

Presentation to the XVIIth Congress of the Conference of the European Constitutional Courts „Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles“, June 28-July 1st, 2017, Batumi

Sub-theme „Constitutional Principles as Higher Norms? Is it Possible to Determine a Hierarchy within the Constitution? Unamendable (Eternal) Provisions in Constitutions and Judicial Review of Constitutional Amendments“

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HIERARCHY OF CONSTITUTIONAL PRINCIPLES AS CRITERIA OF CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

Introductory remarks

Constitution and constitutional interpretation is inseparable from norms and principles. According to the scientific legal doctrine **principles show a high degree of generality being fundamental provisions that are consolidated in the Constitution and determine the direction of the overall legal regulation**¹. According to the extent to which the constitutional principles orient the legal system they **may be divided into coordinating and determining principles**. **The first** orient not only the statutory law but, also, the Constitution itself and settle it into an integral act (for example, the supremacy of the Constitution, the integrity of the Constitution, and the rule of law). **The second** orient the statutory law (for example, democracy and sovereignty, civil society, separation of powers, secular state, social orientation of the state, and geopolitical orientation of the state)². Some constitutional principles are consolidated in the Constitution **explicitly**, while others **are derived from the Constitution implicitly**. **Thus the first preliminary question arises whether is it possible to determine a hierarchy of constitutional principles within the constitution?**

¹ BIRMONTIENĖ, T. et al. *Lietuvos konstitucinė teisė*. Vilnius: Mykolo Romerio universitetas, 2012, p. 79.

² KŪRIS, E. Koordinaciniai ir determinaciniai konstituciniai principai (1). *Jurisprudencija*, 2002, t. 26 (18), p. 56. Also available at: <<https://www3.mruni.eu/ojs/jurisprudence/article/view/3618/3410>> [accessed 16 June 2017]; KŪRIS, E. Koordinaciniai ir determinaciniai konstituciniai principai (2). *Jurisprudencija*, 2002, t. 27(19). Also available at: <<https://www3.mruni.eu/ojs/jurisprudence/article/view/3626/3418>> [accessed 16 June 2017].

The answer to this question probably is “yes”. The positive answer is grounded on the following **two interrelated arguments**.

First, there are different rules for amending the provisions of the constitution. The analysis of the Venice Commission which is based on a systematic compilation of amendment provisions in the constitutions of the member states of the Council of Europe and a number of other States illustrates that **there is difference between the rules on amendment of constitutions which can be strict or flexible ones**³. It is noted that the majority of provisions require a **simple amendment procedure**, whilst a minority of provisions are **more difficult to amend, they enjoy special protection as they are deemed to be more fundamental or protection-worthy**⁴. That implies the certain hierarchy of constitutional provisions.

Second, some countries have substantive limitations on the alteration of the constitution which are explicitly included in the text of the constitution (for example, the Constitutions of Germany, France, Romania, Kosovo, Moldova, Turkey, Ukraine). Among provisions which are substantive limitations on the alteration of the Constitution there are **explicit eternity clauses**, to which all constitutional amendments must comply with. Such explicit eternity clauses are included into nearly 35 percent of the world’s constitutions (that is, 71)⁵. **This also implies that the latter provisions also are treated as superior and more protected than the others.**

The other question which arises from this - **if we have such hierarchy, who can ensure that this hierarchy and the order of constitutional amending process according to this hierarchy will be followed up?** It is only logical to presume that such institutions are **constitutional courts** or equivalent institutions⁶, but what can be done **if the constitutional courts are not provided explicitly with the powers to review the constitutionality of constitutional amendments?**

Therefore, **this presentation aims to provide possible hierarchy of constitutional principles** as it could be understood and according to this hierarchy, **to reveal the doctrine on constitutionality of constitutional amendments**. This presentation also aims **to explain whether the constitutional courts can review the constitutionality of constitutional amendments**. The mentioned goals are implemented taking into account the comparative law perspective and the approach formulated in the jurisprudence of the Constitutional Court of the Republic of Lithuania⁷.

³ European Commission for Democracy through Law. Report on Constitutional Amendment (Venice, 11-12 December 2009). Available at: <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)001.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)001.aspx)> [accessed 16 June 2017].

⁴ ROZNAI, Y. Unamendability and the Genetic Code of the Constitution. *New York University Public Law and Legal Theory Working Papers*. Paper 514. Available at: <http://lsr.nellco.org/nyu_plltwp/514> [accessed 16 June 2017].

⁵ Comparative Constitutions Project, compiled by Zachary Elkins, Tom Ginsburg, and James Melton. Available at: <<https://www.constituteproject.org/search/topics/?key=unamend>> [accessed 16 June 2017].

⁶ Hereinafter referred to as the constitutional courts.

⁷ Hereinafter also referred to as the Lithuanian Constitutional Court.

Before beginning this presentation it should be mentioned that, as noted in the legal doctrine, there are known **procedural and substantive limitations on the alteration of the constitution**⁸. **As for Lithuania**, in the rulings of 24 January 2014 and 11 July 2014 the Lithuanian Constitutional Court alongside with the procedural limitations on the alteration of the Constitution (this reflects the hierarchy of constitutional principles or constitutional values) formulated the substantive limitations on the alteration of the Constitution. According to the Court, **the substantive limitations on the alteration of the Constitution are the limitations consolidated in the Constitution regarding the adoption of the constitutional amendments of certain content**. These limitations stem from the overall constitutional regulation. They are designed 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. **The substantive limitations are composed of two groups: absolute limitations comprising so called “eternity clauses” and relative limitations.**

I. Concept and types of eternity clauses

Absolute limitations on the alteration of the constitution also can be characterized as eternity clauses. **They can be defined as constitutional provisions⁹ or constitutional principles¹⁰ that are immune from amendment** and 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. As it was mentioned, such unamendable or “eternal” clauses may be either **explicitly** included in the text of the constitution, or **implicit**, which are identified through the process of interpreting the constitution by constitutional courts or other institutions exercising constitutional review.

Although the content of explicit unamendable provisions in different states varies, but despite some minor exceptions, one can identify **several common groups of components**: 1) form and system of government; 2) state’s political or governmental structure; 3) state’s fundamental ideology or “identity”; 4) basic rights; 5) state’s integrity; 6) other provisions, unique constitutional subjects

⁸ European Commission for Democracy through Law. Report on Constitutional Amendment (Venice, 11-12 December 2009). Available at: <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)001.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)001.aspx)> [accessed 16 June 2017].

⁹ Classification based on the Venice Commission Report on Constitutional Amendment. For example, Constitution of Armenia: „Articles 1, 2 and 114 of the Constitution may not be amended“. *Ibid.*

¹⁰ For example, Constitution of Norway: „**Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two-thirds (2/3) of the Storting agree thereto**“. However, according to Venice Commission, in the course of the last century this provision has not had a restraining function, and the Norwegian constitutional system has undergone a number of important amendments. *Ibid.*

(for example, immunities, amnesties, reconciliation and peace agreements, taxation or rules governing nationality)¹¹.

Thus comparative law reveals that eternity clauses are **related to 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.

Also there are **two types of eternity clauses: absolutely unamendable fundamental constitutional provisions** (i. e. immune from any amendment) and *de facto* **unamendable constitutional provisions** (i. e. so strict rules that is impossible to amend them).

As regards Lithuania it should be noted that eternity clauses are not explicitly provided in the Constitution. However, while formulating the doctrine of the constitutionality of constitutional amendments, the Lithuanian Constitutional Court **deduced the eternity clauses from the Article 1 of the Lithuanian Constitution construed in conjunction with the Act of Independence of 16 February 1918 as the act of supra-constitutional nature**. In this respect one can see **the similarity with the Moldovan Constitutional Court in acknowledging the supra-constitutional force of the Independence Act**. The Moldovan Constitutional Court in its judgment of 5 December 2013 concerning State language 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 by the status of “eternity clause”, as **it defines the constitutional identity of the political system, whose principles cannot be changed without breaking this identity”**¹².

Absolutely unamendable fundamental constitutional provisions. In its ruling of 11 July 2014, the **Lithuanian Constitutional Court singled out the absolutely unamendable fundamental constitutional provisions that stem 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 revoked, the constitutional identity of the Nation and the**

¹¹ ROZNAI, Y. Unamendability and the Genetic Code of the Constitution. *New York University Public Law and Legal Theory Working Papers*. Paper 514. Available at: <http://lsr.nellco.org/nyu_plltwp/514> [accessed 14 June 2017].

¹² Judgment of the Constitutional Court of Moldova No. 36 of 5 December 2013 (Applications No. 8b/2013 and 41b/2013). Available at: <<http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=476&l=en>> [accessed 16 June 2017].

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 innate nature of human rights **cannot be abolished 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.** Although there is a **formal possibility to alter** the provision “The State of Lithuania shall be an independent democratic republic” of Article 1 of the Constitution **by referendum, if at least three quarters** of Lithuanian citizens with the electoral right vote in favour and **due to the fact** that the principles of independence and democracy are **established in the act of supra-constitutional nature**, this possibility should not be understood as allowing to repeal of independence and democracy.

Inherent nature of human rights has to be interpreted as inseparable part of the democratic order. Although **Article 18 of the Lithuanian Constitution**, stating that “human rights and freedoms shall be innate”, **formally belongs to the range of provisions in respect to which the ordinary amendment procedure applies**¹³, **the constitutional protection of the inherent nature of human rights should be the same as the protection of other values that form the foundations of the statehood of Lithuania.**

Democracy 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. As maintained by Lithuanian exile lawyer J. Varnas, “democracy is a lifestyle based on social justice, the acknowledgment of human value in each person, the equality of all people and love for the close ones. At the same time, it is the moral duty to respect an individual and his personality”¹⁴. From the present-day perspective, it can be stated that **there can be no democracy without the recognition of the innate nature of human rights. Furthermore, the effective implementation of human rights constitutes the substantive content of democracy.** As the Slovenian Constitutional Court noted that “**Only such state order is truly democratic in which respect for human dignity is the principle guideline for the functioning of the state**”¹⁵. **Democracy is not only the rule of majority. It has to include the respect for individual and minority rights.** If respect for human rights is to be ignored we will have not a democracy but such a state order which could be called

¹³ Double consideration and vote at the Seimas, with a break of not less than three months between the votes; a qualified majority of not less than 2/3 votes in favour of all the members of the Seimas is necessary during each vote.

¹⁴ VARNAS, J. Dėl demokratijos esmės. *Tėvynės sargas*. 1978, No. 2 (40), p. 47.

¹⁵ The ruling of 26 September 2011 of the Slovenian Constitutional Court, No. U-I-109/10, para. 11. Available at: <<http://odlocitve.us-rs.si/en/odlocitev/AN03530?q=u-i-109%2F10>> [accessed 16 June 2017].

ironically as “**demodictatorship**“ (“demokratūra”). In other words, democracy could be transformed into a **dictatorship of the majority against minorities** the essence of which is based on the logic of formula “50+1”¹⁶.

By formulating the doctrine of absolute substantive limitations on constitutional amendments, the Constitutional Court stated 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 innate rights. The Constitution should not become an instrument for “committing democratic suicide”**. In this respect, it is possible to speak of the modified John Stuart Mill’s “paradox of a slave”, according to which the principle of freedom cannot require that a person should be free not to be free. Thus, **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**.

Thus, independence, democracy, and the inherent nature of human rights and freedoms – are associated with highest constitutional protection through the consolidation of their absolute unamendability. In the light of the notion of the Constitution as an integrity, this inviolability means not only the prohibition on altering or revoking constitutional provisions consolidating these values, but also the prohibition on adopting amendments to the other articles of the Constitution that would deny any of such values. Therefore, for example, a constitutional amendment legitimising torture or the death penalty or abolishing the restriction on the term of office of the President of the Republic would be constitutionally impermissible, as contrary to Article 1 construed in conjunction with the Act of Independence of 16 February 1918.

The eternity clauses should be understood as protecting the core of fundamental constitutional principles and at the same time 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

¹⁶ DONSKIS, L. Demokratinių vertybių skatinimas. Available at: <http://www.donskis.lt/p/lt/1/1_/52> [accessed 14 June 2017].

national level, and should properly continue to be so in the years to come¹⁷. 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**.

As regards the compliance of constitutional amendments with the eternity clauses, one should keep in mind that such values **as democracy and respect for innate human rights are universal constitutional values** (once universality is understood in terms of modern democratic states)¹⁸. Consequently, it is possible to speak about **the common international, at least European, interest in safeguarding the basic values of democracy**. In this respect, it is worthwhile to refer to the documents adopted by the Commission for Democracy through Law (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 substantive requirements should not be put to the popular vote**.¹⁹ 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 the European *ordre public*.

The nature of eternity clauses as serving against the elimination of democracy and grounded on universal (European) 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**

¹⁷ European Commission for Democracy through Law. Report on Constitutional Amendment (Venice, 11-12 December 2009). Available at: <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)001.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)001.aspx)> [accessed 16 June 2017].

¹⁸ It should be noted that the universality of fundamental constitutional values leads to a certain convergence of national constitutional identities. Such a convergence is especially widely discussed in the context of the “European identity”, which is based on shared fundamental constitutional values. References to this common identity can be found, *inter alia*, in the preambles to the North Atlantic Treaty and the Statute of the Council of Europe, the Declaration on the European Identity (1973), and Articles 2 and 6(3) of the Treaty on European Union.

¹⁹ Guidelines for Constitutional Referendums at National Level. Adopted by the Venice Commission at its 47 Plenary Meeting, Venice, 6–7 July 2001. Available at: <[http://www.venice.coe.int/webforms/documents/CDL-INF\(2001\)010-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2001)010-e.aspx)> [accessed 16 June 2017].

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”²⁰.

De facto unamendable constitutional provisions include **two principles: the republican form of government of Lithuania** established in Article 1 of the Constitution and **the restrictive aspect of the principle 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”. In both cases according to the Lithuanian Constitution the principles could be treated as *de facto unamendable constitutional provisions*, because **they can be amended only by the referendum**, if at least three quarters of Lithuanian citizens with the electoral right vote in favour - **so high number that is impossible to achieve**. As regards of the constitutionality of constitutional amendments, **there could not be such amendments which could deny the core of the mentioned principles unless they are altered in accordance with the Constitution, but, as it was mentioned, it is practically impossible**.

Firstly, the republican form of government of Lithuania reflects the Lithuanian constitutional tradition which is linked to a parliamentary republic. This form of government was expressly established in the Constitution of 1922 and referred to in the Declaration of the Council of the Lithuanian Freedom Fight Movement of 1949.

Secondly, the restrictive aspect of the principle of the geopolitical orientation of the state. This principle also constitutes a significant part of the Lithuanian constitutional tradition which could be traced to the Declaration of the Council of the Lithuanian Freedom Fight Movement of 1949. The restrictive aspect of the principle of geopolitical orientation is consolidated in the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”. According to this principle: 1) there is the prohibition to join the Commonwealth of Independent States or any other union (organization) formed on the basis of dependency to the former USSR; 2) there is the prohibition to deploy on the territory of the Republic of Lithuania the military bases or troops of Russia, or the Commonwealth of Independent States, or states participants of the Commonwealth of Independent States.

II. Relative limitations on the alteration of the Constitution

²⁰BVerfG, 2 BvE 2/08 vom 30.6.2009. Available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [accessed 16 June 2017]. The Court also held that “Within the order of the Basic Law, the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity are, in any case, not amenable to any amendment because of their fundamental quality“.

Relative substantive limitations on the alteration of the Constitution are such constitutional provisions as to which other constitutional amendments should comply with unless these constitutional provisions are altered (as a rule by the referendum) together with them and to the extent that “eternal clauses” are not affected. These limitations include three relatively unamendable constitutional provisions:

Firstly, the positive aspect of the principle of the geopolitical orientation of the state (membership of the Republic of Lithuania in the European Union) - constitutional grounds for this membership, which are consolidated in Articles 1 and 2 of the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”. They include: 1) the conferral of powers of the Lithuania’s state institutions on supranational (the European Union) institutions; 2) the status of the European Union law – it is a part of the Lithuanian legal system. The Lithuanian Constitutional Court declared that the fully-fledged membership in the European Union is a constitutional value and due to the fact that this membership is based only on the will of the citizens of Lithuania expressed in the referendum, **constitutional grounds for this membership may be altered only by referendum. There could not be such constitutional amendments which** may contradict to these constitutional grounds, unless these grounds are altered by referendum (**for example**, the provisions on ownership of land which would provide the exclusive rights for the citizens of Republic of Lithuania excluding the citizens of the European Union).

Secondly, all key provisions contained in the Chapters I “The State of Lithuania” (except for Article 1 of the Constitution) **and XIV** “Alteration of the Constitution”, for example, the state language, the principle of state integrity, the principle of division of powers, the prohibition on multiple citizenship. According to the Constitution, as the provisions of Chapters I (except for Article 1 of the Constitution) and XIV of the Constitution **may be altered only by referendum, no constitutional amendments to the other constitutional provisions which** could deny the values and principles of provisions of Chapters I (except for Article 1 of the Constitution) and XIV of the Constitution should be adopted, unless the respective provisions of the said Chapters are amended accordingly.

Thirdly, the constitutional principle *pacta sunt servanda*, which means the imperative to carry out in good faith international obligations of the Republic of Lithuania assumed in accordance with international law, *inter alia* international treaties. **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, they would deny the constitutional principle *pacta sunt servanda*, consolidated in Article 135 of the Constitution. **This kind of amendments may be made only denouncing the international obligations in accordance with the norms of international law.**

After the description of substantive limitations on the alteration of the Constitution one can conclude that **the hierarchy of constitutional values is reflected in these limitations. At the same time they serve as specific criteria of assessing of the constitutionality of constitutional amendments. Each constitutional amendment could be measured as regarding of its compliance with the higher constitutional values. This means that amendments to the Constitution should not contradict to:** 1) eternity clauses; 2) *de facto* unamendable constitutional provisions, unless their are altered in an appropriate manner (as it was mentioned, it is practically impossible to achieve); 3) the relatively unamendable constitutional provisions, if their are not altered in an appropriate manner. Therefore, the Lithuanian Constitutional Court formulated **a net of criteria for the reviewing the constitutionality of amendments to the Constitution** which is based on the above described hierarchy of constitutional provisions.

III. The power of constitutional courts to review the constitutionality of constitutional amendments

Constitutional courts of some countries have **the explicitly provided power to review the constitutionality of an amendment to the constitution, including Austria, Bulgaria, Germany, Moldova and Portugal.** For example, **the Constitutional Court of Moldova**, in its ruling of 4 March 2016, held that it is competent to examine the constitutionality of law amending the Constitution. The Court based its argumentation *inter alia* on Article 135 para (1) a) (the power to review the constitutionality of laws) and c) (the Court “formulates its position on initiatives aimed at revising the Constitution”)²¹. By adopting this judgment, the Constitutional Court of Moldova joined the trend of constitutionalism, which emerged after World War II, towards accepting the competence of constitutional courts to review constitutional amendments and annul those that contradict the “basic structure” or “constitutional essentials”²².

In some countries such power of the constitutional courts might be limited. For example, Turkey’s Constitution includes express provisions that authorize the Constitutional Court to examine whether the formal requirements for constitutional amendments, as laid down in the Constitution, have been fulfilled²³. **In Ireland judicial power to review the constitutional**

²¹ Judgment of the Constitutional Court of Moldova No. 7 from 4 March 2016 (Complaint no. 48b/2015). Available at: <<http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=en>> [accessed 16 June 2017].

²² HALMAI, G. Internal and External Limits of Constitutional Amendment Sovereignty. Available at: <<http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmaj/Constitutional-Amendment-Power.pdf>> [accessed 16 June 2017].

²³ GÖZLER, K. Judicial Review of Constitutional Amendments. *A Comparative Study* 23-24 (2008). In: BARAK, A. Unconstitutional Constitutional Amendments. *Israel Law Review*, 2011, Vol. 44, p. 331.

amendments does not extend to the content of the amendment²⁴. The Irish Supreme Court after the case of *State (Ryan) v. Lemmon* (1935) reaffirmed its commitment to popular sovereignty in several similar rulings, stating, for example, that “There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional” (*Riordan v. An Taoiseach* (1999)²⁵)²⁶.

A number of states do not have explicitly provided power to review the constitutionality of an amendment to the constitution, including Lithuania. What are the powers of constitutional courts in this situation?

In my opinion, **constitutional court not only can, but also must have jurisdiction to perform judicial review of the constitutionality of constitutional amendments** regardless of whether this power is entrenched in the text of the constitution or not. **If constitutional courts have no such power or such power is restricted, it makes no sense to speak about the supremacy of the constitution.** If we interpret the Constitution as prohibiting the power of the Constitutional Court to review the constitutionality of constitutional amendments, **the political authorities could adopt any constitutional amendments regardless of any constitutional imperatives and there would be no control on these amendments.** The constitution can not tolerate this kind of situation.

It would only seem natural that, as Ulrich Preuss states, “**the institution best suited to verify an unconstitutional constitutional amendment is the constitutional court, which has the authority to review the constitutionality of legislative acts**”²⁷. Therefore, even if the judicial constitutional control of constitutional amendments is not explicitly established in the constitution or in a special law, the competence of the constitutional court to review the constitutionality of constitutional amendments should be understood as **implicit in the very *raison d’être* of any constitutional court as a guardian of the constitution.** As for Lithuania, **the question concerning the competence of the Constitutional Court of the Republic of Lithuania** to examine the constitutionality of constitutional amendments **was not raised at all.** Such a competence as inherent function of the Constitutional Court was clearly acknowledged by the Seimas, which requested an investigation into whether the Law Amending Article 125 of the Constitution, in view of the manner

²⁴ BARAK, A. Unconstitutional Constitutional Amendments. *Israel Law Review*, 2011, Vol. 44, p. 331.

²⁵ Or „No organ of the State, including this Court, is competent to review or nullify a decision of the people. [...] The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with“ (*Hanafin v. Minister of the Environment* (1996)).

²⁶ O’CONNELL, R. Guardians of the Constitution: Unconstitutional Constitutional Norms. *Journal of Civil Liberties*, 1999, Vol. 4 (also available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=883590>). In: HALMAI, G. Internal and External Limits of Constitutional Amendment Sovereignty. Available at: <<http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmal/Constitutional-Amendment-Power.pdf>> [accessed 16 June 2017].

²⁷ ULRICH, K. P. The Implications of “Eternal Clauses”: the German Experience. *Israel Law Review*, Vol. 44 (429), 2011, p. 441. Available at: <<http://law.huji.ac.il/upload/44Preuss.pdf>> [accessed 16 June 2017].

of its adoption, was not in conflict with the Constitution²⁸. Even if one construes the Constitution only literally, the Constitutional Court has to be competent to examine the constitutionality of constitutional amendments because it considers whether the laws are in conflict with the Constitution; the Constitution is always altered by the law, although such a law is adopted in a different manner than the ordinary laws.

Conclusions

At least two factors allow to confirm that the hierarchy of constitutional principles is inevitable. On the one hand, there **exist unamendable constitutional provisions (eternity clauses)**. On the other hand, **there are different rules for amending the provisions of the constitution**. The more complex rules lead to the conclusion that **certain constitutional values are higher than other constitutional values**.

Constitutionality of constitutional amendments depends on existing limitations to amend the constitution. The most important of these limitations are **substantive constitutional limitations**. Among them at the top of the hierarchy of constitutional principles there are **eternity clauses**. **Some of these eternity clauses could be regarded as consolidating universal values, such as rule of law, democracy and the inherent nature of human rights. They are the basis for the common European constitutional identity. There are also *de facto* unamendable constitutional provisions which practically are impossible to amend, as well as relatively unamendable constitutional provisions which could be altered according to a more complex procedure than the rest of the constitutional provisions. The amendments to the constitution should comply with these limitations, i. e. this hierarchy of constitutional principles and that means the amendments can not deny the higher principles unless they are not amended accordingly. Therefore, substantive limitations on the alteration of the Constitution serve as specific criteria of assessing of the constitutionality of constitutional amendments.**

A number of states have substantive limitations on the alteration of the constitution which are explicitly included in the text of the constitution. Constitutional courts of such states which do not have the said explicitly provided limitations can reveal the implicit substantive limitations when they interpret the constitution while adjudicating constitutional justice cases and **taking into account** the acts of supra-constitutional nature (such as the acts of independence), as well as different rules of amendment of the constitution, and the requirement of coherency and harmony of constitutional provisions.

²⁸ The ruling of 24 January 2014 of the Constitutional Court of the Republic of Lithuania. Available at: <http://www.lrkt.lt/en/court-acts/search/170/ta850/content> [accessed 16 June 2017].

The judicial review of the constitutionality of constitutional amendments stems from the very *raison d'être* of any constitutional court as a guardian of the constitution even this power is not established explicitly. Otherwise, the supremacy of the constitution could be denied and conditions for political authorities to adopt constitutional amendments regardless of any constitutional imperatives are created.

The particular responsibility rests on the constitutional courts in **revealing the content of universal constitutional values and protecting the European constitutional identity**. They reveal the **hierarchy of constitutional principles within the constitution and must interpret the constitutional principles in a flexible way** so as to adopt the constitution to the changing circumstances according to various national and international factors. **The role of constitutional courts is of particular importance when it comes to revealing the universal unamendable clauses such as the rule of law, the inherent human rights, and democracy, preventing “dead hand constitutionalism”, and assuming the power to review the constitutionality of constitutional amendments. At the same time that is a part of the European constitutional identity.**