

Eternity Clauses: a Safeguard of Democratic Order and Constitutional Identity

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On behalf of the Constitutional Court of the Republic of Lithuania I have the great honour to congratulate you on the 5th anniversary of the activities of the Constitutional Court of the Republic of Kosovo. It is also an exceptional opportunity for me to congratulate the Constitutional Court of Kosovo on having broken the ice and having successfully integrated into the international community of constitutional courts. This integration is confirmed by the membership in the World Conference on Constitutional Justice.

Bearing in mind the role of Constitutional Courts in ensuring the supremacy of the Constitution within the legal system of the state, I would like to address the issue of one of the instruments, which can be used in protecting the core constitutional values. This instrument is eternity clauses.

Eternity clauses can be defined as constitutional provisions or constitutional principles that are immune from amendment. Therefore, these clauses function as barriers or “stop lines” to constitutional amendment. Any amendment violating those clauses would be unconstitutional in itself and, as such, would be invalid. Such unamendable or “eternal” clauses may be either formal, that is, explicitly included in the text of the Constitution, or implicit. Explicit eternity clauses are included into nearly 35 percent of the world’s constitutions (that is, 71) . However, it is also important to talk about judicial eternity clauses, that is, implicit eternity clauses, which are identified through the process of interpreting the Constitution by Constitutional Courts or other institutions exercising constitutional review.

Dear Colleagues, here I would like to draw your attention to the close relationship between eternity clauses and the concept of constitutional identity. Though this concept lacks a uniform definition, one can rely, at least to a certain extent, on the ideas of Gary Jeffrey Jacobsohn, who speaks about a nation’s particularistic history, values and aspirations as defining its constitutional identity. According to Jacobsohn, though constitutional identity is a dynamic and evolving concept, at the same time it is resistant to its own destruction. Therefore, as a nation, committed to constitutionalism, struggles

to harmonize disparate elements (for example, resulting from the gap between the inscribed commitments and changing political, economic or attitudinal environments), it usually remains true to the basic structures that comprise its constitutional identity. This means that it is right for a constitutional court to reject a procedurally valid constitutional amendment if that amendment would substantively violate the nation's constitutional identity.

I find the ideas suggested by Jacobsohn appealing in the sense that eternity clauses should be understood as protecting the core of fundamental constitutional principles and therefore leaving space for evolutive interpretation of these principles. As the Venice Commission has noted, concepts like "sovereignty", "democracy", "republicanism", "federalism" or "fundamental rights", that is, principles, most often protected by unamendability, over the years have been subject to continuous evolution, both at international and national level, and should properly continue to be so in the years to come. Therefore, eternity clauses, properly understood, should be seen not as imposing "dead hand constitutionalism", but as ruling out amendments that would violate the very substance of relevant constitutional principles.

Another aspect, which should be mentioned when speaking about the relationship between eternity clauses and constitutional identity, concerns the types of values protected by unamendability. Comparative law reveals that eternity clauses may be used in order to safeguard two types of values, relevant to the nation's constitutional identity. The first group is universal values, such as democracy, natural and inalienable human rights and the rule of law. Another group is 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 concerning the division of powers. In Lithuania, such a particular feature, based on historical experience, is the principle of geopolitical orientation, which includes the constitutional prohibition on joining any political, military, economic or other union or commonwealth of states formed on the basis of the former USSR.

The dichotomy of eternity clauses, though not absolute, as "universal and particular" values inevitably interrelate, can be seen as providing a background to the discussion concerning the balance between constitutional rigidity and flexibility. Here I will deal with the first category, that is, eternity clauses protecting universal values, as these values are key to European identity and public order.

Some constitutions, like German or Czech Constitution, comprise clauses, explicitly declaring the unamendable nature of the democratic form of government. Other constitutions, like that of Kosovo, prohibit [albeit indirectly] amendments diminishing the constitutional rights and freedoms. Obviously, as "democracy and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing", such

clauses are inseparably related to the concerns of protecting the core of democracy. At the same time, there are many democratic constitutions without explicit eternity clauses. Accordingly, one may raise an obvious question whether those constitutions should be understood as allowing the abolition of the democratic form of government altogether and (or) authorizing, even if theoretically, major encroachments on fundamental rights. I think that the answer to this question should be “no”, as viable democratic constitutions should be interpreted as containing implicit eternity clauses, protecting the core of democracy.

So, why are eternity clauses necessary?

One may start from the Venice Commission’s Report on Constitutional Amendment where the Commission held that “unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order”. Therefore, the Venice Commission did not deny the potential benefit of unamendability when it comes to safeguarding the core values of democracy.

Keeping in mind that criticism directed towards the eternity clauses mainly consists of arguments pointing towards the limitation of popular sovereignty, I suggest that such arguments would not be well placed in the context of eternity clauses, whether explicit or implicit, safeguarding the basic values of substantive democracy. Constitution should not become an instrument for “democratic suicide”. Clauses prohibiting constitutional amendments that would strike at the essence of the rule of law, inalienable 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, there will be no room left for further exercise of popular sovereignty and self-determination. An example of totalitarian or authoritarian regimes is rather obvious. Therefore, eternity clauses, safeguarding universal values, can be seen as an important instrument for democracies, enabling them to defend themselves.

Another argument in favour of eternity clauses safeguarding the democratic form of government is related to a wider context of international development. Commitment to democracy and efforts to promote democracy is a recurring theme both on universal and regional levels. For example, the preamble to The North Atlantic Treaty states that “the Parties to this Treaty are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law”. The commitment to uphold democratic values is undertaken by each country joining the Council of Europe and the European Union. Such commitments together with developing international standards elevate basic democratic principles to the supranational level.

The nature of eternity clauses as serving against the elimination of democracy and grounded on supranational values is clearly articulated by the German Federal Constitutional Court in its Lisbon judgment, which is worth quoting: “Through what is known as the eternity guarantee, the Basic Law reacts on the one hand to the historical experience of a creeping or abrupt erosion of the free substance of a democratic fundamental order. However, it makes clear on the other hand that the Constitution of the Germans, in accordance with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which cannot be amended by positive law”.

Thus, the German Constitutional Court adheres to the idea that foundational constitutional values, protected by eternity clauses, should be understood as constitutional metanorms, regulating to what extent change is considered legitimate. Such an approach seems especially useful in relation to protection of values which are constitutive of a fully-fledged democracy.

In this context, it is also possible to talk about a certain democracy-based convergence of national constitutional identities, thus constituting wider international identities. This topic is especially widely discussed in the context of the so called “European [constitutional] identity”. As Europe (including the EU and the Council of Europe) does not possess the Constitution *sensu stricto*, the European constitutional identity mostly means the convergence of values pertinent to national constitutional systems. Such a convergence-based conception is evident, for example, in the Declaration on the European Identity (1973), where nine European countries stated that “[s]haring as they do the same attitudes <...> they are determined to defend the principles of representative democracy, of the rule of law, of social justice <...> and of respect for human rights. All of these are fundamental elements of the European Identity”. One may also refer to Article 2 of the Treaty on European Union, stating that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States <...>”. The notion of convergence is also reflected in Article 6 § 3, referring to fundamental rights, guaranteed by the European Convention on Human Rights, as constituting general principles of the Union’s law, as these rights result from the constitutional traditions common to the Member States”. Last but not least, the well established dictum of the European Court of Human Rights, stating that “democracy is without doubt a fundamental feature of the European public order” is also undoubtedly worth noting.

Of course, the notion of democracy as a common value is not limited to European space, as it is reasonable to talk about, for example, common values pertinent to the North Atlantic area. By the way, the shared values and aspirations based on the common

heritage of both Europe and the United States of America were acknowledged in the Declaration on the European Identity (1973).

Consequently, it is possible to talk about the common international, at least European, interest in safeguarding the basic values of democracy. In this context, it is useful to refer again to the Venice Commission. In its “Guidelines for Constitutional Referendums at National Level“, the Commission recommended that texts submitted to a constitutional referendum must abide by the substantive limits (intrinsic and extrinsic) of constitutional reform and that they must not be contrary to international law or the Council of Europe's statutory principles (democracy, human rights and the rule of law). Texts that contradict these requirements of substantial validity should not be put to the popular vote. Such recommendations clearly do not support the view that a voting majority should be constitutionally entitled to adopt amendments negating those values that are perceived as forming the basis of European *ordre public*.

At the same time, it is important to emphasize that rationale for the protection of basic democratic values is first of all entrenched in the nation's democratic constitutional identity as such. In the words of Ulrich K. Preuss, “eternity clauses” mark out issues that corroborate the constitutive elements of the founding act. They define the essential elements of the foundation myth. In other words, they define the collective “self” of the polity – the “we the people.” If the “eternal” normative stipulations were changed, the collective self - or identity - of the polity as embodied in the constitution would collapse.

Here I would like to address the last issue – the role of Constitutional Courts in the context of eternity clauses. Taking into account both external and internal factors mentioned above, I find it reasonable to argue that the absence of explicit constitutional provisions on unamendability of the fundamental constitutional principles does not preclude the existence of implicit eternity clauses, safeguarding the *raison d'être* of democratic constitutions. Here we can speak about the decisive role of the Constitutional Courts, entrusted with the responsibility to ensure the supremacy of the Constitution within the state's legal system, thereby safeguarding the state's polity as such and its constitutional identity.

In this context, I would like to provide an example from the jurisprudence of the Lithuanian Constitutional Court. In its ruling of 11 July 2014 “On the organization and calling of referendums“, the Court emphasized that “the innate nature of human rights and freedoms, democracy and the independence of the state are such constitutional values that constitute the foundation for the Constitution, as a social contract, as well as the foundation for the Nation's common life, based on the Constitution, and the State of Lithuania itself”. Therefore “no one may deny the provisions of the Constitution consolidating these fundamental constitutional values, since doing so would amount to the denial of the essence of the Constitution itself”.

Relying on these arguments, the Constitutional Court declared that, even in keeping with limits on the alteration of the Constitution, “no amendments to the Constitution may be made that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state; if the Constitution were construed in a different way, it would be understood as creating preconditions for putting an end to the restored “independent State of Lithuania, founded on democratic principles”, as proclaimed by the Act of Independence of Lithuania of 16 February 1918”.

This ruling clearly reflects the idea that the authority of the constituent power to revise the constitution does not include the authority to create a completely new constitution, which would negate the universal values of democracy, innate human rights and independence of the state.

Therefore, if a decision, even supported by the absolute majority of population, would be taken to renounce the core values of democracy in its substantial sense, such a decision should be seen as taken outside the existing democratic constitutional structure and amounting to the adoption of an entirely new constitution, destroying the current constitutional identity. Such a step would represent a major drawback in the country’s evolution, as, to quote Winston Churchill, “democracy is the worst form of government except all the others that have been tried”. Of course, it only makes sense to talk about democracy as a universal value provided this democracy is real and not fictitious.

Thank you for your attention and let me wish the Constitutional Court of Kosovo strength and success in fulfilling its task as a guarantor of constitutional democracy and the rule of law, fundamental human rights and freedoms, thereby defending the Kosovar constitutional identity and strengthening European values.