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## INVISIBLE CONSTITUTION AS AN INSTRUMENT OF CONSOLIDATION OF NATION AND DEFENCE OF DEMOCRACY

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**Abstract.** The paper's premise is that the invisible Constitution serves as an instrument to protect democracy and consolidate the nation. The discussion turns around the fundamental aspects of democracy and sovereignty to reveal the subject. The question which is particularly considered is how the Parliament and the Constitutional Court participate in the expression of the principles of democracy in the contemporary world. The paper concludes that the Parliament, through the formal legislative procedures, becomes less capable of achieving a social compromise. As a result, the same representative feature of democracy becomes more unpopular in society and continues to be a prevailing object of criticism among scholarly community. In contrast, the Constitutional Court's role in protecting democracy through the systematic interpretation of a constitution undergoes a profound change in the democratic world. Constitutional Court, through the understanding of both visible and invisible meaning of the Constitution turns it into an expression of the sovereign will of the permanent nation.

**Keywords:** invisible Constitution; democracy; the Parliament; the Constitutional Court; the sovereign

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### Introduction

This paper explores the invisible Constitution as an instrument of consolidation of a nation and protection of democracy. More precisely, the paper analyses the role of the Parliament and the Constitutional Court in revealing the potential of the invisible Constitution. The paper also discusses whether a representative sort of democracy is still valuable in expressing the will of a sovereign written in the principles of an invisible constitution. Invisible Constitution is not so much about the new unwritten Constitution but rather about the systematic interpretation of the principles enshrined in the text of the Constitution and the demonstration of their new entities. Understanding the principles of democracy and their systematic interpretation with the "eternal satellites" – the rule of law and human rights.

Parliament, in the form of laws, has a mission to express the common will of the nation. However, it is possible that the political law issued in the Parliament tends to describe not the needs of society or the will of the country but interests of the governing groups. Regarding whether the Parliament can achieve a social compromise, it is necessary to discuss not solely whether the Parliament, in the form of laws, expresses the will of the nation. It is equally important whether the will of the legislator is discoverable in the labyrinths of procedural legislation. Whether the interests of the country are fully represented? Or instead, the interests of small groups receive attention, and the whole idea of representative democracy remains nothing but fiction. How openly are the parliament laws voted according to the procedural rules? By taking Lithuanian example, all these questions are discussed in Chapter 1.

Regarding the Constitutional Court, the question is whether and how this institution in the name of the Constitution, can promote democracy. One other opportunity to be a guarantor of democracy is to consider the political power appropriately, trying to extend the number of terms for the same person to serve as the President. Even if such textual amendments were offered, the Constitutional Court is often capable to nullify such initiatives grounding the arguments on the invisible Constitution. Based on comparative analysis, Chapter 2 of the paper considers this question by considering several practical cases from the experience of various countries, particularly Eastern European countries.

Constitutionalism as a legal paradigm in the West gave a second chance for the representative democracy to keep operating as the main sort of democracy. However, it is very likely that representative feature of democracy gives more than plenty of opportunities to be criticized or even discuss its transformation into another sort of democracy. It seems representative democracy is more about a state's institutions' institutional system than a society. If to look back to the Western legal and political roots, for instance, to the Declaration of the Rights of the Man and the Citizen (1789), article 16 announced firmly that: "Any society in which no provision is made for guaranteeing human rights or for the separation of powers, has no Constitution". Emphasis should be made on the words "any society". The logic of the term "any society" implies that society and not a representative democratic state, which depends on the temporal government changing every four years, is tied to the law.

### **1. Democracy and the Parliament: in search of a Social Compromise**

Criticism of the law in the sense of legal technique was already known in Antiquity. Influenced by the worldview of individualism in the Renaissance era, when the Parliament law dissociated itself from the law, the Parliament law faced various problems, including the question of legitimacy and so on, leading to a crisis at the end of the 19th century (Bécan & Couderc, 1994). The ideological causes of this crisis can be attributed to the "sacralization" of the Parliament law (Favoreau, 2001). Since 1789 and throughout the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, J. Rousseau's claim that the Parliament law was infallible, which was hardly disputed by almost anyone, prevailed. The rule of law is the rule of Parliament law: the concept of legality coincides with the idea of legality, that is, with the conformity of the activities of public authorities or private individuals with the laws passed by Parliament (Rousseau, 1966). The law is increasingly being equated with the Parliament law. However, according to H. Kelsen (2002), if all Parliament laws are recognized as law, lawfulness is equated with legality, and then it is no longer clear how the concept of legality can further be developed. Positive criticism is and has been a condition for improving the idea of Parliament law. The will of the legislator is also criticized for several reasons.

First, members of Parliament cannot discover it in parliamentary debates. Everyone expresses only their subjective opinion, and no one can claim to speak what is called the "spirit of the law" (Commaille, 1994).

Members of the Parliament are also not competent enough as only a few of them are lawyers\*. Second, a huge group of individuals cannot engage in legislation effectively. Aristotle's thoughts on this issue are very relevant today: "The best system should consist of democracy and tyranny, which some would not consider system at all. Those who mix more [systems] are right because a multi-order system is better. The legal system seems to have no elements of a monarchy, only oligarchic and democratic, and is more inclined towards the *oligarchy*." (Aristotelis, 1997). The features of the oligarchy become apparent when the laws express the interests of more robust, more influential groups. In this case, the representative democratic system is only a fiction, the actual name of which is the oligarchy. Third, the Parliament laws are created on anonymous procedures and are often characterized by false, incomplete and vague will, so jurisprudence and doctrine become the honest legislator, filling in the content of such laws (Bécan & Couderc, 1994). A concept governs doctrine: if it does not express the substantive features of the law, then the doctrine does not emphasize them but is directed to the description of standard features.

After the Second World War, criticism of the concept of Parliament law was supplemented by criticism of the legislative practice. Proponents of any legalism have supported the idea that the Parliament law will always find a way to improve until the possibility of creating new legislation and increasing the number of those laws is established through the adoption of various amendments or additions to the Parliament laws. However, such legislative practice inevitably violates the principles of legislation legal technique: stability, the generality of Parliament laws, their consistency and others. On the other hand, the development of democracy also causes legislation inflation, particularly in periods of social change. The abundance of adopted Parliament laws and their dynamic changes create instability in social processes and reduce the establishment and effectiveness of human rights and freedoms (Bécan & Couderc, 1994). Due to the abundance of Parliament laws, the Parliament law moved away from its essence as it became more notable than general; temporary, rather than stable; the Parliament law became not a rule expressing the law but means of government. Parliament law has evolved into a political law that represents not the needs of society but the will of the governing groups, which expresses the interests of the influence groups. In this way, the opposition of different social groups strengthens as the social order is destabilized because it is aimed at establishing a social compromise and a particular influence.

Through their empirical research, social sciences have confirmed the need for knowledge of the social reality of legislation. Due to the understanding of sociology, the public order is transposed into laws, which can no longer contradict the general social order and express the interests of only one or several influential groups (Holand, 1993). A sociological critique of legislative practice has opened up opportunities to improve the concept of modern Parliament law and the procedural requirements for enacting legislation. The controversy that began in the second half of the 20th century between E. Ehrlich, the founder of the sociology of law, and H. Kelsen, the author of *The Theory of Pure Law*, remains very relevant today and fuels the debate. The summaries of these discussions emphasize that the Parliament law must meet not only formal but also substantive criteria (Mader, 1985). According to Hegel, "in the image of legislation <...>, it is important not only to recognize that the Parliament law is a binding rule of conduct for all but more important is the essential inner moment - to perceive the content in the universality it defines" (Hegel, 2000). Consequently, Parliament laws must express the essence of law in their content. The aim is to return to the law concept and develop it.

### **Procedural legislation and expectations of the nation**

Article 69 of the Constitution of the Republic of Lithuania, which provides that laws shall be adopted by a majority of votes of the members of the Seimas (Parliament of the Republic of Lithuania, n.d.) present at the sitting does not provide for the minimum necessary number of participants in the sitting of the Seimas. This is not

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\* After at least one term in the Parliament, members already consider themselves lawyers because they know how laws come into being and what is written in them. However, they are only legists because they do not understand what the law should be, what the requirements of its content should be and what should be possible directions for improving the law.

detailed in the Statute of the Seimas or other laws of the Republic of Lithuania. Therefore the Seimas is granted a privilege that relieves the members of the Seimas from the obligation to participate in the sittings of the Seimas. Laws (albeit conditionally) are adopted only by a small group of members of Seimas; members of Seimas are not universally obliged or mobilized to participate in the sittings; therefore, draft laws are not discussed in principle; they are only superficially "baked". Parliament laws and decisions adopted by the Seimas are only partially approved. Therefore we cannot even talk about just representing people's interests, coordination and social compromise.

In this case, compromising the interests of the people is impossible. Consequently, the rules of the legislative process criticized by us (especially the absence of the minimum required limit for the number of members of the Seimas present in a legislative sitting) contradict the essential feature of the Parliament law that - the Parliament law expresses a social compromise of different public interests. The Council of Europe emphasized the importance of social compromise in its recommendations, proposing methods and principles for the development of legal norms. The Council of Europe's Methodology emphasizes that "laws will be fair if they reflect the solidarity of society" (Conseil de l'Europe/Principes et méthodes d'élaboration des normes juridiques, Strasbourg, 1983, p. 20), i.e. a social compromise. A social settlement is not possible if only a small group of members of Seimas participates in the sitting, as it cannot correctly represent broad interests. Only the parties interested participate, and no other opinion is presented, defended or expressed. Therefore, the interests of the people are not adequately represented and the interests discussed in the Seimas are not opposed. Opposing interests cannot be reconciled and compromised because they are not fully defined. Without a balance of interests, we cannot talk about a compromise of claims because it does not exist. To eliminate this objection, it is first necessary to oblige the members of the Seimas to participate in the legislative sittings when adopting common Parliament laws or other decisions of the Seimas regarding draft laws. Sittings should be held with the minimum necessary threshold of Seimas members participating in the sitting, of course, no less than 2/3 of the total Seimas members (because social compromise requires all representatives of the nation, and in practice, no less than half of the representatives of the nation).

In many countries, parliaments vote openly. There are exceptions, such as in Italy, where parliamentarians vote secretly on a bill (Lucaire, 1989). However, this is not a general but a particular rule. Such a vote allows to identify each Member of Parliament and check if his words meet his actions. This is done in different ways: voting can be done by clearly saying "yes" or "no"; in some cases, voting is done by tacit behaviour - raising one's left or right hand, standing up or staying seated, entering or leaving, etc. Nowadays, the traditional methods of voting mentioned above are often abandoned, and electronic voting is chosen by pressing the appropriate button. The results of such a poll are automatically calculated and displayed on the boardroom table. The advantages of open voting are that the voting procedure is visible, voters are identified, and results are quickly published.

The Seimas in Lithuania holds open votes on issues discussed at the sittings of the Seimas, except in cases when the Speaker of the Seimas, his deputies and the Chancellor of the Seimas are elected, mistrust in the Government, Prime Minister or particular Minister, Seimas official is decided, a head of public institution appointed by Seimas is being let go, as well as when voting on the wording of the charges during impeachment proceedings. Voting is also done by secret ballot when the question of the appointment of judges of the Constitutional Court is decided. Lastly, if the Seimas chooses, there may be a secret ballot on other personnel questions as well (see Articles 111 and 115 of the Statute of the Seimas, Statute of the Seimas of the Republic of Lithuania, 1998 December 22).

When voting in other Parliaments around the world, decisions are made based on a double quorum: first, the quorum of the participants and, second, the quorum of the votes cast. In many countries, a quorum is recorded in the presence of half of all members of Parliament. However, in many countries, the quorum is significantly higher than half of all members. As mentioned above, there is no quorum of participants in the Republic of Lithuania to adopt ordinary Parliament laws. Therefore it is emphasized once again that this absence of a procedural

requirement cannot ensure the function of expression and implementation of the social compromise of the law. Article 159 of the Statute of the Seimas states that a bill is rejected if it does not receive the required votes. The "required" number of votes, in the absence of a mandatory quorum, can vary widely and is different on a case-by-case basis. The lack of the quorum requirement is very convenient for the legislature as it is relieved of its duty to the groups it represents and, at the same time, to the nation.

On the other hand, parliamentary political responsibility is masked because voters can't know which groups are responsible for a particular law or its numerous amendments; they usually blame the Parliament as a whole or the government or party in power. Therefore, in the consequent elections, the voters are unable to properly grasp the relations between the political forces and vote in favour of the most vivid electoral programs, often in favor of a new party or political power that has not yet been in power and responsibility wise is neutral to the previously passed Parliament laws, i.e. is not to blame for the current state of affairs. And, naturally, Parliament laws passed by a small part of the members of Seimas will never meet the expectations of the nation because they will not create a general compromise. When Parliament laws are passed only by a small group of members in Seimas, the author of that law becomes unclear.

## **2. The Constitutional Court as the Last Bastion in Saving a Democracy: A Comparative analysis**

The Constitutional Court seems the most remote to be perceived as the embodiment of democracy among all governmental institutions. A body non-legitimized by the nation, which often opposes drastic reforms in the socio-economic field. The question is whether it can be treated as a guarantor of democracy. Aharon Barak, one of the most prominent constitutionalists and Supreme Court judges, formalized the role of constitutional judges as defenders of democracy through the prism of the traditional, modern constitutional justice concept of democratic values. According to A. Barak, the Court should be their guardian alongside the democracy (Barak, 2006). This traditional "gentleman's" set includes "the rule of law, judicial independence, human rights, and basic principles that reflect yet other values such as morality and justice, social objectives such as public peace and security, and appropriate ways of behaviour (reasonableness, good faith)" (Barak, 2006). Although such approach is reasonable, the constitutional courts are often mentioned in the context of the development of national democracy when the courts themselves face the dilemma of choosing between two principles of the constitutional order – democracy and the rule of law.

The question that needs to be answered is what the bodies of constitutional control protect in the real world and whether they can promote democracy. To provide an answer, the paper considers the most obvious situation for such confrontation: the abolition of constitutional restrictions on the number of terms for the same person to serve as the President.

On March 10, 2020, Valentina Tereshkova, the State Duma (Russian Parliament) deputy and former cosmonaut, unexpectedly suggested an amendment of the Constitution gives a chance for the President to run for the presidency for more than two constitutional terms. She argued that citizens fear what will happen after 2024, when Putin's term expires, so they (voters) should be given the right to decide for themselves and be allowed to leave Putin for another (or two) terms. President Putin supported the initiative, saying that a fundamental condition for its implementation in the text of the fundamental law should be the official conclusion of the Constitutional Court that "such an amendment will not contradict the principles and basic provisions of the Constitution" (The State Duma, 2020). The "spiciness" of the situation lies in the fact that Putin himself proposed to clarify the "restrictive" provision in the Constitution, setting restrictions on one person to be the head of state for not just two consecutive terms but for two terms in general. And such a proposal was included in the draft constitutional amendments.

The response of the Russian Constitutional Court was entirely expected. Examining this novelty for compliance with the principles of the constitutional order, the Court found that it faced the question of choosing a balance between such constitutional values as a democratic law-governed state, on the one hand, and sovereignty of the people, on the other (the latter, by the way, concerns the possibility for the people to choose freely a person it deems necessary). The Court did not find any violations of the constitutional order in such an ad hoc exception because, firstly, the people have yet to vote for such an amendment. Secondly, the abstract person will have the right to go beyond the standard two terms only "if s/he receives support as a result of the declaration of will of the people of the Russian Federation".

The Court also had to "balance" within its official constitutional doctrine, as in 1998, it was asked whether then President Boris Yeltsin, who was first elected before the 1993 Constitution adoption, would have the right to run for the presidency for the third (by actual count) term. The Court then acted as both a "court of law" and a "court of fact", citing actual political events, such as statements and actions by officials (including B. Yeltsin himself), who testified that both voters and election administration bodies, and the head of state himself, perceived Yeltsin's election in 1996 as the second term, not the first, under the 1993 Constitution. Consequently, there is no need to explain anything further, as the issue is clear, and Yeltsin has already exercised his right to be twice-elected President (Laws, codes and regulatory legal acts of the Russian Federation, 1998).

In 2020, the constitutional review body, formally without departing from previously developed legal positions, determined that it operates within the official constitutional doctrine, as the situation in 2000 is radically different from the situation in 1998 because this time, a special "Putin's" amendment is proposed to the Constitution (Rossiyskaya Gazeta, 2000). Thus, the Court chose the latter, choosing between the law-governed state and the sovereignty of the people.

The President of neighbouring Ukraine Leonid Kuchma once wrote a book, "Ukraine is not Russia". And in many respects, he was right because of the development of democratic processes in Ukraine, but he was wrong on one point. At the end of his second term, his administration devised a plan to extend his tenure, which also consisted of a formal interpretation of the constitutional provision restricting the presidency by one person for more than two consecutive terms. The Constitutional Court of Ukraine was asked, whether the restriction applied to a person who was first elected before the adoption of the Constitution in 1996. The Court concluded that the current Constitution, like any other legal act, cannot have a retroactive effect, and since the Constitution does not provide for the retroactive effect of the two-term restriction, there is no reason to restrict in this way the passive suffrage of a person elected before the entry of the Constitution into force (Ofitsiyni visnyk Ukrainy, 2003).

The situation with the third term of Croatian President Franjo Tudjman, who in 1997 was allowed to be re-elected by the country's Constitutional Court for the third time (Decision of June 11, 1997), stands somewhat aside in this cohort of "interesting" cases. However, in this case, compared to the previous case, there were a few fundamental exceptions. Firstly, when F. Tudjman was initially elected as President, Croatia was still part of the Federal State of Yugoslavia (SFRY). Secondly, the procedure for electing the President changed: F. Tudjman was elected by the Parliament for the first term and by the general election for the second. And thirdly, his first presidential term was shortened and was essentially transitional to the first direct Croatian presidential election since Croatia's independence in 1992.

Returning to the general trends in the protection of the illusory right to re-election for an indefinite number of times, it is necessary to expand the geography of analysis. So, the 2020 presidential election in Ivory Coast was not without scandals and fierce opposition (DW.COM, 2020). The country's Constitutional Council has allowed incumbent President Alassane Ouattara, who has twice headed the country, to participate in the election, using the following arguments to justify its position. Firstly, after the election for a second term, the country adopted a new Constitution in 2016, which was not a revision of the previous one, but became the basis for establishing a new

constitutional order in the form of the third republic. Secondly, the mentioned third republic represents a new system of power with the introduction of the position of vice-president, a bicameral structure of Parliament and a complete overhaul of the judiciary. Thus, the Council saw in such circumstances the emergence of a new representative mandate for the President, which in constitutional terms differed significantly from the previous two. And thirdly, the constitutional review body analyzed the facts of the 2016 constitutional referendum, namely the public statements of supporters and opponents of the new fundamental law that Alassane Ouattara would have the right to run for the presidency again in such circumstances (Conseil-constitutionnel.ci, 2020).

The Constitutional Court of Zambia used a different logic when it allowed President Edgar Lungu to run for the presidency for the third time in 2021. Edgar Lungu held the presidency for the first time in the pre-term election following the death of the previous head of state. The peculiarity of the electoral cycles under the constitutional system of Zambia is that the head of state is elected in the pre-term election only for the term remaining from the entire duration of office of the President. Their powers were terminated ahead of time. This is precisely the rule applied when Edgar Lungu was elected. He held office for a year and was re-elected for a full five-year term (followed by an amendment to the Constitution, including settling the issues of the President's term in office). As noted earlier, the Court, allowing Edgar Lungu to run for the presidency for the third term, recognized that the constitutional provision limiting the term of office of one person should be interpreted systematically, including the provision on early elections using the term "unexpired term" (Judiciaryzambia.com, 2018).

Perhaps the first in a series of indicative cases of restrictions on the presidency is the situation challenging establishing an absolute ban on re-election in the Constitution of Costa Rica. In 2003, the Constitutional Chamber of the Supreme Court, in the second attempt, succeeded in repealing the 1969 constitutional amendments that prohibited the re-election of a person to the presidency. The Court ruled that this violated the right to be elected, which is enshrined in the fundamental law, and, therefore a fundamental right (Martínez-Barahona, 2012).

Judges of the Venezuelan and Ecuadorian Constitutional Courts, as well as their Russian counterparts, in determining the constitutionality of the limitation on the number of terms of office for one person, ruled that under no circumstances should the people's right to elect a president and, accordingly, a specific program of political development of the country be restricted. The Nicaraguan Constitutional Court was not "original" in a similar case when in 2009, under rather strange circumstances, meeting at night and avoiding the participation of opposition-minded judges, pointed out that limiting the "presidential term" violates the principle of equality among candidates, especially of the former President Jose Daniel Ortega Saavedra to be re-elected, as well as the right of citizens to elect politicians of their choice. Similarly, the Bolivian Constitutional Tribunal supplemented its constitutional doctrine in 2017 (Landau, 2018).

Thus, there may be an illusion that in a situation of competition with constitutional values such as the sovereignty of the people and the rule of law, constitutional review bodies try to take a remarkably restrained position, not wanting to be criticized or pressured by the politicians or the public. However, in reality, there are opposite, somewhat favourable situations when courts, in search of a model of national constitutional identity, interfere with the whims of the current elite and do not allow the introduction of clearly unconstitutional changes to the Constitution.

The official constitutional doctrine of Colombia, developed by the local Constitutional Court, namely such a component of it as the doctrine of "replacement of the Constitution", can be an example. It has been used twice by the constitutional review body in cases of revision of restrictions on the re-election of the President. For the first time, it worked "in favour" of establishing the possibility of one-time re-election by setting a new limit at the constitutional level in two maximum terms (the situation concerned the current head of state Alvaro Uribe). The next time Uribe's supporters tried to "soften" the constitutional restriction from two to three possible terms, noting that these changes replaced such provisions of "identity of the Constitution" as separation of powers and the

democratic nature of the Constitution and were therefore unacceptable (Tashnet, 2016). In addition, the Court's argument that the President, who has held the post for eight years, has an advantage over rivals, which makes it much more difficult for an alternative to the incumbent head of state candidate to win, is noteworthy. In addition, the Court highlighted certain aspects of the constitutional scheme of public authority, which provides for inconsistencies during the tenure of a person as head of state and members of independent agencies (including the National Bank) who this person has nominated as a president. The latter factor is a separate guarantee of the autonomy of such structures. Therefore, if the term of office is extended for another 4-year term, the mentioned "cadence mismatch effect" will be eliminated (Cepeda Espinosa & Landau, 2017). The political context of the decision-making is important because, unlike many other Latin American leaders, A. Uribe won the second election as a political outsider with the support of an unstable majority in the Parliament, and therefore did not have such influence in politics as his other colleagues in the "presidential guild" (Landau, 2015).

It is important to note that among dictatorial regimes, trends on how to camouflage the preservation of power in an undemocratic way change periodically. Thus, over time, a new "constitutional initiative" to remove the head of state from another person instead of an autocratic leader by holding formally democratic elections when moving a dictator to a formally less important position of head of a Security Council or representative institution has emerged, which (position) becomes even more important than the presidential one.

Examples of the latter are the conditional transition in Kazakhstan, when former dictator Nazarbayev formally stepped down and resigned as chairman of the country's Security Council, changing the key position in security and law enforcement at the legislative level. And as we can see, the final imbalance of power has led to unrest in the country, which the new President Tokayev used to remove the clan of Nazarbayev from power (Official Website of The First President of The Republic of Kazakhstan - Elbasy Nursultan Nazarbayev. n.d.).

Most likely, another post-Soviet dictator Alexander Lukashenko will follow a somewhat similar path which, having held an unconstitutional referendum, amended the Basic Law, establishing an institution that has no analogues in other democracies at the constitutional level - the All-Belarusian People's Assembly. A body that is able to control not only the executive power but even the head of state himself. At the same time, this structure is knocked out of the general system of checks and balances since there are no levers of influence on it, neither the Parliament nor the judiciary (including the Constitutional Court, which has no right to check the constitutionality of the acts of these Assemblies), and therefore the head of these meetings simultaneously turns into a person with unlimited opportunities and limited terms of tenure (Zviazda, n.d.). Who can potentially take this position, you do not have to guess.

The President of Turkmenistan Gurbanguly Berdimuhamedow also decided not to relinquish power, and by handing over the presidency to his son through formalized procedures portrayed as an election, he assumed the post of Speaker of the Upper House of Parliament with several hidden additional powers.

It is significant and regrettable at the same time that, compared to the cases on the abolition of restrictions on the stay of one person in the presidency, dictators are not even covered by the "constitutional veil" of formal compliance of the proposed reforms with constitutional principles.

To conclude the analysis of this issue, we should turn to the position of one of the most authoritative pan-European expert legal structures, which is a kind of a "tuning fork" for other jurisdictions – the Venice Commission. Its position in this aspect certainly deserves attention and is in fact, reduced to such key positions. Firstly, the right to re-election is not a fundamental right that cannot be equated with other fundamental rights (and it is hardly possible to speak of the status of such a possibility as the right). Similarly, the reference of some Latin American constitutional review bodies to international documents, which even standardize this right as a fundamental one, seems ungrounded.



Secondly, lifting restrictions on re-election may give the incumbent head of state a significant advantage in the next election and, in the long run, turn the country into a "republican monarchy". Thirdly, "term limits aim to protect democracy from becoming a de facto dictatorship. They also keep the opposition parties' hope of gaining power through institutionalized procedures, with little incentive to seize power in a coup. Term limits, therefore, aim to protect human rights, democracy and the rule of law, which are legitimate aims within the meaning of international standards." (Venice Commission. Council of Europe, 2018).

So, with this example, we tried to show that in our age of populism, the Constitutional Court can be the last bastion that will not allow democracy to self-destruct. Politicians such as Trump, Orbán, and others have repeatedly called for unrestricted popular sovereignty to overcome the establishment's monopoly on power. By making decisions similar to the one mentioned by the Colombian Constitutional Court, constitutional review bodies can not only prevent usurpation of power, but also correct the mainstream in the ideological space, not allowing the forces that deny the rule of law as a value, equivalent to the constitutional order of democracy, to dominate.

### **3. Sovereign in the Representative Democracy**

From the discussion above, the following preliminary conclusions come to mind. First, by passing the laws, the Parliament struggles to create a social compromise. Throughout the history of Western legal tradition, it is a well-known fact that the legislator, responsible for expressing the sovereign will, not rarely confused the will of the legislative organ and the sovereign will. For instance, under the III Republic of France, the essence of the principle that a law is an expression of the sovereign will be reconstructed into a thesis that a law is a sovereign will (Carre de Malberg, 1984). Later on, Eastern and Central European states followed such example. The second preliminary conclusion that can be derived from the pages above is that constitutional courts, as the specialized judicial organs responsible for constitutional justice, might be viewed as the last bastion in defence of democracy. The analysis of the role of the constitutional courts in the pivotal moments of democracy in some countries also showed that a test of democracy not always can be passed even in the constitutional courts. Sometimes the constitutional courts become a target of a political will and, later on, a representative of such a will, rather than remaining a mechanism aimed at announcing the sovereign will, written in the Constitution. Constitution, which is nothing but an instrument of consolidation of a nation.

The question often posed in the discussions regarding representative democracy is whether the legislative power truly and effectively represents the idea of sovereignty. More precisely, whether a representative sort of democracy can reveal the full potential of democracy itself, just to remind the concept of J. J. Rousseau: <...if there were the people of God, it would democratically rule itself. However, such a perfect rule never belongs to people...> (Rousseau, 1966). Many authors, who insisted on the impossibility of direct democracy in large European states, had taken this statement for granted as the point of departure to prove that the representative sort of democracy is inevitable. In the following pages, the aim is to discuss the possibilities of the transformation of representative democracy. Representative democracy, which in the XXI century seems to be in a state of disarray. The fact is that it could be transformed by means of law as democracy is nothing more or less than the rule of law. Supreme law, if to be precise. When comparing bad people with a state that produces excellent and bad laws, Aristotle noted that the state will not always follow the laws.

The discussion in the last pages of the paper revolves around several key ideas. Attention is paid to the Western concept of constitutionalism that ended the era of legicentrism and separated the will of the legislative organ and the will of the sovereign. Despite such a significant shift in the constitutional level, it seems that the representative clothes of democracy do not fit anymore, and another step in defending democracy is necessary to be made. The paper also considers the idea of transitioning from a representative democracy to a permanent one by stressing

that democracy needs to be linked not so much to the elections, the Parliament or the representatives but the rule of a supreme law and the doctrine of human rights. In other words, the aim of the mentioned transition might become promising under a condition if the meaning of the Constitution as a social contract remains the backbone of constitutional democracy. The discussion turns around the question of whether and how the transitional step could be accomplished and, if to be accomplished, how it could become more valuable in the consolidation of a nation and a defense of democracy itself.

### **3.1. Representative Democracy and the Concept of Constitutionalism**

Sovereign will or the will of a nation in a democratic state might be expressed in two ways: directly or through the representatives in the Parliament. A representative democracy rather than the direct one is the most frequent in Europe, especially in Eastern and Central Europe. The referendums, where the nation directly decides the most important issues, are too rare to be named as an effective option to express the will of a nation. For example, in the thirty years, fifteen referendums were held in Lithuania (Voter page. n.d.). The legislative process is the most common way of expressing the sovereign will in a representative democracy. However, as it was stressed in this paper, the Parliament is neither successful in seeking a social compromise nor an effective guarantor. Philip Blacher went even further by doubting whether the legislative organ has always respected the most fundamental principles whereby citizens live in society (Blacher, 2001).

Legicentrism as a legal paradigm was based on the theory that the procedure of voting in the Parliament signifies an act of sovereignty. Further, a law voted by the Parliament expresses the will of a nation. Even more, a legislator's will coincides with a nation's will (Carre de Malberg, 1985). Such a legal tradition experienced a sharp change in 1985, when the Constitutional Council in France stated that law remains an expression of the general will only if it respects the Constitution (Judgment of Constitutional Council of the Republic of France of 23 August, 1985, Nr. 85-1970). One might argue that such a formula which came to be regarded as a turning point in a constitutional democracy in the XX century, does not sound newly. Hamilton, already in the XVIII century, said that the Constitution reveals the intentions of the people, and the statute issued in the Parliament expresses the intentions of the agents of a nation. As a result, Hamilton maintained that the Constitution should be preferred to the statute or any other act proceeding from the legislative body (Hamilton, 2001).

If to look at the Constitution of Lithuania, it is interesting to notice that in at least several textual instances the Constitution prescribes the judiciary and other institutions to obey a law voted in the Parliament. For instance, the article 109 of the Constitution states that when considering cases, judges obey only a law (Constitution of the Republic of Lithuania, Article 109). A law in Lithuania might be passed by the Parliament as the Parliament in Lithuania is the only institution having a right to pass such a legal act. Later on, the Constitutional Court of Lithuania clarified that the term 'obey only a law' means that the judiciary power and all the other state institutions must ground the decisions in accordance to a law voted in the Parliament and the law in general (Judgment of the Constitutional Court of the Republic of Lithuania of 11 May, 1999 No. 3/99-5/99). In other words, the rule of legal rules as the criteria to check the laws was strengthened by the rule of law. Thus, as a result of the institutionalization of constitutional control and its constant development, the theory of legicentrism in a slow pace has been removed by constitutionalism as a new legal paradigm in the Western side of Europe as well as Eastern one.

Under constitutionalism, the laws voted in the Parliament came to be controlled in the light of the Constitution as the supreme law to express the will of the nation. Democracy in its substance became not simply the rule of law, but the rule of supreme law. This considerable shift acknowledged that the will of the legislator might be incorrect and should be verified in the context of the Constitution. As a result of the introduction of the paradigm of constitutionalism into legal systems, such public law categories as sovereignty, the concept of Constitution, the

definition of a law voted in the Parliament or the constitutional idea of separation of powers have experienced a huge transformation in European law.

The concept of constitutionalism enabled clarification of the meaning of the sovereign will. The representatives, using voting the laws, certainly express the will of the actual (living) nation. However, the will of actual nation cannot be equated with the sovereign will. The sovereign will stem from the text of the Constitution. The constitutional creator creates the Constitution. Constitutional control is the mechanism to ensure that the laws voted in the Parliament are consistent with the Constitution. Thus, the legislative organ in the way of passing laws is not the only participant in expressing the sovereign will. As the laws have to be issued in accordance to the Constitution, the Constitutional Court is entitled to verify whether the legislator in the form of the laws respects the Constitution. By means of such control, the judge of the Constitutional Court speaks in the name of the sovereign and, in such a way, participates in expressing the sovereign will. Such a statement satisfied far from all constitutional experts. According to Dominique Rousseau, the Constitutional Court is not a representative of the nation: <...its mission is not without limits, and it is aimed at strengthening a political representation in the way of assuring respect to the Constitution...> (Rousseau, 1999). In contrast, Michel Troper agrees with the thesis that the Constitutional Court expresses the sovereign's will and makes an additional point. The Constitutional Court, according to him, in its mission, does not represent the same nation as the elected members of the Parliament do. According to M. Troper, the Parliament represents the actual nation, while the Constitutional Court represents a permanent nation (Troper, 1999), the will of which is written by an invisible Constitution. By such a representation, the Constitutional Court permits to separate the will of the legislator and the sovereign will be enshrined in the text and the content of the Constitution (Blacher, 2001).

The sovereign will, as it was already noticed, is expressed in the text of the Constitution. The sovereign agreed to express the will in the form of a constitutional text. In other words, a constitutional contract was signed by the sovereign. Constitution as a social contract binds a living and a future nation to live under the conditions written in the Constitution. Also, it binds a government not to violate a Constitution as a social contract. The nation decides on fundamental amendments of the Constitution. Here, the amendments of the Constitution of Ukraine, agreed in 2019 by the state actors, come to mind. It was decided then to add a provision into the Preamble of the Constitution in Ukraine. The identity of the Ukrainian people and geopolitical orientation was announced in the amended text of the Preamble in the following terms: <...confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine...> (The Constitution of Ukraine n.d.). Two aspects here need to be mentioned. On the one hand, a national security perspective implies that the geopolitical context surrounding the state of Ukraine is unpredictable and dangerous to such an extent that all measures must be taken inside the country to protect its sovereignty and independence. On the other hand, to regard the Constitution as a social contract expressing the sovereign's will, it is hardly permissible to decide a national identity and geopolitical course questions without consulting a nation in the referendum. The decision to make such an amendment by the agents of the sovereign returns the mind to the times when the concept of legicentrism prevailed in state politics and societal life.

Constitution as an agreement of a permanent validity is full of so-called 'majestic generalities'. All the principles and norms in the Constitution are general and abstract. This feature makes the Constitution visible as well as invisible. As a textual material, the Constitution is a visible document which can be read and explained according to the textual provisions. The richness of the inner side of the Constitution might be expressed in the process of legal interpretation. In such a way, the invisible Constitution turns into reality. In both forms, the Constitution as a social contract is grounded on fundamental values such as democracy, human rights, sovereignty, the rule of law, justice, separation of powers, etc. (Constitutional Court of the Republic of Lithuania of 11 July, 2014. Nr. 16/2014-29/2014). The constitutional project of the democratic state of Belarus was drafted by the Belarusian elite and European partners in November 2021 (The draft of the Constitution of the Republic of Belarus. New edition (25.11.2021)) divided the first part of the Constitution into the articles dedicated to the mentioned

fundamental values of a democracy. The articles on the fundamentals of democracy, separation of powers, and the rule of law find the place in the beginning of the Constitution, where these fundamentals are explained in an appropriate for democratic way. Such a textual picture leaves no doubt that this Constitution, in its visible as well as invisible sides, is aimed to consolidate a nation and defend democracy from any kind of authoritarian tendencies. In comparison, it allows one to read the Constitution of Lukashenka with fresh eyes and acknowledge that its invisible side is far more caricature than a document expressing the supreme law of the land.

As the sovereign will have been formulated over time, the constitutional courts have to analyze a bloc of constitutional texts to clarify the most fundamental constitutional values and express the sheer will of a permanent nation. For example, the Constitutional Court of Lithuania, in the recently published judgment, paid attention to the fact that the sovereign will is also expressed in pre-constitutional documents of Lithuania (Constitutional Court of the Republic of Lithuania of 30 July, 2020 No. 5/2019). The other three fundamental documents mentioned in the judgment of the Constitutional Court are viewed as the legal sources of the Constitution of 1992. As a result of such a statement, the Constitutional Court reminded us that the sovereign would begin with the year 1918. The Constitutional Court regarded all three historical documents as, above all, future constitutional documents. It was also declared that they could not be amended or abolished by any other Constitution. By expressing the sovereign will, the Constitutional Court also created a list of fundamental constitutional values (democracy, independence, geopolitical orientation and the natural sort of legal rights) that, according to the Court, cannot be changed or abolished under any circumstances. It is necessary to conclude that such a step reminds us that the Constitutional Court participates in representing not an actual nation but a permanent one. The will is written in many essential documents, full of visible and invisible values and principles.

Democracy, it is well known, is intertwined with the idea of the rule of law. The paradigm of constitutionalism added a new dimension to the concept of democracy by making it the rule of the supreme law. The Constitution in a state of democracy is an expression of the sovereign will, and the Constitutional Court is entitled to express it. The Constitution, as an expression of the sovereign will, is composed of the actual historical documents that need to be interpreted by the Constitutional Court to represent the permanent nation. In short, it is agreed that constitutional justice profoundly transformed the textual Constitution's classic theory. Moreover, it has changed the very concept of representative democracy itself.

### **3.2. From Representative to Permanent Democracy**

Democracy means the rule of people. It is a living experience of people to whom sovereignty belongs (Pappas, 2008). The sovereignty can be represented directly by the people or indirectly through the representatives. The idea of representative democracy, which is most frequent in the West, lies in the agreement that the will of a nation (the sovereign will) has to be expressed in the Parliament by means of laws. Rousseau believed that the sovereign will is always right. However, the decisions whereby it could be guided are far from clear. As a result, the sovereign will require a guide to show the right path (Rousseau, 1966). From this point, the legislator's necessity, the nation's representative, was born.

As was discussed previously, the idea of representative democracy in the end of XX century in Western Europe and at the beginning of XXI century in Eastern and Central Europe has been transformed profoundly by the transition from the paradigm of legicentrism to constitutionalism. In the name of the constitutional creator, the Constitutional Court took control over the laws issued by the legislator (Blacher, 2001). The sovereign will, written in the constitutional documents, came to be regarded as criteria to verify the legislative process results. Therefore, the democracy with constitutional control and its representative quality was enriched. Now expected feature results in a dual manner: through an institution which permits representatives to vote a law (the Parliament) and through an institution that allows citizens to stand against a rule whereby the fundamental constitutional principles are violated (the Constitutional Court). Despite this shift in democracy, there are

suggestions to rethink a representative feature of democracy seriously. Dominique Rousseau has recently affirmed that democracy became a prisoner of the principle of representation. According to this line of thinking, representation does not produce democracy in any mechanical way, and, even more, representation as an element in relation to democracy should be replaced by the so-called "permanent democracy" (Rousseau, 2015).

Several authors participate in a discussion regarding the idea of permanent democracy. Before analyzing the meaning of it, direct democracy as a model deserves a word. The tradition of ruling in the form of referendums has no roots in Central and Eastern Europe. One could even say that the Brexit process needs to be reminded when someone wish to have more direct democracy on the Central and Eastern side of Europe. Regarding the perspectives of the direct democracy in the Eastern Europe, one good comparison, described recently, requires our attention: <...in the immediate aftermath of the Soviet collapse several independent Eastern European states found faking democracy perfectly natural since they had been faking communism for at least two decades before 1991...> (Krastev & Holmes, 2019). For instance, Belarus state is the most suitable example of fake democracy. As the project of new Constitution of Belarus ruled by Lukashenka announced, the sovereignty belongs to the nation which might be expressed directly and through the representatives (Art. 3). The President, the nation and two other subjects might initiate a referendum (Art. 74). From the first glance, all these provisions seem suitable for any democracy in the West. However, such a visible constitutional text of 2022 hides an invisible reality in the state, which has nothing in common with democracy, especially a direct one.

Returning to the discussion about a permanent democracy, Dominique Rousseau noted that the concept of permanent democracy (*one democratic continue*) is based on three principles: political, legal and sociological (Rousseau, 2015). Without going into details, it is necessary to note that our discussion is limited to the question of the ties democracy can establish with the nation or the sovereign. From the constitutional texts and public political statements, the representative system primarily refers to the nation and less to the society composed of individuals. Also, it seems that representative democracy is more about institutions institutional system of a state than a society. However, if to look back to the Western legal and political roots, for instance, in the Declaration of the Rights of the Man and the Citizen (1789), article 16 announced firmly that: "Any society in which no provision is made for guaranteeing human rights or for the separation of powers, has no Constitution". Emphasis should be made on the words "any society". The logic of the term "any society" implies that society and not a representative democratic state, which depends on the temporal government changing every four years, is tied with the law because of *ubis societas ibi jus*.

The Constitution, as the supreme law, affirms the principle of natural rights and freedoms; it announces the fundamental rights and freedoms of people and defines their limits. Also, that state organ is responsible for implementing the rule of the supreme law. In this regard, the Constitution is directly tied to society. According to D. Rousseau, the relation Constitution/society is ontological, and the relation Constitution/state is historical. Moreover, the latter belongs more to the past than to the future (Rousseau, 2015). Rousseau enumerates three areas where the concept of a state, as well as the representative aspect of democracy, became weaker: first, a state and the concept of its territory have less in common as people, money, pandemic diseases, all sort of information or everything else have no boundaries because of free movement and Internet; second, a state and its relation to the concept of nation is changing profoundly as a global movement of people made them more the citizens of the world than of a particular country, not to mention such modern ideas as e-citizenship and etc.; third, a state and the concept of sovereignty has changed because the state belongs to different international organizations, declarations, pacts, etc. (Rousseau, 2015).

In essence, all three points have a reasonable basis for stating that representative democracy needs to be rethought. Regarding the third mentioned area of weakness between a state and sovereignty, there is a need to illustrate by one example. In many significant cases, the Strasbourg court utilizes a particular interpretive method. European consensus as a legal interpretation method affirms a joint agreement on specific issues in Europe. In

such a subtle way, a particular country is pressured to comply and change a legal regulation in inappropriate way. However, this method might cause not so much of a legal shift in a particular state. It might drive a fundamental transformation in questions belonging to the moral order of a specific state. However, this is an area protected by the invisible Constitution of a national state. European consensus became a key element in Strasbourg court's recognition of rights to homosexual sex (*Dudgeon v. the United Kingdom*, European Court of Human Rights, 22 October, 1981. No.: 7525/76), to same-sex relationship recognition (*Law & Critique: Que(e)rying the ECHR's 'European Consensus'*, 2021) etc. If to apply such a verdict in a national state because a compromise, according to the Strasbourg court, exists in European law and society, the question that might be posed is whether representative democracy permits such a move. A move which might be totally different in relation to a tradition, culture and moral order rooted in a particular society. This example might illustrate that sovereign and the democratic state represented by an institutional mechanism can have totally different views of how society imagines its future in democracy. Permanent democracy is protected by Constitution as a will of the sovereign. More precisely, an invisible constitution is an instrument in the hands of the Constitutional Court to defend democracy and consolidate a nation.

## **Conclusions**

1. The Constitution and democracy are often invisible. This is a reason why a question of the content of the Constitution is often being posed. The very process of revealing an invisible side of the Constitution as a body of fundamental values and of democracy as an expression, balance and implementation of those constitutional values is a necessary existential precondition. Furthermore, the process of revealing the invisible content of the Constitution and democracy should be treated as a primary condition and essential instrument to consolidate a nation and defend a permanent democracy.
2. The question of a guarantee of protection of the Constitution is one of the main actualities, which has several aspects. These aspects' essence lies in the Constitution's origins as a political and legal phenomenon. On the one hand, the Constitution consists of common guarantees of the democratic process. On the other hand, it is necessary to assure political and legal protection of the Constitution itself. That means the theoretical and practical essence of constitutional control is to protect the invulnerability of the Constitution and constitutional justice.
3. If to regard Constitution as a legal order both in a formal meaning (as the rule of legal rules issued in the Parliament) and in a material meaning (as the rule of law), then there is a possibility to speak about the Constitution which is indeed in force and plays a role in a state as a living instrument. Despite a declarative image of the Constitution, its meanings need to be revealed to transform an invisible Constitution into a visible one.
4. So the question arises, what are the mechanisms for protecting democracy through the mechanisms of the "invisible constitution"? As we tried to demonstrate, the "invisible constitution" is not so much about new unwritten constitutional principles but about the systematic interpretation of the principles enshrined in the text of the Basic Law, and the demonstration of their new entities. Thus, in the situation with the interpretation of the principles of democracy, their systematic interpretation with the "eternal satellites" - the rule of law and human rights - is critical.
5. Such a defender of a permanent democracy, the last bastion can only be the Constitutional Court or the body entrusted with its functions. However, much depends on how strong the institutional guarantees of the independence of this body are and how much it shares those liberal democratic values that are partly embedded in the texts of constitutions by their developers in countries that are only at the stage of electoral democracies and prone to slipping into dictatorship.

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