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ETERNITY CLAUSE – A REALISTIC OR MERELY AN ILLUSORY WAY OF PROTECTING THE STATE’S CONSTITUTIONAL IDENTITY?

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Summary. Eternity clauses can be defined as constitutional provisions or constitutional principles that are immune from amendment. The eternity clauses should be understood as protecting the core of fundamental constitutional principles and therefore leaving space for evolutive interpretation of these principles. Therefore, these clauses function as barriers or “stop lines” to constitutional amendment. Legal scholars observe that eternity clauses can aspire to protect two types of values serving as foundations of the state’s constitutional identity. In the first group unmodifiable provisions protect such universal values as democracy, natural and inalienable human rights, or the principle of the rule of law. The principles in the second group, by contrast, protect

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specific values reflecting the special characteristic features of a given state's constitutional identity. Those could include federalism, the role of religion in the state, or the principle of separation of the powers. The analysis of the constitutional regulations and the case-law of the Constitutional Courts should allow us to answer whether the eternity clauses are a realistic or merely an illusory way of protecting the state's constitutional identity?

Keywords: eternity clause, constitutional identity, constitutional values, constitutional principles, constitutional court, constitution.

Klauzula wieczysta – realny czy tylko iluzoryczny sposób ochrony konstytucyjnej tożsamości państwa? Klauzule wieczyste można zdefiniować jako przepisy konstytucyjne lub zasady konstytucyjne, które nie podlegają zmianom. Klauzule wieczyste należy postrzegać zatem jako ochronę rdzenia podstawowych zasad konstytucyjnych, a tym samym pozostawienie miejsca na ewolucyjną interpretację tych zasad. Dlatego też klauzule te funkcjonują jako bariery lub „linie ograniczające” dla zmian konstytucji. Według doktryny prawa konstytucyjnego klauzule wieczystości mogą aspirować do ochrony dwóch rodzajów wartości, służących jako fundamenty tożsamości konstytucyjnej państwa. W pierwszej grupie przepisy niemodyfikowalne chronią takie wartości uniwersalne jak demokracja, naturalne i niezbywalne prawa człowieka czy zasada państwa prawnego. Natomiast zasady z drugiej grupy chronią wartości specyficzne, odzwierciedlające szczególnie cechy charakterystyczne tożsamości konstytucyjnej danego państwa. Należą do nich m.in. federalizm, rola religii w państwie czy zasada podziału władz. Analiza przepisów konstytucyjnych oraz orzecznictwa sądów konstytucyjnych powinna pozwolić odpowiedzieć na pytanie, czy klauzule wieczyste są realnym, czy tylko iluzorycznym sposobem ochrony tożsamości konstytucyjnej państwa.

Słowa kluczowe: klauzula wieczysta, tożsamość konstytucyjna, wartości konstytucyjne, zasady ustrojowe, sąd konstytucyjny, konstytucja.

1. INTRODUCTION

It is an indisputable fact that even though in modern constitutions we attribute in an equal measure a special and supreme legal force to constitutional norms, we are also ready at the same time to accept the claim that some kind of hierarchy among these norms is possible. This is because norms of particular importance or significance to the state's system of governance can take the form of constitutional principles that serve as the lens through which other norms contained in the basic law will be read and interpreted, the latter playing de facto a more or less auxiliary or subsidiary role to the former.

This sort of hierarchical ordering of constitutional norms is a fact. It is also a fact that out of 193 written constitutions being in force, eternity clauses with varying levels of complexity feature in 59, i.e. 30.6%. At the same time, as many as 71 of those constitutions contain a clause limiting the possibility of constitutional amendment (36.8%) and 12 contain a combined solution (6.2%) (O. Preuss, 2016a, p. 294; Tyloch, 2019, p. 6 et seq.). Sometimes the authors of a constitution do in fact vest some of its provisions with supremacy, putting them for one reason or another on a verifiably stronger position in the constitutional hierarchy and imposing certain content-based limitations usually on the method and procedure for their hypothetical amendment. When invoking the special status of the content of a constitutional norm, we usually have in mind that it expresses uniquely important values espoused by the state, requiring stronger preventive or pre-emptive protection, since the lack of such protection would entail the risk of violating or at least undermining the constitutional identity of that state (Suteu, 2021, p. 21).

Thus, the aforesaid content-based limitation and establishment of a different procedure for amending certain constitutional provisions give rise to the phenomenon of “unmodifiable” or “irrevocable” norms, also referred to as eternity clauses or provisions or unmodifiable provisions (Tyloch, 2019, p. 54).

2. ETERNITY CLAUSES’ AND THEIR IMPACT ON THE CONSTITUTIONAL IDENTITY OF THE STATE

Gary J. Jacobsohn defines constitutional eternity clauses as provisions safeguarding the fundamental principles espoused by a given state. He notes that eternity clauses leave room for a continually expanding interpretation of such most important principles (Jacobsohn, 2010, p. 136). The Venice Commission emphasizes that the most frequent unmodifiable principles are “sovereignty”, “democracy”, “republican form of government”, “federalism” or “fundamental rights”, or similar.¹ Then, according to O. Preuss, an eternity clause is a legal instrument that recognizes certain constitutional principles, values or specific provisions as unmodifiable and irrevocable. An eternity clause is a legal instrument allowing society to preserve a particular value in perpetuity and limits the power of the government in order to perpetuate that value and thus maintain the political system (O. Preuss, 2016a, p. 289). Maria Kruk observes that the Czech

¹ See Venice Commission report on constitutional amendments, <http://www.e-democracy.md/files/elections/report-constitutional-amendment-12-12-2009-en.pdf/>.

eternity clause is a reminder that certain amendments to the constitution cannot be made even by a legitimate majority, not even by qualified majority, and not even in the form prescribed for constitutional amendments (Kruk, 2018, p. 50). It must be noted that violating the prohibition against the amendment of an eternity clause leads to the possibility of having enacted an “*unconstitutional constitutional act*” (Koudelka, 2011, p. 46–55). Eternity clauses, therefore, fulfil an important role in protecting the values considered fundamental by the state and which, if changed, could undermine its constitutional identity. Consequently, they must be regarded as a means of protection of the fundamental principles of the state’s constitutional order and its constitutional identity. The function of eternity clauses is first and foremost to stabilize and preserve the system adopted by the state. An eternity clause can be viewed on the one hand as preventive protection and on the other hand as the affirmation of the new values having been recognized by the state (O. Preuss, 2016a, p. 294). The constitution’s “unmodifiable” provisions are the foundation and source of guarantee of the democratic constitutional identity, because they reinforce the universal democratic values (Žalimas, 2015, p. 166) and, “[i]f the ‘eternal’ normative stipulations were changed, the collective self – or identity – of the polity as embodied in the constitution would collapse” (U.K. Preuss, 2011, p. 445). It will thus probably not be a mistaken conclusion that eternity clauses in constitutions are such constitutional provisions or principles as cannot be amended, not even by completing the path prescribed for constitutional amendments by the same constitution (Žalimas, 2015, p. 166). In other words, the existence of eternity clauses is a substantive limitation on constitutional amendability (Witkowski, Serowaniec, 2021, p. 136–137; Tyloch, 2019, p. 54 et seq.).

Even though constitutions claiming absolute unamendability are nowadays relatively rare, some preclude the modification of a number of particularly important provisions (e.g. the constitutions of Turkey, Greece, Italy, Germany, Portugal and Romania). Also in comparative studies, as well as court decisions one can find a diversity of approaches taken to eternity clauses. While the Czech jurist, Professor Zdenek Kühn, denies legislation conflicting with an eternity clause the character of law (Kühn, 2010, p. 24), Professor Stanisław Sagan supports the view that limitations cannot be imposed on constitutional amendments (Sagan, 2018, p. 112). This is probably a consequence of the fact that inserting eternity clauses in constitutions provides the latter with particular rigidity and activates a sort of preservation mechanism for them. Probably for the same reason scholars in comparative constitutional studies are usually of the opinion that such “eternity” with consequent “unmodifiability” of certain constitutional provisions is in fact relative (Garlicki, 1997, p. 141; Banaszak, 2012,

p. 97), since it only applies to amendments of the existing constitution without imposing the slightest limitation on future constitutional law-making when passing a whole new constitution. After all, the authors of the “new constitution” become “original” lawmakers and as such cannot be bound by the same law they create anew and accordingly they cannot be bound by any unmodifiable constitutional norms. Here, it would be expedient to recall the well-turned observation of Professor M. Kruk, who emphasizes that the inclusion of specific types of eternity clauses along with the selection of their substantive contents has always been, still is and probably is going to remain in the future a matter of “separate historical experiences, or priorities or values, regarded as absolutely fundamental” (Kruk, 2018, p. 54) by a given state shaping its basic law in a special moment of its history.

Spectacular examples can be found in the constitutions of the French 5th Republic (Article 89(5) of the 1958 Constitution), Italy (Article 139 of the 1947 Constitution), Greece (Article 110(1) of the 1975 Constitution, as amended in 1986), Germany (Article 81(4) of the Basic Law of 1949), Romania (Article 148(1) of the 1991 Constitution), Portugal (Article 288 of the 1976 Constitution, as amended in 1997) and Turkey (Article 4 of the 1982 Constitution). All of these states, having abandoned the monarchic form of government, have also proclaimed in their republican constitutions the inalterability of the republican form newly adopted by their states. Indeed, for a long time this particular solution had been put neither in dispute, nor in the spotlight in the constitutional debate and literature. The full complexity of the problem came to surface only as late as 1992, following the debate in the French Constitutional Council following discussions surrounding attempts to introduce a new Chapter XV to the Constitution, dealing with the European Communities and the European Union due to the need to ratify the Maastricht Treaty (Kruk, 2018, p. 54). Indeed, the debate on the permissibility and even validity of the fifth paragraph of Article 89, adopted in 1958 – “The republican form of government shall not be the object of any amendment” – had to be perceived and evaluated in the light of the principle of national sovereignty along with the sovereign’s capacity for freely changing the constitutional form of government, already expounded so powerfully by General de Gaulle. The aftermath of this heated debate in French legal literature at the time was the acceptance of the thesis that: “holding the sovereign bound by the eternity clause is not an axiom and any such clause would ultimately have to yield before the sovereign’s decision”. M. Kruk is also correct in asserting that the French experience discussed just above, concerning “the conditions for the removability of an irremovable principle means that the

problem of the permanence of unmodifiability clauses is not a purely theoretical consideration” (Kruk, 2018, p. 54).

The Venice Commission takes a similar view: “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” (Tyloch, 2019, p. 56). From this statement it is clear that in the opinion of its authors eternity clauses are not impermissible but should be used in moderation, only if truly necessary and always with great caution, and the resulting norms should never be interpreted expansively (Witkowski, Serowaniec, 2021, p. 136–137).

Among the arguments cited in favor of opening modern constitutions to the introduction of eternity clauses, the legal literature and case-law stemming from court or tribunal decisions of some EU member states mention the need for guaranteed protection of the constitutional identities of their states (Kühn, 2010, p. 24). “The elements composing the state’s constitutional identity are then regarded as unmodifiable, and the legal literature and court decisions consequently impose a ban on amending constitutional norms composing the constitutional identity of a given state” (Tyloch, 2019, p. 55).

Furthermore, it can be noted that eternity clauses can be classified according to the specific values protected by them. Thus, eternity clauses are usually attached to substantive norms concerning the principles of the state’s constitutional order and the relationship between the state and the individual, but the full spectrum of important values requiring protection by an eternity clause may be very diverse in terms of subject matter and the values offered protection. For example, there can be provisions protecting the state religion (Iran, Afghanistan) or secular character of the state (Turkey), designating a specific language as the official language of the state (Algeria), determining the federal nature of the state (Germany), or the right to opposition (Portugal), or forswearing the right to maintain regular armed forces (Japan). It is notable that also here the Venice Commission spoke on the specific principles that may take the form of unmodifiable principles, including those such as the democratic and republican form of government, the federalist structure of the state, its independence and territorial integrity, as well as the fundamental rights and freedoms of its citizens (Tyloch, 2019, p. 59).

Another reason for inserting eternity clauses in a constitution can also be to establish protection for the state’s constitutional identity and, especially, to drive compliance with the fundamental principles and rules of the basic law. The purpose of imposing such limitations is also to guarantee the constitution’s stability and resilience to the changing realities. It must be noted that the existence of

a regulated procedure for constitutional amendments imposing certain limitations on amendability indicates a certain level of protection that has been established for the constitution by its authors. The number of changes enacted since the constitution came into force shows how its provisions are perceived and complied with, and it also demonstrates the importance of constitutional regulations to the state's constitutional order. Limitations on constitutional amendability are an element indicative of the level of rigidity of the basic law (Suteu, 2021, p. 34–35).

The inclusion of “unmodifiable” provisions in a constitution is intended to serve as an instrument to protect the fundamental concepts underlying the state's constitutional principles. Eternity clauses can be defined generally by reference to the constitution's essence or spirit, or, specifically, by enumeration of what principles may be neither amended, nor repealed (Tyloch, 2019, p. 254–255).

The purpose of “unmodifiable” provisions is mainly to protect the fundamental values espoused by the state, such as democracy. Such provisions are grounded in values that are transnational (i.e. involving many states), and, as the German Constitutional Court has emphasized: “Thanks to what we call the eternal guarantee, the Basic Law on the one hand responds to the historical experience of either slow or rapid decomposition of the institutions of the fundamental democratic order. On the other hand, it clearly specifies that the German Constitution, especially when taking into account the international changes following the inception of the United Nations, has a universal basis that positive law is not capable of amending” (BVerfG, case 2/08, judgment of 30 June 2009). According to the German Constitutional Court, there exist such fundamental constitutional values protected by eternity clauses as ought to be regarded as constitutional metanorms. The intention of such norms is to indicate the point up to which the basic law may be amended (Žalimas, 2015, p. 171).

The Venice Commission notes that the list of key principles often recognized by states as unmodifiable, such as sovereignty, democracy, republican form of government, federal government, or respect for fundamental rights, has expanded over time – both on the international and domestic levels – and will continue to expand. Eternal provisions ought to be regarded not as imposing unmodifiability and preventing change but as not permitting changes violating the essence of the respective constitutional principles (Žalimas, 2015, p. 167).

Inextricably linked to unmodified provisions appears to be the concept of the state's constitutional identity. The German Federal Constitutional Court, when determining the meaning of it in the case concerning the scope of powers possible for the state to transfer to the European Union, referred to Article 79(3)

of the Basic Law, the latter being the German eternity clause (BVerfG order of 14 January 2014).

There is a close relationship between unmodifiable provisions and constitutional identity. As G.J. Jacobsohn asserts, since the constitutional identity is a dynamic concept with continually expanding meaning, it requires special protection from destruction. Accordingly, it is the relevant state's nation that should strive to harmonize the various elements composing that state and remain faithful to the fundamental principles and structures composing the state's constitutional identity. In effect, the constitutional court should have the right to cancel a constitutional amendment, even though the latter may have been adopted in accordance with the procedural requirements set forth in the basic law, should such amendment materially violate the state's constitutional identity (Jacobsohn, 2010, p. 273).

Legal scholars observe that eternity clauses can aspire to protect two types of values serving as foundations of the state's constitutional identity. In the first group unmodifiable provisions protect such universal values as democracy, natural and inalienable human rights, or the principle of the rule of law. The principles in the second group, by contrast, protect specific values reflecting the special characteristic features of a given state's constitutional identity. Those could include federalism, the role of religion in the state, or the principle of separation of the powers. For example, Lithuania protects a principle that is unique to that state – the principle of the state's geopolitical orientation (Žalimas, 2015, p. 168).

The need to protect key democratic values arises from the nation's democratic constitutional identity. According to Darius Žalimas, without eternal universal values (natural human rights, democracy and freedom) the constitution itself could not possibly exist (Žalimas, 2015, p. 170).

Eternal clauses protect the essence of fundamental constitutional principles and simultaneously enable the broad construction of such principles (Jacobsohn, 2010, p. 136). These clauses are a means to safeguard the basic principles of the state's constitutional order and materially affect that identity. Armin von Bogdandy and Stephan Schill conclude that the fact of protecting constitutional principles with an eternity clause can alone be understood as proof of their significance to the state's constitutional identity (Bogdandy, Schill, 2011, p. 1432). Ulrich K. Preuss, in turn, points out that eternity clauses define the material components of the foundational myth and therewith they define the polity itself. Altering those clauses would destroy the state's identity arising from its basic law (U.K. Preuss, 2011, p. 445).

In practice, eternity clauses are not only an instrument enabling the society to protect its recognized values, and this does not take place in the face of the system's destruction, or on the edge of revolution, but regularly, in political and legal reasoning, during the process of the creation of new constitutional standards. Eternal provisions are a smart instrument, for they are invoked not only by courts but also by politicians and members of parliaments especially in the process of constitutional legislation. An eternity clause, "will not ensure eternity but may help protect specific values, before they are outdated" (O. Preuss, 2016a, p. 301–302).

Maria Kruk suggests that the inclusion of an eternity clause in a constitution compels scholars to identify the essence of the democratic state ruled by law, also in the process of judicial decision-making. Zooming in on the essence of the principle makes it possible to verify that a given amendment can violate elements of an eternity clause, thus becoming impermissible. It also makes it possible to identify a list of inviolable principles and impermissible amendments or interpretations of norms without which there would be no rule of law. The constitutional limitations on the modifiability of certain principles recognized as important are a matter of great importance, especially in a situation in which extra-constitutional changes to the system of government contravene or outright violate the principle of a constitutional state ruled by law. Adopting an eternity clause makes it possible to avoid situations when the enactment of unconstitutional amendments to the constitution is passed by the parliamentary majority of the day (Kruk, 2018, p. 53–55).

The purpose of inserting eternity clauses in a constitution is the protection of the state's constitutional identity and especially compliance with the fundamental principles and rules of the basic law. The purpose of establishing such limitations is also to safeguard the constitution's stability and its resilience to the changing realities. According to the Venice Commission, though: "unamendability is a complex and potentially controversial constitutional instrument, which should be applied with caution, and reserved only for the basic principles of the democratic order". The resulting conclusion has to be that the purpose of the inclusion of "unmodifiable" provisions is to protect fundamental democratic values (Tyloch, 2019, p. 54 et seq.).

Unmodifiable provisions are linked to the state's identity, and, according to some representatives of Czech legal doctrine, they compose the constitution's "genetic make-up" (Roznai, 2017, p. 16). It is also noted that an eternity clause is a starting point for building a constitutional identity (Kosař, Vyhnanek, 2019, p. 85–113). A number of scholars claim, however, that the eternity

clause paints an incomplete picture of Czech constitutional identity (O. Preuss, 2016b, p. 367).

Here, consideration has been given to the claim of hypothetical limitation of national sovereignty arising from restrictions on the constitution's amendability in a specific matter.

One cannot possibly agree with the assertion that introducing an eternity clause in any way restricts the nation's sovereignty. It should be concluded, together with Dariusz Żalimas, that the constitution should not become the instrument of "democratic suicide". In his view the prohibition of certain constitutional amendments, those that would violate the democracy principle or the principle of a state ruled by law, or the natural human rights, operates to safeguard the nation's sovereignty and democratic self-determination (Żalimas, 2015, p. 170). This is because the introduction of amendments as those mentioned above would, for example, abolish the principle of democracy in the state and would foreclose that nation's exercise of its sovereignty and self-determination. The imposition of such a prohibition, therefore, serves to provide protection from the establishment of totalitarian or authoritarian regime. Eternity clauses must, therefore, be regarded as an important instrument of democracy, materially contributing to its defences (Tyloch, 2019, p. 194 et seq.).

In this context it is also necessary to make note of the process of convergence of national constitutional identities. This process, rooted in the democratic principle, leads to the emergence of an international identity. In this sense one can speak of "Europe's constitutional identity". Since the European Union does not have a constitution, that constitutional identity is grounded in the constitutional identities of the member states, which are undergoing a process of convergence. According to Article 2 TEU: "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 [...]". Also Article 6(3) TEU recognizes the fundamental rights guaranteed by the European Convention for the Protection of Human Rights as general principles of Union law, arising from the constitutional traditions of the member states (Żalimas, 2015, p. 172).

Eternal provisions in constitutions operate as guarantees. Their role consists in how their presence counteracts the attitude, frequently adopted in the political world, of affirming the currently existing state only when holding the reins of power in it. And, "that phenomenon is dangerous to the state, its constitution and society" (Zubik, 2018, p. 32). For this reason, the eternal provisions embedded in the constitution of a state provide the foundation and guarantee

of its democratic constitutional identity, since they reinforce universal democratic values (Žalimas, 2015, p. 172). Eternal provisions, therefore, are the safeguards of the state's democratic constitutional identity and their amendment, in the opinion of Ulrich K. Preuss, “[i]f the ‘eternal’ normative stipulations were changed, the collective self – or identity – of the polity as embodied in the constitution would collapse” (U.K. Preuss, 2011, p. 445).

3. FINAL REMARKS

To summarize the above discussion, one can conclude that the insertion of eternity clauses in the text of a state's constitution serves important functions. Firstly, the eternity clauses have a material impact on the state's constitutional identity, primarily by identifying the scope of that identity in that state, along with the principles and values composing it. Secondly, unamendable constitutional provisions protect the constitutional identity of the state, for example, in the process of European integration, and they help define that identity, as well as the limits of possible European integration. Thirdly, they identify values and principles accepted to have extraordinary importance in that particular state and protect them by limiting the possibility of an amendment that would lead to a breach or violation thereof. In this regard, it is also necessary to note that unmodifiable clauses also protect the principle of respecting fundamental rights in the state and constitute a guarantee of that protection (Tyloch, 2019, p. 234 et seq.). It needs to be emphasized, however, that eternity clauses do not prohibit the wholesale replacement of the constitution with a new one. The significance of constitutional eternity clauses also manifests itself in how they reflect the history and culture of a specific state. By taking a close look at any clause of this kind, one can infer which of the important values or principles had been in the past violated in such a material way as to make the authors of the constitution resort to imposing substantive limitations on amendability. To conclude the above discussion, it can be reiterated that eternal constitutional provisions are the foundation and necessary guarantee of a democratic constitutional identity (Žalimas, 2015, p. 172).

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