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SHOULD THE CONSTITUTION BE AMENDED IN ORDER TO INTRODUCE PUBLIC PARTICIPATION TO COURTS: IF SO, TO WHAT EXTENT?

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Abstract

This paper analyses whether participation of members of the public in the administration of justice should be laid down in the Constitution of the Republic of Lithuania (hereinafter, *the Constitution*) and if so, to what extent. It is an important issue since in order to introduce lay judges to courts, a draft amendment to the Constitution has been registered (registration No. XIIIP-3273) at the Seimas of the Republic of Lithuania (hereinafter, *the Seimas*). The draft amendment is concerned with two articles of the Constitution. Article 48(4) of the Constitution is amended as follows: "<…> citizens' activity as a lay judge <…> shall not be considered forced labour" and Article 109 of the Constitution is supplemented with Paragraph 5: "In the cases established by law, citizens who have taken the oath of a lay judge consider cases and adopt decisions together with judges".

This paper consists of three parts. In the first part, the legislation of the European Union (hereinafter, *the EU*) countries that have public participation established at the legislative (ordinary) level and not the highest (constitutional) level, i.e. Estonia, Malta, Finland, Sweden, Hungary and Germany has been analysed. In the second part, the fact that the introduction of public participation in Lithuania would require a constitutional amendment that would state that courts are made up of lay judges as well and that their involvement in dealing with cases is established by law. However, this would not only result in the amendment of Article 109 of the Constitution, but also in a supplement of Article 111 of the Constitution with Paragraph 5 which would state that the appointment and dismissal, legal status, and guarantees of independence of unprofessional judges are established by law. In the final, third, part of this paper, the selection of citizens is discussed, including the need to amend the respective Article 112(5) of the Constitution, i.e. supplementing the statement that "A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of

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judges, or their dismissal from office" with *that also decides on the appointment and dismissal of lay judges* or *participates in the selection of lay judges*.

The **purpose** of this paper is to discuss whether the fact that public participation is not established at the constitutional level in other EU countries violates the principles of separation of power or constitutional rule of law. This paper also aims to discuss why the amendment to the Constitution is necessary for Lithuania, and what the scope of such an amendment should be so that the integrity of the Constitution is maintained and the compliance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, *the Convention*) is ensured.

Design/methodology/approach. A qualitative research has been carried out. The following data collection methods were used: questionnaires made up of open-ended questions (the survey was conducted via email) as well as interview (the interview with Prof. Egidijus Kūris via email), thematic analysis, and document selection. The following data processing methods were used: the data was processed by analysing the contents of the documents and summarising the educational (legal) practice. The following data analysis methods were used: dogmatic and comparative analysis. The data regarding the level of regulation of public participation was collected remotely from the participants and experts (judges, representatives of courts, scholars, representatives of ministries of justice) from various countries. The data was collected, processed and analysed from spring 2019 until the submission of this paper for publication, i.e. spring 2020. The participants of the study were asked problem questions related to constitutional regulation. Research papers, other literature related to the issue of the study, constitutions of EU countries, and other international and national legislation were analysed. The scope of the study is the legal framework of EU countries that have lay participation established only at the legislative (ordinary) level instead of the constitutional level. The data for the research was collected from Estonia, Malta, Finland, Sweden, Hungary and Germany. In addition, Poland, Latvia, Slovenia, Slovakia and Norway were included in the study with regards to the amendment of Article 112(5) of the Constitution. The participants from Latvia, Slovenia, Slovakia, and Norway agreed to participate in the study but were unable to provide answers before submitting the paper for review.

The findings. For the EU countries that have lay participation established at the legislative (ordinary) instead of the highest (constitutional) level, it is not necessary to amend the Constitution. This is due to the differences among the countries, their systems and mentality, methods and tradition of constitutional interpretation and constitutional identity. However, within the context of the Lithuanian legal system, it is necessary to amend the Constitution. In order to maintain the integrity of the Constitution, and to harmonise constitutional regulation with the requirements of the Convention, four articles of the Constitution should be considered: amending Article 48(4) of the Constitution, supplementing Article 109 of the Constitution with Paragraph 5, supplementing Article 111 of the Constitution with Paragraph 5, and amending Article 112(5) of the Constitution.

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Research limitations/implications. Not all EU countries participated in the study. Since not all the representatives expressed their consent to their opinions being published, to protect personal data, the identities of such participants or experts have not been given in the paper. Only those who agreed to be quoted with their full name and place of work have been identified in the paper.

Practical implications. Recommendations for further practice so that if the remaining countries decide to introduce public participation to the administration of justice, they can assess whether it is necessary to intervene in the constitution. Meanwhile, countries that have established public participation only at the legislative level may evaluate their constitutional identity with regards to the necessity to amend or supplement their constitutions. There are ongoing discussions in the EU countries about how to select lay judges so that their independence is ensured; therefore, this paper analyses whether lay judges should be introduced to the judiciary system in the same way as professional judges are.

Originality/Value. There is a draft amendment to the Constitution registered at the Seimas. The draft amendments to the Constitution No. XIIIP-3273 were considered in the Committee on Legal Affairs during the autumn session of the Seimas. However, the draft amendments received a lot of important observations, especially from scholars, due to which the consideration was postponed. It is currently unclear whether the authors of the draft amendments plan to clarify the document or not. This contributes to the relevance of the topic and the necessity to publicise the extent of the amendments to the Constitution.

Keywords: lay judges, selection of lay judges, constitution, amendments to a constitution, constitutional amendments, the principle of separation of powers, the principle of constitutional rule of law, the principle of integrity.

Research type: research paper.

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