

CONSTITUTIONAL GROUNDS FOR THE REMOVAL OF JUDGES FROM OFFICE: LITHUANIAN EXPERIENCE

Introduction

Regulating the setup of the state branches of power, national constitutions define the key elements of the judiciary: the fundamentals of its powers, guarantees of its independence, and the basic principles governing the career of judges *inter alia* in appointment and release from office. When ordinary legislation is chosen to define these principles, this often leads to imperfections of the legal regulation chosen by the legislator. It is in these cases that the Constitutional Court, and sometimes international courts, such as the European Court of Human Rights (ECHR), and, in the case of the Member States of the European Union – the Court of Justice of the European Union (CJEU) – become the arbiters in deciding questions of the independence of the judiciary. The courts have to deal with specific issues of the judicial career, and removal of judges from office is one of the most difficult questions – as they have to be the arbiter for judicial institutions.

The constitutional doctrine of the independence of the judiciary is widely developed by the constitutional courts and this often raises questions as to whether it adequately reflects the provisions and principles of the Constitution, and whether the idea of a *living constitution* does not also imply that the same *expressis verbis* Constitutional provisions will be interpreted differently from time to time.

The guarantees of the independence of the judiciary have been extensively analysed in the doctrine of the Constitutional Court of Lithuania (hereafter referred to as the Constitutional Court) and are at the centre of the *Constitutional Court's Ruling of 15 April 2022*.¹ In this ruling, in addition to summarising the provisions of constitutional doctrine, the Constitutional Court also formulated new constitutional provisions that, apart from stimulating the debate on the relationship between two important constitutional institutes of termination of judicial mandate – *the removal of a judge from office on the grounds that he discredited the judicial office* (1) and *the*

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¹ Ruling of the Constitutional Court of Lithuania of 15 April 2022. *On the dismissal of the Judges of the Supreme Court of Lithuania and the Court of Appeal of Lithuania* (15-04-2022 ruling No. KT45-N3/2022, case No. 1/2021-6/2021-20/202). <https://lrkt.lt/en/court-acts/search/170/ta2663>.

removal of a judge through impeachment (2), raises many questions on interpretation of their content and prospects of their application. This ruling provides also an opportunity to discuss a broader approach to the fundamental guarantees of the independence of a judge administering justice and the constitutional provisions which have to ensure that the dismissal/removal of judges is not used as an instrument in political populist processes.²

I. Independence of the court and the judge as a pre-condition for the administration of justice

The independence of the judiciary is an essential element of the rule of law, the fundamental building block of a democracy.³ The concept of the courts, the judiciary, the principle of independence and its historical significance date back to the 18th century.⁴ The independence of the judiciary is an important guarantee of the separation of powers and the system of checks and balances, it is of particular importance to international organisations, such as the United Nations, the Council of Europe, and others. Many documents and studies of international organisations have been dedicated to the analysis of the principles of judicial independence.⁵

The specificities of the national legal system determine certain distinctive features of the judiciary, *inter alia*, guarantees of independence. To analyse these guarantees, it is relevant to look into the doctrine of independence of courts, developed, *inter alia*, in the jurisprudence of the

² Some of the issues raised in this ruling of the Constitutional Court of Lithuania have been examined in: Birmontienė, Toma. *Guarantees of independence of judges and grounds for dismissal (removal)* // Vilnius University Open Series: *Kelyje su konstitucija: recenzuotų mokslinių straipsnių rinkinys*. Vilnius: Vilniaus universiteto leidykla, 2022, p. 12–32.

³ The doctrine of the independence of judges and the courts has been extensively addressed in scholarly doctrine, *inter alia*, in the works of A. Barak, such as: A. Barak *The Judge in a Democracy*. Princeton University Press. 2006; *Regulating Judges. Beyond Independence and Accountability* / edited by Richard Devlin, Adam Dodek. – Cheltenham: Edward Elgar Publishing, 2016. *Challenged Justice: In Pursuit of Judicial Independence* / edited by Shimon Shetreet, Hiram Chodosh, Eric Helland. – Leiden; Boston: Brill/Nijhoff, 2021 and other.

⁴ It should be noted that Montesquieu in *De L'esprit des Loix* (1748) founded the doctrine of the separation of powers in a state, including the judiciary. In English law, the principle of the independence of the judiciary is derived from a provision in the 1701 Act of Settlement, which limited the monarch's power to remove judges from office. The historical origins of judicial independence can also be traced back to the 1787 U. S. Constitution, which enshrines the principles of separation of powers, i.e., the so-called checks and balances.

⁵ Adopted, *inter alia*, by the General Assembly of the United Nations on 29 November 1985 and 13 December 1985. Resolutions *Basic Principles on the Independence of the Judiciary* (40/32 and 40/4146); Recommendation of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities, CM/Rec(2010)12; Studies by the European Commission for Democracy through Law (Venice Commission), *Report on the Independence of the Judicial System*. Part I: The Independence of Judges (12–13 March 2010) (CDL-AD(2010)004); Report On the Rule of Law (25–26 March 2011) (SDL-AD(2011)003); Draft Report on the Freedom of Expression of Judges (CDL (2015)025); Venice Commission opinions: On Amendment to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (CDL-AD(2016)001); On the Act on the Constitutional Tribunal (14–15 October 2016) (CDL-AD(2016)025); Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice of 1 July 2015 (CD-PI(2015)002).

Court of Justice of the European Union⁶ and the European Court of Human Rights,⁷ because the issues being deliberated often stem from both national and global trends affecting the independence of the judiciary.

The independence of the court and of the judge are related concepts; only with a guaranteed independence of the court and the judge an independent court, as a fully-fledged independent judiciary, becomes possible. Without the independence of the judge, there will be no independent court and *vice versa*. Despite being closely linked and inseparable, the concepts of independence of judges and independence of courts can be interpreted independently. In interpreting the content of the principle of the *independence of courts*, the *objective* and *subjective* aspects of independence may be distinguished.⁸ Since the principle of independence of courts cannot be implemented without a system of appropriate guarantees, *external* and *internal guarantees of the principle of the independence of courts* may be identified. The CJEU derives the principle of the independence of courts from the provisions of European Union law,⁹ first of all from its judgment of 24 June 2019 in *European Commission v. Poland*.¹⁰ where it invokes upon the previously developed jurisprudence¹¹ and interprets it as the courts' external and internal guarantees of independence,¹² highlighting the importance of the guarantees of the independence and impartiality of courts and judges.

⁶ For instance, judgment of the Court of Justice of the European Union of 27 February 2018 in C-64/16 *Associação Sindical dos Juizes Portugueses* (EU:C:2018:117); the judgment of the Court of Justice of the European Union of 25 July 2018 in C-216/118 *Minister for Justice and Equality* (PPU:EU:C:C:2018:586); the judgment of the Court of Justice of the European Union (Grand Chamber) of 24 June 2019 in C-619/18 *Commission v Poland*; the judgment of the Court of Justice of the European Union of 5 November 2019 in C-192/18 *Commission v Poland*.

⁷ See, *inter alia*, the judgment of the Grand Chamber of the European Court of Human Rights of 1 December 2020 in *Guðmundur Andri Ástráðsson v. Iceland*, application № 26374/18; the judgment of the Grand Chamber of 15 December 2015 in *Baka v. Hungary*; judgment of the European Court of Human Rights of 28 October 1999 in *Wille v. Lichtenstein*; judgment of the European Court of Human Rights of 22 November 1995 in *Bryan v. United Kingdom*.

⁸ An objective aspect is the requirement for a competent court; the subjective aspect is understood as an individual's right to have his or her rights and freedoms defended by an independent judge, because only an independent court and judge can defend them properly. For more details, see: European Commission for Democracy through Law (Venice Commission) *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice of 1 July 2015* (CD-PI(2015)002); *Report on the Independence of the Judicial System Part I: The Independence of Judges* (CDL-AD92010)004).

⁹ *Inter alia*, Articles 2, 19 of the Treaty on the European Union, Charter of Fundamental Rights of the European Union (Article 47).

¹⁰ Judgment of the Court of Justice of the European Union of 24 June 2019 in C-619/18 *European Commission v Poland (independence of the Supreme Court)*.

¹¹ *Inter alia*, Judgment of the Court of Justice of the European Union of 27 February 2018 in C-64/16 *Associação Sindical dos Juizes Portugueses* (EU:C:2018:117); Judgment of the Court of Justice of the European Union of 25 July 2018 in C-216/118 *Minister for Justice and Equality* (EU:C:2018:586).

¹² In the case-law of the Court of Justice of the European Union, *external* guarantees of judicial independence are understood as the requirement that the court concerned shall exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against

The Constitutional Court of the Republic of Lithuania (Constitutional Court) has developed a broad doctrine of the independence of courts and judges, whereunder the guarantees of the independence of the judges and the courts are regarded as mutually inclusive.¹³ The independence of judges and courts is not a privilege, but one of the most important constitutional duties of the judge and the court.¹⁴ The Constitutional Court has formulated the official constitutional doctrine of the judicial independence in a series of rulings and decisions.¹⁵ The system of guarantees for the independence of the courts and the judge has been developed by interpreting, *inter alia*, the provisions of the Preamble to the Constitution, Articles 5, 30, 31, 109, 112, 115, 116 as well as Articles 52 and 135 of the Constitution.¹⁶

In the doctrine developed by the Constitutional Court of Lithuania, the *inviolability of the judicial office*, including the grounds for *dismissal (removal) of a judge*, is understood as one of the main components of the principle of the independence of judges.¹⁷ The independence and impartiality of the court is a fundamental guarantee of human rights and freedoms, a prerequisite for a fair trial, and a condition of confidence in the court,¹⁸ judges have a guaranteed *inviolability*

external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (cf. (Judgment of the Court of Justice of the European Union of 24 June 2019 in C-619/18 *European Commission v. Poland (Independence of the Supreme Court)*, p. 72). The *internal* guarantees of judicial independence is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law, without calling into question the judge's independence and impartiality (CJEU, 2019 Judgment of the European Court of Justice in C-619/18 *European Commission v. Poland (Independence of the Supreme Court)*, 24 June 2019, p. 73).

¹³ *Inter alia*, Constitutional Court Rulings of 21 December 1999, 22 October 2007, 29 June 2010.

All acts of the Constitutional Court of the Republic of Lithuania are available in Lithuanian and English at www.lrkt.lt.

¹⁴ The fact that the *independence of the judge and the courts is not a privilege, but one of the most important duties of the judge and the court, deriving from the individual's constitutional right to have an independent and impartial arbitrator of disputes*, is an important doctrinal provision that has been reiterated several times in the acts of the Constitutional Court, *inter alia*, in rulings of the Constitutional Court of 6 December 1995, 21 December 1999, 9 May 2006, 15 April 2022.

¹⁵ *Inter alia*, the Constitutional Court's Rulings of 22 December 1994, 21 December 1999 and 21 December 1999. Decisions of 28 March 2006, 9 May 2006, 15 April 2022; judgments of 15 May 2009, 16 May 2016.

¹⁶ The Constitution of the Republic of Lithuania 1992 (as amended) available at <https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192>.

¹⁷ The Constitutional Court has repeatedly emphasised that one of the guarantees of the independence of a judge, as enshrined in the Constitution, is the security of a judicial office (*inter alia*, Rulings of 6 December 1995, 9 May 2006, 2 September 2020 and 15 April 2022).

¹⁸ The principle of the independence of courts and the judge as a prerequisite for the protection of human rights and freedoms has been developed in many Constitutional Court acts and has remained one of the key objectives of the independence of judges and the courts. In its ruling of 28 May 2008, the Constitutional Court, *inter alia*, interpreted this provision as meaning the duty of the judge and the courts arising from the right guaranteed by the Constitution (*inter alia*, Article 109(2) thereof, as well as Article 30(1) thereof) to every person who considers that his or her rights or freedoms are being

of the judicial office, which is understood as an essential constitutional condition for the administration of justice.¹⁹ The independence of the judiciary can be understood as encompassing both the independence of the court as a judicial institution and the independence of the judge.

The doctrine developed by the Constitutional Court distinguishes, *inter alia*, the following aspects of the guarantees of the independence of the judge and the courts: the *institutional and financial independence*; the *procedural independence of judges*; the *immunity of judges*; the *material and social guarantees of judges*; the *inviolability of the judicial office*, of which the *guarantee of non-dismissal of a judge from office* is one of the essential elements.

II. Guarantees of the inviolability of the judicial office. Judicial Council

As one of the key guarantees of the independence of the judge, *the inviolability of the judicial office*, determines not only the continuity of judicial career, but also the fact that judicial mandate can be interrupted (terminated) on various constitutional grounds. It should be noted that the jurisprudence of the European Court of Human Rights, as well as that of the Court of Justice of the European Union, has interpreted the principle of the irremovability of judges from judicial office as deriving from the principle of judicial independence, which is inherent in the rule of law, and that the freedom of the judges from any external interference or pressure requires a series of guarantees which help to protect the person who has a task of adjudicating in a dispute, such as the guarantees against removal from office;²⁰ judges may be removed from office in accordance with the appropriate procedures if they are no longer fit for office, *inter alia*, because of a serious misconduct.²¹

In the ECHR jurisprudence, the principle of *the independence of the judge and the courts* is understood as being closely linked to due process and other rights protected by the Convention, *inter alia*, the right of access to court in the process of appointment and removal of judges *inter alia* *Grand Chamber judgment in the case of Guðmundur Andri Ástráðsson v. Iceland*²² (problems that threatened the independence of the judiciary concerning the violations of the Convention Rights in a process of judicial appointments); *Xero Flor w Polsce sp. z o.o. v. Poland*²³ (in this case the ECHR dealt with a complaint concerning the alleged invalidity of the appointment of a Constitutional Court judge); *Reczkowicz v. Poland*²⁴ (the ECHR found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers).

violated to have an impartial arbitrator to resolve the legal dispute on the merits, in accordance with the Constitution and law.

¹⁹ *Inter alia*, the Constitutional Court rulings of 9 May 2006, 2 September 2020 and 15 April 2022.

²⁰ *Inter alia*, par. 64 of the judgment of the CJEU of 25 July 2018 in C-216/18 PPU *Minister for Justice and Equality*.

²¹ *Inter alia*, paragraph 76 of the CJEU's judgment of 24 June 2019 in C-619/18 (*Commission v Poland*).

²² *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020.

²³ *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.

²⁴ *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021.

In the jurisprudence of the ECHR the protection of the independence of the court is essential in the process of the release of the judge from his office *inter alia* *Oleksandr Volkov v. Ukraine*.²⁵ In the case *Gumenyuk and Others v. Ukraine* ECHR found that the right of access to a court was a fundamental procedural right for the protection of members of the judiciary.

In the most recent ECHR *Grand Chamber judgment Grzęda v. Poland*²⁶ the European Court of Human Rights clarified that judicial independence had to be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to his or her other official functions that were closely connected with the judicial system. The premature termination, following a legislative reform, of a judge's term of office as a member of the *National Council of the Judiciary* (NCJ, Poland) was found as being a violation of Article 6 § 1 of the Convention. Hence in the recent jurisprudence of ECHR the role of independent *self-governing judicial institutions* is highlighted as an important guarantee of judicial independence.

In the jurisprudence of the Constitutional Court of Lithuania the interpretation of the constitutional guarantees of the independence of the courts and the judge are widely developed. The Constitutional Court emphasises that the laws establishing the *procedure for the appointment, promotion, transfer, or dismissal of judges*, i.e., regulating issues of a judicial career, may not violate the principle of the independence of the courts and the judge.²⁷ *The inviolability of the judicial office* is also one of the fundamental constitutional guarantees of the independence of judges, construed in the abovementioned Constitutional Court's ruling of 15 April 2022.

In Lithuania, the duration of judicial office is varied also due to the specificities of the judicial system. Only justices of the Constitutional Court have a constitutional tenure of 9 years,²⁸ while judges in other jurisdictions can serve until the age of 65, this age limit is regulated by an ordinary law – the *Law on Courts*.²⁹ The Constitutional Court has implicitly considered such an age limit for the judicial career, *inter alia*, in the formulation of the doctrine of the extension of the powers of a judge of an ordinary court beyond the age of 65 and has acknowledged the discretion of the legislator to set the age limits for the exercise of the judicial mandate.³⁰

The appointment and dismissal of the judges of the courts of general jurisdiction and administrative courts (except for removal through impeachment) is carried out by the *special statutory judicial authority* provided for in Article 112(5) of the Constitution. The Law on Courts³¹ regulates the procedure and competence of the constitutional institution of self-government

²⁵ *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013.

²⁶ *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

²⁷ *Inter alia*, Ruling of the Constitutional Court of Lithuania of December 1999.

²⁸ Constitution of the Republic of Lithuania, Article 103 (Part 1). <https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192>.

²⁹ Article 57(1) of the Law on Courts of the Republic of Lithuania, published in the *Official Gazette* of the Republic of Lithuania, 1994, no. 46–851, i.c. no. 0941010ISTA000I-480; new wording of the Law as of 1 May 2002: no. IX-732, 24.1.2002, *Official Gazette* of the Republic of Lithuania, 2002, no. 17–649 (20 February 2002).

³⁰ Ruling of the Constitutional Court of Lithuania of 9 May 2006.

³¹ Section III of the Law on Courts, *Judicial Council*.

of the judiciary, the *Judicial Council*, which is composed exclusively of judges. The *Judicial Council* is seen as an exceptional institutional guarantee of judicial independence, and its role has been highlighted in the Constitutional Court's Ruling of 15 April 2022, giving it exclusive rights in matters of judicial career.

The role of the *Judicial Council*, as the guarantor of the independence of the judiciary, has become even more significant in the matter of *dismissal of judges*, since, as the Constitutional Court notes, neither the President of the Republic, having sought advice from the *Judicial Council*, nor the Parliament (Seimas), when dealing with the removal of a judge, can re-examine the issue as to whether a judge (has not) committed a certain action (conduct) and if such action has discredited the judicial office. In its ruling of 15 April 2022 Constitutional Court stressed that if "the President of the Republic or the Seimas could re-examine whether a certain act/conduct of a judge has been committed and whether such action/conduct discredited the judicial office, they would be assuming or usurping the constitutional powers of a special judicial institution. At the same time, this would mean that the *special judicial body* referred to in Article 112(5) of the Constitution, which is established on a purely professional basis, is not a counterweight to the President of the Republic and the Seimas, which are the political bodies of the State, in the formation of the judiciary; such an interpretation would also be incompatible with the constitutional principle of the independence of judges and courts, the balance of powers of the State enshrined in Article 5 of the Constitution, and with the constitutional principles of the separation of powers and responsible governance."³²

Thus, the judicial self-government authority – *Judicial Council* takes on a much broader role of protecting the guarantee of the inviolability of the judicial office, which brings it closer to the role of a *quasi-judicial* authority, whose decisions can be appealed to the courts. The right to apply to the court for redress of violated rights is regarded as absolute in the doctrine of the Constitutional Court³³ and is also a fundamental guarantee of *the inviolability of the judicial office*.

The termination of judicial mandate is a process initiated and, to a certain extent, carried out by political institutions, and it is, therefore, of utmost importance that the *Judicial Council*, in accordance with the requirements of due process, remains independent when approving or disapproving the opinion of the President of the Republic at the time of initiation of the removal of a judge, as this institution becomes an essential guarantee of the *inviolability of the judicial office*, which protects judges from the termination of their powers driven by political, populist motives.

It should be noted that the *Judicial Council*, as an important institutional guarantee of the independence of judges, does not have the power to decide on the appointment and dismissal of justices of the Constitutional Court. The appointment and dismissal of the President and justices of the Constitutional Court is different from that of judges of other judicial systems

³² Ruling of the Constitutional Court of Lithuania of 15 of April of 2022.

³³ Ruling of the Constitutional Court of Lithuania of 30 June 2000.

(Article 103(1), (2) of the Constitution), the self-governing body of the judiciary, the *Judicial Council*, is not involved in their appointment (or removal through impeachment).³⁴

III. Constitutional grounds for termination of judicial mandate (removal from office, impeachment)

The constitutional *principle of inviolability of the judicial office* also implies that a judicial office may be terminated on various constitutional grounds. The list of grounds for dismissal of judges (i.e. termination of office), as enshrined in the Lithuanian Constitution, is exhaustive and cannot be extended by laws or other legal acts.³⁵ The Constitution does not mention *expressis verbis* administrative courts, but judges of these courts are subject to constitutional guarantees of independence of judges similar to those applicable to judges of courts of general jurisdiction,³⁶ with the exception of removal through impeachment proceedings. According to the Constitution, the courts exercising judicial power in Lithuania are part of several judicial systems.³⁷

The Constitutional Court has developed the doctrine of guarantees of *inviolability of the judicial office* by deciding, *inter alia*, on the compliance with the Constitution of the decrees of the President of the Republic and resolutions of the Seimas (parliament) (as well as on the compliance with individual provisions of the European Convention on Human Rights), whereby judges were dismissed from office on various grounds, such as, where a judge of the Supreme Court has been dismissed from the judicial office of the Supreme Court on the grounds of his appointment as a justice to the Constitutional Court,³⁸ where the President of the Supreme Court has not been dismissed by a resolution of the Seimas at the end of his tenure as a President of this Court,³⁹ when a judge was improperly dismissed from the position of Chair of the Civil Division of the Supreme Court,⁴⁰ when a judge appointed as a regional court judge for 5 years was dismissed at the end of that term,⁴¹ the dismissal of judges from the office of Chairman of the regional court and district courts on the grounds of discrediting the judicial office,⁴² and the

³⁴ Ruling of the Constitutional Court of Lithuania of 2 June 2005.

³⁵ *Inter alia* Ruling of the Constitutional Court of 27 of November 2006.

³⁶ Ruling of the Constitutional Court of 9 of May 2006.

³⁷ The Constitutional Court has distinguished between three systems that currently exist under the Constitution and the law in Lithuania: 1) the Constitutional Court exercises constitutional judicial review; 2) the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional and district courts referred to in Article 111(1) of the Constitution form the system of courts of general competence; 3) according to Article 111(2) of the Constitution, specialised courts may be established to hear administrative, labour, family and other categories of cases – at present, one system of specialised courts, namely administrative courts, is established and operates by law, and consists of the Supreme Administrative Court of Lithuania and the administrative district courts (*inter alia*, Constitutional Court rulings of 13 December 2004, 16 January 2006, 15 April 2022).

³⁸ Ruling of the Constitutional Court of 2 of June 2005.

³⁹ Decision of the Constitutional Court of 15 of May 2009.

⁴⁰ Ruling of the Constitutional Court of 2 of September 2020.

⁴¹ *Inter alia* Ruling of the Constitutional Court of 20 of December 2007.

⁴² Rulings of the Constitutional Court of 16 of January 2007; 16 of December 2007.

dismissal of judges of the Supreme Court and the Court of Appeal on the grounds that they *have discredited the judicial office*.⁴³

The right of a judge to apply to the court to challenge the lawfulness of his/her removal, as one of the fundamental guarantees of the *inviolability of the judicial office* and independence of judges, has been extensively analysed by the Constitutional Court in its ruling of 27 November 2006, underlining the *absolute nature of such a right*.⁴⁴

One of the first cases of constitutional justice (Constitutional Court Ruling of 22 December 1994),⁴⁵ which analysed the statutory implications of the dissolution of the Supreme Court and the change of its functions because of the judicial reform, is also important for the development of the doctrine of the termination of the judicial office. As the Constitutional Court has pointed out, the consequences of (i) the dissolution and (ii) the change in the functions of the Supreme Court in the course of the judicial reform are not the same, and therefore, their legal implications in the area of the termination of tenure of the judge are also different; the consequences have to be based on the guarantee of the duration of the tenure of the judge, which is the only way of safeguarding the principle of independence of judges.

The constitutional grounds for the termination of the judicial office (including the appointment procedure) vary not only between different judicial systems, but also within the same judicial system, i.e., the courts of general jurisdiction.⁴⁶ The Presidents and judges of the Supreme Court and the Court of Appeal are worth to be mentioned separately; the procedures for their appointment and dismissal, as laid down in the Constitution, are more complex.⁴⁷ The procedure for the appointment and dismissal of the President and justices of the Constitutional Court is also different, and they can only be dismissed before the end of their tenure through impeachment proceedings.⁴⁸

IV. Dismissal from office on the grounds of Article 115(5) of the Constitution – discreditation of the judicial office

The Lithuanian Constitution provides for different grounds for dismissal of judges in cases where a judge's conduct warrants *dismissal without his or her express will, namely when his or her*

⁴³ Ruling of the Constitutional Court of 15 of April 2022.

⁴⁴ Ruling of the Constitutional Court of 27 of November 2006.

In this ruling, the Constitutional Court stressed that under the Constitution, a judge, as well as any other person who believes that he/she has been unjustly, unlawfully dismissed from his/her office, has the right to seek redress for the violation of his/her right before a court; this right is absolute and may not be limited or denied.

⁴⁵ Ruling of the Constitutional Court of 22 of December 1994.

⁴⁶ It should be noted that, according to the Law on the Judiciary, the appointment and dismissal of judges of general competence of the regional and district courts and of judges of administrative courts of all levels is decided by the President of the Republic, on the advice of the Council of Continuation. The Constitution does not specify the issues of their appointment and dismissal.

⁴⁷ According to Article 112(2) of the Constitution, the judges of the Supreme Court shall be appointed and dismissed by the Seimas on the recommendation of the President of the Republic; according to Article 112(3), the judges of the Court of Appeal shall be appointed and dismissed by the Seimas on the approval of the President of the Republic.

⁴⁸ The Constitution of the Republic of Lithuania (Articles 74, 108).

performance as a judge (not only in professional sense) is evaluated negatively. Judges of general competence, with the exception of the judges and Presidents of the Supreme Court and the Court of Appeal, and judges at all levels of the administrative courts may be dismissed only under Article 115 of the Constitution – *if their behaviour discredits their position as judge* (5) and (6) – *upon the entry into effect of a court judgment convincing them.*

Worth noting that the constitutional ground for dismissal of judges *if their behaviour discredits the judicial office* is seen as the most severe measure of disciplinary liability, covering not only the conduct of a judge by which the judicial office has been discredited during the exercise of his or her judicial mandate, but also such conduct which discredits the judicial office not in relation with the exercise of his or her judicial office; no exhaustive list of such actions (conduct) can be established, each action of a judge must be subject to a comprehensive assessment by the judicial self-government body (*Judicial Council*), and it may be applied without waiting for a conviction by the court, provided that the act is the subject of a pre-trial investigation.⁴⁹ This ground for removal of a judge *may also coincide with the constitutional grounds for impeachment*, as the actions of a judge (or a President) of the Supreme Court and the Court of Appeal may be considered both as a discrediting act against judicial office and as a possible gross violation of the Constitution or violation of the oath.

Although the fact that the Presidents and judges of the Supreme Court and the Court of Appeal may be dismissed on the basis of Article 115(5) of the Constitution – *if their behaviour discredits the judicial office* – was already stated by the Constitutional Court in its ruling of 9 May 2006, when it dealt with other issues related to the *inviolability of the judicial office*, the relationship between the above-mentioned grounds of the termination of a judicial tenure was not revealed in the former or subsequent acts of the Constitutional Court. Thus, in the case of constitutional justice of 15 April 2022, the Constitutional Court was confronted with the need to clarify the question of the relationship between these constitutional grounds for the termination of judicial mandate in the context of the question of the constitutionality of the relevant Presidential Decrees and Parliamentary resolutions on the dismissal of the judges of the Supreme Court and the Court of Appeal. Unfortunately, this attempt by the Constitutional Court has not been fully successful.

The Constitutional Court's ruling of 15 April 2022 definitively confirmed the established practice of dismissing judges of the Supreme Court and the Court of Appeal without impeachment on the basis of Article 115(5) of the Constitution.

The procedure for dismissing a judge on the basis of Article 115 of the Constitution is simpler, although in respect of judges of the Supreme Court and the Court of Appeal such dismissal is subject to the approval of Parliament and the President of the Republic. However, the required

⁴⁹ Although at the initial stage of the development of the constitutional doctrine, in the interpretation of the concept of 'act discrediting judicial office', its content was related to the professional activity of a judge, later, *inter alia*, in the ruling of the Constitutional Court on 27 November 2006, this wording began to be interpreted as including activities which are not related to the office of a judge, "*judges must also be subject to extremely high ethical and moral standards and must have a good repute beyond reproach.*"

majority in the Parliament is lower,⁵⁰ and the consequences of such a dismissal do not entail the more severe consequences of impeachment proceedings.⁵¹ The dismissal of such judges based on Article 115(5) – *if their behaviour discredits the judicial office*– does not involve the Constitutional Court, which in the impeachment process is obliged upon the request of the Parliament to present a conclusion whether the concrete actions (or omission to act) of the certain judge are in conflict with the Constitution. The only safeguard is the *Judicial Council*, the decision whereof, as mentioned already, is binding upon the political institutions. However, it is questionable whether the judicial self-governing institution will in all cases be able to withstand some possible political pressures. Apparently, in the context of impeachment proceedings, the Constitutional Court represents such a safeguard.

It is likely that in the future, the Presidents and judges of the Supreme Court and the Court of Appeal, who may undergo an impeachment procedure, will be dismissed from office based on the doctrine developed by the Constitutional Court on 15 April 2022, *if their behaviour discredits judicial office* based on Article 115(5) of the Constitution. This ground, which competes with, and often encompasses, the grounds for impeachment, is likely to become the main way for refraining from opening a complex impeachment process, by relying instead on the advice of a special judicial body, i.e., the *Judicial Council*. The Constitutional Court, without saying that impeachment is not necessary in this case, has left it to the discretion of politicians, (Parliament) without establishing clear criteria as to when impeachment as a ground for the termination of a judicial office is a necessary and constitutionally binding imperative for the termination of judicial office.

Therefore, considering the reasoning presented by the Constitutional Court in this ruling it could be assumed that the impeachment process applicable to judges can only become an exceptional ground for the removal of the President of the Constitutional Court and the justices from their positions, as the constitutional provisions of the Article 115 to them are not applicable.

Impeachment as an exceptional constitutional ground for the removal of a judge

As mentioned above, impeachment, due to the current trends in constitutional doctrine, can be seen as an alternative procedure for the removal of the Presidents and judges of the Supreme

⁵⁰ In the event of the dismissal of a judge of the Supreme Court and the Court of Appeal (or the approval of the Seimas for such dismissal) under Article 115(5) of the Constitution, the Seimas shall, in accordance with the relevant provisions of the Statute of the Seimas, pass a resolution by secret ballot, which shall be adopted by a *majority of the members of the Seimas present at the meeting*. In the case of impeachment, such a resolution shall require a *3/5 majority vote of all the Seimas members*.

⁵¹ Impeachment as a process of removing a judge from office involves not only more complex procedures but also more strict consequences. Even after the amendment of the Constitution in 2022, the consequences for a person removed from office by impeachment are much more severe, with a corresponding 10-year period of disqualification from holding a certain position, than for a person removed from office on the basis of the provisions in Article 115 (5) of the Constitution. In this case, he or she does not fulfil the requirement of good repute for a certain period of time.

Court and the Court of Appeal, while the procedure for the dismissal of the justices of the Constitutional Court remains exceptional. In the Constitutional Court's acts, the constitutional doctrine of impeachment has been formulated in the context of the disclosure of the issues of the constitutional responsibility of politicians – the President of the Republic, and members of the Seimas (parliament).⁵² It has not been applied to judges.

Impeachment is a specific form of constitutional liability, including the removal of the highest state officials from constitutional duties. This constitutional institution, having originated centuries ago, remains relevant today and raises many questions regarding its legal or political origin. The constitutions of many states consolidate certain elements of impeachment; however, the chosen impeachment models can differ and could be closer to the political or legal constitutional framework that determines the role of the (constitutional) courts.

Under Lithuanian constitutional provisions, the Lithuanian impeachment model is the European one. Although the elements of the constitutional doctrine of impeachment were started to be developed as early as in the ruling of 11 March 1999 and the Constitutional Court described impeachment as one of the measures for the self-protection of civil society, the official doctrine was largely formulated by the Constitutional Court in its ruling of 25 May 2004 and was significantly developed later in the ruling of 5 September 2012. Various aspects of the constitutional concept of impeachment were also revealed in other acts of the Constitutional Court.⁵³

As a rule, impeachment is applied to a certain limited circle of subjects exercising constitutional duties and is carried out as special procedure, which is not identical to traditional legal procedure. There is also the question of the closely intersecting areas of politics and law in the application of this constitutional institution.⁵⁴

Impeachment as the strictest form of constitutional liability in the official constitutional doctrine developed by the Constitutional Court of the Republic of Lithuania is described as a form of public democratic control, as one of the self-protection measures of the national community – the civil nation, and a means of self-defence from those highest state officials who ignore the Constitution and law, so that they are prohibited from holding the respective office once they have failed to fulfil their constitutional obligations.

The application of the constitutional sanction of removal from office can be imposed in respect of the persons specified in Article 74 of the Constitution. Article 74 of the Constitution

⁵² *Inter alia* Rulings of the Constitutional Court of 25 of May 2004; 5 September 2012; Conclusions of 27 of October 2010; 31 of March 2004; June 3 of 2014; 19 of December 2017.

⁵³ *Inter alia*, in the Conclusion of 31 March 2004, rulings of 15 April 2004 and 24 February 2017, the conclusions of 27 October 2010, 3 June 2014, 19 December 2017 and 22 December 2017, also the decision of 10 May 2016 of the Constitutional Court.

⁵⁴ The relevance of the constitutional institution of impeachment has become more apparent in recent times, as fight against the corruption of the highest state officials has been of particular concern. In particular, an analysis of the application of impeachment with regard to the presidents of states inevitably raises the question of whether impeachment is a legal or purely political measure.

of Lithuania provides that the President of the Republic, the President and justices of the Constitutional Court, the Presidents and judges of the Supreme Court and the Court of Appeal, as well as any members of the Seimas (parliament), if they grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a member of the Seimas revoked by a 3/5 majority vote of all members of the Seimas. This is conducted according to the procedure of impeachment, as established by the Statute of the Seimas.

The constitutional grounds for impeachment – a gross violation of the Constitution, a breach of the oath of office or the commitment of a crime – are *expressis verbis* outlined in Article 74 of the Constitution. The Constitutional Court has more than once held that a breach of the oath of office is at the same time a gross violation of the Constitution; and a gross violation of the Constitution also entails a breach of the oath of office.

In its ruling of 25 May 2004, the Constitutional Court interpreted the Constitution to the effect that a person removed from office through impeachment procedure is barred in the future from taking up any office that, under the Constitution, requires taking the oath, including the office of a member of the Parliament. This principle was changed after amending the Constitution in 2022. Under that constitutional amendment (of Article 74), a person who has been removed from office or whose mandate of a member of the Seimas has been revoked by the Seimas under impeachment proceedings for a gross violation of the Constitution or a breach of the oath may take office that is specified in the Constitution and the commencement of which is, under the Constitution, linked with taking the oath provided for in the Constitution if not less than ten years have passed from the decision of the Seimas by which the person was removed from office or his or her mandate of a member of the Seimas was revoked.

Thus, impeachment is a much more complex procedure for the removal of a judge, with more possibilities to challenge such removal; the involvement of the Constitutional Court in this process should provide more protection against politically biased decisions. Considering that due to current trends in constitutional doctrine impeachment is regarded more like an alternative procedure for the removal of the Presidents of the Supreme Court and the Court of Appeal and of judges, and the provisions of Article 115 (5) of the Constitution have become the main ground for the dismissal of judges, it is likely that impeachment will eventually become only a theoretical option for the removal of a judge, despite the rich constitutional doctrine of impeachment that has been developed in relation to the constitutional responsibilities of the President of the Republic and members of the Seimas (parliament).

Some conclusions

According to the doctrine of the Constitutional Court, the independence and impartiality of the court is an essential guarantee of human rights and freedoms, a prerequisite for a fair trial and confidence in the court. The independence of the judiciary is understood as encompassing both the independence of the court as a judicial institution and the independence of a judge. One of the most important guarantees of the independence of a judge is the security of the

inviolability of the judicial office, which not only determines the continuity of judicial career, but also means that the judge's tenure may be terminated on a number of different constitutional grounds, which vary not only from one judicial system to another, but also depend on specificities within the same system of courts of general jurisdiction, and which are not subject to any legislative extension.

The Constitutional grounds for dismissal of a judge provided for in Article 115 (5) of the Constitution, i.e., an *act of discrediting judicial office*, are regarded in the doctrine of the Constitutional Court as the strictest measure of disciplinary liability. This ground for dismissal is understood, *inter alia*, to include conduct (or omission) by a judge which has discredited judicial office while exercising his or her judicial mandate, as well as conduct discrediting the judicial office which is not related directly to the exercise of judicial mandate; neither the President of the Republic, when seeking advice from the *Judicial Council*, nor the Parliament, when dealing with the dismissal of a judge, may re-examine the decision of the *Judicial Council* as to whether a particular act (conduct) of a judge has occurred and decide whether it has discredited the judicial office. The Constitutional Court by extensively developing the constitutional doctrine of the *Judicial Council* vested significant powers to this self-governing body of judges that are likely to protect judges from possible future populist political pressures in cases of removal of judges from office.

The grounds provided for in Article 115 of the Constitution, i.e., *conduct discrediting the judicial office*, may also coincide with the constitutional grounds for impeachment, but unfortunately, the Constitutional Court has not formulated clear criteria for distinguishing between such constitutional grounds for termination of judicial mandate. Hence the removal of a judge through impeachment becomes an alternative, more theoretical option for the dismissal of a judge, leaving the initiative of the impeachment process to the discretion of the Parliament.

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Томас Бірмонтієне. Конституційні підстави для звільнення суддів з посади: досвід Литви

Анотація. У цій статті розглядаються гарантії незалежності судової влади, сформульовані в доктрині Конституційного суду Литви, зокрема в Рішенні суду від 15 квітня 2022 р. Незалежність судової влади є важливою гарантією поділу влади та системи стримувань і противаг, які можна розуміти як такі, що охоплюють як незалежність суду як судової установи, так і незалежність судді.

У статті авторка стверджує, що припинення повноважень судді є процесом, ініційованим і певною мірою реалізованим політичними інституціями. Таким чином, надзвичайно важливо, щоб Рада суддів – орган суддівського врядування у Литві – відповідно до вимог належної процедури залишалася незалежною, коли затверджує чи ні думку Президента Республіки під час ініціювання звільнення судді з посади. Роль Ради суддів як гаранта незалежності судової влади, стала ще більш важливою в питанні звільнення суддів після того, як Конституційний суд ширше розвинув конституційну доктрину і наділив значними повноваженнями цей керівний орган самоорганізації суддів, який може захистити суддів від можливого майбутнього популістського політичного тиску у випадках їх усунення з посад.

Підстави для звільнення судді з посади, передбачені статтею 115 Конституції Литви, а саме поведінка, що дискредитує посаду судді, також можуть збігатися з конституційними підставами для імпічменту, але, на жаль, Конституційний суд не сформулював чітких критеріїв розмежування таких конституційних підстав для припинення суддівського мандата. У статті зроблено висновок, що звільнення судді шляхом імпічменту стає альтернативним, більш теоретичним варіантом, залишаючи ініціативу процесу імпічменту на розсуд парламенту, незважаючи на багату конституційну доктрину з процедури імпічменту, яка була розроблена щодо конституційних обов'язків Президента Республіки та членів парламенту під час цієї процедури.

Ключові слова: незалежність судової влади; верховенство права; звільнення судді з посади; конституційна доктрина; поділ влади, Литва.

Toma Birmontienė. Constitutional Grounds for the Removal of Judges from Office: Lithuanian Experience

Abstract. This article examines the guarantees of the independence of the judiciary formulated in the doctrine of the Constitutional Court of Lithuania, particularly, in the Ruling of 15 April 2022. The independence of the judiciary is an important guarantee of the separation of powers and the system of checks and balances, which can be understood as encompassing both the independence of the court as a judicial institution and the independence of the judge.

It is argued that the termination of judicial mandate is a process initiated and, to a certain extent, carried out by political institutions. Therefore, it is of utmost importance that the Judicial Council, in accordance with the requirements of due process, remains independent when approving or disapproving the opinion of the President of the Republic at the time of initiation of the removal

of a judge from office. The role of the Judicial Council, as the guarantor of the independence of the judiciary, has become even more significant in the matter of dismissal of judges since the Constitutional Court extensively developed the constitutional doctrine on the Judicial Council and vested significant powers to this self-governing body of judges that is likely to protect judges from possible future populist political pressures in cases of their removal from office.

The grounds provided for in Article 115 of the Constitution of Lithuania, i.e., conduct discrediting the judicial office, may also coincide with the constitutional grounds for impeachment, but unfortunately, the Constitutional Court has not formulated clear criteria for distinguishing between such constitutional grounds for termination of judicial mandate. Hence, the article concludes that the removal of a judge through impeachment becomes an alternative, more theoretical option for the dismissal of a judge, leaving the initiative of the impeachment process to the Parliament discretion despite the rich constitutional doctrine of impeachment that has been developed concerning the constitutional responsibilities of the President of the Republic and members of the Parliament.

Keywords: independence of judiciary; rule of law; removal of judges from office; constitutional doctrine; separation of powers, Lithuania.

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