KEYNOTE SPEECH AT THE CONSTITUTIONAL COURT (JUDICIAL YUAN) OF THE REPUBLIC OF CHINA (TAIWAN)

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THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF THE LITHUANIA AND ITS LEADING CASES

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Dear President and Judges of the Judicial Yuan of the Republic of China (Taiwan),

Dear Colleagues and Friends,

It is an honour for us to be here today and together with you. We deeply appreciate the invitation to visit the Constitutional Court of the Republic of China (Taiwan) as well as the National Taiwan University and the Institutum Iurisprudentiae Academia Sinica. We are also grateful for this opportunity to present you the overview of the practice of the Lithuanian Constitutional Court and its leading cases.

I would like also to take this opportunity to express our sincere sympathy and firm support to the Republic of China (Taiwanese) fight in the cause of freedom and in defence of its self-determination to have an independent democratic State. Modern

international law cannot be perceived as oriented towards the protection of the interests of solely powerful States. It is rather focused on human and people's rights as well. Therefore, in accordance with the modern international law, the Taiwanese self-determination has to be protected and promoted, while all the attempts to preclude the Taiwanese people from the realisation of their inherent right to self-determination have to be regarded as both illegitimate and illegal. In particular, having in mind that the realisation of this right means the firmly established liberal democratic constitutional order of the Republic of China (Taiwan), which is in a sharp contrast to the communist dictatorship and totalitarian rule in the People's Republic of China who claims to sovereignty over Taiwan without any sound legal ground.

One should also pay a tribute to the activities of the Taiwanese Constitutional Court (Judicial Yuan), without which the liberal constitutional order would be unlikely successful. Indeed, its activism in protecting liberal democracy and human rights can serve as inspiration for many constitutional courts in Europe and worldwide. We can learn a lot from your progressive experience that was sometimes acquired in particularly difficult conditions.

Dear Colleagues,

I hope from my report you will be able to see a number of similarities between constitutional law, in particular the constitutional jurisprudence, of our countries. They can be started from a very similar (if not common) vision of the Constitutional Court and constitutional justice. But let me begin with some general characteristics of the Lithuanian Constitutional Court, in particular how its mission has been perceived at least during the last decade.

Needless to say, the Lithuanian Constitutional Court first of all has the power of control over the constitutionality of legal acts, which is primary and main competence of constitutional courts justifying their existence. In this way, constitutional courts carry out their duty to remove unconstitutional provisions from the respective legal

systems. More precisely, the Lithuanian Constitutional Court determines the constitutionality of legal acts that occupy the highest place in the hierarchy of the national legal system (and this practice is recommended by the Venice Commission (the European Commission for Democracy through Law), as it restricts the workload of the Constitutional Court to the constitutional cases of major importance): laws and all other acts of the Parliament (Seimas), decrees and any other acts of the President of the Republic and all the acts of the Government. Meanwhile, the legal acts of the executive power of the lower level (such as orders by ministers) and the acts of municipalities (local self-governing authorities) belong to the competence of administrative courts. The complaints regarding the constitutionality of the legal acts, though to a different extent and on different conditions, can be submitted to the Constitutional Court by the Parliament, the parliamentary opposition (the group of MPs that is not less than 1/5 of all MPs), the President, the Government, ordinary courts and individuals (natural and legal persons).

In addition, the Lithuanian Constitutional Court exercises a few other functions that are, to a different extent, typical for some other constitutional courts: it considers also 1) cases regarding the constitutionality of international treaties, 2) cases of impeachment of the highest officials, members of the Parliament, the constitutional and supreme justices (in this field, due to a wide circle of persons who may be subject to the impeachment, Lithuania can be even considered as the country who has the most developed constitutional doctrine on impeachment), 3) cases on the legality of parliamentary and presidential elections, 4) cases on removal of the President from the office due to health reasons.

One more essential function that is not specifically mentioned in the text of the Constitution, but which is an immanent element of all the other functions of the Constitutional Court, is the development of the official constitutional doctrine – the official and binding interpretation of the Constitution in the jurisprudence of the

Constitutional Court. This phenomenon can be referred as the jurisprudential or living Constitution. It is developed on the basis of the following main principles: 1) gradual development; 2) consistency; 3) the inadmissibility of interpretation of the Constitution based on lower-ranking legal acts; 4) the harmonisation with international and the European Union law; 5) the application of different methods of the interpretation of the Constitution (not only literal (verbal), but also systemic, logical, teleological, historical, comparative methods, thus the most important is that the Constitution has to be understood not only according to its letter, but in the light of its spirit as well).

Here, in developing the official constitutional doctrine, the saying "grows like coral", or layer by layer, perfectly fits to describe this process. As new constitutional doctrinal provisions are formulated, the diversity as well as completeness of the legal regulation consolidated in the Constitution is disclosed. As famously noted by Charles Evans Hughes, "we are under a Constitution, but the Constitution is what the judges say it is", that is as much as there is the official constitutional doctrine. The most important here is consistency of the constitutional jurisprudence that cannot be undermined by such factors, as, for example, a mere change in the composition of the Constitutional Court or political expediency, or public opinion. Otherwise, a threat would arise to the stability of the official constitutional doctrine and to the stability of the constitutional order itself.

Dear Colleagues,

However, it is not so important, which functions (apart from that of control of the constitutionality of legal acts) exactly the Constitutional Court has. It is much more important how does the Constitutional Court exercise them, whether it is indeed capable to take into account all the specificity and significance of its mission.

This depends on how active and determined is the Constitutional Court in pursuing its functions, including the evolutive development of its powers necessary for the accomplishment of its mission. According to the Constitution the latter is to act as a judicial institution that administers the constitutional justice, in order to ensure the supremacy of the Constitution and constitutional legitimacy in the legal system.

Thus, here inevitably we are facing the of the so-called judicial activism, which has no precise legal definition and more often is referred in the political science. I fully agree with the President of the Judicial Yuan Mr Tsong-Li Hsu who considers the judicial activism of the Constitutional Court as a key factor in safeguarding and promoting the liberal democratic constitutional order. He sees the judicial activism as a positive intervention of the Constitutional Court into the disputes involving political powers, by scrutinizing through constitutional parameters the political decisions more stringently, instead of adopting the attitude of over-respect and obedience towards the political branches of the State power (regretfully sometimes this over-respect is based on a wrong premise of the allegedly less legitimate character of the judiciary than that of the directly elected legislator). In other words, I would describe judicial activism as the proper and effective fulfilment by the Constitutional Court of its duties rather than abstaining from the decisions necessary for guaranteeing the supremacy of the Constitution. The leading principle in the activities of the Constitutional Court should always be that no compromise can be made at the expense of the Constitution and the rule of law.

As from the Lithuanian practice, I would emphasise a few aspects of the evolving powers of the Constitutional Court as an active guardian of the constitutional order. First, it is the power of the Constitutional Court to correct the limits of the constitutional case before it. The Court has to make the throughout examination of all the issues of unconstitutionality involved or concerned with the case, including the aspects that are not raised by petitioners. Therefore, the Court can recognise the impugned legal act as

unconstitutional on other grounds than stated by a petitioner; the Court can also declare unconstitutional those legal acts (or provisions) that are not disputed by a petitioner but, as it becomes clear during the consideration of a case, are related with the impugned legal act (or provision). This is not arbitrariness on the side of the Constitutional Court. It is rather the power dictated by the necessity to ensure the supremacy of the Constitution, i.e. the aim serving to a public interest: the Court could hardly be considered as serving that interest if it remains passive when, in considering the case, discovers other unconstitutional elements than raised by a petitioner. Thus, the *erga omnes* significance of the constitutional cases is a specific feature that makes them different from civil or criminal cases where the limits of judicial examination are much more dependent on the will of the parties.

Secondly, as from the jurisprudence of the Lithuanian Constitutional Court, we can see the well-established principle that no legal act may have immunity from the control of its constitutionality. This means that there should be no gaps in the system of constitutional review. Therefore, the Constitutional Court cannot restrict its jurisdiction only with regard to the legal acts expressly mentioned in the list of acts provided by the text of the Constitution. The Constitutional Court should also assume the jurisdiction to review the constitutionality of all the acts with not lower rank than the acts of the Government, even if they are not named in the text of the Constitution.

This principle explains why the Constitutional Court can decide, for instance, on the constitutionality of constitutional amendments (adopted either by the Parliament or by even a referendum), although there is no express constitutional provision on the judicial review of constitutional amendments. However, it is clear that in absence of the judicial review the constitutional rules on amending the Constitution would become meaningless; in other words, there would be no means to preclude or to outlaw the adoption for the constitutional amendments of any content or under any procedure. Therefore, it would be even reasonable to state that the judicial constitutional review

of constitutional amendments should be regarded as an immanent function of constitutional justice, i.e. of any constitutional court, whether or not this function is expressly provided in the text of the constitution.

The same logic applies to the acts adopted by a referendum. The Constitutional Court stated about its powers to review constitutionality of laws or other acts passed by the referendum, although this kind of legal acts are not mentioned in the text of the Constitution as an object of the constitutional review. Even the People who adopted the Constitution are themselves subject to the Constitution, including the constitutional requirements for referendums.

Thirdly, the implied powers of the Constitutional Court to apply some of its rulings retroactively, first of all, by declaring as null and void the legal acts that were adopted in breach of the constitutional prohibition to overrule a decision of the Constitutional Court. This prohibition arises out of the binding nature of an act of the Constitutional Court, as well as from the finality and non-appealability of an act of the Constitutional Court, as expressly established by the text of the Constitution. Therefore, although the text (para. 3, Art. 107) of the Constitution states about the prospective force of the decisions of the Constitutional Court, the Constitution itself provides the implied exception from this rule: the finality and non-appealability of a decision of the Constitutional Court, the principles of the supremacy of the Constitution and the rule of law, as well as the constitutional mission of the Constitutional Court, give rise to the power of the Constitutional Court to declare anti-constitutional all the legal consequences of a legal act adopted in breach of the prohibition on overruling the legal power of an act of the Constitutional Court. Otherwise, the preconditions would be created for the situation, which is obviously not tolerated by the Constitution: it is a situation, where, in pursuit of short term political goals, a knowingly anti-constitutional legal act could be deliberately adopted, which would overrule the act of the Constitutional Court and, for a limited period (until the legal regulation established by

the said act is declared anti-constitutional once again by the Constitutional Court), would create knowingly anti-constitutional, though formally legal, consequences.

The possibility for the Constitutional Court to declare null and void all the consequences of a legal act that overrules the decision of the Constitutional Court discourages the deliberate adoption of knowingly anti-constitutional legislation. That is why there are only two cases in practice where the legal acts of the Parliament were recognised in essence as null and void.

Almost all the doctrine on the exceptions regarding retroactivity of the decisions of the Constitutional Court has been formulated in the Decision of 19 December 2012 of the Constitutional Court. They include also the power of the Constitutional Court to declare the impugned legislation null and void (i.e., to proclaim unconstitutional all the consequences of the disputed legal act) in cases of the gravest breaches of the fundamental constitutional values or principles such as the independence of the State, democracy, the republican form of government, inherent nature of human rights. This case can be the first, though perhaps not the most important, assigned to the category of the leading cases that we can be proud of. However, it serves as a perfect illustration how effective the judicial activism can be also in preventing the gravest breaches of the constitutional order (to certain extent, even assuming the function of preliminary constitutional control). By interpreting the Constitution, the active and responsible Constitutional Court has the possibility to take into account variety of relevant factors, to foresee the future challenges to the constitutional order and to state a kind of *lex ferenda*, by pronouncing in advance on unconstitutionality of a certain type of the legal regulation.

The majority of the other leading cases I am going to touch can be regarded as namely an expression of this type of the judicial activism. Frankly speaking, at least it was my understanding, they are also directed at taming political populism that is probably a constant and universal challenge to the constitutional order based on the

rule of law. By placing the People above any Constitution, it is in general contrary to the modern concept of constitutionalism. It is not a surprise that populism can bring to the power authoritarian leaders and results in the backsliding of democracy. It is also not a surprise that the most remarkable populistic movements (in particular, in its anti-democratic and anti-humanistic rhetoric) are at least indirectly serving to the aims of Russia's aggressive policy and its attempts to influence the politics of neighbour States.

Dear Colleagues,

I am pleased to proceed with the case, which I consider to be the most important leading case of the Lithuanian Constitutional Court and which can be the most familiar to you. More precisely, it is not one case, but several rulings developing the doctrine of constitutionality of constitutional amendments (the Ruling of 24 January 2014 regarding the amendment to Art. 125 of the Constitution, where this amendment was declared unconstitutional due to a violation of the established procedure for amending the Constitution; the Ruling of 11 July 2014 regarding referenda, where the requirements for constitutional and other referenda were clarified; the Ruling of 30 July 2020, where the concept of constitutional laws was developed).

In essence, the Lithuanian doctrine of constitutionality of constitutional amendments is very close to that developed by the Taiwanese Constitutional Court in 2000 and 2014 (it is an amazing coincidence that both courts worked on similar issues in the same year). The Lithuanian doctrine can be also deduced from the purpose of the Constitution; one can say that it also protects the core of the Constitution, including the essence of a liberal democratic constitutional order – the principles of a democratic republic, the sovereignty of the people, the protection of fundamental rights and the separation of powers (especially the system of checks and balances). Moreover, like in Taiwan, the Lithuanian Constitutional Court dared to formulate this doctrine in absence of any express constitutional provisions on material (substantial) limitations on

constitutional amendments as well as on the power of the Constitutional Court to verify the constitutionality of constitutional amendments. I presume that, in formulating this doctrine, both courts took into account the challenges to the independence and democratic constitutional order of our States, which indeed are similar. Here it seems appropriate to recall the words of Aharon Barak, one of the most famous world legal authorities, that "In a democratic society, the role of the court is to protect the constitution and democracy. Protecting the constitution does not only involve protection against statutes that violate the constitution but also against amendments to the constitution that violate its foundations. The role of the court is to protect the basic structure and fundamental values of the constitution. There is thus a strong justification for recognizing the court's authority to examine whether an amendment to the constitution is constitutional". Indeed, in the absence of any judicial scrutiny of constitutional amendments, any established limitations on the alteration of the constitution may become just a "soft law".

In grounding the doctrine of constitutionality of constitutional amendments, the Constitutional Court held that the concept, nature, and purpose of the Constitution, the stability of the Constitution as a constitutional value, and the imperative of the harmony of the provisions of the Constitution imply both substantive (material) and procedural limitations on the alteration of the Constitution. The substantive limitations on the alteration of the Constitution are the limitations consolidated in the Constitution regarding the adoption of constitutional amendments of certain content; these limitations stem from the overall constitutional regulation, and they are designed to safeguard the universal values upon which the Constitution is founded and to protect the harmony of these values and the harmony of the provisions of the Constitution. The procedural limitations on the alteration of the Constitution are related to the special procedure set for the alteration of the Constitution in Chapter XIV "The Alteration of the Constitution" of the Constitution. A failure to comply with either substantive or procedural limitations set on the alteration of the Constitution would constitute a

ground for declaring a particular constitutional amendment as being in conflict with the Constitution.

I guess the more interesting are the substantive (material) limitations. The Lithuanian Constitutional Court has formulated a number of them, taking into account the source of particular constitutional provisions and the requirements for their amendment. According to these criteria, the substantive (material) limitations can be grouped into absolute limitations (which are designed to protect the fundamental constitutional values and entail the impossibility of constitutional amendments that deny such values), *de facto* absolute limitations (which imply that the Constitution can in principle be amended, however in practice its is not possible due to an extremely high qualified majority of votes required for the adoption of the respective constitutional amendments) and conditional limitations (which imply that the Constitution can be amended upon the fulfilment of particular conditions that stem from the Constitution, where these conditions would ensure that the harmony of the provisions of the Constitution, as well as the harmony of values consolidated in these provisions, is not violated).

First of all, as regards absolute unamendability, it follows from the eternal constitutional clauses, the source of which are the fundamental constitutional acts of the State of Lithuania, in particular the Act of Independence of 16 February 1918. They are regarded to be pre-constitutional acts, by which the independence of the Republic of Lithuania has been declared or restored; therefore, they are the source of the Constitution and their fundamental principles have even supra-constitutional force.

The Lithuanian Constitutional Court singled out the absolutely unamendable fundamental constitutional principles that stem from the Act of Independence of 16 February 1918: independence, democracy, and the inherent nature of human rights. The Constitutional Court held that, if these principles were revoked, the constitutional identity of the People and the People itself would be destroyed. The denial of these

provisions of the Constitution would amount to the denial of the essence of the Constitution itself. Therefore, according to the Constitution, the independence, democracy, and the innate nature of human rights cannot be abolished even by referendum. Otherwise, the Constitution would be understood as creating the preconditions for abolishing the restored "independent State of Lithuania, founded on democratic principles", as proclaimed by the Act of Independence of Lithuania of 16 February 1918. Although there is a formal possibility to alter the provision "The State of Lithuania shall be an independent democratic republic" of Article 1 of the Constitution by referendum, if at least three quarters of Lithuanian citizens with the electoral right vote in favour and due to the fact that the principles of independence and democracy are established in the act of supra-constitutional nature, this possibility should not be understood as allowing to repeal the independence and democracy. Meanwhile, inherent nature of human rights has to be interpreted as inseparable part of the democratic order. Although Article 18 of the Lithuanian Constitution, stating that "human rights and freedoms shall be innate", formally belongs to the range of provisions in respect to which the ordinary amendment procedure applies, the constitutional protection of the inherent nature of human rights should be the same as the protection of other values that form the foundations of the statehood of Lithuania.

By formulating the doctrine of absolute substantive limitations on constitutional amendments, the Lithuanian Constitutional Court stated what is obvious: under the Constitution, no one is empowered to destroy the core of the constitutional identity of Lithuania as an independent and democratic state, and no one may deprive human beings of their innate rights. The Constitution is not a pact for "committing democratic suicide". In this respect, 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 to choose not to be free. Thus, clauses prohibiting constitutional amendments that would strike at the essence of the rule of law, inalienable human rights and democracy as such, serve as a safeguard of democratic self-determination, however

paradoxically this may sound. If the substance of democracy is depleted, though in a formally democratic way, there will be no room left for further exercise of popular sovereignty and self-determination. An example of totalitarian or authoritarian regimes is rather obvious. Therefore, eternity clauses, safeguarding universal values, can be seen as an important instrument for democracies, enabling them to defend themselves.

By the way, this reasoning is in line with the Venice Commission's recommendations. In its "Guidelines for Constitutional Referendums at National Level", the Commission recommended that texts submitted to a constitutional referendum must abide to the substantive limits (intrinsic and extrinsic) of constitutional reform and that they must not be contrary to international law or the Council of Europe's statutory principles (democracy, human rights, and the rule of law). Texts that contradict these substantive requirements should not be put to the popular vote. Such recommendations clearly do not support the view that a voting majority should be constitutionally entitled to adopt amendments negating those values that are perceived as forming the basis of the European *ordre public*.

Second, *de facto* unamendability is associated with the two constitutional principles: the republican form of government of Lithuania (Art. 1 of the Constitution) and the restrictive aspect of the principle of the geopolitical orientation of the State, which is expressed in the Constitutional Act "On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions". These principles could be treated as *de facto* unamendable constitutional provisions, because they can be amended only by a referendum, if at least three quarters of Lithuanian citizens vote in favour – so high number that is impossible to achieve. As regards the constitutionality of constitutional amendments, there could not be such amendments that could deny the core of both principles unless these principles are also altered in accordance with the Constitution, but, as it was just mentioned, it seems to be practically impossible.

Third, there are several relative limitations on constitutional amendments. The first is the positive aspect of the principle of the geopolitical orientation of the State (the membership of the Republic of Lithuania in the European Union) – the constitutional grounds for this membership, which are consolidated in Articles 1 and 2 of the Constitutional Act "On Membership of the Republic of Lithuania in the European Union". They include: 1) the conferral of powers of the Lithuania's State institutions on supranational (the European Union) institutions; 2) the status of the European Union law – it is a part of the Lithuanian legal system. The Lithuanian Constitutional Court declared that the fully-fledged membership in the European Union is a constitutional value and due to the fact that this membership is based only on the will of the citizens of Lithuania expressed in the referendum, the constitutional grounds for this membership may be altered only by another referendum. Therefore, there could not be such constitutional amendments that contradict to these constitutional grounds, unless these grounds are altered by a referendum (for example, the provisions on ownership of land which would provide the exclusive rights for the citizens of Republic of Lithuania excluding other nationals of the European Union).

The second relative limitation follow from the more stringent requirements to amend the constitutional provisions contained in Chapters I "The State of Lithuania" and XIV "Alteration of the Constitution", for example, the State language, the principle of State integrity, the principle of separation of powers, the prohibition on multiple citizenship. According to the Constitution, as the provisions of both Chapters may be altered only by a referendum, no constitutional amendments to the other constitutional provisions, which could deny the values and principles safeguarded by those two Chapters, should be adopted, unless the respective provisions of the said Chapters are amended accordingly by a referendum.

The third relative limitation is a unique one (as far as I know, only Switzerland has a similar limitation) and reflects a particularly friendly attitude towards

international law. It follows from the constitutional principle *pacta sunt servanda*, which is an inseparable element of the rule of law and means the imperative to carry out in good faith international obligations of the Republic of Lithuania assumed in accordance with both general international law and international treaties. Therefore, the Constitution does not permit any such constitutional amendments that would deny the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle *pacta sunt servanda*, consolidated in Art. 135 of the Constitution. This kind of constitutional amendments may be possible only following the denunciation of the respective international obligations in accordance with the rules of international law.

While determining the procedural limitations on the alteration of the Constitution, the Constitutional Court pointed out that, under the Constitution, different procedures are established with regard to the alteration of constitutional law and ordinary law. The constitutionally established special procedure for amending the Constitution may not be equated to the passage of laws (*inter alia*, constitutional laws – a specific category of laws in the Republic of Lithuania, which is close to the concept of organic laws). The constitutionally consolidated special procedure for amending the Constitution includes various special requirements (the prohibition on making amendments to the Constitution during a state of emergency or martial law; the possibility of amending certain provisions of the Constitution only by referendum; the particular subjects entitled to submit a motion to alter or supplement the Constitution; the requirement that amendments to the Constitution be considered and voted twice; the requirement that amendments to the Constitution be adopted by a special qualified majority vote of 2/3 of all the members of the Seimas, etc.).

I would like to emphasize that, although the doctrine of constitutionality of constitutional amendments was applied only once in assessing the concrete constitutional amendment, it is proved to be a particularly significant in prevention of

various populistic and anti-constitutional initiatives that sometimes could be even detrimental to the foundations of the Lithuanian State, including pluralistic democracy and inherent human rights (for example, there are no more initiatives to amend the Constitution in a manner contrary to the membership in the European Union or to international human rights law). In addition, it outlawed in advance any popular referenda on independence and democracy (here I recall that two our neighbours – the aggressor States (Russia and Belarus) use referenda as a means to justify the annexation of foreign territories and the authoritarian rule).

Dear Colleagues,

As you can see, the cases dealing with the constitutionality of constitutional amendments involve a number of particularly important constitutional issues: the constitutional foundations of statehood, a direct democracy and referenda, inherent human rights, the relationship of the Constitution with international and the European Union law. Therefore, naturally most of other leading cases of the Lithuanian Constitutional Court can be also associated with the doctrine of the constitutionality of constitutional amendments.

Let me first to touch a few cases where the constitutional principle of the Western geopolitical orientation of the State of Lithuania was developed. This principle is one of the most remarkable and significant elements of national constitutional identity of the State of Lithuania. The key Ruling here remains that of 24 January 2014 regarding the constitutionality of constitutional amendments; it was preceded by the rulings of 15 March 2011 and 7 July 2011 regarding the deployment of the Allied (of other NATO Nations) troops on the Lithuanian soil and the protection of classified information.

However, it is also the already mentioned Ruling of 30 July 2020, where the constitutional tradition of the Western geopolitical orientation of the State of Lithuania was distinguished and traced back to one of the fundamental constitutional acts of supra-constitutional character – the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949, which was adopted by the highest political and military authority of the Resistance to the Soviet occupation. The principle of the Western geopolitical orientation of the State of Lithuania was then reflected in the provision of the Declaration, by which the adherence to the Universal Declaration of Human Rights was announced and the appeal to all of the democratic world for assistance was made.

Looking at the mentioned rulings of the Lithuanian Constitutional Court, one can distinguish the following elements of the constitutional doctrine on the Western geopolitical orientation of the State of Lithuania. First, its direct relevance to the unamendable fundamental constitutional values such as the independence of the State, democracy, and inherent human rights. The Western geopolitical orientation is considered to be the constitutional principle safeguarding those values and the foundations of the State and the People's sovereignty. Indeed, the independence of Lithuania is supposed to mean, first and foremost, a break of all the ties of dependency on Russia (the former Soviet Union) and the rejection of its claims to influence.

Second, the Western geopolitical orientation is based on the commonness of values with the Western democratic states – the recognised and protected universal democratic constitutional values that are common with other European and North American states.

Third, the restrictive aspect of the constitutionally expressed Western geopolitical orientation of the State of Lithuania means the prohibition for the State of Lithuania to join the post-Soviet unions of states and international organisations created on the basis of the former USSR. This prohibition is established by the

Constitutional Act on the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions, which is a constituent part of the Constitution and belongs to the category of *de facto* unamendable clauses (as mentioned already, it can be changed by three quarters of Lithuanian citizens).

Fourth, the integrative aspect of the Western geopolitical orientation means the constitutional imperative for the State of Lithuania to be a fully-fledged member of the EU and the NATO as well as to fulfil in good faith the international obligations related to that membership. In part it is explicitly expressed in the Constitutional Act on Membership of the Republic of Lithuania in the European Union, which is also a constituent part of the Constitution. As regards the membership in the NATO, this constitutional imperative is implied and follows from the concept of the State of Lithuania as a common good of all the People, which has to seek all the most effective means for ensuring national security and defence (needless to say, the NATO is the most effective collective defence alliance).

Fifth, the constitutional principle of the Western geopolitical orientation has its positive impact on the interpretation of other constitutional provisions. Among other arguments, relying also on this principle, the Lithuanian Constitutional Court narrowed the meaning of Art. 137 of the Constitution, which establishes the prohibition to deploy foreign military bases on the territory of Lithuania. The deployments of the Allied forces for the purposes of collective defence and security were excluded from this prohibition, by restricting it solely to the deployments that can pose a threat to national security (moreover, looking historically, this constitutional prohibition was aimed at the withdrawal of the Russian armed forces that had been illegally deployed in Lithuania until September of 1993). In such a way the Lithuanian Constitutional Court confirmed the constitutionality of Lithuania's membership in the NATO, which had been disputed by petitioners in the case of 15 March 2011. They raised the question that can be rephrased as follows: does the Constitution obligate the state to commit a

suicide by prohibiting it from using the most effective measure for its defence, i.e. the assistance of other NATO countries?

Sixth, the constitutional principle of the Western geopolitical orientation also serves as setting the minimum constitutional standard for national legislation. For example, in its Ruling of 7 July 2011 the Lithuanian Constitutional Court held that, while regulating the protection of state secrets, the Republic of Lithuania may not establish lower standards of the protection in question than those pertaining to the protection of classified information in the EU and NATO.

Seventh, as mentioned already, the principle of the Western geopolitical orientation provides the relevant criteria for assessing the constitutionality of constitutional amendments.

Thus, the Lithuanian constitutional identity, founded upon fundamental constitutional values such as the independence of the State, democracy, 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 summary, the constitutional principle of the Western geopolitical orientation is one of the most important principles disclosed in the jurisprudence of the Lithuanian Constitutional Court, by safeguarding the independence of the State and ensuring the viability of the Constitution (the stability of its text, including its openness to changes in the democratic development of Europe and Lithuania as well as its ability to adapt to new challenges in the geopolitical environment).

Dear Colleagues,

Let me proceed with the doctrine of referenda where I can feel some differences from the approach taken by the Taiwanese Constitution. Here again the key is Ruling of 11 July 2014, which is also important in dealing with the constitutionality of

constitutional amendments. In addition, the Ruling of 15 February 2019 can be mentioned, as it elaborated further the constitutional principles for the organisation of referenda; the Ruling of 30 July 2020 elaborated the issue of a force of the decisions taken by a referendum.

Interesting that Ruling of 11 July 2014 seems to be the correction and a significant development of the official constitutional doctrine formulated in the first years of the activity of the Lithuanian Constitutional Court. In the Ruling of 22 July 1994 the Court noted that the Parliament's duty to call a referendum could not be subject to any additional conditions or decisions, which are not indicated in the Constitution; otherwise, allegedly the supreme sovereign power of the People would be limited. Subsequently, elaborating on this doctrine twenty years later, the Constitutional Court held that the statements from the Ruling of 22 July 1994 may not be interpreted without taking account of other provisions of the Constitution, as well as of the entire official constitutional doctrinal context and its development. It was emphasised that the requirement that the Constitution must be observed when referendums are called may not be regarded as an additional condition, which is not provided for in the Constitution. The Constitution is equally binding on the People. Therefore, the provisions of the Constitution may not be interpreted to mean that the People may, by a referendum, establish any legal regulation it requests, including a legal regulation not complying with the requirements stemming from the Constitution (including the substantive limitations on constitutional amendments). Accordingly, the Constitutional Court held that the imperative derives from the principle of the supremacy of the Constitution not to put to a referendum any such possible decisions that would not be in line with the procedural or substantive requirements inherent in the Constitution, even if these requirements are not consolidated in the text of the Constitution *expressis verbis*. In addition, the Constitutional Court emphasised the importance to consolidate by law the requirements stemming from the Constitution for the content and form of an issue submitted to a referendum, including the requirement

that issues submitted to a referendum must be formulated in a clear and not misleading manner, also that they may not include several unrelated questions or provisions, etc.

Thus, if to sum it up, the point of departure for the development of the doctrine of referenda is that the Constitution, as a social contract for the present and future generations, is the supreme law that is *erga omnes* binding on all, including the People as a sovereign. Therefore, the supreme sovereign power of the People may be executed, *inter alia*, directly (by a referendum), only in observance of the Constitution. This may not be regarded as a restriction or limitation on the sovereignty of the People, as the purpose pursued by subjugating the People to the authority of the Constitution is to protect such constitutional values as the sovereignty of the People, the independence of the State of Lithuania, its territorial integrity, and the constitutional order as well as to preclude the invocation of the People's sovereignty for the destruction of the said constitutional values (here again we come back to the maxim that the Constitution is not a pact for committing democratic suicide).

From the case law of the Lithuanian Constitutional court, one can distinguish a few important constitutional imperatives following from such a concept of direct democracy. First, it is not permitted to put to a referendum any such possible decisions that do not comply with the requirements stemming from the Constitution, including the draft constitutional amendments that do not comply with the substantive (material) limitations on the alteration of the Constitution. Therefore, the issues contrary to the State independence, democracy and inherent nature of human rights can never be put to a referendum.

Secondly, under the Constitution, direct democracy cannot be opposed to indirect (representative) democracy as they both aim at the expression of the will of the People. Therefore, due to their nature and the constitutional regulation, some issues can be reserved to the exclusive competence of the Parliament. For example, they include the adoption of a State budget, the establishment of taxes, the appointment and

dismissal of the State officials, including judges, the impeachment. Also the Parliament cannot be dissolved by a referendum. There we can see some differences from the Taiwanese constitutional order, where non-confidence in the State officials can be expressed by a public voting (an imperative mandate). In addition, following the imperatives of consistency of a legal system and a hierarchy of legal acts, the legal acts adopted by a referendum can be subject to amendments by the Parliament (unless they are falling within the category of such constitutional amendments that can be adopted only by a referendum).

Thirdly, the democratic electoral principles have to be applied *mutatis mutandis* to the organisation of referenda. Therefore, the legal regulation of referenda must create preconditions for the establishment of the real and authentic will of the People without any distortions. This imperative includes the requirement of fairness of the process by applying the same conditions to all referenda and excluding the subjective manipulations from the side of the State authorities, for example, eliminating their discretion to decide on different length of voting (a number of voting days).

Dear Colleagues,

The Lithuanian Constitutional Court had numerous cases on various civil, electoral, political, social and procedural rights. However, the most important are the constitutional principles common to all the block of human rights. I have already demonstrated that, due to the jurisprudence of the Constitutional Court, inherent nature of human rights is granted the highest possible level of protection, as it is one of the eternal or unamendable constitutional clauses, which also is an inseparable element of the concept of democracy. As maintained by the Lithuanian exile lawyer J. Varnas, "democracy is a lifestyle based on social justice, the acknowledgment of human value in each person, the equality of all people and love for the close ones. At the same time, it is the moral duty to respect an individual and his personality".

At this point we face the concept of the Constitution as an anti-majoritarian act, which was stated by the Lithuanian Constitutional Court in its Ruling of 19 August 2006 and further developed in the Conclusion of 19 December 2017 concerning gender equality and the Ruling of 11 January 2019 regarding the recognition of the same-sex couples as a family. This concept implies the necessity of pluralistic democracy and the protection of minorities and each individual against dictatorship of the majority. As stated by the Lithuanian Constitutional Court, the State can be truly democratic, provided it respect human dignity of each person. Thus, democracy is not only the procedural rule of majority. As pointed out by the famous Lithuanian philosopher Leonidas Donskis, in substance it cannot become a demo-dictatorship, i.e. the dictatorship of the majority against minorities, the essence of which is based on the logic of formula "50+1".

That is why, the list of grounds of the prohibited discrimination in the text of Art. 29 of the Lithuanian Constitution can not be regarded as being exhaustive; otherwise, the general constitutional aim of equality of persons before law cannot be achieved. Therefore, the Constitutional Court declared that the Constitution also prohibits the discrimination based on the grounds of sexual orientation and identity (later also – age), although they are not expressly provided by the Constitution.

Moreover, by outlawing sexual harassment and by recognising the equal family rights to the same-sex couples, the Lithuanian Constitutional Court has also emphasised that, under the Constitution, the prevailing social stereotypes of a certain time cannot serve as a constitutionally justifiable ground of public order for the discriminatory practice. Therefore, neither long-standing national nor religious traditions (or customs) can justify the discriminatory treatment of women or the LGBT people. By the way, this approach differs in essence the democratic civilisation from the ideology of "Russian world" that denies gender equality and openly discriminates

the LGBT community pursuing the aim of the alleged protection of the "traditional Orthodox values" from the "rotten West".

As you can see, the key aspects of the Lithuanian constitutional jurisprudence on human rights are similar to Taiwanese. I have in mind that the Judicial Yuan has also consolidated gender equality and, in particular, contributed to the empowerment of women by removing from the legal system the legal provisions that had expressed the male superiority stemmed from stereotypical customs; while, in 2017, relying on the principles of equal rights and non-discrimination, the Taiwanese Constitutional Court declared the freedom of same-sex marriage.

Dear Colleagues,

The last group of the Lithuanian constitutional cases I wanted to touch involves the issue of the relationship of the Constitution with international (and the EU) law. At the first sight, as both national and international law claim superiority in their respective fields of operation, to reconcile them could seem almost an impossible task. However, it is the mission of the Constitutional Court to find the formula of harmonisation relying on the relevant constitutional principles, when there are no express provisions on the impact of international (and the EU) law on the Constitution.

The development of the official constitutional doctrine by the Lithuanian Constitutional Court can serve as an excellent example how the text of the Constitution claiming to unconditional supremacy can be interpreted as resulting in the duty of the Constitutional Court to interpret the Constitution consistently with international (the EU law). Moreover, though formally having a lower rank in the national legal system, international (and the EU) law has to be treated as the source for the interpretation of the Constitution. This can be seen from a number of rulings, in particular those of 9 December 1998, 5 September 2012, 18 March 2014.

The basis for the Constitutional Court to rely on international and the EU law is provided by the Constitution itself. I think in all the constitutions we can find the similar fundamental principles, according to which the Constitution, on the one side, and international and the EU law (provided that the state concerned is a member of the EU or seeks the membership or association), on the other side, must be presumed as compatible and must be interpreted in harmony. As regards Lithuania, from the jurisprudence of the Constitutional Court we can see the following relevant constitutional principles: 1) the respect for international obligations (*pacta sunt servanda*), in accordance to which the State of Lithuania has in good faith to carry out the international obligations arising out of treaties and customary international law; 2) the rule of law, which includes both the principle of the supremacy of the Constitution and the principle of the respect for international law; therefore, under the rule of law, the supremacy of the Constitution has to be reconciled with the respect for international (and the EU) law; 3) an open civil society, in accordance to which the State and society should be open to international (and European) community and its law; 4) the Western geopolitical orientation of the State, in accordance to which the State of Lithuania has to be committed to the common values of the Western democracies and to fulfil the obligations arising out of the membership in the EU and NATO. Taken together, all these principles serve as a bridge between the Constitution, on the one side, and international and the EU law, on the other side. As a consequence, they lead to the openness of the Constitution to international and the EU law, in particular the constitutional presumption of their compatibility and the perception of international and the European standard as a minimum constitutional standard for the protection of human rights and other universal constitutional values.

The duty of consistent interpretation obliges the Constitutional Court to see the Constitution in the broader international and, in particular, European context, to harmonise the interpretation of constitutional provisions with the relevant international and European rules, i.e. to take international and the EU law as a source of inspiration

for the development of the official constitutional doctrine. For example, in the Decision of 20 December 2017 (and the Ruling of 6 February 2020) the Constitutional Court stated that there is no constitutional ground to interpret the issues of internal market and competition in a different way than they are regulated by the EU law. The duty of consistent interpretation was also expressly stated in the Ruling of 28 September 2011 on the State Family Policy Concept, where the Constitutional Court emphasised that the constitutional concept of family must also be interpreted by taking into account Art. 8 of the European Convention on Human Rights (the respect for family life) and the relevant case-law of the European Court of Human Rights, according to which the concept of family is not limited solely to a family based on marriage and has to include other types of the relationship of living together. However, almost in each ruling regarding human rights issues, even if it is not stated expressly, the Constitutional Court relies on international and the European human rights law (that happened also in the mentioned Conclusion of 19 December 2017 and the Ruling of 11 January 2019 regarding non-discrimination, gender equality and the same-sex families).

The latter case is also remarkable for its reliance on the jurisprudence of foreign constitutional courts, including the relevant jurisprudence of the Czech, Slovenian, Croatian and German constitutional courts. Indeed, once under the Constitution Lithuania is striving for an open civil society, there is no constitutional ground to ignore the most progressive practice of foreign constitutional courts (as well as the recommendations of the Venice Commission) as a source for the interpretation of similar constitutional provisions.

It is worth to note that the inconsistency between the Constitution and international (or the EU) law is considered to be an anomaly that has to be removed either by the corresponding amendment of the Constitution or the denunciation of the international obligations that are in conflict with the Constitution. However, in case of human rights obligations, the only solution is to amend the Constitution, as another

option would be hardly consistent with the constitutional principles of an open civil society and the Western geopolitical orientation of the State.

Dear Colleagues,

Let me conclude by expressing the hope that my report has demonstrated convincingly that the Constitution is much more than only its text and that there is a sufficient degree of uniformity between our Constitutions in defining the major constitutional values. Such universal constitutional concepts as the rule of law, liberal democracy, human dignity cannot not significantly differ among constitutional democracies. That is why, although we are separated by oceans and thousands of miles and our Constitutions have a different wording, we do not feel this distance looking at the jurisprudence of the constitutional courts of our States.

May I wish you success in maintaining and promoting the highest professional standards in your activities, which keep the Taiwanese Constitutional Court among the most progressive constitutional courts around the world.