuing these acts are subject to the norms they determine. In his opinion, the constitution's content is composed only of norms created by interpretation by law enforcement agencies, which are subject exclusively to their own will.⁷¹ Therefore, based on his arguments, it is quite logical that Michel Troper claims that the court, interpreting the constitution, exercises constituent power.⁷² The court, which controls the constitutionality of laws, is both a legislator and a founder of the constitution. Such a court, as a control body with constituent power, establishes its powers.⁷³ While

64 Mathieu (n 29).

65 Nassim Nicholas Taleb, *Antifragile: Things that Gain from Disorder* (Penguin Books UK 2013) ch 5.

66 Sajó (n 1) 240.

67 *ibid* 241.

68 Decision no 13-p/2020 Case no 1-24/2020(393/20) 'On the constitutional submission of 47 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine' (Constitutional Court of Ukraine, 27 October 2020) [2020] Official Gazette of Ukraine 92/2976.

69 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Bantam Books 1982) no 78.

70 Constance Grewe, 'Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des europäischen Gerichtshofes für Menschenrechte' (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 467-9.

71 Michel Troper, *Pour une Théorie Juridique de l'État* (Presses Universitaires de France 1994) ch 19, 291.

72 *ibid*.

73 *ibid*.

Troper's concept may seem overly voluntaristic, to some extent, it is quite logical and organically fits into the French tradition.

As for us, in general, it is impossible to be in captivity of classical democratic sovereign theories today based on modern realities. Traditional approaches to democracy can no longer be considered sufficient to criticise judicial legitimacy. While this usually does not remove all problems in the activities of the judiciary, especially in societies that are not stable constitutional democracies, the corresponding vector of development can hardly be ignored or deliberately stopped.

5 THE LIVING/INVISIBLE CONSTITUTION

Along with the idea of informal changes to the constitution through judicial interpretation, there exists a closely related concept known as the living and invisible constitution.

The idea of a 'living constitution' serves as an alternative to the 'material constitution', as highlighted by Marco Goldoni and Michael A. Wilkinson. Although prominent in English-speaking jurisdictions, this concept is well-known in other Western constitutional traditions.⁷⁴ According to Volodymyr Shapoval, the normative content of the constitution created by interpretation by the courts is characterised as a living constitution.⁷⁵ According to Oksana Shcherbanyuk, the judicial doctrine of a living constitution is based on a special method of interpreting the constitution - an evolutionary interpretation, according to which constitutional norms are interpreted in the light of the conditions of modern life, taking into account the peculiarities of the development of society, that is, dynamically.⁷⁶

Benjamin N. Cardozo pointed out that 'A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, and the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.'⁷⁷

In addition to the concept of a living constitution, albeit much less often mentioned, some scholars also refer to the concept of an invisible constitution.⁷⁸ While not

74 Goldoni and Wilkinson (n 21) 3.

75 Volodymyr Shapoval, *Fundamentals of Constitutionalism (Essays on History, Theory and Practice)* (Myshalov DV 2021) 55.

76 Oksana Shcherbanyuk, 'Individual Constitutional Complaint as a Means of Ensuring Constitutional Democracy' (2018) 12 *Law of Ukraine* 81, doi: 10.33498/louu-2018-12-077.

77 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale UP 1921) 83-4.

78 Yurii Barabash, Darijus Beinoravičius and Juozas Valčiukas, 'Invisible Constitution as an Instrument of Consolidation of Nation and Defence of Democracy' (2022) 4(3) *Insights into Regional Development* 110, doi: 10.9770/IRD.2022.4.3(7); Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution In Comparative Perspective* (CUP 2018); David L Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (OUP 2016); Laurence H Tribe, *The Invisible Constitution* (OUP 2008).

necessarily synonymous with the concept of a living constitution, the overarching notion remains the same idea – the real meaning of the constitution is established by judges.

6 LIMITS OF JUDICIAL INTERPRETATION OF THE CONSTITUTION

What can be said about the limits of interpretation? Indeed, despite the relatively serious arguments regarding legitimacy, the question still arises: how can we distinguish where judicial interpretation can be considered beyond permissible limits? After all, in the presence of a formal text of the constitution as an act of constituent power, the courts remain somehow limited to it.

Benjamin Cardozo argued that ‘they (judges – Hryhorii Berchenko) have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law.’⁷⁹ This approach seems to us quite reasonable, underscoring the importance of respecting established limits.

András Sajó and Renáta Uitz point out that the line of demarcation between the application, interpretation and rewriting of the constitution is not always so vivid.⁸⁰ They bring a dilemma: while courts lack democratic constituent power, constitutions are a product of man, and people as such are imperfect, and human foresight is limited.⁸¹

According to Josef Isensee, the constitutional theory has not yet solved the dilemma of how to avoid the "softening" of the constitutional state without being in a state that is frozen in its development and divorced from reality.⁸²

In the context of the formal text and the decision of the constituent power, there is an approach according to which the courts are limited to the text of the constitution (which is a manifestation of the constituent power). Instead, Gary Jeffrey Jacobsohn and Yaniv Roznai emphasise the need for the courts to protect the very core of the constitution, although they recognise the possibility of a constitutional revolution through interpretation.⁸³ Another question is that even constitutional revolutions in the form of interpretation in certain cases can also be recognised as legitimate. Therefore, as we can see, this is a fairly broad approach to judicial interpretation as an opportunity for informal constitutional changes.

In our opinion, András Sajó speaks quite successfully and metaphorically about the need to protect the core of the constitution:

‘Although constitutional values and concepts are subject to changing and flexible interpretations, they do have a core meaning that we need to insist on if we want the words

79 Cardozo (n 77) 129.

80 Sajó and Uitz (n 35) 342.

81 *ibid* 343.

82 Peter Häberle, ‘Die Menschenwürde als Grundlage der staatlichen Gemeinschaft’ in Josef Isensee und Paul Kirchhof (hrsg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 2 *Verfassungsstaat* (CF Müller Verlag 2004) 317.

83 Jacobsohn and Roznai (n 16) 245-6.

and the law to convey some sort of meaning. Maybe all orders and all concepts are like Peer Gynt's onion; we can keep peeling off the layers until we reach the center and find nothing there. Constitutionalism, however, requires us to believe that there is a core. This belief does not ban peeling off the layers and does not demand us to proclaim human rights absolute and immutable.⁸⁴

Lucia Rubinelli underscores the role of the courts in maintaining the basic structure of a constitution, emphasising that while they cannot alter this structure, they can marginally interpret and rewrite its content, provided they maintain relative independence over political (democratically elected) players.⁸⁵ Rubinelli cites an additional procedural criterion for the legitimacy of informal changes made by the judiciary in addition to the essential (material) criterion that we saw from previous authors (she calls this the basic structure of the constitution). This opinion is in some way correlated with her idea of social legitimacy and recognition of the relevant role of the judiciary as a derivative of the constituent power.

On the other hand, there is a narrower approach to the limits of judicial interpretation, which focuses on the text of the constitution itself. According to this perspective, 'the wording of the Basic Law is an insurmountable barrier to any interpretation, while the constituent power or amendments to the constitution is intended to update the text itself'.⁸⁶ As you can see, in this case, there are virtually no opportunities for informal changes. The disadvantage of this approach is that the textual component comes to the fore, and the essential (material) is ignored.

Ultimately, the idea posed by Gary Jeffrey Jacobsohn and Yaniv Roznai regarding the core of the constitution as the boundary beyond which interpretation becomes illegitimate appears justified. Likewise, Lucia Rubinelli's emphasis on the basic structure of the constitution and the independence of the court itself as the material and procedural limit of judicial interpretation is noteworthy and deserving of support.

Thus, we can say that the courts are the bridge between reality and super-positive norms and the material constitution, with which the latter can manifest itself. In any case, it is necessary to recognise the fact of the transformation of the constitution through its judicial interpretation. It is always necessary to understand the alternative, which is the development of the constitution through acts of an ordinary legislator. Moreover, the legitimacy to speak on behalf of the constituent power of the legislature is much less than that of the constitutional courts if you take the approach of Pierre Rosanvallon and other scholars. That is why the development of the constitution through its interpretation should not be opposed to the concept of constituent power; it is necessary to look at the latter more broadly, considering the idea of judicial interpretation of the constitution.

84 Sajó (n 1) 289.

85 Colón-Ríos and others (n 39) 935.

86 Isensee (n 19).

7 THE POWER TO INTERPRET OFFICIALLY

Lucia Rubinelli exemplifies the exercise of derivative constituent power by constitutional courts through their authority in handling conflicts of institutional competence, known ‘*conflitti di attribuzione*’, as outlined in Article 134 of the Italian Constitution. This authority extends to adjudicating conflicts between the highest state bodies, such as legislative, executive and judicial branches, or between the national government and regions.⁸⁷ Similar competencies are enshrined in the constitutions of many other countries, including Serbia, Kosovo, Albania, Montenegro, North Macedonia, Slovenia, Germany, Spain, and others.

Additionally, the Supreme Court of Canada possess similar powers, demonstrated through its practice of implicitly assessing laws that amend the Constitution of Canada.⁸⁸

In resolving disputes over competing competence, known as competence conflict, the role of constitutional courts in interpreting the constitution is evidently significant, highlighting their involvement in informal changes to the constitution.

In addition to resolving conflicts of institutional competence, constitutional courts also wield broader powers, such as implementing binding interpretation of the constitution in abstracto, which are not directly tied to conflict resolution but nevertheless contribute to informal changes. This authority, known as ‘official interpretation,’ is relatively rare and carries significant weight as it is normative and binding on all others.

However, Victor Skomorokha emphasised that the concept of ‘official interpretation of legal norms’ is not generally recognised.⁸⁹ As Volodymyr Shapoval notes, the concept of official interpretation is absent in the legal theory and practice of countries whose law is assigned to the Anglo-Saxon “family” of legal systems.⁹⁰

Nonetheless, the implementation of binding interpretations of the constitution is enshrined in several countries, including Azerbaijan, Kyrgyzstan, Moldova, Russia and Ukraine.⁹¹ For example, in Ukraine, such powers are called ‘the official interpretation of the Constitution of Ukraine.’ Similarly, the Constitution of Bulgaria, in accordance with paragraph 1 of part 1 of Article 149 of the Constitution of Bulgaria, grants the Constitutional Court the authority to provide mandatory interpretations of the constitution.⁹²

87 Colón-Ríos and others (n 39) 933.

88 Berchenko and others (n 26) 166.

89 Victor Skomorokha, *Constitutional Jurisdiction in Ukraine: Problems of Theory, Methodology and Practice* (Lesya 2007) 415.

90 Volodymyr Shapoval, *Modern Constitutionalism* (Yurinkom Inter 2005) 100.

91 Jacek Zalesny (ed), *Constitutional Courts in Post-Soviet States: Between the Model of a State of Law and Its Local Application* (Peter Lang 2019) ch 1.

92 ‘Constitution of Bulgaria’ in *Constitutions of the Countries of the World: Republic of Bulgaria, Romania, Hungary, Republic of Croatia* (OBK 2021) 60.

In Ukraine, the idea of abandoning such an official interpretation has repeatedly emerged. Bohdan A. Futey posed a rather simple question, asking whether the 'solution of issues of compliance with the Constitution' differs from the official interpretation,⁹³ a distinction that may appear strange for an American federal judge.

The Venice Commission has also weighed in on this matter. In its opinion, on the draft constitution of Ukraine dated May 21 1996 CDL-INF (96)6 regarding the text approved by the Constitutional Commission on March 11 1996, the Commission expressed scepticism that 'while it is obvious that the Constitutional Court has to interpret the Constitution to arrive at its decisions, it seems outside the usual functions of a judicial body to adopt an official interpretation of the Constitution. What may be provided for is that the Constitutional Court can give advisory opinions, interpreting constitutional provisions with respect to certain specific problems' (Article 150).⁹⁴

As stated in preliminary opinion CDL-PI (2015) 016 dated July 24 2015 (paragraph 47),⁹⁵ 'under the amendments, the Constitutional Court retains the competence "to provide the official interpretation of the Constitution" (Article 147 and Article 150 § 1.1.2.), which is contrary to previous recommendations of the Venice Commission.'⁹⁶

Therefore, despite our commitment to the idea of judicial lawmaking and informal changes to the constitution by interpretation, we do not support a normative interpretation as a separate authority of the constitutional court unless it concerns the resolution of competence conflicts).

Today, while the law requires the constitutional submission regarding the official interpretation of the Constitution to include 'substantiation of the grounds that caused the need for interpretation' (part 4 of Article 51 of the Law of Ukraine of July 13 2017 No. 2136-VIII),⁹⁷ this requirement is extremely evaluative and its qualification as fulfilled or not depends entirely on the position of the Constitutional Court of Ukraine itself. Notably, the CCU is increasingly beginning to gravitate towards the tendency to avoid providing a normative interpretation (see, for example, the Ruling of the Constitutional Court of Ukraine on the

93 Bohdan A Futey, *Formation of the Legal State in Ukraine 1991–2005* (2nd edn, Yurinkom Inter 2005) 95.

94 Opinion of the Venice Commission CDL-INF(96)6 of 21 May 1996 'On the draft Constitution of Ukraine (Text approved by the Constitutional Commission on 11 March 1996 (CDL(96)15)' <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(1996\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)006-e)> accessed 05 February 2024.

95 Preliminary Opinion of the Venice Commission CDL-PI(2015)016 of 24 July 2015 'On the Proposed Constitutional Amendments Regarding the Judiciary of Ukraine' <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e)> accessed 05 February 2024.

96 It is about the Opinion of the Venice Commission CDL-AD(2008)029 of 24 October 2008 'On the draft laws amending and supplementing (1) the Law on constitutional proceedings and (2) the Law on the Constitutional court of Kyrgyzstan' § 18 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)029-e)> accessed 05 February 2024.

97 Law of Ukraine no 2136-VIII of 13 July 2017 'On the Constitutional Court of Ukraine' [2017] Official Gazette of Ukraine 63/1912.

closure of constitutional proceedings regarding the official interpretation of a separate paragraph of the fourth preamble of the Constitution of Ukraine of November 14 2023 No. 17-up/2023).⁹⁸ This is not surprising given the inherent difficulty in implementing normative interpretation objectively.

Furthermore, one might question what the Constitutional Court of Ukraine would do if asked to give an official interpretation of the rule of law (Article 8 of the Constitution) without reference to a specific controversial situation. It seems more expedient to form the content of this principle on a case-by-case basis.

We now turn to the argument put forth by Michel Troper, who contends that interpretation in abstracto is inherently present in any solution in concreto (meaning casual review of constitutionality). According to Troper, an in concreto decision provides for a preliminary interpretation of one or more constitutional provisions, as the court must determine whether the act that is being challenged is contrary to the constitution. This preliminary interpretation always remains abstract in nature; it binds the legislator subject to constitutional control, not only in connection with this dispute but also regarding the further application of the interpreted provisions. Thus, Troper asserts that an interpretation is always abstract, whether it is given in a decision in abstracto or to justify a decision in concreto, and its author is always the constitutional legislator.⁹⁹

In this regard, we believe that securing the authority to check specific acts for compliance with the constitution is quite enough. Therefore, as for us, we advocate reevaluating the concept of the 'official interpretation of the Constitution' as a separate authority of the Constitutional Court of Ukraine. While this authority has certain analogues in foreign countries, we propose restricting it to the consideration of casual cases or tying it to the resolution of competence conflicts - tied to specific practical problems of law enforcement. In its most radical version, even a complete rejection of such an interpretation in general is possible. At the same time, interpretation by the Constitutional Court will necessarily be carried out casually - when considering a particular case through constitutional control (constitutional review of legislation).

98 Resolution no 17-yn/2023 Case no 1-7/2020(172/20) 'On closing the constitutional proceedings in the case based on the constitutional submission of 142 people's deputies of Ukraine regarding the official interpretation of a separate provision of the fourth paragraph of the preamble of the Constitution of Ukraine' (Grand Chamber of the Constitutional Court of Ukraine, 14 November 2023) <<https://zakon.rada.gov.ua/laws/show/vb17u710-23#Text>> accessed 05 February 2024.

99 Troper (n 71) sez 19.

8 CONCLUSIONS

As for us, it is impossible to be in captivity of classical democratic sovereign theories in light of modern realities. Traditional approaches to democracy can no longer be considered sufficient to criticise judicial legitimacy. While this does not remove all problems in the activities of the judiciary, especially in societies that lack stable constitutional democracies, the corresponding vector of development can hardly be ignored or deliberately stopped.

Judicial activity guarantees the protection of the material constitution, principles and human rights. That is, the judiciary prevents democratically made sovereign decisions from infringing on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights.

Questions about the judiciary's role, the possibility for informal constitutional changes, and judicial law-making serve as pivotal indicators distinguishing authoritarian/totalitarian countries from democratic ones. In non-democratic regimes, the existence of an independent judiciary, as well as some real possibilities for interpreting the constitution, which is recognised by the courts of civilised countries, seems unnecessary and harmful. Only the dictator has the sole monopoly right to the constitution there. Such views conflict with modern ideas of law, human rights, and the dynamism of social life. Thus, judicial interpretation is a legitimate form of informal constitutional change.

Diverse approaches exist on the latitude for informal changes to the constitution, ranging from recognition of the corresponding changes in the form of a constitutional revolution, as proposed by Gary Jeffrey Jacobsohn and Yaniv Roznai, to narrower approaches that prioritise adherence to the text of the constitution. We consider the idea of the constitution's core as the limit, beyond which will mean the illegality of interpretation, the most justified.

Pierre Rosanvallon suggests an approach to addressing the legitimacy of the interpretation of the constitution by the constitutional courts by expanding the concept of democratic legitimacy and its inexhaustibility exclusively with the electoral model and the sovereign idea of constituent power. This connection between constitutional justice and constituent power is also seen in the practice of the Venice Commission. Thus, according to the appropriate approach, by the mouth of the constitutional courts, it is precisely the constituent power that shows the high degree of legitimacy of such courts. Moreover, public legitimacy of interpretation is very important, as societal support or dissent may or may not support this interpretation while having its own interpretation (Josef Isensee, Peter Häberle). This underscores the important of freedom of speech and interpretation of the constitution as safeguards against potential abuse.

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