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The Judicial Role in Constitutional Amendment and Dismemberment

The Constitution of the Republic of Lithuania was adopted by referendum on 25 October 1992, following the restoration of Lithuania's independence on 11 March 1990.

Its predecessors, i. e. the Constitutions of 1922, 1928 and 1938, which established the constitutional legal order of the State of Lithuania from 1918 until 1940 (i. e. prior to its occupation by the Soviet Union), had, too, codified the principal of the supremacy of the constitution, according to which "any law that contradicts the Constitution shall be invalid", however, they established no mechanism of the legal enforcement of this principle.

The Constitution of 1992, for the first time in the state's history, envisaged an institution of constitutional justice – the Constitutional Court, which was attributed the power "to decide whether the laws and other acts of the Seimas (i.e. the Parliament) are in conflict with the Constitution, and whether the acts of the President of the Republic and the Government are in conflict with the Constitution or laws" (Article 102).

The constitutional provisions on the status of the Constitutional Court (Articles 102-108), together with the constitutional provisions of Chapter XIV, which lay down the procedural requirements for the amendment of the Constitution, form the basis of the so-called Lithuanian constitutional doctrine on the constitutionality of constitutional amendments, which comprehends the constitutional grounds for the judicial review of constitutional amendments and the hierarchy of constitutional norms and principles as a criterion for establishing the constitutionality of such amendments. Consequently, the Lithuanian constitutional doctrine provides a quite comprehensive approach towards the invalidation of unconstitutional amendments on the grounds of – as have been precisely distinguished by professor R. Albert – procedural unconstitutionality, content-based unconstitutionality and notional unconstitutionality (i. e. in cases of contradiction of the constitutional amendment with supra-constitutional law or an unwritten constitutional norm).

The powers of the Constitutional Court to review constitutional amendments. Although the Constitution of the Republic of Lithuania does not contain explicit provisions directly establishing the powers of the Constitutional Court to assess the compliance of constitutional amendments with the Constitution, it is the official constitutional jurisprudence of the Constitutional Court that has confirmed its powers to investigate the constitutionality of laws adopted by the Parliament on amending the Constitution.

While its earlier jurisprudence had already confirmed the fact that any act (part thereof) adopted by referendum is subject to constitutional review, which is carried out by the Constitutional Court (ruling of 28 March 2006), it later concluded that the powers of the Constitutional Court also include the review of the constitutionality of constitutional amendments adopted by referendum. Consequently, the Constitutional Court may investigate the constitutionality of amendments to the Constitution adopted either by the Parliament or by referendum.

The evolution of the powers of the Constitutional Court, which, *inter alia*, regards its power to review the constitutionality of legal acts that are not explicitly mentioned in the text of the Constitution, stems from the principle that under all circumstances the supremacy of the Constitution and the rule of law cannot be compromised. The Constitutional Court must, therefore, have all of the powers, which are necessary to fulfil this purpose – to ensure that the legislature, as well as the nation, directly implementing its sovereign powers in referendums) implement these powers, including the powers to adopt constitutional amendments, in line with the provisions of the Constitution. Lithuanian constitutional doctrine acknowledges that in the absence of such judicial scrutiny of constitutional amendments, any established limitations on the alteration of the constitution may become "soft law".

In this regard, Lithuania stands with the majority of the states around the world, the constitutions of which do not *expressis verbis* mention the possibility of the review of the constitutionality of constitutional amendments (explicit provisions can be found in the Hungarian, Moldovan, Romanian, Turkish, and Ukrainian Constitutions).

In Lithuania, the same legal argumentation applies to the powers of the Constitutional Court to review the constitutionality of all legal acts adopted by referendum, to Constitutional laws, to the acts of the Parliament, which have the force of a law, but are not formally identified as law (for example, the Statute of the *Seimas),* as well as to other legal acts adopted by the Parliament, ranking lower than laws.

Procedural and substantive restrictions on constitutional amendments. While certain fragments of the Lithuanian doctrine on the constitutionality of constitutional amendments may already be found in the earlier jurisprudence of the Constitutional Court, the essential development of this doctrine must be linked to the year of 2014, specifically, the rulings of the Constitutional Court of 24 January 2014 and 11 July 2014.

In these rulings, the Constitutional Court, firstly, stressed the essential procedural requirements for the initiative and adoption of constitutional amendments. Among others, the general requirements for amending the Constitution, following Article 148 of the Constitution, are:

- the provision of Article 1 of the Constitution, according to which "The State of Lithuania shall be an independent democratic republic", may only be altered by referendum, with no less than 3/4 of the citizens of Lithuania with the electoral right voting in favor of it;

- the provisions of the First Chapter entitled "The State of Lithuania" and the Fourteenth Chapter on "The Alteration of the Constitution" may be altered only by referendum;

- amendments to the Constitution concerning other chapters of the Constitution must undergo two votes at the Parliament, with a break of not less than three months between the votes. An amendment is adopted, if, during each of the votes, no less than 2/3 of all the members of the Parliament vote in favor thereof;

- a failed amendment to the Constitution may be submitted to the Parliament for reconsideration not earlier than after one year.

Secondly, alongside with these procedural restrictions on constitutional amendments, the Lithuanian Constitutional Court for the first time disclosed the concept of substantive restrictions reflecting the hierarchy of constitutional norms and principles. According to the Court, the substantive restrictions on constitutional amendments are the limitations consolidated in the Constitution regarding the adoption of constitutional amendments of certain content; these restrictions stem out of the overall constitutional regulation. Their aim is to defend the universal values upon which the Constitution, as supreme law and as a social contract, and the state, as the common good of the entire society, are based, as well as to protect the harmony of these values and the harmony of the provisions of the Constitution, i.e. to preserve the integrity of the Constitution. The substantive restrictions may be assigned in one of two groups: absolute restrictions (comprising the so called "eternity clauses") and relative restrictions.

Eternity clauses. In its report on Constitutional Amendment (published in 2009), the Venice Commission (European Commission for Democracy through Law) defined eternity clauses as the constitutional provisions or constitutional principles that are immune from any amendment (are irrevocable) and function as barriers or "stop lines" to constitutional changes. Any constitutional amendment that is incompatible with eternity clauses is to be considered unconstitutional and, as such, invalid (null and void).

The "eternal" clauses are either explicitly provided in the text of the constitution or are implicit, i.e. identified through the interpretation of the constitution. It is, therefore, the responsibility of constitutional courts to identify the implicit "eternal" clauses, considering the overall constitutional legal order, the origin and the rules for amending the different constitutional provisions. It is logical to presume that such core provisions, aimed at preventing the complete destruction of the constitutional order established and protected by that constitution, should be known to all constitutions. Comparative analysis allows us to distinguish eternity clauses that aim at defending to two types of fundamental values belonging to the nation's constitutional identity: 1) universal values, such as democracy, natural and inalienable human rights and the rule of law; 2) particularistic values, reflecting such particular features of a nation's constitutional identity as federalism, the role of religion in a given society, or certain principles regarding the division of powers in a given state.

One can also identify the following two groups of eternity clauses: *de jure* eternity clauses (i.e., absolutely unamendable – immune from any amendment, when no possibility to amend those clauses is foreseen) and *de facto* eternity clauses (i.e., their amendment can be *de jure* possible, but so strict rules for their amendment are established that makes it impossible in practice).

In Lithuania, the eternity clauses have not been explicitly distinguished by the Constitution,

but have rather been identified by the Constitutional Court, which took into account the already mentioned procedural requirements for the amendment of the Constitution, as well as the origin and purpose of its fundamental provisions. For example, while formulating the doctrine of constitutionality of constitutional amendments, the Lithuanian Constitutional Court deduced the absolutely unamendable eternity clauses from Article 1 of the Constitution construed in conjunction with the Act of Independence of 16 February 1918, as the fundamental act of supra-constitutional nature.

The latter jurisprudence, which acknowledges the supra-constitutional nature of the Act of Independence, is similar to the approach of the Constitutional Court of the Republic of Moldova. In its judgment of 5 December 2013 regarding state language, the latter emphasized that the Declaration of Independence of the Republic of Moldova "constitutes the primary legal and political basis of the Constitution. Thus, no provision of the Constitution reflected in the text of the Declaration of Independence can violate the limits (provisions) of the Declaration. Moreover, being the founding act of the state Republic of Moldova, the Declaration of Independence is a legal document which cannot be subject to any change and/or amendments. Thus, the Declaration of Independence benefits the status of an "eternity clause", as it defines the constitutional identity of the political system, whose principles cannot be changed without breaking this identity" (Judgment of the Constitutional Court of Moldova No. 36 of 5 December 2013).

***De jure* eternity clauses**. In its ruling of 11 July 2014, the Lithuanian Constitutional Court singled out the absolutely unamendable fundamental constitutional provisions that had been proclaimed by or followed from the Act of Independence of 16 February 1918: **independence**, **democracy**, and **the inherent nature of human rights**. The Constitutional Court held that, if these principles were to be abolished, the constitutional identity of the Nation and the Nation itself would be destroyed. The denial of these provisions of the Constitution would amount to the denial of the essence of the Constitution itself. Therefore, according to the Constitution, the independence, democracy, and the inherent nature of human rights cannot be revoked even by referendum. Otherwise, the Constitution would be understood as creating the preconditions for abolishing the restored "independent State of Lithuania, founded on democratic principles", as proclaimed by the Act of Independence of Lithuania of 16 February 1918. That is why, though a formal possibility exists to alter by referendum the provision of Article 1 of the Constitution, according to which "The State of Lithuania shall be an independent democratic republic", if at least three quarters of Lithuanian citizens with the electoral right vote in favour of it, this possibility cannot be interpreted only literally. Due to the fact that the principles of independence and democracy are established by an act of supra-constitutional nature (the Act of Independence), this possibility is be narrowed so as not to allow to repeal independence and democracy, i.e. the fundamental principle of Article 1 of the Constitution that the State of Lithuania is independent and democratic cannot be changed in any circumstances.

Meanwhile, although the inherent nature of human rights has not been expressly referred in the Act of Independence of 16 February 1918, it is considered to be an inseparable part of the democratic constitutional order and, therefore, also irrevocable as the principle of democracy itself. In other words, though Article 18 of the Constitution, which provides that "human rights and freedoms shall be innate", formally belongs to the range of the constitutional

provisions that are subject to the ordinary amendment procedure, the constitutional protection of the inherent nature of human rights is subject to the same level of constitutional protection as other foundations of the statehood of Lithuania – independence and democracy.

Indeed, democracy that serves as a connecting link between Articles 1 and 18 of the Lithuanian Constitution, as genuine democracy presupposes the recognition of the innate nature of human rights. There can be no democratic legal order without the recognition of the inherent nature of human rights. Furthermore, the effective implementation of human rights constitutes the substantive content of democracy. As the Constitutional Court of Slovenia noted, "only such state order is truly democratic in which respect for human dignity is the principle guideline for the functioning of the state" (ruling of 26 September 2011 of the Slovenian Constitutional Court).

Democracy must not be confused with the simple rule of majority. It has to include the respect for individual and minority rights. This concept of democracy has been confirmed a number of times by the European Court of Human Rights, which interprets the notion of democracy as including the respect for minority rights and as a part of the European public order.

By identifying the *de jure* eternity clauses as absolute substantive restrictions on constitutional amendments, the Lithuanian Constitutional Court proclaimed what is obvious: under the Constitution, no one is empowered to destroy the core of the constitutional identity of Lithuania as an independent and democratic State, and no one may deprive human beings of their inherent rights. Thus, clauses prohibiting constitutional amendments that would strike at the essence of the rule of law, inherent human rights and democracy as such, serve as a safeguard of democratic self-determination, however paradoxically this may sound. If the substance of democracy is depleted, though in a formally democratic way (e.g., by referendum), there will be no room left for further exercise of popular sovereignty and self-determination. In this regard, examples of totalitarian or authoritarian regimes, in particular the Nazi and the Soviet repressive regimes, are rather obvious. Therefore, the eternity clauses safeguarding universal values (such as democracy, the rule of law and inherent human rights) can be seen as an important instrument for democracies, enabling them to defend themselves.

Thus, as the core of the Constitution, the principles independence, democracy and the inherent nature of human rights enjoy the highest protection by their absolute unamendability; this also means that they are at the top of the hierarchy of constitutional norms and principles. Taking into account the perception of the Constitution as an integral act (the integrity of its provisions), the inviolability of these supreme principles presupposes not only the prohibition to abolish or change them, but also the prohibition to amend other provisions of the Constitution so as to deny any of the supreme values (independence, democracy or the inherent nature of human rights), i.e. the prohibition of constitutional amendments contrary to these values. That is why, for example, such constitutional amendments, as legitimising torture, reintroducing the death penalty to the Lithuanian legal order or abolishing the restriction for the same person to be elected to the office of the President of the Republic for no more than two consecutive terms, would be unconstitutional (null and void) as contrary to Article 1 of the Constitution (first and foremost, to the principle of democracy, including the inherent nature human rights).

***De facto* eternity clauses**. *De facto* eternity clauses are just one step below the *de jure*

eternity clauses in the hierarchy of constitutional norms and principles. In Lithuania, there are two *de facto* unamendable constitutional principles: **the republican form of government** of Lithuania established in Article 1 of the Constitution and **the restrictive aspect of the geopolitical orientation of the State**, which is expressed in the Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions" (the latter Act is a constituent part of the Constitution). These constitutional principles may be regarded as *de facto* unamendable, as, according to the Constitution, they can be amended only by the referendum, when at least three quarters of Lithuanian citizens with the electoral right vote in favour, i.e. a number so high that is practically impossible to reach. According to the Constitutional Court (ruling of 24 January 2014), the Constitution may not be amended in a way, which would deny the *de facto* eternity clauses, unless the latter are also amended at the same time (however, as mentioned, it is practically impossible).

Firstly, the republican form of government of Lithuania reflects the Lithuanian constitutional tradition of a parliamentary republic. This form of government was expressly established in the Constitution of 1922 (the only permanent pre-war Constitution of democratic nature, adopted in a democratic manner). It was also referred to in one of the fundamental supra-constitutional acts – the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949, which proclaimed that the restoration of independence of the Republic of Lithuania had to be implemented in the spirit of the Constitution of 1922.

Secondly, the restrictive aspect of the geopolitical orientation of the State means non-alliance of Lithuania with the post-Soviet entities under the Russian domination (whose actual purpose is to preserve the ties inherited from the Soviet Union, i.e. to preserve the decisive influence of Russia). This principle constitutes a specific Lithuanian constitutional tradition that could also be traced to the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949. The Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions" establishes two main constitutional prohibitions that cannot be overruled by constitutional amendments: 1) the prohibition to join the Commonwealth of Independent States or any other union (organization) formed on the basis of dependency to the former USSR (e.g., the Euro-Asian Union, the Organisation of the Treaty on Collective Security); 2) the prohibition to deploy on the territory of the Republic of Lithuania the military bases and troops of Russia, or of the Commonwealth of Independent States, or of any other CIS country.

Accordingly, following the Lithuanian constitutional doctrine, the denial of any of the mentioned eternity clauses through constitutional change, would mean the dismemberment of the Constitution.

Relative Restrictions on Constitutional Amendments. Relative restrictions on constitutional amendments apply to the constitutional provisions that are not impossible to amend, but are rather subject to stricter rules of amendment. Such provisions enjoy a higher level of protection than the rest of constitutional provisions and, as a rule, can only be amended by referendum. Therefore, the amendments to the latter provisions must comply with the former provisions unless they are changed at the same time. In other words, the essence of relative restrictions on constitutional amendments is the prohibition, by means of the constitutional amendment to a certain provision, to deny another constitutional provision enjoying a higher level of protection, unless both constitutional provisions are changed in

accordance with the rules provided by the Constitution.

The Lithuanian Constitutional Court has identified three relative restrictions on constitutional amendments following from the Constitution of the Republic of Lithuania. First, it is the positive aspect of the geopolitical orientation of the State – **the membership of the Republic of Lithuania in the European Union**. As it is based on the will of the citizens of Lithuania expressed in the referendum, the fully-fledged membership in the European Union is regarded to be a constitutional imperative and value. Therefore, the constitutional grounds for the membership of Lithuania in the EU, consolidated in Articles 1 and 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" (which is also the constituent part of the Constitution), can only be amended by referendum (these grounds are: (1) the conferral of powers of the Lithuanian state institutions on supranational (the EU) institutions; (2) the status of the EU law – its incorporation into the Lithuanian legal system). Consequently, according to the Constitution, no constitutional amendment can be allowed, which would contradict the constitutional grounds of the EU membership, unless the latter are also changed by referendum. For example, it would not be permissible under the Constitution to adopt a constitutional provision providing the exclusive rights of ownership to land for the Lithuanian citizens (thereby excluding other EU nationals), unless the issue of the EU membership itself was raised at the referendum at the same time. Due to this kind of restriction, in 2014, the referendum on the issue of preventing the introduction of euro was precluded. Similarly, it would not be compatible with the Constitution to vote in the referendum on the EU association agreements with the third countries.

Second, such are **the provisions of Chapter I** "The State of Lithuania" (except Article 1) and **Chapter XIV** "Alteration of the Constitution" of the Constitution, including the constitutional principles on the State language, the territorial and political integrity, the division of powers, the prohibition of multiple citizenship. According to the Constitution, these provisions of Chapters I and XIV can be changed only by referendum. Therefore, no constitutional amendment to other constitutional provisions, which would deny the provisions of Chapters I and XIV, can be adopted, unless the respective provisions of Chapters I or XIV are amended accordingly at the same time by referendum.

Third, relative restrictions apply to **the constitutional principle of *pacta sunt servanda*** (provided in Article 135(1) of the Constitution), which is an inseparable part of the rule of law and establishes the imperative to carry out in good faith all the international obligations of the Republic of Lithuania, assumed in accordance with international law, *inter alia* international treaties; it also includes the imperative to implement obligations stemming from its geopolitical orientation, i. e. Lithuania's membership in NATO. Due to the principles of the rule of law and *pacta sunt servanda,* constitutional amendments cannot be used as a means for deliberate avoidance of international obligations. That is why the Constitution does not permit the constitutional amendments that would be contrary to international obligations of the State and, at the same time, would deny the constitutional principle *pacta sunt servanda* (e.g., no constitutional amendment that is incompatible with the European Convention on Human Rights may be considered constitutional). Such constitutional amendments are possible only upon denunciation of the corresponding international obligations, in accordance with the rules of international law. The restriction on constitutional amendments, which arises out of the constitutional principle *pacta sunt servanda*, reflects a particularly friendly (and unique)

constitutional approach to international law.

I would, therefore, like to **conclude** by saying that the judicial review of the constitutionality of constitutional amendments is, undoubtedly, an inherent function of the institutions exercising constitutional control. This function is necessary in order to effectively guarantee the supremacy and viability of the constitution. The fully-fledged review of the constitutionality of constitutional amendments encompasses both procedural and substantive aspects, as it is especially the latter limitations on constitutional amendment that are aimed to protect the fundamental constitutional values (the "eternal clauses") and ensure the viability of the constitution as a coherent unity.

The understanding of the constitution as an integrity allows for an assertion that every constitution contains implicit limitations precluding constitutional amendments that would disrupt the internal unity of the constitution. Therefore, the doctrine of the constitutionality of constitutional amendment places certain limits on the constituent power, by drawing a line between amending the Constitution and replacing it with an entirely new one, thus – to a lesser or greater extent – denying the existing legal order, even the constitutional tradition (identity) of a particular state. Accordingly, in Lithuania, the hierarchy of constitutional norms and principles serves as specific substantive criteria for the assessment of the constitutionality of constitutional amendments.

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Finally, I would like to express my sincere gratitude to the President of the Judicial Yuan, the organizers of the International Conference of the Constitutional Court of Taiwan for the exceptional possibility to be here and take part in this remarkable event. I would also like to thank Professor R. Albert for his very interesting speech on the topic of "The Judicial Role in Constitutional Amendment and Dismemberment", which served as great inspiration for my own humble remarks on the subject.