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**VIABILITY OF THE CONSTITUTION AND THE ROLE OF THE
CONSTITUTIONAL COURT**

The distinctive quality of the Constitution is that it has not only to be effective in the future, but to create the future¹. That is, the Constitution generates a set of inviolable principles to which future law and government activity more generally must conform. Thus one can underline the first function that constitutions serve – to be the framework of higher law for the nation. This function of constitutionalism is vital to the stability of democracy. Without a commitment to higher law, the state operates for the short-term benefit of those in power or the current majority. That can be demonstrated by the recent experience of Ukraine.

A second function that constitutions serve is the symbolic one of defining the nation and its goals², or what can be called national constitutional identity of a given state. Taking into account both functions, constitutions should be drafted with a view to having them served for decades or even centuries.

The viability of constitutions is a result of the interaction of different factors, both external (i. e. historical circumstances, stability of the political environment) **and internal** (such as explicit and implicit constitutional provisions, operating as safeguards of viability of a constitution, including the so-called “eternity clauses” and the provisions establishing institutions of constitutional review).

Current Lithuanian Constitution of 1992 can be described as stable, as it was amended only several times. Absolute majority of amendments were related to the requirements of the membership in the European Union; none of them aimed to drastically change the form of government or other key elements of constitutional order. This demonstrates that our political actors have learned to operate within the framework provided by the Constitution.

The major factor relevant to the viability of Lithuanian Constitution is its antimajoritarian character. After restoration of Lithuania’s independence, at least six different drafts of the Constitution were submitted. The largest and particularly intense debate was on the

¹ T. Birmontienė. A Constitutional Framework for Effective Governance.

² T. Ginsburg, Z. Elkins, J. Melton. The Lifespan of Written Constitutions: <http://www.yale.edu/macmillan/ruleoflaw/papers/Ginsburg-Lifespans-California.pdf>.

future state powers, their separation, and interaction. Finally, a political compromise, merging the elements of a parliamentary republic and a semi-presidential model of governance was achieved. The fact that Lithuanian Constitution was the result of political compromise highlights its antimajoritarian nature: it was not an ideological product of a dominant political force, but a common result of public debate, approved in the referendum by overwhelming majority. All the most influential political forces undertook the commitment and remain committed to the compromise embodied by the Constitution.

Viability of a constitution can be perceived as its stability. According to the official constitutional doctrine formulated by the Constitutional Court of the Republic of Lithuania, the stability of the Constitution is a great (if not the most important one) constitutional value.

I would underline **two aspects of viability of the Constitution as its stability**. First, **a possibility of making amendments to the Constitution should be related to objective legal necessity**: in other words, the Constitution has to be changed only when there is no alternative for its interpretation, when it is clear that the wording of a given provision does not longer correspond to the changing imperative needs of the nation's development (e.g., higher level of the protection of human rights, membership in the EU).

Second, **the unamendability of the certain core values, enshrined in a constitution and defining the nation's constitutional identity**, or what can be characterized as *eternity clauses*. There are a few fundamental principles embodied by the Constitution of Lithuania, such as the independence, democracy and the inherent nature of human rights, which cannot be revoked; otherwise the nation's constitutional identity and the nation itself would be destroyed. There is also a *de facto* eternity clause – the geopolitical orientation of the State of Lithuania – that in practice is impossible to change, as this would require extremely high percentage of votes (75 percent of all the nationals) in the popular referendum.

Here one should notice what **an important role in safeguarding the viability of the Constitution has to be played by the Constitutional Court**. The establishment of the Constitutional Court in Lithuania was a novelty of the 1992 Constitution as previously we had never had a special mechanism of the constitutional control. It corresponded with a trend of judicial constitutional review in the constitutions of the fourth wave of global constitutionalism.

The essential function of the Constitutional Court is to ensure the supremacy of the Constitution within the national legal system. Under the Constitution, in performing this function the Constitutional Court has the exclusive powers to interpret the Constitution by revealing its meaning and the content of its provisions. As a result of the activities of the Constitutional Court, the **Constitution-centered concept** of the legal system gradually emerged. There are the following key elements of the Constitution-centered perception of the national legal system:

1. The Constitution is not a fundamental statute, or it is not only *Основной Закон*. It cannot be measured or perceived by the same criteria as ordinary (statutory) law. The Constitution itself is a highest standard to assess all the legislation.

2. The Constitution has to be perceived as the supreme law (*найвище право*), to which all other legal acts must comply. It is namely *law*, not a statute.

3. There are only a few sources of the Constitution (constitutional law): the text of the Constitution and the acts of the Constitutional Court providing the official and binding interpretation of the text of the Constitution (the official constitutional doctrine). To some extent foreseen by the Constitution itself, international law and the law of the European Union can be also seen as sources of constitutional law. For example, Art. 135 of the Constitution of the Republic of Lithuania obliges Lithuania to follow the universally recognised principles and norms of international law; therefore in the official constitutional doctrine, as developed by the Constitutional Court, international law is perceived to be a minimum constitutional standard of human rights protection. By virtue of Art. 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, which is a constituent part of our Constitution, the European Union law can serve as a source in interpreting the constitutional status and powers of the State institutions (it is provided that the Republic of Lithuania, as the EU Member State, has to share with or confer on the EU the competences of its State institutions in the areas provided for in the EU founding treaties). Thus the Constitution has to be perceived as sufficiently open to the progressive influence of international and the EU law.

4. The perception of the *living* Constitution. This perception comes from the interpretation of the Constitution, established in the acts of the Constitutional Court. Interpretation of the Constitution given by the Constitutional Court must be sufficiently flexible in order to meet modern challenges, to live according to the evolution of the State, creating an opportunity for necessary changes and stability while preserving the basic constitutional principles.

5. The Constitution is not only its text, but its spirit as well (the overall constitutional regulation, including the expressly provided and implied constitutional provisions and principles, the values protected by the Constitution). Therefore, the Constitution is perceived as an ideal law, without gaps or any other flaws; any of national legal acts can be challenged with regard to its compliance with the Constitution. The Constitution determines the content and direction of the whole national legal system.

Due to the Constitution-centered concept of the legal system, the Constitutional Court has the authority to ensure stability (and viability) of the constitutional order by adhering to the dynamic interpretation of the Constitution (ensuring its living content) and by revealing the constitutional requirements to the amendments of the Constitution. As regards the latter, the

Constitutional Court has the powers **to review even amendments of the Constitution** not only on procedural but also on substantive (material) grounds, that is to review the compliance of their content to the requirements established in the Constitution, in particular in view of the fundamental constitutional values. Certainly, in pursuing its tasks the Constitutional Court must be strong in its competence, independent from any influence and firmly committed to human rights, democracy and other European constitutional values.

Perhaps most important thing in ensuring the stability (viability) of the Constitution of a democratic State is **the concept of constitutionality of constitutional amendments**, according to which there should be certain material (substantive) limitations for the amendments of the Constitution related to the special protection of the independence, democracy and other values defining the national constitutional identity. The Constitutional Court of Lithuania has revealed the requirements for constitutional amendments, and it is one of the proves of its important role in guaranteeing the stability of the constitutional order.

In its rulings of 24 January 2014 and 17 July 2014, the Constitutional Court of the Republic of Lithuania has **elaborated the doctrine of substantive limitations on the alteration of the Constitution**. These limitations are designed to defend universal values, upon which the Constitution as the supreme law and as a social contract is based:

1. There are **core constitutional values** that cannot be abolished at any time by any manner (even by the referendum): the Constitution does not permit any amendments that would deny the independence of the state, democracy or the inherent character of human rights and freedoms, i.e. the provisions consolidating Lithuania as an independent and democratic state and recognising the innate nature of human rights and freedoms may be defined as “eternal”; they may not be repealed, since otherwise the constitutional identity of the State (and the State and nation, as such) would be destroyed. The denial of these provisions of the Constitution would amount to the denial of the essence of the Constitution itself. Although this prohibition to abolish the core constitutional values is not expressly provided by the Constitution, it follows from the 16 February 1918 Act of Independence of Lithuania, which is seen as the fundamental act of the State of supra-constitutional nature and to which all the State constitutions must comply. Therefore, the Constitution cannot be an instrument to abolish the values proclaimed in the Act of Independence – the independence and democracy, from which also innate nature of human rights is inseparable. I have to note that similar eternity clauses, prohibiting constitutional amendments that provide for the abolition or restriction of human and citizens’ rights and freedoms, or are oriented toward the liquidation of the independence or violation of the territorial indivisibility of the state, are enshrined in Article 157 of the Constitution of Ukraine.

2. The special protection of **the geopolitical orientation of the State** proclaimed by the Constitution. There are two substantive limitations in this regard: 1) no amendments may be made that would deny the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” (with the exception of the cases where certain provisions of this Constitutional act would be altered by a referendum, where not less than three-fourths of the citizens of Lithuania with the active electoral right vote in favour of it). That makes almost impossible any integration of Lithuania into the CIS or other post-Soviet block consisting of the former Soviet republics with the aim to maintain the former ties (in fact, the influence of Russia in the post-Soviet area; 2) no amendments can be made that could be contrary to the membership of the Republic of Lithuania in the EU: any amendments to the Constitution that would deny the commitments of the Republic of Lithuania arising from its membership in the European Union are not permitted, unless the constitutional grounds for membership of Lithuania in the European Union (consolidated in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union” – the principle of shared competence with other EU Member States and the integration of the EU law into the national legal system) have not been changed by referendum.

In the present situation I consider the consolidation of geopolitical orientation of the State in the Constitution to be the most important experience of Lithuania for Ukraine. Now you have the unique opportunity to strengthen the achievements of the Revolution of Dignity by enshrining in the Constitution the geopolitical course of the State which had chosen the way of European integration and intends to follow European and transatlantic values.

3. **Respect for international obligations:** the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania and at the same time—the constitutional principle of *pacta sunt servanda*, as long as the said international obligations have not been renounced in accordance with the norms of international law. That would be also applicable in respect of Lithuania’s membership in the NATO.

4. **Other constitutional provisions with higher level of protection:** it is not allowed to circumvent with the amendments to the Constitution those constitutional provisions that can be changed only by referendum, i.e. the amendments to the Constitution may not violate the harmony of the constitutional provisions or the harmony of the values consolidated by them.

Another factor is special procedure (procedural limitations) for the making amendments to the Constitution, which is more complex in comparison with the procedure for the amending constitutional and ordinary laws (the Constitution specifies the special subjects who enjoy the right to submit a motion to alter or supplement the Constitution to the Seimas: a group of not less than 1/4 of all the members of the Seimas or not less than 300,000 voters. Amendments of

the Constitution must be considered and voted at the Seimas twice; there must be a break of not less than three months between the votes)³. Key provisions of the Constitution can be amended only by the referendum.

To sum it up, the role of the Constitutional Court maybe regarded even as crucial in maintaining the stability (and viability) of the Constitution. Provided that it adheres the dynamic interpretation of the Constitution and discloses the “living” content of the Constitution, i.e., the content of the Constitution that evolves, to a certain extent, together with the development of the State itself. This opens the door to the necessary changes, alongside preserving the stability of the fundamental constitutional values. And, provided that the Constitutional Court is strong, independent, consistent and European-minded in protecting the core constitutional values. I believe that is a key of success of your Constitutional Court.

³ The Constitutional Court’s rulings of 14 March 2006 and 28 March 2006.