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The Eternity Clause as a Smart Instrument – Lessons from the Czech Case Law

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"An ounce of prevention is worth a pound of cure."
Benjamin Franklin

Abstract. This article presents a concept on legal character called The Eternity Clause i.e. a legal standard declaring some principles, values or specific constitutional provisions to be unalterable and irrevocable. The Eternity Clause is viewed as a substantive legal instrument, which enables society to preserve its values for eternity. Its purpose is to surpass simple appeal and limit practical 'power'; to maintain the desired values; to maintain the political system and maybe even remove the mask of legality from violent revolution.

The majority of the modern constitutions contain some form of Eternity Clause. However, the purpose of this paper is to show that the clause can be viewed in another way. It concerns a practical instrument, which should be also heard in political and constitutional law debate especially during constitutional-law making process.
Keywords: Eternity Clause, Constitutional Amendment, Constitutional Change

1. INTRODUCTION

The concept of eternity has always defied modern law. We no longer live in a traditional society in a cyclic non-linear or profane and mystical time.[1] In these modern times time is perceived as a continuum, flowing from moment to moment. People look into the past and into the future (with expectation, aversion or fear) and think, in specific terms, that eternity stands somewhat apart.

Modern law is an instrument. It has a dynamic character and is consequently capable of adapting to the continual progress of society. However, its task is to stabilise and guide this progress, like a modified river course. It cannot stop the flow of progress; no dam is strong enough to completely eliminate progress, but it can guide, preventively regulate or at least respond to it.

The character of the Eternity Clause (German "*Ewigkeitsgarantie*"[2]) i.e. a legal standard declaring some principles, values or specific constitutional provisions to be unalterable and irrevocable, is of a similar character. But what is its legal character?

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[1] In regard to this particularly the works by Mircea Eliade, i.e. Eliade (2004). Recently of interest also Kysela (2014a).

[2] The Eternity clause is an appropriate general notion for 'unamendable' constitutional provisions or 'supra-constitutional' limits on constitutional amendments. It underlines its 'external' character. See for example Roznai (2013b).

There has been an increase in interest in this topic in recent years;[3] this topic was of interest over a century ago. It is clear from the extensive quantity of literature that this is a fairly difficult topic to understand. There is a fairly simple standard, a general rule, which determines, in the Czech Republic for instance, that amendment of an essential requirement of a democratic state governed by the rule of law is impermissible. In Iran, this forbids departure from the Islamic character of the republic; in Portugal, it identifies specific constitutional provisions, in great detail, which must not be subject to any amendment.

However, ending here reveals that this is an unusually ambitious and even presumptuous standard, the purpose of which is to overcome the adversity of fate and touch on eternity. As Gilgamesh sought immortality or eternal youth for himself, this standard seeks the same for its system. Nevertheless, this standard is also exceptionally cryptogrammic as it usually contains several vague concepts and fails to anticipate any clear sanctions. However, the Eternity Clause is consequently usually considered a positive legal standard today and not just having a political appeal towards constitution makers.

The purpose of this paper is to show that the eternity clause can be viewed in another way as a practical clever instrument. It can be utilised for example by the Constitutional Court, as would be demonstrated on the example of the Czech Republic, to support fundamental decision rejecting constitutional change. It can be an even more important instrument that should be heard during constitutional-law making procedure. It should be used in the political and constitutional law debate, which is very important in today's world.

What is the legal character of the Eternity Clause? The Eternity Clause is not a substantive 'instrument'; it is not a legal rule like granting the autonomy to one of the regions in the country or abolition of death sentence with clear legal consequences. Its purpose is to surpass simple appeal and limit practical 'power', maintain the desired values and maintain the political system, maybe even remove the mask of legality from violent revolution. But it does so not at the time of destruction of the system, on the edge of revolution, but regularly, in political and legal reasoning, during the process of the creation of new constitutional standards.

2. THE HISTORICAL BASIS

The oldest explicit Eternity Clause was embodied in the Constitution of the Swiss Republic of Helvetica from 1798, which stated in the last sentence of Article 2: 'The form of government, even though it may change, must always remain a representative democracy.'[4] However, the Republic of Helvetica was created as a result of the French Invasion and it is no wonder that it disappeared after only four years in existence, along with its constitution.

[3] The state science classic Georg Jellinek refuses the legal route to invalidation of the '(French) Eternity Clause'. See Jellinek (1906) 509. In 1918 we encounter an article by František Brychta – Brychta (1918). In general we can mention: Roznai (2013a); Roznai (2013b); Sólyom (2014); Most recently Roznai, Suteu (2015), but we should mention also Halami (2012); Pfersmann (2012); Barak (2011); Smith (2011); Bezemek (2011); Weinthal (2011); Albert (2010); Albert (2009); Samar (2009); Mazzone (2005); Silva (2004); O'Connell (1999). In Czech and Slovak science for example Molek (2014); Holländer (2005); Procházka (2011); Pavlíček (2011); Bröstl (2008); Kysela (2010); Kühn (2010); Kudrna (2010), Tomoszek (2016).

[4] However, some provisions of the constitution of the American post-colonial states of Delaware and New Jersey, dating from 1776, could be considered even older predecessors of the Eternity Clause.

The basic element of the constitution, along with the 'representative democracy', was a centralised government, i.e. in both cases the direct opposite of what is characteristic for Switzerland since the beginning of the 19th century which was strong federalism and an unusual proportion of direct democracy, particularly on the level of self-administering cantons. According to Pavel Molek, this was not exactly an encouraging example for the future of 'Eternity Clauses' in European constitutions.

The second oldest known and still effective constitution consequently containing the oldest 'Eternity Clause' is the Norwegian Constitution dating from 1814, which prohibits amendment of its spirit and its principles (Art. 112). Eivind Smith writes that the Norwegian Eternity Clause ensures the smooth constitutional development of the Norwegian Kingdom in the long-term, but it certainly did not ensure the endurance of the original principles and spirit of the original, much more monarchist, constitution.[5] This is consequently a proof of failure of the declared goal but the achievement of another meritorious goal. It may be appropriate to ironically mention that this is the strength of 'unmodifiability.'

However, modern Eternity Clauses draw from the French constitutional amendment dating from 1884, which anchored the republican form of government as unmodifiable and particularly the German Basic Law, according to Art. 79, par. 3 of which, such amendments, which affect the separation of the Federation into countries, fundamental cooperation of countries in the legislative process or the principles stipulated in Articles 1 to 20 of the Basic Law (the republican establishment and the principles of a democratic; social and federal state; the sovereignty of the people; the division of power and the limitation of legislative power by constitutional rules and executive power and judicial acts and justice) are inadmissible. For example, the famous decisions by the Indian Supreme Court and the entire subsequent Indian attitude in this matter are derived from the concepts of the German scientific environment.[6]

More examples can be found throughout the world; some are very colourful. For example, the Mexican Constitution from 1924 determined that the religion of the Mexican nation is and will always be Apostolic Roman Catholicism. The Constitution of Qatar from 2004 protects the inviolability of the Emir. Several Nigerian constitutions explicitly 'eternalized' amnesties for those who committed crimes against humanity.[7] The constitution of Afghanistan (2004) states that the principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. It also declares that Amending fundamental rights of the people shall be permitted only to improve them.[8]

[5] Smith (2011).

[6] In February 1965 German professor Dietrich Conrad visited India and presented a lecture on the topic of 'Implicit restrictions of constitutional amendments' at the Faculty of Law of the Hindu University in Banaras. The transcript of the lecture came to the attention of solicitor M. K. Nambyara, who represented one of the complainants in the *GolakNath Case* (the subject of the dispute was the parliament's authority to amend the Constitution) and consequently came before the Supreme Court. See Roznai (2013a) 692.

[7] For example the fifth Nigerian Constitution dating from 18/07/1999, in Art. 134 prohibits any amendment to the last article of this constitution, i.e. Art. 141. This article simply states: Amnesty is granted to the plotters of the efforts to realise a putsch on 27/01/1996 and 09/04/1999. See also Roznai (2013a).

[8] Art. 149 of the Constitution of Afghanistan. The role of Islam as the religion of the State is unamendable also in Algeria or Morocco.

Typical modern constitution prohibits alternation of basic democratic values and rule of law guarantees. For example, Brazilian constitution prohibits constitutional amendment aimed at abolishing direct, secret, universal and periodic suffrage; separation of powers; individual rights and guarantees and the federalist form of the National Government.[9] The constitution of Moldova opposes any revision, if it implies the infringement of fundamental rights and freedoms of citizens, or their guarantees.[10]

In 2015, there were 193 valid and effective written constitutions. 59 of these contained a classic Eternity Clause (30.6 %) and 71 contained a specific clause restricting constitutional amendment (36.8 %), 12 constitutions contained a specific combination (6.2 %) and only 51 constitutions have no similar form of restriction (26.4 %).[11]

3. THE LEGAL CHARACTER OF THE ETERNITY CLAUSE

The following table shows the legal characterisation of the Eternity Clause.

Table 1. The Eternity Clause as a Clever Instrument

	Character	**Explicit stipulation**	**Option of legal amendment**	**Option of actual amendment**	**Example**
A.	Political proclamation	Necessary	Yes – by amending the Constitution/law	Yes – revolution	*Alterations to the Constitution must respect the dignity of the human person.*[12]
B.	Classic positive standard	Necessary	Yes – amendment of the clause	Yes – revolution	*Constitutional revision laws shall respect the rights of workers, workers' committees and trade unions.*[13]
C.	"Above-positive" law standard	Not necessary	No	Yes – revolution	*The Republican form and the secularity of the State may not be the object of a revision.*[14]
D.	Natural law standard	Not necessary	No	No	*The wording could be the same as "C".*

In this table, first two columns only identify the specific variants and their basic characteristics, which are determined only by additional aspects, particularly those in the last two columns. The third column indicates whether the 'Eternity Clause' is explicitly described and expressed in any document, most frequently of course in the constitution itself. This basically concerns whether it is possible to contemplate the 'Eternity Clause' in

[9] Constitution of Brazil, Art. 60/4 (1988, rev. 2015).
[10] Constitution of Moldova, Art. 142/2 (1994, rev. 2006).
[11] Hein (2015).
[12] Article 236, letter a. of the Constitution of Angola (2010).
[13] Article 288. letter e. of the Constitution of Portugal (1976).
[14] Article 144 of the Constitution of Togo (1992).

cases when it is not explicitly anchored, as in the constitution of the Slovak Republic for instance. The clause may be explicit or, conversely, implicit. The fourth column resolves the issues of whether the 'Eternity Clause' is a legal standard, or whether it can be removed or its restrictions overcome by legal methods. In practice, such removal would naturally not take place by explicitly changing or removing the clause itself, but more likely by accepting a new constitution as a whole. On the other hand the reasoning is that such removal is not possible due to the logic of the issue and the clause would then lose its purpose.[15] The example of the reviews of the Constitution of Portugal dated 1982 and 1989 more or less confirms the truth of those who believe that this two-phase amendment is feasible. The fifth column indicates whether the "natural law" solution can be applied in its most radical form, i.e. whether the clause is truly eternal, because the concept is outside the realm of any human body, and so all that necessary is to recognize it and adhere to it, never amend or supplement it.

The difference between the purely natural-law solution (D) and the pragmatic standpoint, which accents the eternal value, but is aware of its expedience (C), is absolutely evident.

But what are the individual clauses intended for depending on their character? Eternity Clauses are always intended to stabilise and preserve the system. The explicit proclamations of 'unmodifiability' frequently have a purely particularly political subtext, which naturally applies to the most famous Eternity Clause of unmodifiability before acceptance of the German Basic Law, i.e. the clause of unmodifiability of the French Third Republic.

The intensity of individual versions can still, however, be differentiated. Version A serves as a 'gentle' political instrument and appeal, particularly within the terms of the legislative process. Zdeněk Kühn assessed this version on the basis of the Czech example and called it simply an absurd attempt by citizens of the Czech Republic, who were endeavouring to limit a power, the character of which cannot be limited at the time of renewal of an independent Czech state.[16]

Version D concerns a philosophical proclamation because it endeavours to incorporate the whole essence of the universe, not just a practical reality. According to Zdeněk Kühn, the opposite consequences apply – a law accepted in conflict with the Eternity Clause is not an act (or law).[17] This also applies to all versions bah A. However, the question is, how will the system deal with such a 'non-law'.

The fundamental difference is that only version D works with actual 'eternity', with Plato's ideas, which are not derived from man nor society, but from metaphysical constants. The Egyptologist Miroslav Bárta writes: 'The innermost characteristic of every imperium and practically every ruler includes the conviction that they will never leave the stage.'[18] But, Joseph Tainter showed that every civilisation will fall (collapse) and Eternity Clauses cannot prevent this occuring.[19]

[15] See Molek (2014). In relation to the issue of elimination of the clause as an instrument to remove 'unmodifiability' see also Roznai (2014a).

[16] Kühn (2010) 24.

[17] Kühn (2010) 24.

[18] Bárta, Kovář (2011) 24.

[19] See Tainter (1988) and Bárta and Kovář (2011). However, it is not possible to agree with Bárta's statement that during redefinition of the roles of our modern state, pensions should be cancelled. This is actually an absurd and immediate descent into 'collapse'.

In practice, the goal is to preventively address this issue, i.e. surpass simple appeal and limit practical 'power' with binding effect, to preserve the desired values and to preserve the political system and maybe even remove the mask of legality from violent revolution. For instance, George Fox and George Nolte speculate that if the constitution of the Weimar Republic of Germany had included an Eternity Clause, Hitler would have been forced to openly violate it and his ascent to power may not have been successful.[20] From the practical viewpoint, it is irrelevant, to a certain degree, the objective character of the clause and consequently whether it exists as a natural-law untouchable standard or whether it is simply a flowery political commitment. The important question is how it is applied by the relevant authorities of power. For example, the Supreme German Federal Court acknowledged the existence of supra-legal law in 1961 which can be established by intuition and can be found through inspiration of conscience and reason.[21] This evidently concerns preference of version D, which, however, has specific practical consequences.

The Eternity Clause is always part of a system, which must be understood and utilised in some manner. It can be used, not exclusively, as preventive protection but also, paradoxically, as formal confirmation of new values. It may consequently also have a transformative function and is effective not in some distant future, but, completely practically, in the present against revisionist powers. This can also be illustrated on the Czech clause, which is based on observations by President Václav Havel and confirms departure from the 'socialist' regime to the liberal-democratic regime.

Several practical questions consequently arise from our acceptance of the legal character of the Eternity Clause. What is the reference framework that we use to gauge the constitutional amendment? Who enforces and sanctions the Eternity Clause? And, primarily, what are the practical consequences of its violation?

4. THE REFERENCE FRAMEWORK

Yaniv Roznai, with regard to the reference framework, infers that it is inappropriate to restrict constitution makers by 'natural law' correction. Even if the thesis that there is a binding, objective moral principle (as a minimum natural law) in each society is accepted, it is not a good idea to use this as a measure to determine the validity of constitutional amendments and supplements. Such a viewpoint blurs the difference between the law 'as it is' and the law 'as it should be' and will consequently be incompatible with the essence of the law as a social institution providing a specific level of foreseeability.[22] Roznai also criticizes this attitude as tautological, with reference to the Irish and German courts.[23]

Pavel Holländer, a great advocate of natural law correction, quotes caustic criticism of natural law from the pen of Alasdair MacIntyre, who states that no natural or human rights exist. According to him, belief in these is the same as belief in witches and unicorns. Their proponents declare that the statements that they have human rights are certain truths. MacIntyre points out that we know that no certain truths exist. Moral philosophers in the 20th century sometimes appeal to their and our intuition, but one of the things that we should be familiar with in relation to the history of moral philosophy is that if a moral philosopher

[20] See Fox, Nolte (1995).
[21] In relation to this see Kysela (2006) 80.
[22] Roznai (2013) 570.
[23] Roznai (2013) 571.

uses the word 'intuition', this is always a signal that there is something fundamentally wrong with the reasoning.[24]

However, Holländer refuses this criticism with reference to Alexy's eight theses which reputedly indicate the existence of natural law. His main argument is reference to the Böckenförde dilemma – that a free, secularised state lives under prerequisites, which it cannot guarantee itself and the thesis by Josef Ratzinger concerning a state's goal of 'good' based on Augustine's statement that otherwise it falls to the level of a well-functioning band of thieves.[25] Former German constitutional judge Udo di Fabio also thinks similarly, when he criticises departure from the traditional values forming society.[26] According to Jiří Přibáň, it is not possible to ask whether natural law is superior to positive law, because it is its internal component, without which acts would lack purpose.[27]

However, in modern society we cannot agree on what is 'good', but we can agree on the process of deciding about 'good'. In relation to this, Albert Dicey gives an effective quote by Leslie Stephen: "If Parliament ordered the murders of all blue-eyed babies, their protection would be illegal, but the legislators would have to be mad to accept such an act and the recipients would have to be idiots to respect it."[28] H.L.A. Hart reacts in a similar manner when he refuses the permeation of 'morals' or other extra-legal institutions into law itself, but on the other hand, he acknowledges that a judge does not have to apply or adhere to specific legal standards, for extra-legal reasons.[29] According to Tomáš Sobek, jurisprudence from the aspect of value is actually neutral in value, because it can be filled with any values or principle.[30] In relation to this, the oft-quoted Carl Schmitt was also very flexible from the aspect of values and could be seriously compared with Nazi ideology. It is consequently not possible to do otherwise than agree that the corrective power of constitutional amendments should also protect legal certainty and should therefore be as specific as possible, if we accept its admissibility at all.

5. GUARDIAN

The supreme or constitutional courts are usually considered the guardians of the 'Eternity Clause' with the role of political bodies neglected. Aharon Barak speaks about constitutional justice as a 'natural mechanism of the protection of the Eternity Clause', as a 'legal teeth' of this clause.[31] It is claimed that the courts do not make their own decisions about laws but simply execute decisions by the people embodied in the Charter of Basic Rights and Freedoms. Courts reputedly, like Odysseus' sailors, simply make sure that the cables protecting them against the Sirens remain sufficiently strong. This is how the supreme and constitutional courts protect society and its natural obligation to adhere to specific rights and principles.

On the contrary, Ran Hirschl speaks of the judicialisation of mega-politics, which should always be left to democratically elected bodies to make society-wide decisions. This

[24] Holländer uses this example fairly frequently. Holländer (2011a) 38.
[25] Holländer (2011a) 38.
[26] Fabio (2005).
[27] Přibáň (2011) 32.
[28] Dicey (1965) 70.
[29] Hart (1961) 168.
[30] Sobek thus convincingly debunks the so-called Radbruch Myth, see Sobek (2011b) 345.
[31] Barak (2011) 333.

concerns issues related to the values of society, which cannot be simply, without debate and consensus, decided on the basis of interpretation of legal standards.[32]

Jeremy Waldron has criticised judicial review of constitutionality for two main reasons. Firstly, he claims that there is no reason to believe that rights are better protected by judicial review of constitutionality than they would be protected on the soil of democratic law-making bodies. Secondly, he claims that, regardless of the results that the judicial review brings, it is democratically illegitimate.[33]

Judges do not apply law, but legal principles. And Tomáš Sobek comments: 'By their moral attitudes, judges represent only their personal opinions, while law-makers represent the opinions of their voters'.[34] Zdeněk Kühn is also careful in regard to the role of judges and reminds us that, for example at the close of the 19th century, it was difficult to imagine a decision by the American Supreme Court, which would declare racial segregation to be constitutionally inadmissible – such a decision would simply be refused by the majority of society and all the political elite. Judges consequently always remain within the limits of what is socially possible; they are limited by the opinions and prejudice of their time.[35] This is beautifully documented by Gerald Rosenberg on the example of the American judicature.[36]

Melissa Schwartzberg also criticises this viewpoint, because, in practice, it occurs that the courts themselves and not the people decide about constitutional amendments.[37] In spite of this, in my opinion it would be a mistake to refuse the Eternity Clause *en bloc* as an undemocratic and false instrument. The smartness of the Eternity Clause is now only revealing itself

6. THE MORALS OF (CZECH) CRISIS DEVELOPMENT

A political crisis in the Czech Republic occurred in 2009 when the conservative government lost its fragile majority but the socialist opposition was also unable to create a new cabinet. The two main parties decided, for pragmatic reasons, to utilise constitutional experience from 1998 and dissolve the Chamber of Deputies by means of a one-off constitutional act. The politicians needed to refresh options, because they realised that they were unable to agree on guidance of the country under the existing arrangement.

However, the Constitutional Court was waiting for such an opportunity and its ruling, called *'Melčák'* after MP Miloš Melčák[38] still surprised everyone. It contained the decision that the constitutional act on reduction of the electoral period on the date the ruling was announced and that the decision by the President of the Republic to announce elections to the Chamber of Deputies was cancelled simultaneously with the relevant constitutional act.[39]

[32] Hirschl (2007).

[33] Waldron (2006).

[34] Sobek (2011a) 186. John Hart Ely thinks similarly. See Ely (1980).

[35] See Kühn (2011a) 217.

[36] Rosenberg (2008).

[37] Schwartzberg (2007) 5.

[38] Constitutional Court Ruling Pl. 27/09.

[39] This ruling also found its way into world expert literature [see for example Williams (2011)]; however, it was also subject to significant criticism from this aspect as rash even by proponents of the possibility of review of constitutional acts [see Roznai (2014b) or Kudrna (2010)].

The Constitutional Court based its decision on Art. 9 of the Constitution[40] which stipulates: (1) The Constitution may only be supplemented or amended by constitutional acts. (2) Amendments to the essential requirements of a democratic state governed by the rule of law are impermissible.[41] The court emphasised that the constitutional act to reduce the electoral period affected the substantive core of the Constitution which it perceived as synonymous with the essential requirements of a democratic state governed by law. The fact that this viewpoint is arguable is a secondary matter.

The constitutional judges considered Art. 9, par. 2 of the Constitution normative, particularly on the basis of comparative reasoning: 'Similarly, the German case of Art. 79, par. 3 of the Basic Law is a response to undemocratic development and Nazi despotism during the period before 1945 (and similarly Art. 44, par. 3 of the Federal Constitution of the Austrian Republic), Art. 9, par. 2 of the Constitution is the result of experience with the decline of the legal culture and the trampling of basic rights during the forty-year period of the communist regime in Czechoslovakia," which, according to the Constitutional Court, indicates that "protection of the substantive core of the Constitution, e.g. the imperative of unmodifiability of the essential requirements of a democratic state governed by law according to Art. 9, par. 2 of the Constitution, is not just an appeal, proclamation, but a constitutional provision with normative impact.'

However, the reason to cancel the relevant act is not based only on the fact that it interfered with the essential requirements of a democratic state governed by law. In fact, the Constitutional Court combines the provisions of Art. 9, par. 1 of the Constitution and Art. 9, par. 2 of the Constitution (possibly other explicit authorisation provisions of the Constitution in Art. 2, par. 2, Art. 10a, par. 2, Art. 11, Art. 100, par. 3) into one competence standard.

As Zdeněk Kühn notes, the Constitutional Court perceives Art. 9, par. 1 of the Constitution to be a positive part of the competence standard and Art. 9, par. 2 a negative part of the competence standard. In order to declare a constitutional act unconstitutional, at least one of three conditions must be violated: (I) the procedural condition (acceptance by due legislative process), (II) the condition of competence (authorisation) according to Art. 9, par. 1 of the Constitution, or according to any other explicit constitutional authorisation (Art. 2, par. 2, Art. 10a, par. 2, Art. 11, Art. 100, par. 3 of the Constitution), and (III) the substantive condition, stipulated in Art. 9, par. 2 of the Constitution.[42] Hans Kelsen also made similar reasoning.

The Constitutional Court understood the need to change the constitutional order but refused the one-off 'violation'.[43] The main argument of the Constitutional Court is the

[40] Constitution, Act No. 1/1993 Coll.

[41] He omitted the third paragraph, stipulating: interpretation of legal standards cannot authorise removal or endangerment of the foundations of a democratic state.

[42] Kühn (2010).

[43] However, dissenting judge Vladimír Kůrka criticises this point: 'If viewed in more detail, it becomes justifiable that this may concern 'supplementation' of the Constitution; even an act for a 'single use' is a permanent part of the legal order, and the circumstance that after its application (and thereby its 'exhaustion') it can no longer actually be applied (no other social relations may originate according to this act or be governed by it as legal relations), is of no significance. Such an act supplements the Constitution by acquiring preference compared to it in a specific situation, in the position of speciality to a certain degree (epithets such as 'suspension', postponement of the Constitution, etc. have other impact than expressive).' Alexander Bröstl also refers to the concept of permeation, when he generally criticises this practice by using the phrase: Comfort, peace, tobacco. See Bröstl (2008) 19.

prohibition of an 'individual' act. Such an act is not an act according to the court in the substantive sense of the word because one of the basic characteristics of an act is its generality.[44]

Another question that arose, which is entirely understandable, is whether an individual act lacking generality is absolutely inadmissible. The court itself understands that this is not absolute as it is particularly willing to consider acts, which conversely protect the essential requirements of a democratic state governed by law, to be acts, even though they lack generality. For example, this concerns restitution acts.[45] The Constitutional Court naturally considers especially the act on the state budget and other individual acts, which the Constitution explicitly authorises it to issue, to be admissible acts in general. For example this concerns constitutional acts on state borders (Art. 11 of the Constitution) or establishment of higher self-administrative units (Art. 100, par. 3 of the Constitution). Art. 2, par. 2 of the Constitution, on the basis of which the constitutional act on referendum and accession to the European Union was accepted, is also indirectly such authorisation.

But are other individual acts, for which there is no explicit authorisation, automatically inadmissible?[46] For example, Masaryk University was established by individual Act No 50/1919 Coll. Is such an act automatically *ultra vires* due to its individuality? The Constitutional Court defends its actions as follows: 'If the Constitutional Court is required to answer the question of whether Art. 9, par. 1 of the Constitution also authorises the Parliament to issue individual legal acts in the form of constitutional acts (for example to issue sentences on specific parties for specific actions, to issue administrative rulings of appropriation, to reduce the term of office of a specific representative of a government body, etc. etc.) the answer is – no!'[47]

The Constitutional Court consequently argues using the strongest possible example. However, doctrine was also able to respond to this when Václav Pavlíček points out the procedure by the French Senate in relation to the persisting anti-Semitism of military courts during the Dreyfus Affair in France.[48] Even though the Constitutional Court's procedure is based on the competence standard determined by the constitution makers, this cannot be interpreted without taking into account the degree of its violation. The thesis of prohibition of the generality of a constitutional act does not apply in general, even though the Constitutional Court believes it does with reference to the fact that the generality of the act is, of itself, an essential requirement for a democratic state governed by the rule of law and

[44] In the classic American film Mr Smith Goes to Washington (directed by Frank Capra, 1939), which is a modern story about 'democracy', the bone of contention is the absolutely individual act on a training centre for the youth. Paradoxically it is the 'right' proposal, which must face the arbitrariness of a 'rotten' congress. It would also be possible to refer to works by Lon L. Fuller and his basic rules of legal morality, which the relevant act could have problems being approved by. See Fuller (1964).

[45] For example the enumerative act (Act No. 298/1990 Coll.), by which partial restitution of church property was executed.

[46] For example Jan Musil in his dissent against the ruling by the Pl. Constitutional Court 27/09 states: 'I believe that the form of "non-general" act may be legislatively-technical inappropriate and undesirable, but, it is, of itself, neutral in value. It only violates constitutionality if this form is truly competent to pose a risk to or violate basic rights in the specific normative material. The requirement of the generality of a legal standard is not actually part of the essential requirements of a democratic state governed by law.'

[47] Pl. Constitutional Court 27/09, item IV.

[48] Pavlíček (2011).

a fundamental requirement for division of power. Furthermore, critics of this procedure argue that the 'authorisation' in the Constitution, which explicitly requires the form of a constitutional act for a specific action, is not actually authorisation but rather a qualification of a constitutional act. i.e., a safeguard that a specific institution cannot be amended by another sub-constitutional regulation or restriction of the constitution maker.[49]

The Constitutional Court understands that it is possible to dissolve the Chamber of Deputies in the middle of the electoral period, it understands that a specific member of parliament cannot count on the fact that their passive voting rights (or mandate) are an absolute right without the possibility of external interference. However, the court was unable to reconcile with a political solution, which preserved the function of the chamber of deputies until early elections, whereas, in its opinion, it gave precedence to a one-off politically advantageous solution over a stable legal order. This is also the court's belief, which in its eyes, justifies the intensity of its intervention into the legitimate expectations of citizens and members of parliament and evokes sufficient intensity of the spurious retroactivity.[50]

In general, criticism was focused on the Constitutional judges for their insufficient reasoning for the proportionality of their intervention. The reduction of the electoral period is diametrically different to its extension, or ad hoc treatment of the electoral period of another body (for example the president).[51] The court argues the need to create a legitimate parliament; however, sidelines the issue of the legitimacy of the actual constitution maker, who was aware of his inability to resolve a specific political crisis and therefore desired to consult the original constitution maker, the people.

In relation to one of the procedural resolutions, Jan Musil states in his brilliant dissent 'If the fine balance between the elements of a 'democratic state governed by the rule of law' is disturbed there is a risk that it will be the lawyers in the final instance, who will 'wisely' decide what is advantageous for the state and for society and what is not. It will be they who will interpret vague, non-transparent and disputable juristic terms such as 'essential requirements of a democratic state governed by the rule law,' 'special statutory authorisation to create constitutional regulations,' 'retroactivity,' etc., they will determine the rules for application of power in the state and in society. This trend is the expression of an elite concept of 'the owners of the keys to interpret laws,' which is regularly repeated in human history. In my opinion this is a malign concept, not leading to a good end.'[52]

There are two opposing viewpoints from the Constitutional-legal aspect of the whole *'Melčák'* issue. Are the provisions of Art. 9, par. 1, in combination with Art. 9, par. 2, a competence standard or qualification of constitutional law? Should the Constitutional

[49] See for example Suchánek (2011) 113.

[50] It is interesting that the subsequent rapid amendment of the Constitution, enabling rapid dissolution of the Czech Parliament, did not lead to the desired goal, i.e. to early elections. The Czech Social Democratic Party members were concerned (or at least they claimed to be) that the Constitutional Court could invalidate other elections with reference to the prohibition of retroactivity.

[51] In general the issue of the content of the actual act is of secondary importance to the Constitutional Court. However, this is frequently criticised due to the very 'democratic' content of the actual act. Some may perceive this as just a conflict between the democratic state and the rule of law. See Roznai (2014b).

[52] The different opinion of Constitutional Court judge, Jan Musil, concerning the ruling by the Constitutional Court Pl. Constitutional Court 24/09, items 16 and 17.

Court have acted as it did?[53] Paradoxically, a decision which endeavours to protect a state governed by the rule of law may also harm it.[54] However, it seems that even this controversial decision by the Constitutional Court was finally accepted, but more as an eccentricity than as a guiding decision concerning new practice. Pavel Molek writes 'This ruling consequently did not endanger the concept of the broadly conceived unmodifiable requisites of the Czech Constitution. However, the question is, whether it may have become an imaginary Buddenbrook House for it: magnificent, massive, reflecting the past ascent of this idea, but not sustainable in the future.'[55]

As clearly demonstrated in the case of the 'Amnesty of the President of the Republic from 01/01/2013',[56] the Constitutional Court suddenly adhered to the procedural rules and refused the complaint against the former president of the Republic Václav Klaus, who was accused of treason. The Constitutional Court was similarly very strict during the proceeding concerning the complaint by Tomio Okamura against his elimination from the presidential elections.[57] During this proceeding the court also indicated that it is not prepared to protect (or at least examine) the 'values' of a democratic state governed by the rule of law as actively as it seemed to in relation to the *'Melčák*' case. Inspiration from the 'activist' German Constitutional Court is also 'drying up', which the candidates for the European Parliament for the Pirate Party and the Green Party found, when the Constitutional Court failed to defend them, on the contrary to its counterpart, and left the closing clause required in these elections valid.[58]

It seems that particularly the 'Zeman's Constitutional Court' now fully appointed by the new president Miloš Zeman, will not be willing to continue developing the *'Melčák*' case. It is therefore more up to the political actors to utilise its interpretation and the general Eternity Clause in the event of another Constitutional Crisis. The Czech example also shows that relying on a single institution is not effective or appropriate long-term approach.

7. CONCLUSIONS

Apparently, Gandhi was asked what he thinks about western civilisation, he smiled and said: 'It would be a wonderful idea!' Modern countries responded to the various terrible impulses of the 20th century by anchoring the principles of the democratic state in the body of their constitutions, or in the appended Charter of Rights. Furthermore, they gradually developed these in many international treaties, which are directly applicable, frequently preferentially.

These principles and natural law do not 'levitate' somewhere in some realm of ideas but are incorporated into the positive legal order with a supra-law or even supra-constitutional character. Many constitutional systems consequently anchored by the Eternity Clause, which should prevent inadmissible constitutional amendment.

[53] Maxim Tomoszek adheres to this opinion for example, and Yaniv Roznai negatively refers to him. See Tomoszek (2011) and Roznai (2014b).

[54] Similarly Roznai (2014b).

[55] Molek (2014) 109.

[56] Resolution File No. Pl. 4/13.

[57] Resolution File No. Pl. 27/12.

[58] Ruling by the Constitutional Court. Pl. 14/14.

Frederick Schauer, however, wrote: 'What makes the constitution a constitution? Nothing…Or more precisely, nothing can make the constitution un-constitutional.'[59] Pavel Holländer sets an elaborate superstructure in the form of metaphysical justification of the protection of a state governed by law from the constitution maker opposite this simple viewpoint, whereas he also points out the imagined metaphysical constant of God.[60] If the final justification of democratic legitimacy is not democratic procedure, but the internal concept of democratic values, moral discourse is, in Holländer's opinion, a discourse about their justification through rationality *ex post*, or *apriori* transcendence. The question is, whether both these opposite standpoints are based more on faith than on reason. The question is whether this must be so.[61] With reference to Alexy's justification of the existence of inviolable natural law, Holländer evidently reflects on Plato's ideal categories of 'Good', 'Justice' or 'Right'.

On the contrary, for Jiří Přibáň, referencing to John Rawls or Robert Nozick, states good is too strong metaphysical category, which we may adhere to in our relationship with God or ideas about an ethical life, but this should be left to theologians or moralists.[62] Přibáň even speaks of the 'Terror of Good.'[63] In response, Holländer says that this does not necessarily concern the 'Terror of Good' but more a constant in place of variables, which we are not capable of gauging.[64]

Similarly to Tomáš Sobek, the author of this paper understands the principles of natural law, morals and the related values as an evolutionary product of life together, as the adaptive strategy of a social being, which requires highly developed cooperation with others for survival, i.e. effective coordination of actions and stabilised expectations.[65]

This was best summarised by Petr Pithart 'I am evidently an incorrigible 'proceduralist'. Because I believe that where people have good procedural rules available, this is where we can win rights, which we consider natural – rather than where they have been declared by all sorts of Declarations and Charters, but where procedural law is full of holes. I am evidently a legal 'liberal' to this point, who is afraid of 'good' and 'values'. Afraid of them? Afraid for them, because they are what is important! *Fiat iustitia, et pereat mundus!*'[66] Jeremy Waldron similarly writes: 'Conflict concerning rights is not unreasonable, people can disagree with each other concerning their content and simultaneously take rights seriously. Under these circumstances, rules must be created to resolve these disputes, which would respect the voices and opinions of everyone whose rights are at stake and treat them as equal.'[67]

In practice, the Eternity Clause is not a substantive 'instrument', which enables society to preserve its values, not at the time of destruction of the system, on the edge of revolution, but regularly, in political and legal reasoning, during the process of creation of new constitutional standards. The Eternity clause is a smart instrument, because it is used not only by courts but also by statesmen, especially during the constitutional-making process.

[59] Schauer (1995) 145.
[60] Holländer (2009) 103.
[61] Holländer (2011a) 41.
[62] Přibáň (2011b) 42.
[63] Přibáň (2011b) 44.
[64] Holländer (2011a) 41.
[65] Sobek (2011) 23.
[66] Pithart (2011) 122.
[67] Waldron (2006)

The character of actual natural law, i.e. metaphysical correlate, is thus irrelevant. The Eternity Clause will not ensure eternity but may help protect specific values, before they are out-dated. This is also how the Eternity Clause could function well, all it requires is for us to 'believe' in it. However, Richard Albert thinks that the clause may also be counterproductive and may 'use' all the oxygen and thereby smother democracy itself.[68]

Development after the First and particularly after the Second World War did not provide a general standard of metaphysical 'justice',[69] but rather an effective instrument to protect the democratic process. If 'metaphysical correlate' was considered literally, it could be used to quickly remove the upper layer of civilisation in the spirit of 'new' and 'better' values. Marek Skovajsa writes, 'The ability of citizens of a modern liberal state to differentiate between the political concept of justice and their own broad world opinion can be considered one of the biggest achievements of modern political development.'[70]

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[68] Albert (2011) 714.

[69] Even Jiří Baroš ends his work by stating that constitutional justice contributes to people governing each other justly. However, what is justly? Baroš (2013) 51.

[70] Skovajsa (2011) 141.

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