The Eternity Clause

Lessons from the Czech Example

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Abstract

This article presents lessons from the Czech example of the so-called Eternity Clause' i.e. a legal standard declaring certain principles, values or specific constitutional provisions to be unalterable and irrevocable. The Eternity Clause is viewed and applied in the Czech Republic as a substantive legal 'instrument' that enables society to preserve its values. It is used to limit practical 'power' and to maintain desired values and the political system.

That the Eternity clause is a practical instrument has already been proved by the Czech Constitutional Court in its famous 'Melčák' decision. However, recent developments show that the Czech Constitutional Court is no longer open to such a 'radical' approach. Nonetheless, it still seems that the court is prepared to defend the values of liberal democracy, just not in such a spectacular way. It is, therefore, more up to the political actors or the people themselves to use Eternity Clause arguments to protect liberal democracy and its values.

Keywords: eternity clause, constitutional amendment, Czech Republic.

The times, they are a-changin'.
—Bob Dylan

A Introduction

The times, they are changing. Liberal democracies around the globe are struggling not only with the rise of populism or authoritarianism[1] but also with a questioning of their very most basic values.[2]

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1 *See, e.g.,* T. Ginsburg, A.Z. Huq & M. Versteeg, 'The Coming Demise of Liberal Constitutionalism?', *The University of Chicago Law Review*, Vol. 85, No. 2, 2018, 239-608 or E. Araujo, F. Ferretti & R. White, *et al*, 'Beyond Electoralism: Reflections on Anarchy, Populism, and the Crisis of Electoral Politics: A Collective of Anarchist Geographers', *An International E-Journal for Critical Geographies,* Vol. 16, No. 4, 2017; pp. 607-642; D. Wood, 'The Global Turn to Authoritarianism and After', *Surveillance & Society*, Vol. 15, No. 3/4, 2017, pp.357-370.

2 This development can be seen in day-to-day Czech politics, but it is a worldwide tension. *See* D. Law, 'Alternatives to Liberal Constitutional Democracy', *Maryland Law Review*, Vol. 77, No. 1, 2017, pp. 223-243.

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This is a topic not just for political scientists, sociologists and historians but also for constitutional lawyers. From a legal point of view, one of the instruments to protect the constitutional order of a liberal democracy is the so-called Eternity Clause (German 'Ewigkeitsgarantie'),[3] *i.e.*, a legal standard declaring some principles, values or specific constitutional provisions to be unalterable and irrevocable. We have witnessed rising interest in this topic in recent years around the world both outside and within the Czech Republic, the latter being of interest to this article.[4]

We have here a fairly simple standard, a general rule, which determines in the Czech Constitution that the *amendment of an essential requirement of a democratic state governed by the rule of law is impermissible*.[5] This wording raises questions about whether the Eternity Clause should be considered a positive legal standard or merely a political entreaty towards constitution makers.

The aim of this article is to show that even more important than the philosophical background and wording of the constitutional rule is actual political and judiciary practice. The Eternity Clause is not a typical legal 'instrument'; it is not a

3 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, e.g.,* Y. Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments'. *International and Comparative Law Quarterly*, Vol. 62, No. 3, 2013a, pp. 557-597. It is also not an innovation of our times. . *See* Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, 1st ed., Oxford, 2017, p. 18.

4 The political science classic Georg Jellinek refuses the legal route to the invalidation of the "(French) Eternity Clause". *See* G. Jellinek, *Allgemeine Staatslehre.* 1st ed., Praha, 1906, p. 509. In 1918, we encounter an article by František Brychta – F. Brychta, 'Otázka nezměnitelnosti ústav', *Časopis pro právní a státní vědu,* Vol. 1., 1918. In general, we can mention: Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, 1st ed., Oxford, 2017; Y. Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea', *American Journal of Comparative Law,* Vol. 61, No. 3, 2013b, pp. 657-720; Y. Roznai & S. Suteu, 'Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Principle', *The German Law Journal*, Vol. 16, No. 3, 2015, pp. 542-580; G. Halami, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?', *Constellations*, Vol. 19, No. 1, 2012, pp. 182-203.; A. Barak, 'Unconstitutional Constitutional Amendments', *Israel Law Review*, Vol. 44, No. 2, 2011, pp. 321-341; Smith, E., 'Old and Protected? On the "Supra-constitutional" Clause in the Constitution of Norway', *Israel Law Review*, Vol. 44, No. 2, 2011, pp. 369-388; R. Albert, 'Nonconstitutional Amendments', *Canadian Journal of Law & Jurisprudence*, Vol. 22, No. 5., 2009 and many more. In Czech and Slovak science, for example, P. Molek, *Materiální ohnisko ústavy: věčný limit evropské integrace?* 1st ed., Brno, Masaryk University, 2014; P. Holländer, 'Materiální ohnisko ústavy a diskrece ústavodárce', *Právník*, Vol. 144, No. 3, 2005, pp. 313-336. V. Pavlíček, 'Kdo je v České republice ústavodárcem a problém suverenity', in M. Vanduchová & J. Hořák (Eds.) *Na křižovatkách práva: pocta Janu Musilovi k sedmdesátým narozeninám,* Praha, C.H. Beck, 2011, pp. 21-39; J. Kysela, 'Předpoklady soudní kontroly ústavnosti ústavních zákonů', *Jurisprudence*, Vol. 19, No. 2, 2010; Z. Kühn, 'Nad nálezem Ústavního soudu ve věci protiústavního „ústavního "zákona č. 195/2009 Sb.', *Právní rozhledy*, Vol. 18, No. 1, 2010, pp. 20-29.; J. Kudrna, 'Cancellation of early elections by the Constitutional Court of the Czech Republic: Beginning of a New Concept of "Protection of Constitutionality"', *Jurisprudencija*, Vol. 122, No. 5, 2010, pp. 43-70, M. Tomoszek, *Podstatné náležitosti demokratického právního státu*, 1st ed., Praha: Leges, 2016., M. Madej, 'Melčák nebo Melčáci? Ústavní soudy rušící ústavní zákony', *Právník*, Vol. 155, No. 5, 2016, pp. 413-426.

5 Art. 9 of the Constitution, Act No. 1/1993 Coll.

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legal rule like the prohibition of smoking or the abolition of the death sentence, with clear legal consequences. Its purpose is to transcend being a simple entreaty, but to limit practical 'power' and to maintain desired values and the political system.

That the Eternity Clause is a practical instrument has already been proved by the Czech Constitutional Court in its famous 'Melčák' decision.[6] However, recent developments show that the Czech Constitutional Court is no longer open to such a 'radical' approach. In other words, several recent decisions[7] of the Constitutional Court show that the Melčák 'precedence' and its philosophical reasoning are not being strictly followed by the Court. Nonetheless, it seems that the Constitutional Court is still prepared to defend the values of liberal democracy, just not in such a spectacular way.[8] This approach is still remarkable in comparison to other Central European countries. Polish and Hungarian Constitutional courts are no longer considered as strong defenders of liberal democracy. Surprisingly, the Slovak Constitutional Court decided to choose 'Czech' spectacular way mentioned above. In its new decision of 30 January 2019,[9] the court decided that an amendment to the Constitution is invalid for violating the core material of the Constitution. The decision is based on basic structure doctrine, because Slovak constitution does not mention any eternity clause.

Nevertheless, a moderate use of the Eternity Clause could be even more effective than a radical one. However, without any action, the values of liberal democracy could slowly completely vanish. The Czech example also shows that relying on a single institution (the Constitutional Court) is not effective or appropriate from a long-term standpoint. The Eternity Clause and its protected values would be safe only if a majority of both the political elite and the general public shared those core values. Otherwise, no legal standard could resist breaking on the wheel of time.

B Natural Law Correction

The Czech doctrine is highly influenced by the German approach.[10] Part of it tends towards understanding the Eternity Clause as a 'natural law' correction.[11] But we also ought to agree with Yaniv Roznai, who concludes that it is inappropriate to restrict constitution makers by a 'natural law' correction. Even if we accept the thesis that there is a binding, objective moral principle (as a basis of natural

6 Constitutional Court Ruling Pl. 27/09. *See* more details below.

7 Resolution File No. Pl. 4/13, Resolution File No. Pl. 27/12, Resolution File No. I. ÚS 2166/16.

8 *See* Declaration of representatives of Czech judiciary on situation in Poland from 24 July 2017. Retrieved from https://www.usoud.cz/en/current-affairs/declaration-of-representatives-of-czech-judiciary-on-situation-in-poland/ (last accessed 16 November 2018).

9 Slovak Constitutional Court Ruling Pl. ÚS 21/2014-96 from 30 January 2019.

10 *See* K. Léko, K. Blažková & J. Chmel, *Zahraniční vlivy a srovnávání v ústavním právu,* Praha, Leges, 2017.

11 P. Holländer, 'Vážně jsme už všichni positivisté?', *in* J. Přibáň & P. Holländer (Eds.), *Právo a dobro v ústavní demokracii: polemické a kritické úvahy*, Praha, Sociologické nakladatelství, 2011, pp. 35-42, p. 38.

law) in every society, 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.[12] Roznai also criticizes this attitude as tautological, with reference to the Irish and German courts.[13]

In modern society, we cannot agree on what is 'good'. What we can agree on is the process of deciding about the 'good.'[14] According to Tomáš Sobek, jurisprudence, from the point of view of value, is actually neutral, because it can comprise any value or principle.[15]

In the Czech context, one of the main questions has always been whether the 'Eternity Clause' is a legal standard or, more precisely, whether it can be removed or its restrictions overcome by legal methods. The example of the reviews of the Constitution of Portugal dated 1982 and 1989 more or less shows that a two-phase elimination amendment might not be impossible. In practice, such a removal would probably 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, one could argue that such a removal is not possible due to the logic of the issue, and the clause would then lose its purpose.[16]

Eternity Clauses are always intended to stabilize and preserve the system. Explicit proclamations of 'unmodifiability' frequently have a particularly political subtext, which naturally applies to the most famous Eternity Clause of unmodifiability before the acceptance of German Basic Law, namely the unmodifiability clause of the Third French Republic.

In the 1990s, most Czech legal scholars probably saw the Eternity Clause as a 'gentle' political instrument and entreaty, particularly within the terms of the legislative process. Zdeněk Kühn mentions an absurd attempt by citizens of the Czech Republic, who were endeavouring to limit a power, the character of which could not be limited at the time of the renewal of an independent Czech state.[17] But, consequently, the clause could also have a transformative function, effective not in some distant future but completely practical in the present against revisionist powers. This can also be illustrated by the Czech clause, which, based on annotations by President Václav Havel, confirms the political transition from a 'socialist' to a liberal-democratic regime.

Later, on the other extreme, an alternative understanding of the Eternity Clause started to prevail (not only in the Constitutional Court). The absolute character of the Eternity Clause as a 'natural law' correction means that law

12 Roznai, 2013a, p. 570.
13 Roznai, 2013a, p. 571.
14 J. Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, Vol. 115, No. 3, 2006, pp. 1346-1372.
15 Sobek, thus, convincingly debunks the so-called Radbruch Myth; *see* T. Sobek, *Právní myšlení: Kritika moralismu*, 1st ed., Praha: A,V ČR, 2011a, p. 345.
16 *See* Molek, 2014.
17 Kühn, 2010, p. 24

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accepted in conflict with the Eternity Clause is not an act (or law) at all.[18] This is an approach based on the work of Carl Schmitt or Robert Alexy.[19]

As we have already mentioned, in practice, the goal is more or less to address this issue preventatively, *i.e.*, to transcend a simple entreaty and to limit practical 'power' with binding effect, to preserve desired values and the political system, and maybe even to 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 might not have been successful.[20]

The Eternity Clause is always part of a system that must be understood and utilized in some manner. It can be used, not exclusively, as a preventative protection but also, paradoxically, as a formal confirmation of new values. This was the case in the Czech Republic in the 1990s.

From a practical viewpoint, it is irrelevant, to a certain degree, what the objective character of the clause is (and consequently whether it exists as an untouchable natural-law standard, or whether it is simply a flowery political commitment). The important question is how it is applied by the relevant authorities of power, especially by the Constitutional Court.

C Before 'Melčák'

The supreme or constitutional courts are usually considered the guardians of the 'Eternity Clause'. Aharon Barak even speaks about constitutional justice as a "natural mechanism of the protection of the Eternity Clause", as the "legal teeth" of this clause.[21]

On the contrary, Jeremy Waldron[22] and Ran Hirschl criticize this point of view. Hirshl speaks of the judicialization of the so-called mega-politics, which should always be left to democratically elected bodies to make society-wide decisions. This concerns issues related to the values of society, which cannot be simply arrived at without debate and consensus, decided on the basis of interpretation of legal standards.[23]

In the Czech Republic, the same discussion continues in the early 1990s. As Tomáš Sobek comments, by their moral attitudes, judges represent only their per-

18 *Ibid*

19 *See*, *e.g.,* R. Alexy, 'On the Concept and the Nature of Law', *Ratio Juris*, Vol. 21, No. 3, 2008, pp. 281-299.

20 *See* G.H. Fox and G. Nolte, 'Intolerant Democracies', *Harvard International L J*, Vol. 36, No. 4, 1995.

21 Barak, 2011, p. 333.

22 Waldron, 2006.

23 R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 1st ed., Cambridge, Harvard University Press, 2007.

sonal opinions, while law-makers represent the opinions of their voters.[24] Zdeněk Kühn is also careful in regard to the role of judges. He reminds us that, for example, at the close of the 19th century, it was difficult to imagine a decision by the American Supreme Court that would have declared racial segregation to be constitutionally inadmissible – such a decision would simply have been refused by the majority of society and all the political elite. Judges, consequently (unfortunately or thank God), always remain within the limits of what is societally possible; they are limited by the opinions and prejudices of their time.[25]

It took 90 years to transform the 'Eternity Clause' from pure theory to practice. Two necessary conditions have to be fulfilled. One of them is the development of the theoretical reasoning of unamendability. We see František Brychta discussing the idea in an article as early as 1918.[26] Another 'practical' condition is the establishment of a real Constitutional Court. It is a fact that the history of the constitutional judiciary in the Czech Republic is almost 100 years old. It begins shortly after the birth of the Czechoslovak Republic among the ashes of the Austro-Hungarian Empire, influenced a lot by Hans Kelsen. The Constitutional Charter of 1920 mentions the Constitutional Court of Czechoslovakia, and it was actually established in 1921. But it was only for a short period of not great importance, as the court served only for a limited time with little respect of its role in the system. After the war and during the communist regime, the constitutional judiciary had no place in the constitutional system of the new Czechoslovakia. In 1968, as a product of the famous 'Prague spring', in what eventually amounted to a mere side-note of history, an Act in the Czechoslovak Federation mentioned the creation of a constitutional court for the Federation and also a constitutional court for each national republic. Despite the fact that none of these courts was ever established, it remains on the judicial record.

The collapse of the communist regime allowed the establishment of the new Constitutional Court of the Czech and Slovak Federal Republic in 1991. However, it was a very short period due to the early demise of Czechoslovakia. Following the dissolution of the federation, the new Constitutional Court of the Czech Republic began its work in 1993. This 'first' court was influenced by such extraordinary personalities as Vladimír Čermák, Vojtěch Cepl, Pavel Holländer, Vladimír Klokočka, and Antonín Procházka.[27] These judges were very open to natural-law arguments, and they prepared the foundations for future decisions.

Nevertheless, the Constitutional Court had to wait more than 10 years, till 2009, for an opportunity to show its approach to the Eternity Clause question and the fusion of theory and practice. That moment came when the conservative

24 T. Sobek, 'Bezhodnotvý positivismus', *in* J. Přibáň & P. Holländer (Eds.), *Právo a dobro v ústavní demokracii: polemické a kritické úvahy*. Praha, Sociologické nakladatelství, 2011b, pp. 179-191, 186. Similarly, in J.H. Ely, *Democracy and Distrust. A Theory of Judicial Review*. 1st ed., Cambridge, Harvard University Press, 1980.

25 *See* Z. Kühn, 'Jakou hodnotu má právní argumentace?', J. Přibáň & P. Holländer (Eds.), *Právo a dobro v ústavní demokracii: polemické a kritické úvahy*, Praha, Sociologické nakladatelství, 2011, pp. 204-214, p. 217.

26 *See* Brychta, 1918.

27 V. Čermák. *Otázka demokracie,* 2nd ed. Brno, Centrum pro studium demokracie a kultury, 2017.

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government lost its fragile majority and the socialist opposition was also unable to create a new cabinet. The ensuing political crisis culminated in the two main parties deciding, for pragmatic reasons, to utilize the country's constitutional experience from 1998 and to dissolve the Chamber of Deputies by means of a one-off constitutional act.[28] The politicians wished to deal new cards, because they realized that they were unable to agree on the guidance of the country under the existing arrangement.

The ruling of the Constitutional Court, simply called 'Melčák', after MP Miloš Melčák,[29] still surprised everyone. It contained the verdict that the decision by the president of the Republic to announce elections to the Chamber of Deputies and the constitutional act on the reduction of the electoral period (allowing the president to announce early elections) were cancelled simultaneously.[30]

The Constitutional Court based its decision on Article 9 of the Constitution,[31] 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."[32] In the first place, the court emphasized 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 the rule of law.[33]

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

28 In 1998, irregularities in the finances of the Civic Democratic Party (ODS) led to political crisis. The ODS split into two parties (Václav Klaus contra versus Jan Pilip and Jan Ruml). The only solution to the crisis seemed to be early elections. Politicians decided to dissolve the Chamber of Deputies by means of a one-off constitutional act as a smoother way to a new government.

29 Constitutional Court Ruling Pl. 27/09.

30 This ruling also found its way into world expert literature (*see, e.g.*, K. Williams, 'When a Constitutional Amendment Violates the "Substantive Core": The Czech Constitutional Court's September 2009 Early Elections Decision', *Review of Central and East European Law*, Vol. 36, 2011, pp. 33-51); however, it was also subject to significant criticism from this point of view as rash even by proponents of the possibility of the review of constitutional acts (*see* Y. Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act', *ICL Journal [Vienna Journal on International Constitutional Law]*, Vol. 8, 2014, pp. 29-57 or Kudrna, 2010).

31 Constitution, Act No. 1/1993 Coll.

32 Nevertheless, the third paragraph, stipulating, 'Interpretation of legal standards cannot authorise removal or endangerment of the foundations of a democratic state, was omitted.

33 The fact that this approach of understanding the substantive core of the constitution as synonymous with the essential requirements of a democratic state governed by the rule of law is arguably a secondary matter.

This, according to the Constitutional Court, indicates that

> protection of the substantive core of the Constitution, e.g. the imperative of the unmodifiability of the essential requirements of a democratic state governed by the rule of law according to Art. 9, par. 2 of the Constitution, is not just an appeal, proclamation, but a constitutional provision with normative impact.[34]

However, we must realize that the reasoning behind cancelling the relevant act was not based only on the fact that it interfered with the essential requirements of a democratic state governed by the rule of law. Actually, the Constitutional Court combined the provisions of Art. 9, par. 1 of the Constitution and Art. 9, par. 2 of the Constitution (possibly other explicit authorization 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: (1) the procedural condition (acceptance by due legislative process), (2) the condition of competence (authorization) according to Art. 9, par. 1 of the Constitution, or according to any other explicit constitutional authorization (Art. 2, par. 2, Art. 10a, par. 2, Art. 11, Art. 100, par. 3 of the Constitution), and finally (3) the substantive condition, stipulated in Art. 9, par. 2 of the Constitution.[35] Hans Kelsen reasoned similarly.[36]

The Constitutional Court understands the need to change constitutional order, but refuses its one-off 'violation'.[37] We, thereby, gradually come to the specific argument by the Constitutional Court in the relevant case. This argument revolves around the prohibition of an 'individual' act. Such an act is not an act

34 Constitutional Court Ruling Pl. 27/09

35 Kühn, 2010.

36 H. Kelsen. *Allgemeine Staatslehre*, 1st ed., Berlin, Springer, 1925, s. 254

37 However, dissenting judge Vladimír Kůrka criticizes 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 an impact other than just being expressive)." *See* Constitutional Court Ruling Pl. 27/09.

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according to the court in the substantive sense of the word, because one of the basic characteristics of an act is its generality.[38]

Another question that arose is entirely understandable, and that is whether an individual act lacking generality is absolutely inadmissible. The court itself understands that this is not absolute. It is particularly willing to consider acts that 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.[39] The Constitutional Court specifically considers the act of the state budget and other individual acts, which the Constitution explicitly authorizes it to issue, to be admissible acts in general. This includes constitutional acts on state borders (Art. 11 of the Constitution) or the 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 the referendum and accession to the European Union was accepted, is indirectly also such an authorization.

But are other individual acts, for which there is no explicit authorization, automatically inadmissible?[40] 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![41]

Consequently, the Constitutional Court argues using the strongest possible example. However, academics were doctrine able to respond to this when Václav Pavlíček pointed out the procedure by the French Senate in relation to the persisting anti-Semitism of military courts during the Dreyfus Affair in France.[42] Even

38 It may be of interest that 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 an absolutely individual act for a youth training centre. Paradoxically, it is the 'right' proposal that 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* L. Fuller, *The Morality of Law,* 1st ed., Yale University Press, 1964.

39 For example, the so-called Enumerative Act (Act No. 298/1990 Coll.), by which partial restitution of church property was executed.

40 For example, Jan Musil, in his dissent against the ruling by the Pl. Constitutional Court 27/09, states: "I believe that the form of a 'non-general' act may be legislatively-technically 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."

41 Constitutional Court Ruling Pl. 27/09.

42 Pavlíček, 2011.

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 the prohibition of an individual 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, in and of itself, an essential requirement for a democratic state governed by the rule of law and a fundamental requirement for division of powers. Furthermore, critics of this procedure argue that the 'authorization' in the Constitution, which explicitly requires the form of a constitutional act for a specific action, is not actually an authorization, but rather a qualification of a constitutional act, *i.e.*, a safeguard that a specific provision cannot be amended by another sub-constitutional regulation or a restriction of the constitution maker.[43]

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 his or her passive voting rights (or his 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, in its eyes being the court's belief, justifies the intensity of its intervention into the legitimate expectations of citizens and members of parliament and evokes sufficient intensity of the retroactivity.[44]

In general, criticism was focused on the Constitutional judges for their insufficient reasoning regarding the proportionality of their intervention. Reduction of the electoral period is diametrically different to its extension or ad hoc treatment of the electoral period of another body (the president, for example).[45] This decision was meant to protect the values of liberal democracy, but its effect on other values is unpredictable and could potentially harm them.

The court argues the need to create a legitimate parliament; however, it sidelines the issue of the legitimacy of the actual constitution maker, who was aware of his or her 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

43 *See, e.g.*, R. Suchánek, 'Nepohodlné články Ústavy aneb co nezměníme, to pomineme nebo vyložíme', *in* P. Mlsna (Ed.), *Ústava ČR – vznik, vývoj a perspektivy*, 1st ed., Praha, Leges, 2011, p. 113.

44 It is interesting that the subsequent rapid amendment of the constitution, enabling the quick dissolution of the House of Deputies 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.

45 In general, the issue of the content of the actual act is of secondary importance to the constitutional court. However, this is frequently criticized 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, 2014.

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> 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 of 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.[46]

From the constitutional-legal standpoint, there are two views of the whole 'Melčák' issue that oppose one another. Are the provisions of Art. 9, par. 1, in combination with Art. 9, par. 2, a competence standard or a qualification of constitutional law? Should the Constitutional Court have acted as it did? Paradoxically, a decision that endeavours to protect a state governed by the rule of law may also harm it.[47] Although the decision was not based solely on Eternity Clause arguments, it uses the clause in a form in which it is not entirely appropriate.

D After 'Melčák'

The controversial 'Melčák' decision was never formally challenged, although some members of parliament considered a formal resolution stating the decision of the Constitutional Court to be *ultra vires* and with no effect.

After almost a decade, we could conclude that this decision could be seen more as an eccentricity than as a guiding decision concerning new practice. As 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.'[48]

It was clearly demonstrated in the case of the so-called 'Amnesty of the President of the Republic dating from 01/01/2013'.[49] In the New Year's speech on 1 January 2013, President Václav Klaus declared a relatively unprecedented amnesty, which immediately unleashed an unusually sharp and extensive criticism, especially for the *abolice* part of Klaus's decision, which can abort criminal proceedings halfway through.

On 14 January 2013, a group of senators proposed that the Constitutional Court should annul this *abolice* part, which, in their view, was contrary to the val-

46 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.

47 Similarly, Roznai, 2014.

48 Molek, 2014, p. 109.

49 Resolution File No. Pl. 4/13.

ues of a democratic state governed by the rule of law (argumentation from the *Melčák* case).

According to Pavel Rychetský, the president of the Constitutional Court, who was part of the minority in the proceedings, the Constitutional Court had to deal with a clash of two constitutional law principles in this case. The first principle says that the Constitutional Court can never conclude or accept that there could ever be a decision of a democratic state that no one can review or abolish. The second is the constitutional principle, according to which 'state power can be exercised only in cases within the limits and in the ways provided by law'.[50] In other words, Unconstitutional Amnesty should be reviewable, but at the same time, there is no specific authorization for the Constitutional Court (as a part of state power) to deal with it.

The Constitutional Court did not use Eternity Clause arguments, and it refused to examine the Amnesty decision on a procedural basis to do with a lack of authorization. It is paradoxical that the Constitutional Court acknowledged the 'Melčák' complaint, formally directed against the decision by the president of the republic to announce elections to the Chamber of Deputies, yet actually directed against the normative (constitutional) act allowing such a decision; it is ironic that the Court later rejected the proposal against the quasi-normative act of the amnesty with the formal argument that it was an individual decision and the Court had no power to deal with it.

The Constitutional Court was similarly very strict during the proceeding concerning the complaint by Tomio Okamura against his elimination from the 2013 presidential elections.[51] 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 be in relation to the 'Melčák' case.

Nevertheless, we can divine 'the spirit' of the Melčák decision in the obiter dicta of the 'Amnesty' decision. The Constitutional Court refused to examine the Amnesty on the basis of procedural reasons. But the Court did note that, although a judicial review of the Amnesty decision has been ruled out, it might conceivably be possible in the future (with obvious reservations) to admit that, in a very excessive situation, the Constitutional Court would be in some form prepared to protect the values of a democratic state governed by the rule of law even against the Amnesty decision.[52] This is the typical modus operandi of supreme courts since the famous *Marbury vs. Madison* decision, to threaten powers but to not apply them in particular cases. Such an attitude based on an Eternity Clause may indeed be more effective for the protection of liberal democracy, but it also shows incoherence in Constitutional Court jurisprudence.

Moreover, in this particular case, it was also an illogical argument. As the dissenting judge Ivana Janů remarked,

50 Resolution File No. Pl. 4/13.
51 Resolution File No. Pl. 27/12.
52 Resolution File No. Pl. 4/13.

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> the logic of the majority opinion is clear: if the amnesty is not a legal regulation, it is not possible to decide on the amnesty under § 64 et seq. of the Act of the Constitutional Court. The Constitutional Court is not competent to discuss such a proposal (and any content of the amnesty cannot change anything)…. Moreover, I do not understand the majority opinion that, in the obiter dicta – in the context of the whole resolution, surprisingly – a review of amnesty decisions in 'extraordinarily extreme' situations is allowed. However, the content contradiction of a possible future extreme amnesty with Art. 9, par. 2 of the Constitution, in my view, cannot ensure that only for such a case the Amnesty 'becomes' legal regulation.[53]

This non-activist approach was later confirmed by another interesting decision of the Constitutional Court related to the Melčák 'precedence'. It was the motion of the Czech Pirate Party and its candidate to the Senate of the Parliament of the Czech Republic.[54] The main objection of the complainants was that the statutory condition for election to the Senate – reaching the age of 40 – is disproportionate, discriminatory, and contradictory to the provisions of the Charter of Fundamental Rights and Freedoms, namely equality and dignity in rights, prohibition of discrimination, and equal access to elected and other public functions.

According to the complainants, the principle of equality is a fundamental principle of the constitutional order of the Czech Republic and also a fundamental basis for the interpretation and application of law. In their point of view, the principle of the equal right to vote is one of the "essential elements of a democratic state governed by the rule of law" within the meaning of Art. 9, par. 2 of the Constitution, which also allows a judicial review of the constitutionality of the contested provision of Art. 19, par. 2 of the Constitution. The 40-year age limit is considered by the complainants to be too high and arbitrary, and they refer to the 'Melčák' case.

The Constitutional Court was not prepared to use Eternity Clause arguments in the way the complainants wished. The court pointed out that the requirement to reach the age of 40 years for election to the Senate has been part of the Constitution since its adoption. However, Art. 9, par. 2 of the Constitution must be perceived as a limitation by the constitutionalist towards the future while protecting the constitutional order from inadmissible changes. According to the Court, it does not, however, open the way for the Constitutional Court to review and possibly 'correct' the original text of the Constitution.

This is a clear and understandable argument. Nevertheless, we can read between the lines that the court is not willing to hear the 'Melčák' case's philosophical arguments anymore, and it is not willing to challenge the constitutional order in the name of some vague principles.

Inspiration from the 'activist' German Constitutional Court is also 'drying up', a fact that the candidates for the European Parliament for the Pirate Party and the Green Party discovered when the Constitutional Court failed to defend

53 Resolution File No. Pl. 4/13.
54 Resolution File No. I. ÚS 2166/16.

them, contrary to its German counterpart, and left the closing clause required in these elections still valid.[55]

It seems that particularly 'Zeman's Constitutional Court', now fully appointed by the recently re-elected President, Miloš Zeman, will not be willing to continue developing the 'Melčák' case. On the other hand, it seems that the Constitutional Court is still prepared to defend the values of liberal democracy, just not in such a spectacular way. We should mention the Declaration of the representatives of the Czech judiciary on the situation in Poland on 24th July 2017 signed by Pavel Rychetský, president of the Constitutional Court; Pavel Šámal, president of the supreme court; Josef Baxa, president of the supreme administrative court; Pavel Zeman, the supreme public prosecutor; and Anna Šabatová, the public defender of the rights ombudsman.

The Declaration says:

> The laws passed on the National Council of the Judiciary and on the ordinary courts and the proposed law on the Supreme Court, which make it possible for the executive and legislative powers to relieve the judiciary entirely of its independence, to relieve inconvenient judges of their mandate and to subordinate the judiciary to the political system, represent an attack on the very foundations of the operation of the democratic rule of law. While we are aware of and respect the sovereignty of the Polish state, we cannot remain silent about steps that threaten its very source, which are the inviolable values of European civilisation, humanism and fundamental rights and freedoms.[56]

Nevertheless, the judiciary and especially the Constitutional court cannot stand alone against the whole political class. Pavel Rychetský, who has been president of the Constitutional Court for 15 years, mentioned several times that he would retire during his second term. It seems that he has changed his mind and will keep his function till 2023, but then it could be the start of a completely new Constitutional Court, like we saw in Poland. The term of Josef Baxa, president of the supreme administrative court for more than 15 years, ended in September 2018, and his successor, doyen of Czech administrative court, Michal Mazanec, has limited term due to his age.

Anna Šabatová, public defender of the rights ombudsman, will probably not be re-elected in two years' time, and there are also speculations about the resignation of Pavel Zeman, supreme public prosecutor.[57]

55 Ruling by the Constitutional Court. Pl. 14/14.

56 Declaration of representatives of Czech judiciary on situation in Poland from 24 July 2017. Retrieved from https://www.usoud.cz/en/current-affairs/declaration-of-representatives-of-czech-judiciary-on-situation-in-poland/(last accessed 16 November 2018).

57 M. Pokorný & O. Houska, 'Šéf žalobců Zeman plánuje odchod, láká ho post evropského prokurátora. Ten má řešit dotační podvody', Aktuálně.cz, 23/4/2018. Retrieved from https://zpravy.aktualne.cz/domaci/pavel-zeman-planuje-odchod-ze-statniho-zastupitelstvi-chce-s/r~aa7aef2244ae11e8a79a0cc47ab5f122/ (last accessed 16 November 2018).

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In January 2019, there was a suspicion that President Miloš Zeman's office has attempted to influence courts with regard to the outcome of specific cases. Even though the situation in the Czech Republic is different from that of Poland or Hungary so far, it could change. It is, therefore, more up to the political actors to use arguments based on values of liberal democracy and on the Eternity Clause in the event of another Constitutional Crisis as the Slovakian Constitution Court recently did even without Eternity Clause mentioned in the Constitution.[58]

As Kim Lane Scheppele writes, liberal and democratic constitutionalism is worth defending, but first, we need to stop taking for granted that constitutions can defend themselves.[59] Yaniv Roznai adds that the fact that unamendability can be overridden by violent and extraconstitutional means should not severely undermine its usefulness in normal times.[60]

E Conclusion

As we have mentioned, liberal democracies around the globe are struggling not only with the rise of populism or authoritarianism but also with the questioning of their very most basic values. The Czech Republic is no exception.

Could the Eternity Clause and the unamendability of the Constitution offer a solution to this development? In practice, the Eternity Clause is not a substantive 'instrument' that enables society to preserve its values automatically. Its purpose is to transcend being a simple entreaty but to limit practical 'power,' maintain desired values and the political system, and maybe even remove the mask of legality from violent revolution. But, it does so not at the time of the destruction of the system, upon the edge of revolution, but regularly, in political and legal reasoning, during the process of the creation of new constitutional standards. The Eternity Clause is a 'clever' instrument, but actors like the Constitutional Court, the Senate of the Parliament, or even the people have to be willing to use it. It could be a tool in fight with 'autocratic legalism.'[61]

That the Eternity Clause could serve as a practical instrument has already been proved by the Czech Constitutional Court in its famous 'Melčák' decision. The character of actual natural law, *i.e.*, as a metaphysical correlate, is thus irrelevant.

The Eternity Clause will not ensure eternity but may help protect specific values, before they are outdated. This is also how the Eternity Clause could function well; all it requires is for us to 'believe' in it. But, as Richard Albert writes, the clause may also be counterproductive and may 'use' all the oxygen and thereby

58 This specific decision should not be overestimated. Most of the judges of the court would be changed in a few months.

59 K.L. Schappele, 'Autocratic Legalism', *The University of Chicago Law Review*, Vol. 85, No. 2, 2018, 545-583, p. 583.

60 Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, 1st ed., Oxford, 2017, p. 132.

61 *See* K.L. Schappele, 'Autocratic Legalism', *The University of Chicago Law Review*, Vol. 85, No. 2, 2018.

smother democracy itself.[62] The Constitutional Court might be thinking along the same lines. It is not willing to continue developing the 'Melčák' case. Nevertheless, the Court is still prepared to defend the values of liberal democracy, just not in such a spectacular way and maybe not forever.

Developments after World War I and particularly after World War II did not provide us with a general standard of metaphysical 'justice',[63] but rather an effective instrument to protect the democratic process. If we were to consider a 'metaphysical correlate' literally, it could be used to quickly remove the upper layer of civilization in the spirit of 'new' and 'better' values. It is, therefore, more up to the political actors or the people themselves to use Eternity Clause arguments to protect liberal democracy and its values. If the majority and the elites fail in their job, the Eternity Clause alone will not succeed in its job.

62 R. Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, Vol. 42, 2010, pp. 663-665.

63 Even Jiří Baroš ends his work by stating that constitutional justice contributes to people governing each other justly. However, what is justly? *See* J. Baroš, 'Od ústavní demokracie k ústavnímu soudnictví', in H. Smekal & I.Pospíšil (Eds.), *Soudcokracie, nebo judicializace politiky? Vztah práva a politika (nejen) v časech krize*, 1st ed., Brno, muni PRESS, 2013, p. 51.

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