REPUBLIC OF CHINA (TAIWAN)

ANNUAL ACADEMIC CONFERENCE OF THE CONSTITUTIONAL COURT 2023

"CONTEMPORARY CHALLENGES OF CONSTITUTIONALISM"

Prof. dr. Dainius Žalimas

Dean of the Law Faculty at Vytautas Magnus University (Kaunas, Lithuania),

former President of the Constitutional Court of Lithuania

CONTEMPORARY CHALLENGES TO THE INDEPENDENCE OF JUDICIARY: LITHUANIAN PERSPECTIVE

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

Dear Colleagues and Friends,

It is an honor for me to address you today. I deeply appreciate the invitation of the Taiwanese Constitutional Court to speak at the annual academic conference devoted to contemporary challenges to constitutionalism. Please accept my apologize for not being able to attend this event live. However, I believe we will have opportunities to meet in future.

I would like to take this opportunity to express my sincere sympathy and firm support to the Republic of China (Taiwanese) cause of freedom and liberal democracy. Common understanding of the rule of law, pluralistic democracy and human rights keep us united despite of a large geographical distance. In this context I would like also to recall the inspiring jurisprudence of the Taiwanese Constitutional Court, which can serve as an excellent example of effective judicial activism in protecting a liberal democratic constitutional order.

Dear Colleagues,

Needless to say how important is the topic of independence of judiciary and how sensitive are the challenges to the judicial independence. In a democracy and a state governed by the rule of law, independence is a an inseparable element the concept of a court or the judiciary: a court dependent on the legislative or executive branch of power may not be considered a court at all. For example, in the Lithuania's neighborhood, the Russian and Belarusian courts that have already become an instrument for the commission of international crimes at the instruction of the respective regimes cannot be referred as being courts. The actual situation of independence of courts reflects the democratic maturity of a state and indicates whether a state has the characteristics typical of the rule of law, as, for example, whether the principle of the separation of powers is implemented in the state and whether human rights are respected.

Therefore, it is not accidental that the Constitutional Court of the Republic of Lithuania has been consistent in holding that the independence of judges and courts is one of the essential principles of a democratic state under the rule of law and an essential condition for the protection of human rights and freedoms. The Lithuanian Constitutional Court has stated a number of times that the judicial independence is not a privilege of judges; it is rather one of the main duties of a judge and courts, which is necessary for the protection of human rights. Thus, the judicial independence has to be safeguarded not for the sake of judges' benefit but for the welfare of the people. It is reasonable to admit that in his or her dispute nobody is willing to have a partial arbiter, who is dependent on political authorities.

Dear Colleagues,

Judicial independence has been addressed by the Lithuanian Constitutional Court a number of times. Therefore, it is really difficult to find one or a few leading cases on this topic. That is why I am going to speak about the key principles and provisions of the official constitutional doctrine regarding the judicial independence.

It is not something specific that the Constitutional Court addressed two main sides of judicial independence – institutional independence and procedural independence. The former is mostly related to the judiciary as a branch of government, while the latter concerns constitutional guarantees necessary for a proper administration of justice by individual judges.

There are two main issues of institutional independence addressed by the Lithuanian Constitutional Court. The first is financial independence of the judiciary, or the sufficient allocation of budgetary resources for the effective functioning of the judiciary. The last remarkable ruling is that of 3 November 2020, where the Constitutional Court emphasized that a status of the judiciary enshrined in the Constitution presupposes, *inter alia*, the financial independence of courts, where such financial independence is ensured by such a legal regulation under which funds are allocated to the judicial system and each court in the state budget approved by law and the amount of such funds is adequate to the scope of the functions performed by the courts, so that they would be able to properly administer justice. In view of this, the legal regulation governing the state budget process must be such that, when planning and approving state budget appropriations for the courts, they would not be subjected to political pressure as a result of their activities and consideration would be given to the substantiated proposals of the courts regarding the allocation of state budget appropriations to their activities, *inter alia*, presented through the judicial self-governance institution; among other things, the legal regulation governing the state budget process should ensure the participation of this judicial self-governance institution in the preparation of a draft state budget. Otherwise, if the Government, when preparing a draft state budget, and the Seimas, when approving the state budget, had wide discretion to decide on the amounts of state budget appropriations allocated each year to the courts, the preconditions would be created for violating the independence of the judiciary.

Although the legal regulation on drafting a state budget, which complies with the constitutional requirements, is already in place, inadequate financing of the judiciary (with the probable exception of the Constitutional Court) still remains among the pending issues.

Next issue related to financial independence of the judiciary is an adequate level of renumeration of judges. Here we can see quite an extensive jurisprudence on the constitutional requirements to renumeration of judges, such as the differentiation of their salary according to the level of a court and the duration of judicial career. The most important principle that a salary and other material guarantees must be real and compatible with the constitutional status of judges and their dignity.

However, the largest part of the Constitutional Court's jurisprudence in this field is related to the constitutional principles that must be followed in reducing the renumeration of judges due to an economic or financial crisis. It is natural as Lithuania has suffered two serious economic crises (in 2000 and in 2008-2009), which led to inevitable significant reduction of public spending. The most remarkable ruling here is that of 1 July 2013, where the Constitutional Court held that the reduction of the level of social guarantees for judges and the worsening of material provision for courts in the absence of any economic crisis, as well as any disproportionate and discriminatory reduction or worsening of such social (material) guarantees during an economic crisis, should be regarded as an attempt to infringe the independence of courts (and judges). In the decision of 14 January 2015 the Constitutional Court emphasized the failure to ensure the reality and stability of material guarantees for judges would create the preconditions for increasing the risk of corruption and the preconditions for political pressure on decisions taken in administering justice. The biggest challenge at least for the Constitutional Court was disproportionate reduction of salaries of its judges, which was twice bigger than that applied to ordinary judges and politicians. This kind of reduction was found disproportionate and discriminatory; it even resembled to political revenge to the Constitutional Court for its activity.

Dear Colleagues,

The second issue of institutional independence of the judiciary, which has extensively addressed by the Lithuanian Constitutional Court, is judicial self-governance. The special body of judges is foreseen by the Constitution (Art. 112 (5)) for the advise to the President on appointment and dismissal of judges. In 2006 and 2020 the Constitutional Court seized the opportunity to clarify the competence of that special body – the Judicial Council. It is twofold – to serve as a filter in selecting judges and, more general, to speak on behalf of the whole judiciary (except the Constitutional Court) in defending judicial independence. Under the Constitution, the Judicial Council is composed only of judges and is elected by judges of ordinary courts. Without the advice of the Judicial Council the President can neither appoint (or submit the candidate to the Parliament) nor dismiss (or propose to the Parliament to dismiss) a judge. This should serve as a guarantee against the politization of the judicial corpus and that it is formed on strictly professional basis.

Does it always work in practice? I am surprised to note that sometimes the Judicial Council fails to perform its duties properly. For example, as it is clear from the Constitutional Court's ruling of 2 September 2020, the Judicial Council gave the wrong advice to the President breaking its previous practice: by agreeing with the President's proposal to dismiss of a judge from administrative position in the Supreme Court (the head of a division of civil cases) without being sure about the promotion of that judge to a higher administrative office (the President of the Supreme Court), the Judicial Council contributed to the situation when the Parliament dismissed that judge without the planned promotion. Another example can be seen in 2022 when the Judicial Council did not dare to object to the President's candidate to the Supreme Court who deliberately ignored the requirements of health check and security clearance (the candidature was rejected later by the Parliament). In my opinion,

this strange reluctance to confront the President even in cases of manifest unconstitutionality may be explained either by a lack of competence or the dependance of judicial on the will of the President.

As regards the independence of individual judges, the Lithuanian Constitutional Court has also elaborated a very detailed official constitutional doctrine. Apart from the issue of renumeration for their work, this doctrine includes the explanation of the procedures of appointment and dismissal of judges. The most sensitive issue here is the dismissal of a judge prior his/her term of office. The Constitutional Court consistently underlines the principle of integrity of the judicial term of office, therefore a judge can be dismissed only on the basis of one of the constitutional grounds provided in the exhaustive list in the text of the Constitution. Additional guarantee is that the Judicial Council has to check whether such a ground really exists. On rare occasions, a judge can be dismissed for systemic flaws in his/her work, once they can be assessed as amounting to the discreditation of judicial profession. Logically, this assessment can be done only by the Judicial Council and other bodies of judicial self-governance responsible for the assessment of quality of judicial work.

Dear Colleagues,

The Constitutional Court is a part of the judiciary; therefore, in Lithuania the Constitutional Court and the justices of the Constitutional Court have most of the general guarantees of judicial independence, similar to those enjoyed by ordinary courts. The judges of the Constitutional Court are entitled to the same means of legal defense of their rights as ordinary judges. However, the specific mission (to ensure the supremacy of the Constitution) and the specific mode of formation (appointment of judges for a limited term) of the Constitutional Court predetermines also a few specific challenges to independence of its judges.

The first specific challenge is political pressure that may be stronger than on ordinary courts, since inevitably the Constitutional Court is much more involved in political process by settling constitutional disputes. Formally, Article 114(1) of the Constitution provides that interference by any institutions of state power and governance, members of the Seimas (Parliament) or other officials, political parties, political or public organizations, or citizens with the activities of a judge or court is prohibited and leads to responsibility provided for by law.

However, it is a formal side. Politicians may find more sophisticated ways to make influence on the Constitutional Court (especially in response to the concrete decisions unfavorable for them) than direct pressure. From my own experience I can mention a few examples.

First, legislative initiatives aimed at restricting the constitutional competence of the Constitutional Court. For example, in Lithuania public calls to follow the example of Hungary, which limited the powers of its Constitutional Court in adopting decisions on budget formation and tax policy issues in 2010, were voiced after the Constitutional Court had adopted its rulings concerning the transfer of a share of personal income tax to municipal budgets and concerning the imposition of tax on immovable property. Among the proposals, the following can be mentioned: 1) the proposal to provide that the rulings of the Constitutional Court and decisions regarding the interpretation of the rulings of the Constitutional Court come into effect only after their implementation according to the procedure set out in the Statute of the Parliament; 2) the proposal that the results of voting on the final acts of the Constitutional Court be announced publicly (it should be noted that the secrecy of the deliberation room and voting, aimed at ensuring the independence of the judges of constitutional courts, is

established in Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Spain, and the Czech Republic; in Belgium and Italy, the disclosure of voting secrecy is a criminal offense); 3) the proposal to change the present quorum of 2/3 of the justices of the Constitutional Court that is required for considering cases and adopting rulings by raising it to eight justices; 4) the proposal to reduce the distance for staging rallies, pickets, or other public actions from 75 to 25 meters of the building of the Constitutional Court; 5) the proposal to prohibit the Constitutional Court to adopt decisions on national financial and economic matters. All of the mentioned political initiatives are clear manifestations of the attempts by some politicians either to control the Constitutional Court so that it is completely obedient to them or to have freedom for their action without any constitutional control. It is rather ironic as this reminds us of the pitiful Soviet regime, where there was no constitutional control whatsoever, and courts were under control of the omniscient Communist Party. However, as none of the above initiatives have been implemented, they may not be viewed as posing a current direct threat to the institutional independence of the Constitutional Court.

Second, deliberate delay in appointment of new judges and then publicly questioning the powers of those who remain in their office until the replacement. I myself was in this situation for more than a year. However, the Law on the Constitutional Court contain a specific guarantee against this kind of paralysis of the Constitutional Court, by providing that a judge continues to exercise his/her duties until the replacement by a new judge. I believe, this provision can be constitutionally grounded on the principle of judicial independence, though the text of the Constitution is silent about the situation when the Parliament delays the rotation of the Constitutional Court's judges. The Constitutional Court has not had an opportunity to pronounce on this issue.

Third, influence through the former judges, professional and academic community, which is a subtle and quite efficient way in a small country to achieve a desirable result. For example, in 2019 the Lithuanian Constitutional Court proclaimed unconstitutional the requirement of mandatory legal assistance in an appeal process, raising a wave of disappointment in professional community of court lawyers. Later, in 2021 the Constitutional Court following the change in its composition by 1/3, adopted the opposite decision in an analogous case regarding the cassation, without clearly explaining this change of its stance and simply omitting the question why the arguments and foreign jurisprudence employed in a previous case was not applicable this time.

Dear Colleagues,

The second specific challenge for the Constitutional Court possible unwillingness or weak determination of the Constitutional Court itself to defend its independence, sometimes by abandoning the independence without any struggle and following the public opinion or, even worse, aiming at good relations with political authorities. Though formally, under the Constitution, there are all guarantees against this threat. For example, a number of times the Lithuanian Constitutional Court emphasized that it is the opposite to the political branches of government, the activities of which are based on political agreements, deals and compromises that are not always in line with the Constitution. The Constitutional Court executes constitutional judicial control; the Constitutional Cour – an individual and independent court – administers constitutional justice and guarantees the supremacy of the Constitution in the legal system as well as constitutional legitimacy. The Constitutional Court, while invoking its already formed official constitutional doctrine and precedents, must ensure the

continuity of the constitutional jurisprudence (its consistency and non-discrepancy) as well as the predictability of its decisions.

The Constitutional Court is a legal, but not a political institution; the Constitutional Court decides the legal questions attributed to its competence under the Constitution only by invoking legal arguments, *inter alia* the already formulated (by itself) official constitutional doctrine and precedents; the final acts of the Constitutional Court may not be determined by accidental (from the legal point of view) factors (for example, the change in the composition of the Constitutional Court); the Constitutional Court may not pursue its activities by following *inter alia* the arguments of political expediency, the position of political parties or different public organizations, opinions of and assessments by politicians, political science or sociological research, results of public opinion polls; otherwise, presumptions to doubt the impartiality of the Constitutional Court might appear and there might arise a threat to its independence and the stability of the Constitution itself, *inter alia* the official constitutional doctrine.

However, regardless the above mentioned official constitutional interpretation guaranteeing the independence of the Constitutional Court, the practice sometimes can be different. One of the reasons for derogations from the theoretical model of the judicial independence lies in the different status of the Constitutional Court's judges. Naturally they are more sensitive to the political context, once after the expiration of their term they have to think about their future career. This task is not so easy when a retired judge has miserous guarantees until the pension age. That is why, sometimes a judge of the Constitutional Court who cares about the future may take into account the position of politicians much more than ordinary judges, in particular as regards the position of the President who is responsible for the formation of the judicial corpus.

Some statistics to illustrate the activities of the Lithuanian Constitutional Court in the recent years, which speaks for itself that this challenge may be real and not only the result of speculative reflection. In 2020 in 78 percent (14 out of 18) judgments the Constitutional Court declared unconstitutional the impugned legal regulation, in 2021 this number was 69 percent, while in 2022 it decreased to even 38 percent (6 out of 16 cases). These numbers demonstrate the changing attitude into much more favorable to the acts of political branches of government. This can be illustrated by a number of cases showing sometimes a shortage of legal argument in justifying constitutionality of legal acts (e.g., in 2023 – on the right to acquire weapons where almost absolute police discretion to decide on granting this right was justified, in 2021-2022 – on the right to a fair trial and access to a court, which was in essence denied in respect of decisions of the ombudsman's office and the parliamentary commission on ethics, in 2021 – on admissibility of certain individual constitutional complaints).

Probably the most visible example in this field is the dramatically changed attitude to decrees of the President. If in 2020 the Constitutional Court declared unconstitutional the decree of the President (based on the wrong advice from the Judicial Council) regarding the dismissal of a judge, then in 2022 the Constitutional Court twice justified the presidential decrees regarding the dismissal and appointment of judges on a doubtful grounds. In one of the cases the Court even neglected the Venice Commission's recommendations and justified the dismissal of judges solely by the aim of fighting corruption under the simplest procedure that neither requires a proper investigation nor a qualified majority of votes in the Parliament. The second case may give even an impression of immunity of presidential decrees from the constitutional control: the Court refused to open a procedure regarding the decree of the President submitting the candidate to the Supreme Court without prior health check and security clearance.

Certainly, these are subjectively selected challenges to the independence of the Constitutional Court. They are noted on the basis of personal experience and monitoring the situation. One may say they are to certain extent typical for the post-Soviet countries in transition to a fully-fledged democracy. Those challenges may be pertinent to a shorter or longer period, however, they can be addressed effectively by the gradual transformation of society and mentality.

Thank you for your kind attention!