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CONSTITUTIONAL IDENTITY AS IMPLIED LIMITS OF CONSTITUTIONAL AMENDMENT POWERS. THE CASE OF POLAND[2]

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Summary. Ongoing discussions on the need to amend the effective Constitution of the Republic of Poland of 2 April 1997 or to enact a new Fundamental Law have made the question on the limits of permitted modifications of system-related decisions to become increasingly pertinent also in the context of Polish constitutional law. The question posed above naturally raises further questions: the importance of the constitution itself, its role in the legal system, the relationship between constituent power and constituted power, as well as the interdependence between constitutionalism and democracy. These questions are well embedded in theoretical and legal considerations, and the answers to them depend to a large extent on the adoption of specific initial assumptions.

Keywords: constitutional amendment; Constitutional Identity; Constitution of the Republic of Poland; democracy.

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Tożsamość konstytucyjna jako implikowane ograniczenia uprawnień do zmian konstytucyjnych. Przypadek Polski. Trwające dyskusje na temat potrzeby zmiany obowiązującej Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. bądź uchwalenia nowej ustawy zasadniczej sprawiły, że kwestia granic dozwolonych modyfikacji decyzji systemowych staje się coraz bardziej istotna również w kontekście polskiego prawa konstytucyjnego. Postawione pytanie badawcze w naturalny sposób rodzi kolejne pytania: o znaczenie samej konstytucji i jej roli w systemie prawnym, jej związek z władzą, a także współzależność między systemem konstytucjnym a demokracją. Pytania te są dobrze osadzone w rozważaniach teoretycznych i prawnych, a odpowiedzi na nie w dużej mierze zależą od przyjęcia konkretnych założeń.

Słowa kluczowe: zmiana konstytucji, tożsamość konstytucyjna; Konstytucja Rzeczypospolitej Polskiej; demokracja.

1. INTRODUCTION

The subject matter related to the so-called unconstitutional amendments to the constitution is the focus of attention of contemporary constitutionalism[3]. Ongoing discussions on the need to amend the effective Constitution of the Republic of Poland of 2 April 1997 or to enact a new Fundamental Law have made the question on the limits of permitted modifications of system-related decisions to become increasingly pertinent also in the context of Polish constitutional law. The question posed above naturally raises further questions: the importance of the constitution itself, its role in the legal system, the relationship between constituent power and constituted power, as well as the interdependence between constitutionalism and democracy. These questions are well embedded in theoretical and legal considerations, and the answers to them depend to a large extent on the adoption of specific initial assumptions. At the same time, the normative solutions adopted in individual states and the related concepts of the limits of

[3] Cf. Y. Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, American Journal of Comparative Law 2013, Vol. 61, Issue 3; The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments, International and Comparative Law Quarterly 2013*,* Volume 62, Issue 03; J. I. Colón-Ríos, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin* America, Victoria University of Wellington Law Review, 2013 Vol. 44 Issue 3, Y. Roznai, *Unconstitutional Constitutional Amendments*. *The limits of amendment power,* Oxford 2017; R. Albert, *Constitutional Amendment and Dismemberment*, Yale Journal of International Law 2018 Vol. 43, Issue 1.; D. Landau, R. Dixon, Y. Roznai*, From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras*, Global Constitutionalism Vol. 8, Issue 1, 2019.

admissibility of constitutional amendments formulated in judicial rulings prove that in constitutional practice it is difficult to find a golden formula for reconciling two – *prima facie* – opposing functions of the constitution. On the one hand, the stabilizing function, connected with guaranteeing the sustainability of the system-making decisions taken, and on the other hand, the dynamic function that allows for the modification of the original assumptions behind the system, which is often a reaction to changes in the political, economic or social context.

Taking into account the importance of the subject matter under consideration, it may be somewhat surprising that Chapter XII of the Constitution of the Republic of Poland, which regulates the issues of introducing changes to the Constitution, fails to directly regulate at least several issues, leaving room for doubt. One of them is certainly the problem of the possible adoption of a new constitution, i.e. a complete formal amendment of the existing fundamental law. Since it lies outside the main thematic axis of this study, I consider it necessary to merely point out that, in my opinion, the Constitution of the Republic of Poland in its current wording of Article 235[4], does not allow for the introduction of such a change.

Moreover, the effective constitutional regulations do not subject any of the provisions of the Polish Fundamental Law to a non-changeability clause. In other words, the Constitution of the Republic of Poland lacks the so-called unamend-

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[4] Article 235 states that: *1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.*

2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.

3.The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.

5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.

6. If a bill to amend the Constitution relates to the provisions Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

7. After the conclusion of the procedures specified in para 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw).

able provisions. This imposes a significant hindrance to all considerations concerning the determination of the possible limits of the admissibility of changes to the Constitution (especially in the context of making so-called complete material changes). The absence of the so-called unamendable provisions in the Constitution means that any search for unamendable content within the framework of the fundamental law in force must focus on concepts which are referred to as implied[5], implicit[6], or intrinsic[7] limitations on the power of constitutional amendment. These concepts assume that - regardless of the presence in the text of the constitution of provisions explicitly prohibiting the derogation of certain rules or regulations - it is possible to deduce from the body of constitutional regulations the prohibition of introducing particular changes. Their theoretical justification is based on the assumption of an existing distinction between the original and derived or secondary constituent power[8].

2. CONSTITUTIONAL IDENTITY AS AN IMPLIED LIMITATION OF CONSTITUENT POWER. GENESIS AND DEVELOPMENT.

In the political practice of modern states, the most frequently quoted example of the concept of implied prohibitions on amending the constitution is the so-called basic structure doctrine of the Constitution of India[9].

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[5] R. Dixon, Constitutional Amendment Rules: A Comparative Perspective, (University of Chicago Public Law & Legal Theory Working Paper No. 347, 2011), pp. 97; available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1070&context=public_law_and_legal_theory (access: 15 April 2019).

[6] In regard to amending constitutional amendment rules see: R. Albert, *Amending constitutional amendment rules***,** International Journal of Constitutional Law, Volume 13, Issue 3, July 2015, pp. 655–685.

[7] Y. Roznai, Towards a Theory of Constitutional Anamendability: On the Nature and Scope of Constitutional Amendments Powers, Ius Politicum No. 18 available at: http://juspoliticum.com/uploads/jp18-t01_roznai.pdf

[8] K. Gözler, *Le Pouvoir de Révision Constitutionnelle*, Thèse, Bordeaux IV, Université Montesquieu, 1995, p. 12-32; K. Gözler, *Pouvoir constituant*, Bursa, Éditions Ekin Kitabevi, 1999, p. 10-28. For a similar distinction see R. Guastini, "On the Theory of Legal Source", *Ratio Juris*, 20(2), 2007, p. 302, p. 307-308. Y. Roznai, Towards a Theory of Constitutional Anamendability:…

[9] More broadly on this topic cf. Y. Roznai, *Unconstitutional constitutional amendments*…, p. 54 et seq.; S. Krishnaswamy, *Democracy and Constitutionalism in India: a Study of the Basic Structure Doctrine*, Oxford University Press, 2010; D. G. Morgan, *The Indian Essential Features Case*, 30 International & Comparative Law Quarterly 1981, p. 307 et seq.; G.J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective'*, 4(3) International Journal of Constitutional Law 2006, p. 460 et seq.

This doctrine was formulated in the jurisprudence of the Supreme Court of India to justify the legitimacy of this Court to review the constitutionality of an amendment to the Constitution. It is based on the premise that the Constitution of India has certain fundamental characteristics that cannot be changed or destroyed by amendment. The concepts of implied prohibitions on amending the constitution were adopted in Belize[10], Kenya[11], and Colombia (*constitutional replacement doctrine*)[12]. At the same time, it is worth noting that the Indian basic structure doctrine was inspired by the theoretical thought of the German doctrine of law, referring to the concept of constitutional identity formulated by C. Schmitt[13].

C. Schmitt based his concept of constitutional identity on Sieyès's distinction between constituent and constituted power. As stated by M. Polzin, the author of "Constitutional Theory" transposed Sieyès's thought, formulated in the historical context of the French Revolution, into the situation of an "ordinary" (in contrast to "extraordinary") status of the state[14]. According to Schmitt, the will of the constituent power (in simplified terms: nation or monarch[15]) created legitimacy for the validity of the constitution[16]). Only in such an understanding did the constituent power have the competence to decide on the fundamental questions of „the type and form of its own political existence"[17]. These key decisions (in relation to issues such as the form of government, human rights, or division of powers) constituted in Schmitt's view the so-called „positive constitution"[18], which should be distinguished from a written/formal constitution (i.e. „relative"[19]

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[10] J.I. Colón-Ríos, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America*, 44(3) Victoria University of Wellington Law Review (2013), p. 521.

[11] R. Stacey, *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process*, 9(3-4) Int'l. J. Const. L. (2011), p. 589.

[12] A. Bulkan, *The Limits of Constitution (Re)-Making in the Commonwealth Caribbean: Towards the "Perfect Nation"*, 2(1) Can. J. Hum. Rts. (2013), p. 81.

[13] The doctrine of "basic structure" was introduced introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, Limitation of Amendment Procedures and the Constituent Power, 15-16 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970). For D. Conrad's influence on the Indian Supreme Court, see A. G. Noorani, "Behind the Basic Structure Doctrine: On India's Debt to a German Jurist, Professor Dietrich Conrad", 18 FRONTLINE (April 28 - May 11, 2001), available at http://www.hinduonnet.com/fline/ fl1809/18090950.htm.

[14] Cf. M. Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law,* International Journal of Constitutional Law 2016, Vol. 14 No. 2., p. 420.

[15] Cf. C. Schmitt, *Constitutional Theory*, Warsaw 2013, p. 142–151.

[16] Cf. C. Schmitt, *Constitutional Theory* …, p. 143 and 161.

[17] Cf. C. Schmitt, *Constitutional Theory* …, p. 145-146.

[18] Cf. C. Schmitt, *Constitutional Theory* …, p. 54.

[19] Cf. C. Schmitt, *Constitutional Theory* …, pp. 39.

constitution if we follow Schmitt's terminology). As a result, with regard to the Weimar Constitution, Schmitt stated that it consisted of two types of provisions: firstly, the provisions that constituted the fundamental decisions concerning the political system, and thus forming the „true" constitution, and secondly, the less important provisions that were simply „constitutional laws"[20].

The concept of constitutional identity, which emerged in Germany during the period of the Weimar Republic, underwent a significant reinterpretation in German jurisprudence and after many decades, on the basis of the existing Fundamental Law of the Federal Republic of Germany of 1949 and the perpetual clause of Art. 79 (3) which was introduced into it, it was (in a substantially modified form) introduced into the constitutional jurisdiction by the Federal Constitutional Court (*Bundesverfassungsgericht*; hereinafter: FCC) in its judgment concerning the Lisbon Treaty[21], and further developed in subsequent rulings.[22] The FCC used the term „constitutional identity" to define the limits of the constitutionally acceptable transfer of the competences of state bodies to the EU. This term is currently used in the doctrine of German law, in the sense similar to the basic structure doctrine.

In the context of the problem of determining the limits of admissibility of amendments to the Constitution of the Republic of Poland, the concept of constitutional identity is important, inter alia, because of the fact that the Constitutional Tribunal (*Trybunał Konstytucyjny*; hereinafter: CT) has referred to it in its jurisprudence.

3. CONSTITUTIONAL IDENTITY IN THE JURISPRUDENCE OF THE POLISH CONSTITUTIONAL TRIBUNAL. THE POTENTIAL AND THREATS.

The Polish CT introduced the term „constitutional identity" into its jurisprudence in the judgment of 24 November 2010, K 32/09 concerning compliance with the Constitution of the Treaty of Lisbon. The context of the ruling proves that this is a typical example of a constitutional borrowing[23]. In the grounds for

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[20] Cf. C. Schmitt, *Constitutional Theory* …, pp. 52 and 65.

[21] More broadly on this topic, M. Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power…,* p. 421 et seq.

[22] Cf. M. Hong, *Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court VerfBlog,* 2016/2/18, https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/

[23] W. Osiatyński, *Paradoxes of constitutional borrowing*, *International Journal of Constitu-*

the decision, it is easy to identify numerous similarities with the arguments previously formulated by the German FCC.

The CT pointed out in the ruling of 24 November 2010 that constitutional identity is closely related to the concept of national identity, which also encompasses tradition and culture. Constitutional identity is formed by competences covered by the prohibition on transfer pursuant to Article 90 of the Constitution. According to the CT, Article 90 of the Constitution remains the guarantee of the preservation of constitutional identity. Competences that are not transferable to an international actor (EU) reflect the values on which the Constitution is based. From this perspective, constitutional identity is therefore, as in the ruling of the FCC, a concept defining the "hard core" of the Constitution.

However, owing to the lack of unamendable provisions in the Constitution of the Republic of Poland, the CT had a much more difficult task than the German FCC. When establishing the so-called objective order of values reflected in the Constitution, it could only rely on the assumption of an internal hierarchy of constitutional norms, the systematics of the fundamental law (including both its particular chapters and particular provisions) and last, but not least, the content of Article 235 of the Constitution. In this context, it should be stressed that the fundamental problem of the Tribunal's understanding of constitutional identity, as in the case of other concepts of implied prohibitions of constitutional changes related to fundamental laws not containing so-called perpetual clauses, is the allegation of arbitrariness. For this reason, in establishing a catalogue of unamendable norms, the CT should be exceptionally prudent. In this context, the general nature of the concept of constitutional identity, which characterizes the judgment of the CT of 24 November 2010, is not surprising.

Among the matters covered by the absolute prohibition on transfer, the CT included the provisions defining the fundamental principles of the Constitution and the provisions concerning the rights of the individual determining the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure a better implementation of constitutional values and the prohibition on transfer of constituent power and competences to create competences.

The concepts of the implied prohibitions of amending the constitution are usually judicial concepts, and therefore are and should be shaped gradually, *casu*

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tional Law, Volume 1, Issue 2, April 2003, pp. 244–268; The Migration of Constitutional Ideas, ed. S. Choudhry, Cambridge University Press 2007.

ad casum. The allegation of the arbitrariness of these concepts cannot be fully rebutted. Nevertheless, regardless of doubts as to the detailed catalogue of unalterable norms, the concepts of implied prohibitions of amending the constitution, including the Polish concept of constitutional identity, are well justified by the adoption of three theoretical assumptions: firstly, the limited character of the so-called secondary political power; secondly, the internal hierarchy of constitutional norms, and thirdly, the cohesion (harmony) of the constitution.

The role of signposts in the further judicial clarification of the concept of constitutional identity may be fulfilled by the standards of international law[24] and the constitutional orders of other states. Both the first and the second signposts for the jurisprudence of the CT are of the nature of the so-called comparative argumentation[25]. The foreign literature emphasises the need for prudence and a thorough analysis of foreign legal systems before resorting to comparative argumentation to justify a court decision.[26] Understandable also is the doubt as to whether arguments of a legal-comparative nature are adequate to determine the meaning of the concept from the definition referring to the features individualising and structuring the essence of the constitution of a given country. It should be noted, however, that the individualized nature of constitutional identity does not preclude that it may, to some extent, conceptually correspond to the standards of international law, as well as to the concepts of implied prohibitions of other countries in relation to amending their constitutions[27].

4. IMPLIED LIMITATIONS ON AMENDMENTS TO THE CONSTITUTION AND CONSTITUTIONAL REVIEW

The issue of the limitations on the admissibility of changing the constitution is complemented by the issue of the competence of constitutional courts to

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[24] The significance of international law standards in determining the content of unamendable norms was pointed out by L. Garlicki in the context of the Polish constitutional law, cf. L. Garlicki, *Normy konstytucyjne relatywnie niezmienialne* (in) in:) *Charakter i struktura norm konstytucji,* ed. J. Trzciński, Warszawa 1997, pp. 152-153.

[25] Cf. A. Paprocka, *Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego*, Państwo i Prawo 7/2017, pp. 37-54.

[26] Cf. *The Use of Foreign Precedents by Constitutional Judges*, ed. T, Groppi, M.C. Ponthoreau, Oxford, Portland 2013; M. Bobek, *Comparative Reasoning in European Supreme Courts*, Oxford 2013; G. Halmai, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague 2014.

[27] R. Dixon, D. Landau, Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Amendment, International Journal of Constitutional Law, vol.13, no. 3, pp. 606–638, 2015.

examine the constitutionality of laws amending the constitution. This issue is firmly anchored in the political practice of individual states[28]. It raises a great deal of controversy, not least because of the political background to such matters. From a theoretical perspective, doubts arise as to the possibility of examining the conformity with the constitution of norms which, by changing the constitution, inherently have the same legal force. While the competence of the constitutional court to examine the constitutionality of a law amending the constitution is not usually controversial, the question of the admissibility of substantive control of the compliance of such a law with constitutional norms is the subject of lively in the theory of constitutional law. Interestingly, in current political practice, the rule is that constitutional courts which decide to carry out such a review do not have a clearly assigned competence under constitutional or statutory norms. The theoretical justification for exercising control over the constitutionality of constitutional amendments is based on the principle of the superiority of the constitution and the assumption of the limited scope of the so-called secondary constituent power. Since the introduction of amendments is a competence vested in a given body by the constitution, the amendment itself: "is not and cannot be the whole of the constitution"[29].

An attempt to transfer these determinations on to the ground of the Polish political order leads to the conclusion that – owing to the expressly guaranteed superiority of constitutional norms and the implied limitations imposed on the amendment of the Polish Fundamental Law – constitutional amendments must not violate the constitutional identity of the Republic of Poland.

However, the dogmatic and legal analysis of the provisions of the Constitution does not unequivocally answer the question of whether the Polish CT has the competence to examine the substantive compliance with the Constitution of laws amending it. The main question is whether the act amending the Constitution under Article 235 is encompassed by the concept of the act from Article 188(1) of the Constitution of the Republic of Poland. If we take the form of a normative act as a criterion, there is no doubt that the Act on amending the constitution, despite its different, higher legal force and the rigid procedure of enactment specified in Article 235, is an act in the broad understanding of this word. If as a classification criterion we take legal force and place it in the hierarchy of sources of law,

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[28] More broadly on this topic cf. K. Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Bursa 2008; M. A. Cajas-Sarria, *Judicial review of constitutional amendments in Colombia: a political and historical perspective*, The Theory and Practice of Legislation 2017, Vol. 5, Issue 3, pp. 1955–2016

[29] U. Baxi, *Some Reflections on the Nature of Constituent Power* (in:) *Indian Constitution – Trends and Issues*, eds. R. Dhavan, A. Jacov, N.M. Tripathi, New Delhi 1978, p. 123.

it becomes evident that this type of normative act is generically different from statutes.

The adoption of a thesis on the admissibility of the substantive review of the constitutionality of constitutional amendments by the CT may be based on one of two arguments, which are not mutually exclusive The first is based on a purely theoretical argument, which is the assumption of the limited character of the secondary constituent power, and in addition on the internal hierarchy of constitutional norms and the harmony (cohesion) of the constitution as a whole. The second is based on dogmatic and legal argument, with the adoption of such an interpretation of the concept of an act to amend the Constitution, as recognizes that this act falls genre-wise within the concept of acts under Article 188(1) of the Constitution.

A positive answer to the question as to whether the CT has the competence to carry out substantive control over the constitutionality of acts which amend the Constitution requires the determination of a number of important issues, such as the procedure for initiating such a case before the constitutional court or the consequences of a judgment on the unconstitutionality of a law amending the Constitution. In relation to the first of the indicated problems, it should be noted that owing to the technical and legal specificity of the nature of constitutional amendments, the act on amending the Constitution, when *vacatio legis* ceases to exist, enters into force and thus changes the existing content of the norms of the Constitution. Therefore, the best procedure for initiating such cases before the CT would be the procedure of preventive control, initiated, pursuant to Article 122 of the Constitution, at the request of the President of the Republic of Poland. Moreover, it is also necessary to consider whether the subsequent control of the act on amending the Constitution is at all admissible and practicable in the Polish legal system. The already mentioned specificity of the technique of changing the Constitution, i.e. amendment, has the effect that, with the entry into force of the act on amending the Constitution, it loses its normative separateness. The consolidated (unified) text of the amended Constitution will already contain the content modified by the amending law. This issue is connected with the problem of determining the consequences of a potential confirmation of the unconstitutionality of a law amending the Constitution. While in the case of preventive control, such an effect is easy to determine and raises no reservations (lack of entry into force of an unconstitutional act on amending the Constitution), in the case of examining the constitutionality of a constitutional amendment a posteriori, it raises a great deal of theoretical and legal doubts (establishment of an internal contradiction between the norms of the already amended Constitution).

The acceptance of the thesis of the competence of the CT to verify the constitutionality of an amendment to the Constitution also requires reflection on the

specificity of an applicable constitutional model, i.e. the constitutional identity of the Republic of Poland. The analysis of this issue highlights the above-mentioned assumptions of the internal hierarchy of constitutional norms and the coherence (harmony) of the Constitution as a whole. The main problem in this context is to determine the content of the constitutional model. Because the concept of constitutional identity is imprecise, the allegation that constitutionality is being controlled through the prism of an undetermined model arises. This allegation cannot be ignored, although it should be borne in mind that the body of rulings of every constitutional court is developed gradually, and the content of individual constitutional norms is often expressed in general, conceptually open, terms such as social justice, the democratic rule of law, and human dignity. This means that regardless of the adoption of the concept of constitutional identity as the limit of admissibility of amendments to the Constitution of the Republic of Poland, constitutional norms serving as models in the process of control of the constitutionality of law often require gradual concretization possible along with the cases appearing in the constitutional court. What distinguishes the concept of constitutional identities from other constitutional models is, first of all, its considerable complexity and, secondly, the possibility of applying it to the control of the constitutionality of acts on amending the Constitution.

With regard to the issue of the review of the constitutionality of acts amending the Constitution by the CT, it should also be stressed that apart from the theoretical and dogmatic legitimacy of such review, the constitutional court, when deciding to review its amendment with the Constitution, should have exceptionally strong social legitimacy. It is difficult to imagine the acceptance of a decision on such a fundamental issue by the constitutional court in a situation where, by virtue of a prolonged constitutional crisis or other non-legal reasons, it has lost public trust. Social legitimacy, rather than political legitimacy, should be of key importance, as the latter may be limited by the conflict between the constituent power and the constitutional court on the grounds of the allegation that the secondary legislator exceeded its powers.

5. FINAL REMARKS

The concept of unconstitutional amendments, which is currently highly topical, is based based on three theoretical assumptions. The first, fundamental, assumption is the one originating from Sieyes, namely the premise of the need to distinguish between the constituent and legislative power. Nowadays it is well developed. In its present form, it also stresses the need to distinguish between

two types of constituent power: original and derived. Further assumptions are auxiliary in nature. One of them is the assumption of an internal hierarchy of constitutional norms. It is the easiest way to base the concept of unconstitutional changes to the constitution in those countries where so-called perpetual clauses exist, i.e. unamendable provisions. The second auxiliary assumption refers to the idea of the cohesion (harmony) of the constitution as a whole. This assumption fits best with the concept of implied limits of constitutional amendment powers, including the basic structure doctrine and constitutional identity concept.

The introduction by the Polish CT of the concept of constitutional identity into the jurisprudence in the judgment concerning the constitutionality of the Treaty of Lisbon opens the discussion on the meaning of this concept in the context of unconstitutional constitutional amendments. Although, as with any concept of the implied limits of constitutional amendment powers, constitutional identity can easily be accused of arbitrariness, it contains considerable potential. Its further clarification is the task of the CT, but also, especially in the current situation in Poland, of representatives of the science of constitutional law and the theory of law. In clarifying the concept of constitutional identity, both the standards of international law and the constitutional orders of other countries may play a significant role. The individualized nature of constitutional identity does not preclude that in some respects it will be in line with the standards of international law, as well as with the concepts of the implied prohibitions of other states against amending their constitutions.

However, because of the ongoing constitutional crisis and the de facto destruction of the social legitimacy of the CT, the assessment of the conceptual complementation of the idea of unconstitutional amendments, i.e. the problem of the CT's competence to review compliance with the Constitution of the amendment of the Constitution of 2 April 1997, requires considerable reservations[30]. After all, it is quite likely that the CT, taken over by the ruling party, would issue a decision which in practice would constitute a formal confirmation of compliance with the Constitution of the amendments introduced by the parliament[31].

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[30] More on the topic of "hostile takeover" of the Constitutional Tribunal cf. W. Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, Hague Journal of the Rule of Law 2019, Vol. 11, Issue 1, pp.63–84.

[31] More on the topic of abberational interpretation of the concept of constitutional identity in the body of rulings of the Hungarian Constitutional Court cf. G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, Review of Central and East European Law, Vol 43, issue 1, pp.

BIBLIOGRAPHY:

Albert R., *Amending constitutional amendment rules***,** International Journal of Constitutional Law, Volume 13, Issue 3, July 2015.

Albert R., *Constitutional Amendment and Dismemberment*, Yale Journal of International Law 2018 Vol. 43, Issue 1.

Baxi U., *Some Reflections on the Nature of Constituent Power* (in:) *Indian Constitution – Trends and Issues*, eds. R. Dhavan, A. Jacov, N.M. Tripathi, New Delhi 1978.

Bobek M. , *Comparative Reasoning in European Supreme Courts* , Oxford 2013.

Bulkan A., *The Limits of Constitution (Re)-Making in the Commonwealth Caribbean: Towards the "Perfect Nation"*, 2(1) Canadian Journal of Human Rights (2013).

Cajas-Sarria M. A., *Judicial review of constitutional amendments in Colombia: a political and historical perspective*, The Theory and Practice of Legislation 2017, Vol. 5, Issue 3.

Colón-Ríos J. I., *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin* America, Victoria University of Wellington Law Review, 2013 Vol. 44 Issue 3.

Conrad D., *Limitation of Amendment Procedures and the Constituent Power,* 15-16. Indian Yearbook of International Affairs 375 (1970).

Dixon R., *Constitutional Amendment Rules: A Comparative Perspective*, " (University of Chicago Public Law & Legal Theory Working Paper No. 347, 2011), pp. 97; available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1070&context=public_law_and_legal_theory (access: 15 April 2019).

Dixon R., Landau D., *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Amendment, International Journal of Constitutional Law*, Vol.13, No. 3.

G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, Review of Central and East European Law, Vol 43, Issue 1.

Garlicki L., *Normy konstytucyjne relatywnie niezmienialne* (in:) *Charakter i struktura norm konstytucji,* ed. J. Trzciński, Warszawa 1997.

Gözler K., *Le Pouvoir de Révision Constitutionnelle*, Thèse, Bordeaux IV, Université Montesquieu, 1995.

Gözler K., *Pouvoir constituant*, Bursa, Éditions Ekin Kitabevi, 1999.

Gözler K., *Judicial Review of Constitutional Amendments: A Comparative Study*, Bursa 2008;

Guastini R., "On the Theory of Legal Source", *Ratio Juris*, 20(2), 2007.

Halmai G., *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague 2014.

Hong M., *Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court VerfBlog,* 2016/2/18, https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/.

Jacobsohn G.J., *An Unconstitutional Constitution? A Comparative Perspective'*, 4(3) International Journal of Constitutional Law 2006.

Krishnaswamy S., *Democracy and Constitutionalism in India: a Study of the Basic Structure Doctrine*, Oxford University Press, 2010.

Landau D., Dixon R., Roznai Y., From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras, Global Constitutionalism Vol. 8, Issue 1, 2019.

Morgan D. G., *The Indian Essential Features Case*, 30 International & Comparative Law Quarterly 1981.

Noorani A. G., Behind the Basic Structure Doctrine: On India's Debt to a German Jurist, Professor Dietrich Conrad, 18 FRONTLINE (April 28–May 11, 2001), available at http://www.hinduonnet.com/fline/ fl1809/18090950.htm.

Osiatyński W., *Paradoxes of constitutional borrowing*, *International Journal of Constitutional Law*, Volume 1, Issue 2, April 2003.

Paprocka A., *Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego*, Państwo i Prawo 7/2017.

Polzin M., *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law,* International Journal of Constitutional Law 2016, Vol. 14 No. 2.

Roznai Y., *The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments*, International and Comparative Law Quarterly 2013*,* Volume 62, Issue 3.

Roznai Y., *Towards a Theory of Constitutional Anamendability: On the Nature and Scope of Constitutional Amendments Powers*, Ius Politicum No. 18 available at: http://juspoliticum.com/uploads/jp18-t01_roznai.pdf

Roznai Y., *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, American Journal of Comparative Law 2013, Vol. 61, Issue 3.

Roznai Y., *Unconstitutional Constitutional Amendments*. *The limits of amendment power,* Oxford 2017.

Sadurski W., *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, Hague Journal of the Rule of Law 2019, Vol. 11, Issue 1.

Schmitt C., *Constitutional Theory*, Warsaw 2013.

Stacey R., *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process*, 9(3-4) International Journal of Constiutional Law (2011).

The Migration of Constitutional Ideas, ed. S. Choudhry, Cambridge University Press 2007.

The Use of Foreign Precedents by Constitutional Judges, ed. Groppi T,. Ponthoreau M.C, Oxford, Portland 2013.