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CONSTITUTIONAL PRIORITIES  
AS AN EXAMPLE OF SUBSTANTIVE  
AMENDMENT OF THE CONSTITUTION

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**Summary.** The aim of this article is to present the phenomenon of constitutional priorities as an example of so-called informal constitutional change. Constitutional priorities are a form of informal (substantive) constitutional amendment. Constitutional priorities are construed as a process of determining or giving priority to certain constitutional rules (constitutional provisions) and assigning lesser importance to others. Constitutional priorities are not permanent, they are a response to emerging social and economic, as well as political issues (situational context). They follow the changing reality and have an impact on the content and understanding of the provisions of the Constitution. The “substitution” of constitutional priorities may proceed in a crawling

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manner, i.e. through transformation of the state (e.g. environmental protection and sustainable development) or in an immediate manner as a response to a serious threat to the state and its citizens.

**Keywords:** constitutional priorities, constitutional amendment, formal constitutional amendment, informal constitutional amendment.

**Zjawisko priorytetów konstytucyjnych jako przykład tzw. zmiany nieformalnej konstytucji.** Celem artykułu jest przedstawienie zjawiska priorytetów konstytucyjnych jako przykładu tzw. zmiany nieformalnej konstytucji. Przez priorytety konstytucyjne rozumiemy proces ustalania lub przyznawania pierwszeństwa jednym normom konstytucyjnym (przepisom konstytucyjnym) oraz wyznaczania podrzędnego znaczenia – innym normom konstytucyjnym. Priorytety konstytucyjne nie są stałe, stanowią one odpowiedź na pojawiające się problemy społeczne i gospodarcze, a także polityczne (kontekst sytuacyjny). Podążają za zmieniającą się rzeczywistością i mają wpływ na treść oraz rozumienie przepisów konstytucji. „Zamiana” priorytetów konstytucyjnych może się odbywać w sposób pełzający, tj. przez stopniowe przeobrażenia państwa (np. ochrona środowiska i zrównoważony rozwój), lub w sposób natychmiastowy jako reakcja na poważne zagrożenie dla państwa i jego obywateli.

**Słowa kluczowe:** priorytety konstytucyjne, zmiana konstytucji, formalna zmiana konstytucji, nieformalna zmiana konstytucji.

## 1. INTRODUCTION

Constitutional amendment is an inspiring subject for constitutionalists. It is repeatedly raised in search of a better vision of the state and law. On the one hand, we identify the desired amendments to the Basic Law, pointing to its shortcomings, weaknesses and defects. On the other hand, we note the acceptable limits of constitutional amendment by inquiring about its identity which determines its nature and substance (Wróbel, Ziółkowski, 2021). Our paper is intended to draw attention to the concept of the so-called constitutional priorities, which we believe to be one of the forms of informal (substantive) amendment of the constitution. Constitutional priorities are a response to a changing context of interpretation. That context has an effect on the content of constitutional provisions and may change the manner in which they are construed. In order to present the substance of constitutional priorities, we first define the concept of formal and substantive amendment of the constitution.

## 2. FORMAL AND SUBSTANTIVE AMENDMENT OF THE CONSTITUTION

1. The Constitution of the Republic of Poland of 2 April 1997 is formally amended by the so-called law amending the Constitution, adopted under Article 235 thereof. That provision stipulates that a draft law amending the Constitution may be proposed by the President,  $\frac{1}{5}$  of the deputies or by the Senate. The amending law is adopted in the same wording by the Sejm by a majority of at least  $\frac{2}{3}$  of votes in the presence of at least half of the statutory number of deputies and thereafter, within a period not exceeding 60 days, by the Senate – by a full majority of votes in the presence of at least half of the statutory number of senators. The Constitution provides for a national referendum if the amendment concerns the provisions of Chapters I, II and XII. The said procedure clearly shows that the amendment of the Constitution referred to in Article 235 is an interference with its text (partial amendment) (Granat, 2017a).<sup>1</sup> “Such interference often involves repealing certain provisions, adding new ones or replacing certain provisions with reworded provisions (which result, for example, from their restatement or modification of characters therein)” (Laskowska, 2018, p. 20). In our opinion, the provision of Article 235 of the Constitution does not provide a normative basis for the preparation and adoption of a new constitution for Poland. This view is not fully endorsed, since an argument to the contrary may be identified in the doctrine of law, according to which Article 235 of the Constitution regulates, in addition to partial amendment, the procedure for adoption of a new Basic Law and allows for derogation from the applicable one. Putting a debate in legal theory aside, it should be noted that formal amendment may either be partial or complete. Formal amendment is codified, formalized, multi-stage and follows a specific procedure. To date, the Constitution of the Republic of Poland has been amended twice. The first amendment concerned the European Arrest Warrant, and the other one – the so-called qualification of no criminal record of a deputy or senator.

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<sup>1</sup> “Amendments permitted under Article 235 may be impossible since there exists a value defined as the identity of the Constitution of the Republic of Poland (constitutional identity). The significance of that construct is not yet recognized in our doctrine. However, it seems that it may act as a barrier blocking certain amendments or be a “filter” to amendments permitted under Article 235. Without that category introduced into the debate on the amendment of the constitution, we do not know which of them are acceptable and which should be rejected”.

2. Informal or substantive amendment does not concern the text of the Constitution, but its norms (Lis-Staranowicz, 2018, p. 84)<sup>2</sup> since they are sensitive to interpretation. It is not codified and is effected outside the framework of Article 235 of the Constitution. “There are gaps in the language of the Constitution which are filled by case-law and systematic interpretation [...]. The constitution is not an infeasible construct, a form of monument, but an act which, due to the porosity of its normative structure, is animated by practice. The life of the constitution involves interpreting its provisions. Therefore, application of the constitution is not something radically different from the constitution itself” (Granat, 2019, p. 136). The content of a constitutional norm is affected by the environment (context) in which it applies. The relationship between the context and the content of a constitutional rule is perfectly illustrated by Article 83 of the Constitution of 22 July 1952, which was only repealed in 1997. That provision guaranteed freedom of speech, printing, assembly, rallies and demonstrations. Exercising that freedom was facilitated by making “the printing works, paper resources, public buildings and halls, means of communication, the radio and other necessary material means available for use to the working people”. From 1952 to 1989, freedom was granted to every citizen, but it was fenced off by the “barbed wire” of socialism. Freedom was only allowed within the framework of one indisputable socialist idea. Therefore, it was a sham freedom, since transgressing the bounds of that idea was severely punished. The “purity” of thought was guarded by censorship, the purpose of which was “removal” of words, thoughts and views incompatible with the state’s socialist regime. In 1989, as a result of political changes, the provision of Article 83 of the Constitution became a source of freedom of speech within the liberal meaning. Therefore, censorship was abolished and illegal magazines became legal. The context in which Article 83 of the Constitution applied had an impact on the legal norm decoded therefrom, but above all it was important for the limits of freedom of speech in Poland.

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<sup>2</sup> Based on the example of the U.S.: “In simplified terms, the procedure of informal amendment is as follows. First, under pressures such as civil war, world war, economic crisis, social crisis, terrorism, technological progress, there is a change in social, economic and political conditions that make it necessary, as indicated by the nation, its representative bodies or elites, to adjust the constitution. Second, the representative bodies do not attempt to adopt formal amendments or such attempts are unsuccessful. Third, in such a situation, the understanding of constitutional norms changes, while the identity of the constitution as to its wording is maintained. Fourth, the content of a substantive amendment is determined by means of a sometimes turbulent dialogue between the nation, its representative bodies and the Supreme Court”.

### 3. CONSTITUTIONAL PRIORITIES

1. Constitutional priorities are a form of informal (substantive) constitutional amendment. The concept of constitutional priorities is based on the assumption that: a) the constitution is a legislative act which is applied, respected and implemented by the state, b) constitutional rules should be implemented to the maximum legal and actual extent possible, c) in a particular (political, legal and economic) context, priority is given to certain constitutional rules while others become subordinated to them. Therefore, constitutional priorities are construed as a process of determining or giving priority to certain constitutional rules (constitutional provisions) and assigning lesser importance to others. Constitutional priorities are not permanent, they are a response to emerging social and economic, as well as political issues (situational context). They follow the changing reality and have an impact on the content and understanding of the provisions of the Constitution. The “substitution” of constitutional priorities may proceed in a crawling manner, i.e. through transformation of the state (e.g. environmental protection and sustainable development) or in an immediate manner as a response to a serious threat to the state and its citizens.

In our opinion, a) the obligation to counteract epidemic threats (Article 68(4)), ecological safety (Article 74) and border surveillance (Article 5 and Article 26 of the Constitution) is a priority in Poland today.

2. Epidemic safety. The obligation of the state to counteract epidemic threats (epidemic safety) has its source in the Constitution. Since March 2020, Article 68(4) of the Constitution, hitherto a little-known provision, has set the main direction of state policy. Pursuant to that provision, “Public authorities shall combat epidemic diseases and prevent the negative effects of environmental degradation on health”. From the entry into force of the Constitution until the onset of the COVID-19 pandemic, it was overshadowed by other constitutional provisions. As Katarzyna Daszkiewicz-Miastkowska notes, “In the Polish research area, the issue of combating epidemic diseases is analyzed mainly from the perspective of mandatory preventive vaccinations, obligatory treatment or the operation of the National Health or Veterinary Inspectorate” (Daszkiewicz-Miastkowska, 2017, p. 73). Thus, the state’s obligations in relation to combating epidemic diseases were dominated by preventive actions, including the introduction of the so-called mandatory preventive vaccinations (Daszkiewicz-Miastkowska, 2017, p. 70–71). That provision was, *inter alia*, an argument of defence against the pleas of members of the anti-vaccine movement who, in the proceedings before the Constitutional Court, argued that compul-

sory vaccinations contravened the right to privacy and human dignity derived from the Constitution. In turn, the Sejm, as a participant in the proceedings pending before the Constitutional Court, emphasized that “[...] Article 68(4) of the Constitution stipulates an obligation incumbent on the legislator to design a preventive vaccination system in such a manner as to simultaneously protect the community of citizens (including individuals) from the threat of epidemics and to protect individuals from potential negative side effects of vaccination. That obligation should be discharged by adopting a specific model of preventive vaccination applicable in the state. The Constitution does not specify the design of that model, since it extends beyond legal issues and is determined by the epidemiological status, current medical knowledge and the level of public awareness as to the benefits of preventive vaccination. In other words, the provisions of the Constitution refer to the issue of a preventive vaccination system inasmuch as the constitutional provisions give rise to an obligation of the legislator to adopt statutory regulations that will ensure citizens’ right to health and provide protection against epidemic diseases. In view of the above, in the opinion of the Sejm the established obligation of preventive vaccination is indispensable under Polish conditions in order to accomplish the task of protection of both individual and public health”.<sup>3</sup> In the pre-pandemic era, the constitutional obligation to combat epidemic diseases concerned the area of medicine, public health and was of a preventive nature (Florczak-Wątor, 2021). Such understanding of Article 68(4) of the Constitution prevailed.

On the other hand, in the pandemic era, that obligation should be subject to a more extensive analysis. First, a state of epidemic seems to be a prerequisite for a declaration of a state of natural disaster, which is a “serious” interference with the constitutional status of an individual in the state. Second, “the obligation to combat epidemic diseases” should be construed as all activities related to eradicating infection, preventing its spread, countering and combating its effects, including those of a socio-economic nature.<sup>4</sup> Third, maintaining epidemic safety, as indicated by the practice of the last two years, requires a mass and immediate restriction of the exercise of constitutionally guaranteed rights and freedoms (Florczak-Wątor, 2020, p. 6). During the first wave of the

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<sup>3</sup> See: the position of the Sejm in proceedings before the Constitutional Court expressed in case SK 95/20, BAS-WAK-2572/20. The Constitutional Court has not yet resolved the issue of compulsory vaccination. So far, the Supreme Administrative Court has expressed its opinion on the issue and has not held that obligation to be in contradiction to the Constitution.

<sup>4</sup> See: Article 2 of the Act of 2 March 2020 on special measures for the prevention, counteraction and eradication of COVID-19, other infectious diseases and the crisis situations caused by them (consolidated text: Journal of Laws of 2020, item 1842, as amended).

pandemic, the restrictions introduced by the state, albeit disputed as to their constitutionality, were accepted by a majority, which, in order to protect life and health, was willing to give up a significant part of its freedom – such as freedom of movement, freedom of assembly and association, or use of cultural goods (Morawski, 2020, p. 7–16). Therefore, in the current situational context, ensuring epidemic safety has become a priority and personal freedom and privacy have become secondary and subordinate thereto. In the post-pandemic future, those values may be reversed in favor of freedom and privacy.

3. The right to a clean environment, including the right to clean air, is one of the most topical and urgent issues related to the operation of modern states, including Poland. It is not due to the fact that pollution of the environment became a problem only a year or two ago, but because it is only recently that the issue has become a sweeping subject of political and social debate in the EU forum and thus also in Poland. It is mainly due to an increase in the awareness of the residents of Poland, who, alarmed by scientific data on the environment's poor quality, began to associate in various types of organizations and “force” central and local government bodies to take specific actions. Citizens' actions also include increased litigation, and statements of claim filed against the State Treasury by public figures (e.g. actors) has contributed to publicizing environmental protection issues to an even greater extent. However, it should be clearly noted that Polish Constitution of 1997, despite containing many so-called environmental regulations, does not stipulate a subjective right to a high quality environment (Doktór-Bindas, 2020, p. 106 et seq.). It is primarily due to the fact that at the time it was drafted, ensuring clean air and access to clean water for the citizens (or more broadly, the residents) of our country was not recognized as a constitutional priority by the legislator. Today, however, the situation has reversed. Not only have people begun to notice the problem of polluted environment – dirty water, poisoned and barren soil, contaminated air – but they have also begun to strongly demand that the state take appropriate action to solve those problems and prevent them in the future.

Concurrently, it is worth emphasizing that despite the fact Polish Basic Law failed to stipulate an independent subjective right to a clean environment, that issue is not entirely ignored by the provisions of law. It should be remembered that the issue is regulated by the provisions of international and EU law, which entails the obligation they be complied with and duly implemented, also by Poland. In addition, various “compartments” of the environment are regulated by individual national laws, among which a particular place is held by the Environmental Protection Act (consolidated text: Journal of Laws of 2021,

item 1973). Therefore, it may be assumed that the right to a quality environment should be deduced from a series of different provisions, and at the same time the provisions of the Constitution of the Republic of Poland itself should also be interpreted in a clear pro-environmental context (Trzewik, 2016). It is necessary, or even required from the perspective of a social belief in the importance of the environment for the life and health of people and the citizens' clear expectation that the manner in which the state has operated to date will change. Thus, under the "green" provisions of the Constitution, on the one hand, we are trying to derive the constitutional right to clean air and water, and on the other, we are limiting the constitutional freedom of economic activity and the right to property in order to implement the "green" rules of the Basic Law.

4. In the current political and social context, the obligation to protect the border is becoming especially relevant. Pursuant to Article 5 of the Constitution, Poland shall safeguard the independence and integrity of its territory, and in accordance with Article 26 of the Constitution, the Armed Forces shall ensure the inviolability of Polish borders. Pursuant to Article 1 of the State Border Protection Act of 12 October 1990 (consolidated text: Journal of Laws of 2019, item 1776, as amended), the state border is a vertical space along the border line which separates the territory of Poland from the territories of other states and high seas. The state border also separates airspace, water and subterranean areas. As indicated in security science, the border carries out three major functions (Jakubczak, 2019, p. 13). Its military function is to block armed attacks (e.g. hybrid aggression). The second, economic function is to provide a barrier against illegal movement of goods and services (e.g. arms and drug trafficking), while the third one, of a social nature, is to prevent illegal movement of persons between countries, "stopping illegal migration and trafficking in human beings and their organs" (Jakubczak, 2019, p. 13). In view of the migration crisis at the Polish-Belarusian border, a state of emergency was declared in Poland on part of its territory,<sup>5</sup> as the existing measures failed to fully secure the border.<sup>6</sup> As provided for in the regulation, the state of emergency was declared due

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<sup>5</sup> Regulation of the President of the Republic of Poland of 2 September 2021 on the declaration of a state of emergency in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship (Journal of Laws, item 1612); 1 October 2021 on the extension of the state of emergency declared in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship (Journal of Laws, item 1788).

<sup>6</sup> The justification for the imposition of the state of emergency emphasizes the exceptional nature and extraordinary scale of migratory pressure on the Polish-Belarusian border, which has its source in the intended and planned activities of the Belarusian services, aimed at destabiliz-

to a particular threat to the security of citizens and public order. During the state of emergency, the right to organize and hold assemblies and mass events was suspended and an obligation to carry an identity card or another valid document was imposed. A prohibition to stay in designated places, facilities and areas located in the area covered by the state of emergency at specified times was introduced, as well as a prohibition to capture the appearance or other characteristics of specific places, objects or areas located in the area covered by the state of emergency using technical means. Access to public information on activities carried out in the area covered by the state of emergency in connection with the surveillance of the state border and the prevention of and counteracting illegal migration has also been restricted (§ 2 of the Regulation).<sup>7</sup> In order to “physically” protect the border, the Act of 29 October 2021 on the construction of state border protection installations (Journal of Laws, item 1992) was adopted, consisting in the erection of a structure (wall). The above measures were intended to secure the border endangered by the migration crisis. In this frame of reference, the state of emergency, which, pursuant to Article 230 of the Constitution, may be imposed only in the event of a threat to the constitutional system of the state, the security of citizens or public order, has served the state to secure the border against an external threat. Moreover, in the current situational context, border surveillance has become a constitutional priority, while other constitutional values (human freedom) have become secondary and subordinated thereto.

The constitutional regulation on the state of emergency does not fully correspond to the assumptions resulting from the necessity to secure the state border. The destabilization of the situation at the border and the influx of migrants from the territory of Belarus should rather be regarded as a factor of “external threat”, which is construed as rationale to declare martial law. Yet, there can be no question of an armed attack on the territory of the Republic of Poland, and

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ing the situation at the border with Poland and other Member States of the European Union, i.e. Lithuania and Latvia. Therefore, it is therefore “to eliminate all situations that may hinder the activities of Polish services carrying out their mission at the border with the Republic of Belarus. This will allow Border Guard officers and soldiers of the Armed Forces to effectively carry out tasks in the border area covered by the crisis situation” – justification of the proposal of the Council of Ministers to declare a state of emergency.

<sup>7</sup> It is indicated in the doctrine of the law that the state of emergency declared is illegal because it was intended to protect citizens and their state, “but in this case there is an attack on citizens’ rights and constitutional order under the guise of border surveillance” – as in R. Piotrowski, *Stan wyjątkowy zamiast chronić obywateli, zwiększa zagrożenie kraju i obywateli* [8 arguments], [on-line] okopress: <https://oko.press/stan-wyjatkowy-zamiast-chronic-obywateli-8-argumentow/>.

therefore the provisions of Article 229 of the Constitution are also not fully adequate to the circumstances. The “threat” should undoubtedly be deemed external, however, it destabilizes the internal situation in the country.

Thus, it must be assumed that the provisions of Polish Basic Law do not fully correspond to the conditions that underlie the declaration of a state of emergency. Within such legal framework, state authorities have two options for action: first, formal amendment of the Constitution or, second, an appropriate interpretation of the existing provisions of the Constitution in view of the current context. For obvious reasons, formal amendment will be difficult to implement, and therefore also unrealistic. Consequently, the second solution is a natural choice, although as it seems, not the only one. On 30 November 2021, the President of the Republic of Poland signed the Act of 17 November 2021 amending the State Border Protection Act and certain other acts (Journal of Laws, item 2191). In fact, that Act replicates the conditions that underlie the declaration of a state of emergency and produces similar legal effects, although formally, of course, it does not impose the state of emergency. Therefore, its adoption raises justified concerns as to its conformity with the Constitution of the Republic of Poland.

In conclusion, the sudden and unexpected migration crisis affected the interpretation of the provisions of the Constitution on border surveillance and emergency states. Border surveillance has become a constitutional priority to which other values of the Constitution have been subordinated.

#### 4. WHO SETS CONSTITUTIONAL PRIORITIES?

In our view, constitutional priorities are set by political bodies, i.e. the Council of Ministers, the parliament and the President. The sequence of those bodies is not incidental, since the Council of Ministers pursues the entire internal and foreign policy of the state (Article 146 of the Constitution). It encompasses “activities intended to satisfy social, economic and political needs [...]”. Hence, the policy requires the Council of Ministers to set directions for development, devise strategies, establish the premises of social and welfare projects, prepare draft laws (Juchniewicz, 2021, p. 365). It is the first authority to respond to a changing social, political and economic context.<sup>8</sup> In response to emerging crises, it may present draft laws intended to pursue constitutional values of fun-

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<sup>8</sup> E.g., Regulation of the Council of Ministers dated 19 March 2021 on the establishment of certain restrictions, orders and prohibitions in connection with a state of epidemic (Journal of Laws, item 512).

damental importance to the Sejm.<sup>9</sup> The parliament also plays an important role by adopting laws implementing the provisions of the Constitution. The parliament, as a body representing diverse political views, has the tools to set constitutional priorities in the manner most consistent with the will of the people or by political consensus. In turn, the President, as the head of state, is competent to verify the priorities set by the parliament, vetoing adopted laws or lodging motions with the Constitutional Court (Witkowski, 2021, p. 331).

We believe the Constitutional Court to be the authority that sets constitutional priorities. The Constitutional Court is a body that “weighs” constitutional rights and freedoms or constitutional principles, giving priority to some and shifting others to the background. For example, in the financial crisis in 2009–2012, the Constitutional Court prioritized the constitutional principle of budgetary balance over the claims of citizens against the state based on the failure to duly implement social rights also derived from the Constitution (Granat, 2017b, p. 8).<sup>10</sup> Budgetary balance was an important value in the crisis of public finances.

It seems that every court, when resolving a dispute before it, faces the necessity to resolve a conflict of values, freedoms, rights and obligations. For example, the District Court in Olsztyn held that in the C19 era, the constitutional right to safe and hygienic working conditions was superior to the constitutional right to privacy of employees who were forced by the employer to notify any private travel abroad. Under the conditions of a raging pandemic, the employer was able, as the court noted, to demand such information, because he was obliged to ensure safe and hygienic working conditions (Verdict of the District Court in Olsztyn of 29 January 2021, file ref. no. IV Pa 79/20).

However, citizens who have the right to strike, the right to petition, the right to assembly and, above all, the right to vote, get the last word. By choosing certain political parties and their programs, they either opt for a liberal direction of economic freedom or for the freedom of economic activity with a wide range of embedded social benefits, the payment of which may affect the principle of budgetary balance. By exercising their political rights, citizens exert pressure on their representatives to implement values, norms and constitutional provisions (Lis-Staranowicz, 2020, p. 81). This is the manner in which they are prioritized.

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<sup>9</sup> E.g., governmental draft law amending the Act on electromobility and alternative fuels and some other acts, Sejm paper no. 1622/IX kad.

<sup>10</sup> “The tension between the exercise of constitutional rights of citizens and the conditions of public finances of the state during the crisis is reflected by the judgments of the Constitutional Court, the most important of which, in my opinion, concerned the issue of adjustment of pensions (K 9/12, item 1) and open pension funds (K 1/14, item 2)”.

## 5. CONCLUSIONS

A rigid constitution, by design, should be an act that is difficult to amend. Hindering amendment is one of the main guarantees protecting it against hasty modifications related to the pursuit of a specific state policy. Therefore, it may not be regarded as a defect of the Basic Law in a situation in which it “does not keep up” with the dynamically changing reality. After all, the Constitution should be a stable and timeless act. Therefore, the content of constitutional norms, formed in the process of its application, is natural and desirable for the proper operation of a modern state and society. The institution of constitutional priorities clearly shows which matters, and especially which values and state and social needs, prevail in a particular period of time and which concurrently become superior.

However, substantive amendment of the constitution also has its limits. Incidentally, it is also the case with formal amendment, which in many countries is subject to certain, more or less specific, restrictions on its potential modifications. It seems that in relation to substantive amendment of the constitution, such function will primarily be performed by two factors, both of which are not very “clear-cut” and specified more in the area of legal science, namely: the spirit of the constitution and the constitutional identity. Interpreting the provisions of the Basic Law in contradiction with its spirit or the identity of the constitution will in fact be *contra legem*.

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