

THE PRINCIPLE OF THE GEOPOLITICAL ORIENTATION OF THE STATE IN THE CONSTITUTION OF THE REPUBLIC OF LITHUANIA

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Honourable members of the Government and the Seimas,
Honourable Chairman of the Constitutional Court of Ukraine,
Your Excellences Ambassadors of Latvia and Ukraine,
Dear colleagues judges, ladies and gentlemen,

I am honoured to congratulate you on the occasion of the Day of the Constitution. October 25th will mark 22 years from the day that the Lithuanian Nation adopted the Constitution of the Republic of Lithuania by referendum. We are happy that the validity of this Constitution has been the longest in comparison with the former Constitutions of Lithuania. This shows the viability of our Constitution. This viability could be related with various factors. One of such factors is the dynamic interpretation of the Constitution in the jurisprudence of the Constitutional Court, which discloses the “living” content of the Constitution, i.e., the content of the Constitution that evolves, to a certain extent, together with the development of the state itself. This opens the door to the necessary changes, alongside preserving the stability of the fundamental constitutional values.

In fact, the Constitution of the Republic of Lithuania has a big inner potential that is inseparable from the constitutional traditions of the state. One of such traditions is the constitutional principle of the geopolitical orientation, which implies the European and Trans-Atlantic integration chosen by the Republic of Lithuania and the necessity to fulfil the international obligations related with membership in the EU and NATO (this is the content of this principle as defined by the Constitutional Court in its ruling of 7 July 2011). In my opinion, in the light of today’s geopolitical background and seeing how Ukraine, like Lithuania some time ago, pays the price of the lives of its best people for its own geopolitical choice and its resolve in favour of democracy, this constitutional principle becomes a very important one and deserves a broader discussion. Meanwhile, the decision of the Constitutional Court of Moldova recognising European integration as a constituent part of the national constitutional identity and stating that any orientation of Moldova, except European, is unconstitutional, has recently been called by the Foreign Minister of Russia as “outrageous” and “shocking”. Alongside, today there is an opportunity to explain some provisions of the rulings of the Constitutional Court (specifically those concerning the limitations

on amending the Constitution and conducting referendums) regarding which the critics of those rulings usually choose to remain silent.

By the way, perhaps it is not a coincidence that the Constitutional Court has had a possibility of developing the doctrine disclosing the content of the principle of geopolitical orientation namely in recent years together with rising tensions in the geopolitical situation. The geopolitical orientation of Lithuania was mentioned for the first time in the Constitutional Court's ruling of 15 March 2011 on international military operations, exercises and other events of military co-operation. This ruling was passed subsequent to the petition filed in July 2008, when the aggression by Russia against Georgia was looming, and whose question could be paraphrased in this way: "Does the Constitution obligate the state to commit suicide by prohibiting it from using the most effective measure for its defence, i.e. the assistance of NATO countries?" The principle of the geopolitical orientation was later developed in the Constitutional Court's rulings of 7 July 2011, 24 January 2014, and 11 July 2014. Alongside, it needs to be noted that even before those rulings were passed the content of the principle of the geopolitical orientation of the State of Lithuania had been tackled in the legal doctrine. In 2001, this principle was discussed by Prof. Egidijus Kūris, who emphasised the negative (i.e. non-alignment to post-Soviet Eastern unions) and positive (i.e. the European and transatlantic integration of Lithuania) aspects of this principle. In general, it is possible to state that the clear consolidation of the geopolitical orientation in Lithuania's Constitution, which includes both negative and positive aspects, is also a specific feature of this Constitution, especially if a comparison is made with other states whose constitutions contain only the provisions necessary for membership in the European Union. By the way, these aspects are closely interrelated. As noted by colleague Prof. Egidijus Šileikis, the constitutional act on the non-alignment to post-Soviet Eastern unions, which is a constituent part of the Constitution and was adopted before the adoption of the current Constitution, also reflects the idea of the orientation to Western unions.

Ladies and gentlemen, I would like to emphasise that the Preamble to the Constitution contains an obligation to take into consideration the constitutional traditions of the Republic of Lithuania when the Constitution is interpreted. In other words, this shows an inseparable link between the constitutional regulation and the fundamental elements of the tradition of Lithuanian statehood, including the aspirations of the Nation that were made clear by the struggle for freedom and independence. Therefore, in order to properly understand the principle of the geopolitical orientation of the state as an important part of Lithuania's constitutional identity, it is necessary to remember a special historic document. What I mean is the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949, which was adopted more than 60 years ago under the conditions of the fight against Lithuania's second occupation perpetrated by the

USSR. As noted by Prof. Vytautas Sinkevičius, this Declaration, having entrenched the continuity of the State of Lithuania and the principles of the restoration of its independence, is a legal act of special constitutional significance, i.e. it is a primary source of constitutional law and one of the constitutional foundations of the independent State of Lithuania.

The beginning of the geopolitical orientation of the State of Lithuania as a constitutional tradition lies namely in this Declaration. Paragraph 22 of the Declaration consolidates the provisions that declare the contribution of the State of Lithuania to full implementation of “the true principles of democracy stemming from the understanding of Christian morality and declared in the Atlantic Charter, <...> the Declaration of Human Rights and other declarations of justice and freedom”. The Declaration also appealed to all of the democratic world for assistance in implementing its goals.

By means of those provisions, the geopolitical orientation of the State of Lithuania was consolidated for the first time. It was expressed in two aspects. Firstly, the existence of common values with the community of Western democratic states was declared. Secondly, the aspiration for the integration into that community was expressed.

The commonness of values shared with Western democratic states was stated declaring the loyalty to the Universal Declaration of Human Rights that had been adopted only two months before that date, on 10th December 1948. Alongside, it was implied that the State of Lithuania had chosen the course of geopolitical orientation that was different from that of the occupant Soviet Union, which, as is known, rejected the provisions of the Universal Declaration of Human Rights.

It should also be noted that the Declaration maintained that “the restoration of the State of Lithuania <...> shall be implemented pursuant to the provisions of this Declaration and in the spirit of the 1922 Constitution of Lithuania”. Thus, the constitutional identity of the State of Lithuania was linked namely to the democratic 1922 Constitution and not to the Constitutions octroyed after the 1926 *coup d'état*. In this respect, the Declaration, in a consistent manner, continued the constitutional identity of Lithuania as that of an independent and democratic state, as consolidated in the Act of Independence of Lithuania of 16 February 1918, and, at the same time, revealed a critical attitude towards the development of the state after 1926.

The aspiration for integration with the community of democratic states is reflected in the appeal to the democratic world for assistance. That appeal of the Republic of Lithuania, which was fighting against the occupation, may also be understood as an appeal to exercise the right of collective self-defence, which is the essential element of the principle of collective defence. At the same time, it may be viewed as an appeal to join the system of Western democratic states for security and collective defence, which at the time was still under creation (the North Atlantic Treaty was signed almost two months later).

Ladies and gentlemen, I think we should agree with Prof. Sinkevičius that “when reading the Declaration, you are overwhelmed with respectful excitement. And with pride. The pride that such a Declaration has actually been written”. Because the authors of the Declaration, who did not have any legal education, formulated and declared, in the name of the Lithuanian Nation, the provisions of eternal value. That statement was the first of such kind in the history of the State of Lithuania. It clearly expressed Lithuania’s geopolitical orientation namely toward the Western democratic world and marked the turning point of the State of Lithuania to the fostering of democratic values.

It is important to note that the principles mentioned in the Declaration—the commitment to democracy, human rights, justice, and freedom—are now embodied in Article 1 of the Republic of Lithuania’s Constitution (“The State of Lithuania shall be an independent democratic republic”) and in Paragraph 1 of Article 135 thereof, in which the most important principles of the foreign policy of Lithuania are consolidated. Thus, we can reasonably speak about the evident continuity of the constitutional tradition of Lithuania.

The value-based commonness with Western democratic states as the foundation of the geopolitical orientation of Lithuania is also reflected in the Constitutional Court’s ruling of 24 January 2014. The Constitutional Court noted that “the fundamental constitutional values consolidated in Article 1 of the Constitution—the independence of the state, democracy, the republic—are closely interrelated with the geopolitical orientation of the State of Lithuania, which is consolidated in the Constitution and implies European and transatlantic integration pursued by the Republic of Lithuania. <...> Such geopolitical orientation of the State of Lithuania is based upon the recognised and protected universal democratic constitutional values, which are common with the values of other European and North American states.”

Ladies and gentlemen, in this context, it is necessary to emphasise that the commitment to real (rather than fictitious) democracy provides grounds for certain growing similarity [convergence] of the national constitutional identities of democratic states, which determines the formation of identities of an international character. The subject of collective [constitutional] identity has been especially extensively discussed in the context of the so-called “European [constitutional] identity”. The references to European identity, based on common values, were evident already in the 1973 Declaration on European Identity. In that declaration, the nine Member Countries of the then European Communities indicated that “they are determined to defend the principles of representative democracy, of the rule of law, of social justice <...> and of respect for human rights. All of these are fundamental elements of the European Identity”. In addition, the Declaration on European Identity also contains the provisions on the shared values and aspirations based on a common heritage of Europe and the United States of America. The commonness of values shared by democratic states is also disclosed in the provisions of the Treaty on European

Union that refer to values common to the Member States—human rights, freedom, democracy, the rule of law, pluralism, non-discrimination, tolerance, and solidarity (Article 2), as well as the fundamental rights resulting from the constitutional traditions common to the Member States (Article 6). In the same respect, the provisions of the Preamble to the North Atlantic Treaty are relevant, through which the Parties to the Treaty reaffirmed their commitment “to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law”. It would also be expedient to mention a famous *dictum* by the European Court of Human Rights that “democracy is without doubt a fundamental feature of the European public order”.

Thus, the Lithuanian constitutional identity, founded upon such fundamental constitutional values as the independence of the state, democracy, the republic, and the innate nature of human rights and freedoms, should be understood in a broader context, as an integral part of the democratic constitutional identity of Western states.

In this context, it should be noted that the provisions of the Constitution that are protected by the geopolitical orientation of Lithuania, i.e. the provisions consolidating Lithuania as an independent and democratic state and recognising the innate nature of human rights and freedoms may be defined as “eternal”, i.e., such that may not be repealed, since otherwise the constitutional identity of the state would be destroyed (by the way, similar eternity clauses, prohibiting constitutional amendments that provide for the abolition or restriction of human and citizens’ rights and freedoms, or are oriented toward the liquidation of the independence or violation of the territorial indivisibility of the state, are enshrined in Article 157 of the Constitution of Ukraine). The circumstance that the protection of fundamental democratic values is not only a national but also supranational standard makes it possible to speak of the eternal character of those provisions of the Constitution that safeguard the core of these values. In this context, I would like to draw attention to the Constitutional Court’s ruling of 11 July 2014, which considers the issues of organising and calling referendums. The Constitutional Court emphasised that “the innate nature of human rights and freedoms, democracy, and the independence of the state are such constitutional values that constitute the foundation for the Constitution, as the social contract, as well as the foundation for the Nation’s common life, which is based on the Constitution, and for the State of Lithuania itself. The denial of these provisions of the Constitution would amount to the denial of the essence of the Constitution itself. Therefore, even where regard is paid to the limitations on the alteration of the Constitution stemming from the Constitution itself, it is not permitted to adopt any such amendments to the Constitution that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state. If the Constitution were construed in a different way, it would be understood as creating preconditions for putting an end to the restored ‘independent State

of Lithuania, founded on democratic principles', as proclaimed by the Act of Independence of Lithuania of 16 February 1918.”

These provisions of the Constitutional Court's ruling mean that, under the Constitution, no one is empowered to destroy the identity of Lithuania as an independent and democratic state, which is consolidated in the Act of Independence of Lithuania, and no one may deprive a human being of their innate rights. Therefore, the provision of the Constitution, under which the provision of Article 1 of the Constitution “the State of Lithuania shall be an independent democratic republic” may only be altered by referendum if not less than three-fourths of the citizens of Lithuania with the electoral right vote in favour thereof, should not be understood as allowing the repeal of independence and democracy. The Constitution should not become an instrument for “committing democratic suicide”. In other words, it is possible to speak of the modified John Stuart Mill's “paradox of a slave”, according to which the principle of freedom cannot require that a person should be free not to be free. The prohibition on destroying democracy, independence, and the innate nature of human rights and freedoms serves as a guarantee of the Nation's sovereign powers, since where the essence of democracy and independence were destroyed, even by formally democratic means, it would inevitably mean the destruction of the Nation's sovereignty. In that respect, the experience of totalitarian and authoritarian regimes is sufficiently evident.

In addition, the principle of the geopolitical orientation itself should also, in a certain sense, be categorised as an “eternal clause”. The Venice Commission has noted that constitutional provisions whose alteration is subject to particularly complex requirements may be considered *de facto* unamendable. This is of particular relevance when speaking of the prohibition on alignment to post-Soviet Eastern unions, which is an element of the principle of the geopolitical orientation. As the Constitutional Court noted in its rulings of 24 January 2014 and 11 July 2014, the provisions of the Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” may be altered only in the same manner as provided for in Article 2 of the Constitutional Law “On the State of Lithuania”, since the former is based on the same expression of the sovereignty of the Nation as the Constitutional Law “On the State of Lithuania”: i.e., these provisions may be altered only where “not less than three-fourths of the citizens of Lithuania with the active electoral right vote in favour of it”.

Ladies and gentlemen, as mentioned before, in the effective Constitution, the geopolitical orientation of the state is expressed in both negative and positive aspects. The negative aspect is explicitly consolidated in the before-mentioned Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions” and it establishes the limits that may not be overstepped by the Republic of Lithuania when it participates in international integration processes. The positive aspect, meaning the establishment of the direction of the geopolitical integration of the

state and the promotion of a dynamic activity on that course, emerges from the overall constitutional legal regulation and is in part consolidated in the Constitutional Act “On Membership of the Republic of Lithuania in the European Union”. In this context, I would like to note that, as the Constitutional Court held in its ruling of 24 January 2014, the fully-fledged membership of the Republic of Lithuania in the European Union is a constitutional value and a constitutional imperative based on the statement of the sovereign will of the Nation.

As regards the positive aspect of the principle of the geopolitical orientation, it is important to draw attention to the fact that, in addition to European integration, the Constitution also consolidates (in an implicit manner) transatlantic integration, i.e. membership of Lithuania in NATO, which provides the biggest possible and irreplaceable security guarantees. By the way, Article 47 of the Constitution, in its wording valid from 21 July 1996 until 23 February 2003, used to explicitly consolidate the category of the criteria for the European and transatlantic integration chosen by the Republic of Lithuania, which also implied the relevant directions of the geopolitical integration of the Republic of Lithuania. However, the fact that such criteria no longer have their explicit expression in the text of the Constitution does not mean that the geopolitical orientation of Lithuania does not include transatlantic integration. The interpretation of the principle of the geopolitical orientation of Lithuania, which includes not only European, but also transatlantic integration, is substantiated, among other things, by the constitutional conception of the State of Lithuania as the supreme common good. This conception gives rise to the constitutional imperative to ensure the protection of the fundamental constitutional values (first of all, the independence of the State of Lithuania and the democratic constitutional order) by using all measures accessible to the state which are lawful and most effective in order to protect those values from external threats. It is evident that in the absence of such an imperative, the Constitution as a social contract would become meaningless, whilst the state could not be deemed to be the common good. Therefore, I daresay that Lithuania’s membership in NATO that implements this imperative is also a constitutional value.

Ladies and gentlemen, before finishing my speech, I would like to make a short comment on the implications of the constitutional principle of the geopolitical orientation.

First, as it is evident from the Constitutional Court’s before-mentioned rulings of 7 July 2011 and 24 January 2014, the appropriate fulfilment of the obligations of membership in the EU and NATO is a constitutional priority in Lithuania’s foreign and security policy. It means, among other things, the necessity to implement the European standards on human rights and the duty to ensure the development of the system of national defence in line with the needs of the system of NATO collective defence and the funding of national defence that is necessary for such development.

Second, other provisions of the Constitution should also be interpreted in the light of the disclosed concept of the principle of the geopolitical orientation of the State of Lithuania. For example, the prohibition on the establishment of foreign military bases on the territory of the Republic of Lithuania, which is consolidated in Article 137 of the Constitution, may not be understood as an absolute prohibition against the presence of the military forces of other countries on the territory of this country. Under the Constitution, the forces and military bases of NATO allies may be established in the Republic of Lithuania. As noted by the Constitutional Court in its ruling of 15 March 2011, the prohibition consolidated in Article 137 of the Constitution “does not mean that on the territory of the Republic of Lithuania there may not be any such military bases that, subsequent to the international treaties of the Republic of Lithuania, are directed and controlled by the Republic of Lithuania jointly (together) with its states-allies”: i.e., Article 137 of the Constitution must be understood as safeguarding, rather than precluding the protection of, the independence of Lithuania, democracy, and other constitutional values.

Third, the geopolitical orientation established in the Constitution, when it is construed in conjunction with the principle of *pacta sunt servanda*, consolidated in Paragraph 1 of Article 135 of the Constitution, gives rise to the presumption of the compatibility of international and EU law with the Constitution. This presumption implies certain openness of the Constitution towards the influence of international and EU law as well as the interpretation of certain provisions of the Constitution along with international and EU law. In addition, international and EU legal norms are regarded as a minimum required standard for the protection of human rights and fundamental freedoms, which may not be violated by the national legal regulation. For example, as the Constitutional Court noted in its ruling of 18 March 2014, the Republic of Lithuania “may not establish any such standards that would be lower than those established under the universally recognised norms of international law”. The constitutional presumption of the compatibility of international and EU law with the Constitution is indirectly also confirmed by the doctrine developed in the Constitutional Court’s ruling of 24 January 2014 in relation to unconstitutional amendments to the Constitution. In that ruling, the Constitutional Court pointed out that the Constitution does not permit any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania arising from its membership in the EU, NATO, and other international organisations, as long as these international obligations have not been renounced in accordance with the norms of international law.

Ladies and gentlemen, dear guests, in summarising, I would like to emphasise that the principle of the geopolitical orientation is one of the most important principles among those consolidated in the Constitution and disclosed in the jurisprudence of the Constitutional Court, which ensures the indispensable conditions for the viability of the Constitution—the stability of the

text of the Constitution and at the same time its openness to changes in the democratic development of Europe and that of Lithuania, as well as its capacity to adapt to new challenges arising in the geopolitical environment.

Once again congratulating you on the occasion of the Day of the Constitution, I would like to wish us all courage and strength, so that we could consistently protect the eternal constitutional values, thus contributing to the strengthening of the constitutional identity of Lithuania as a reliable member of the community of independent and democratic Western states.