

REPUBLIC OF CHINA (TAIWAN)
CONSTITUTIONAL LAW FORUM 2023
“JUDICIAL INDEPENDENCE AND CONSTITUTIONALISM”

Panel 3. Judicial Independence from Social Pressure

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**CONSTITUTIONAL JUSTICE AND SOCIETY'S REACTION:
TENSION OR REINFORCEMENT?**

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 and the Judges Association to speak at the Constitutional Law Forum. 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 as well as the perceived necessity of judicial activism in protecting liberal democratic constitutional order keep us united despite of a large geographical distance.

Dear Colleagues,

It is axiomatic that constitutionalism includes judicial independence. Meanwhile, the latter can be affected by a number of different factors, including social pressure on the judiciary. There might be perfect formal constitutional guarantees of judicial independence, but all the judges are also human beings and members of society. Naturally, they are also affected by public opinion and face the dilemma in difficult cases before them, whether to follow the prevailing sentiment of the society or to confront it sometimes putting at risk their own careers or even life. However, this kind of risk is a natural part of our profession, once we are determined sincerely and firmly to stand for the rule of law.

The solution of this dilemma follows from the very notion of constitutionalism and the rule of law. As stated in the *Vilnius Communiqué* of the IV Congress of the World Conference of Constitutional

Justice, the rule of law being inseparable from the constitution itself should not be perceived in a formal sense as blind adherence to the letter of a constitution; it has rather material (substantive) meaning based on certain universal values and linked to democracy and human rights.

I would like to refer to the words of Jutta Limbach, the former President of the German Constitutional Court. She writes that a modern state must be democratic and at the same time ensure the fundamental rights of every human being. This is a principled response by a modern constitutionalist to the political accusations against the Constitutional Court that allegedly it might be incompatible with the principle of democracy.

Jutta Limbach also emphasizes that the majority rule is not the only basis of democracy. Democracy does not mean only that power comes from the people and policies are determined solely by the elected representatives of the people. The other side of democracy is universal democratic and human values that have to be respected and protected by all authorities. For this purpose, special institutions such as constitutional courts are established by the Constitution as a social contract. Two totalitarian dictatorships – nazi and communist – have taught us that democracy cannot exist without protecting dignity and rights of each person. Democracy is therefore a delicate balance between the majority rule and the legitimate interests of minorities.

Dear Colleagues,

At this point we come to the role of the Constitutional Court in its relationship with society. From the very outset, it is necessary to reject, as purely political and not legally grounded, all speculations that the Constitutional Court allegedly has less legitimacy than elected representative bodies of the people. On the contrary, the Constitutional Court has also all the necessary powers granted by the people, who adopted the Constitution and are its sole source. Under the Constitution the people have entrusted the Constitutional Court, as a judicial institution independent of any political power, the mission to control that the decisions adopted by their elected representatives are not in conflict to the will of the people expressed in the Constitution.

Therefore, as Jutta Limbach also writes, the only criterion for the judges of the Constitutional Court in their work is the Constitution. The authentic constituent power of the people is reflected by the Constitution rather than by public opinion or the opinion of the majority, no matter how desirable it may be to receive positive public reaction to the decisions of the Constitutional Court.

Thus, the defense of humanistic and democratic values enshrined by the people in the Constitution is the main reason why judges are obliged to disobey the general opinion when it comes to constitutional guarantees of fundamental rights and democracy. If the defense of a certain sensitive minority is at stake, the Constitutional Court has the duty (I would emphasize, that this is a particularly important and honorable duty) not to stand aside in the face of public opinion or fear of public protests. However, this is also the reason why a certain tension between constitutional justice and society is inevitable in a constitutional democracy. Nevertheless, it is usually healthy for the progressive development of a pluralistic democracy.

Being active in properly fulfilling its mission, the Constitutional Court can move the society forward, as sometimes the political power may deliberately leave unpopular decisions to the Constitutional Court. For instance, in Lithuania a death penalty was abolished and family rights of

same-sex couples were recognized by the respective decisions of the Constitutional Court, while politicians preferred to abstain from deciding on those issues.

If the Constitutional Court were to follow the public opinion and avoid the decisions necessary for the defense of the liberal democratic constitutional order and fundamental rights, such a constitutional court would be an absolutely unnecessary appendix of political power – a completely meaningless organ of an imitated or fictitious democracy; a mob or Lynch court would suffice then.

Dear Colleagues,

Decisions of the Constitutional Court, which are made in echoing the prevailing public opinion and without sound constitutional arguments, can be treated as the expression of judicial populism. They have little in common with a proper judicial activity.

Judicial populism can be illustrated by the flawed practice of the Lithuanian law enforcement authorities and ordinary courts, which was referred by the European Court of Human Rights in the case *Beizaras and Levickas v. Lithuania* of 2020. In this case a violation of the European Convention on Human Rights was found because prosecutors and judges were following not the Constitution but the majority opinion when they refused to prosecute persons who threatened a male couple for kissing in public (moreover, even the victims were blamed to be responsible for the aggression allegedly provoked by their behavior that was unacceptable to the majority). This practice was rather a play with the crowd and it clearly went against the Constitution. In its judgment the European Court of Human Rights also referred to the positive jurisprudence of the Lithuanian Constitutional Court on the issue of non-discrimination against same-sex couples.

Regrettably, we can find cases of judicial populism with much graver consequences, which can even amount to the commission of gross international crimes. As an example is the Russian Constitutional Court that adopted even five decisions to allow the annexation of the Ukrainian territories (in 2014 – the annexation of Crimea, last year – four more parts of Ukraine). They can be treated as complicity in committing an international crime of aggression.

Dear Colleagues,

The Lithuanian Constitutional Court has developed an extensive doctrine revealing its constitutional status and place within society. It has emphasized that the Constitutional Court is a body of judicial power that is in essence different from the political branch of government. The activity of the latter is based on political agreements and compromises, which are not always in line with the Constitution. The Constitutional Court itself depends only on the Constitution, it is obliged to follow the Constitution and even to adhere to its own decisions, by ensuring continuity, consistency and predictability of its jurisprudence.

In responding to occasional attempts to make influence by pressure of public opinion, the Lithuanian Constitutional Court has consistently formed an official constitutional doctrine that can be summarized in two essential points. First, the criteria for the adoption of decisions of the Constitutional Court may not be based on such random factors from the legal point of view as the changes in the composition of the Constitutional Court, political expediency, statements of politicians, programs of political parties, the position of other authorities, sociological surveys and

public opinion polls. Second, review of the decisions of the Constitutional Court is in principle impossible. Only in an exceptional case, such as the constitutionally justified need to increase the level of protection of human rights, other democratic values and the rule of law, there might be a reason for reinterpretation of the constitutional doctrine. But naturally, such a reason cannot be, for example, a change of the government and its policies, no matter how qualitatively new it is.

The Lithuanian Constitutional Court has also consistently revealed the concept of democracy under the Constitution, explicitly rejecting its perception as solely the majority rule. Two the most relevant elements of constitutional democracy can be mentioned. First, the Constitution is perceived as an anti-majoritarian act that protects the individual from the dictatorship of the majority; prevailing social attitudes and stereotypes cannot be a legal basis for restricting human rights and discrimination, including on criteria not explicitly mentioned in the text of the Constitution, such as age, sexual orientation or identity. Second, according to the Constitution, Lithuania is a pluralistic parliamentary democracy, the prerequisites of which are the protection of freedom of expression and the existence of a real political opposition, whose constitutional mission is to criticize the ruling majority and present an alternative political program. However, the Constitution also obliges to defend a pluralistic democracy by combatting such activities as organized campaigns of disinformation and war propaganda, conducted in particular by neighboring authoritarian regimes in Russia and Belarus.

Dear Colleagues,

The last question is how to ensure that the decisions of the Constitutional Court, even if they are not popular, are accepted by the society. Based on the Lithuanian experience, I would say that there is nothing special that has to be done, except proper implementation of the mission of the Constitutional Court. If the public sees that the Constitutional Court really adopts its decisions not following the political conjuncture, but strictly in accordance with the Constitution, the Court will not lose public confidence in its activities, even if some of its decisions may not be popular.

In unpopular cases the most important for the Constitutional Court is to have well-grounded and sound constitutional arguments as well as to be able to explain its decisions to the society in a clear, comprehensible and not formalistic legal language. It is also healthy to do this before politicians are starting to spread their erroneous interpretations. In other words, by its behavior the Constitutional Court should demonstrate that it is living within the society, not above or next to it. This tactics in actively implementing the mission of the Constitutional Court can bring impressive results: for example, according to the public opinion polls of the first half of 2021, the Lithuanian Constitutional Court was at the top of the public trust leaving other courts and institutions of the political branches of government far behind and being even ahead of the mass media and the Catholic Church. This happened notwithstanding the fact that some of the decisions of the Constitutional Court (for example, on the recognition of family rights to same-sex couples in 2019) were not supported by even 80 percent of the population.

Thus, the conclusion is that judicial activism and devotion in sincere defending the Constitution can be a key instrument for transforming an inherent tension between constitutional justice and society's reaction into their mutual reinforcement.

Thank you for your kind attention!