FAIR TRIAL IN LITHUANIA:

FROM EUROPEAN CONVENTION TO REALISATION

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Abstract

This research is an assessment of the level to which the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights is available in the Republic of Lithuania. It is also intended to fill a void in the literature on the functioning of human rights protection in contemporary Lithuania.

Three aspects of Article 6 are considered: judicial independence; the rights of the parties; and implementation of the Convention. Also considered is the residual effect of Soviet cultural history, which appears to continue its affects on Lithuania's legal system to the detriment of the right to a fair trial.

Although the judiciary appears institutionally independent, its members do not appear independent in fact. Potential parties to litigation may be denied access to a court for some claims. Parties in litigation face the possibility of lengthy proceedings, persons suspected of a crime face potentially lengthy pretrial investigations with indeterminate periods of detention, and targets of criminal investigations can face public opinion assessing guilt, including by political leaders and the prosecution service. The prosecution service also appears institutionally independent, while its members do not appear independent in fact. In considering implementation of the Convention, Lithuania has complied with most of the adverse judgments by the European Court of Human Rights. However, Lithuania's promise to provide conditions for a fair trial in the national legal order, made when it adopted the Convention, appears in need of substantial improvement.

At the most fundamental level there are three areas that would benefit the prospects for a fair trial in Lithuania: increased public education and civic involvement; improve quality of public services by improving legal education and training, including compliance with professional ethics; and developing problem solving techniques focused on improving system functions rather than assigning fault.

Acknowledgements

With deep appreciation for the human rights advocates in Lithuania:

> *In the final analysis, a democratic government represents the sum total of the courage and the integrity of its individuals. It cannot be better than they are.*
>
> Eleanor Roosevelt
> *Tomorrow Is Now*
> (Harper & Row, 1963) 119-20

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ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GBP	British pounds
CCJE	Consultative Council of European Judges, Council of Europe
CEPEJ	European Commission for the Efficiency of Justice of the Council of Europe
CLAHR	Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe
CQI	continuous quality improvement
HRMI	Human Rights Monitoring Institute
KGB	Soviet State Security Agency (*Komitet gosudarstvennoi bezopastnosti*)
Lithuanian SSR	Soviet Socialist Republic of Lithuania
NGO	non-governmental organization
TQM	total quality management
UK	United Kingdom
USA	United States of America
USSR	Union of Soviet Socialist Republics

Chapter 1. Methodology and Remit

When the Republic of Lithuania adopted the Convention for the Protection of Human Rights and Fundamental Freedoms[1] after regaining independence in 1990, it undertook the obligation to provide the rights embodied in the Convention to those within its jurisdiction. Essential to the scheme of the Convention is Article 6 providing for a fair trial in civil and criminal proceedings, including the right to an independent tribunal, a reasonable opportunity to present one's case, and the ability to challenge Convention violations in the domestic courts. By protecting the right to a fair trial and the right to be presumed innocent, Article 6 'is intended to enshrine the fundamental principle of the Rule of Law'.[2] Without Article 6, it would be impossible to vindicate any of the substantive Convention rights.

Because of the connection between the right to a fair trial in protecting the rule of law and the substantive rights enumerated in the Convention,[3] an assessment of Article 6 rights suggests the prospects for the protection of all rights enshrined in the Convention. This research is a qualitative assessment of the level to which the right to a fair trial required by Article 6 of the European Convention is available in Lithuania and, thereby, suggesting the prospects for Lithuania's legal system in promoting and

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[1] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (ETS 005, Rome 4 November 1950) (European Convention on Human Rights or ECHR); Protocol No 11 to the Convention, Restructuring the Control Machinery Established Thereby (ETS No 155, Strasbourg, 11 May 1994) (Protocol No 11); Protocol No 14 to the Convention, Amending the Control System of the Convention (CETS No 194, 13 May 2004) (Protocol No 14). Lithuania became a State Party to the Convention on 20 June 1995. Council of Europe Treaty Office <http://conventions.coe.int> accessed 30 August 2012.

[2] *Salabiaku v France* App no 10519/83 (ECtHR 7 October 1988) para 28.

[3] As illustrated in its preamble, the concept of the rule of law is a founding principle of the Convention, considered in the jurisprudence of the European Court of Human Rights as inherent in all articles of the Convention (*Golder v UK* (1975) 1 EHRR 524 para 34; *Engel and Others v Netherlands* (1976) 1 EHRR 647 para 69) as well as a guiding principle for the application of the guarantees of Article 6, including the right to a fair trial within a reasonable time (*Sürmeli v Germany* App no 75529/01 (ECtHR 8 June 2006) para 104), and in criminal cases, the presumption of innocence and the rights of the defence (*Salabiaku v France* (n 2) para 28).

protecting the rights protected in the Convention and furthering the rule of law.[4]

When applying the provisions of the Convention, the European Court considers the Convention a 'living instrument' that is to be interpreted using contemporary standards.[5] Another consideration of the Court in its decisions is the fundamental principle of subsidiarity that underlies the Convention system, requiring that member states examine the effectiveness of their domestic procedures to ensure that they respect human rights.[6] In keeping with this principle as to Article 6 of the Convention, member states are required to maintain a system of courts that will ensure fair trials as required in Article 6.[7] This principle is also why the Court's complaint system is subsidiary to the national systems that safeguard human rights.[8] That is, when the Court considers an application, it does not act as a court of fourth instance by re-establishing the facts, re-examining alleged breaches of national law,[9] or ruling on the admissibility of evidence.[10] Called the fourth instance doctrine, this practise is considered to be in the

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[4] The Council of Europe considers the rule of law inherent in any democratic society, recently defining it as requiring everyone to 'be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures'. European Commission for Democracy Through Law (Venice Commission) 'Report on the Rule of Law', Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011) CDL-AD(2011)003rev, para 16.

[5] *Tyrer v UK* (1979-80) 2 EHRR 1 para 31 ('the Convention is a living instrument which ... must be interpreted in the light of present-day conditions'); *Marckx v Belgium* (1979) 2 EHRR 330 para 41; text to nn 1080-82 in ch 5 (interpreting the ECHR as a 'living' document).

[6] ECHR (n 1) art 1; *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 286-87; *IM v France* App no 9152/09 (ECtHR, 2 February 2012) para 136.

[7] *Zimmermann and Steiner v Switzerland* App no 8737/79 (ECtHR, 13 July 1983) para 29 (states have a duty to 'organise their legal systems so as to allow the courts to comply with the requirements of Article 6 (1) including that of trial within a reasonable time'); *Boddaert v Belgium* (1993) 16 EHRR 242 para 39 (art 6 'commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice').

[8] *Scordino v Italy (no 1)* App no 36813/97 (ECtHR, 26 March 2006) para 140.

[9] *Bernard v France* (2000) 30 EHRR 808 para 37 (it is 'not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them).

[10] *Schenk v Switzerland* (1991) 13 EHRR 242 paras 45-49.

interest of the applicant and the efficacy of the Convention system 'that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention'.[11] This area in which Strasbourg is willing to allow national authorities discretion in fulfilling their obligations under the European Convention is also referred to as 'the margin of appreciation'.[12]

In the context of Article 6, the primary concern of the Court is whether an applicant was afforded an ample opportunity to state his or her case in the domestic courts and to challenge any evidence considered as false; it is not whether the domestic courts reached a right or wrong decision.[13] The requirements of Article 6 and related jurisprudence most significant to current conditions in Lithuania will be raised throughout the subsequent chapters, with further discussion relating to an independent tribunal in Chapter 3 and provisions relating to the rights of the parties in Chapter 4. A brief overview of Article 6 is provided here, followed by a general account of the literature and the methodology employed in this research. This chapter concludes with an overview of the chapters that follow.

The full text of Article 6 of the Convention is as follows:

Right to a Fair Trial

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public

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[11] *Varnava and Others v Turkey* (2010) 50 EHRR 21 para 164.

[12] *De Diego Nafria v Spain* (2003) 36 EHRR 36 para 39 (domestic courts are better placed than an international court to evaluate the context of a legal dispute in the light of local legal traditions); *Pla and Puncernau v Andorra* App no 69498/01 (ECtHR 13 July 2004) para 46 (national authorities and, in particular, the courts of first instance and appeal are provided a wide margin of appreciation).

[13] *Butkevičius v Lithuania* App no 48297/99 (ECtHR, 28 November 2000) (decision) 22; *Karalevičius v Lithuania* App no 53254/99 (ECtHR, 6 June 2002) (decision) 12.

order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[14]

Article 6(1) applies to both civil and criminal proceedings. The remaining two paragraphs of Article 6 – 6(2) and 6(3) – apply only in criminal proceedings, with 6(2) providing the right to be presumed innocent and 6(3) providing additional procedural rights: to be fully informed of the nature and cause of the charges; to have adequate time and facilities to prepare a defence in person or through a lawyer of one's own choosing paid at state expense if they cannot afford to pay for one; to examine

[14] ECHR (n 1) arts 6(1)-(3). Fair trial rights in Lithuania are protected by its Constitution, providing for the presumption of innocence; right to a public and fair hearing by an independent and impartial court; right not to self-incriminate that is extended to family and close relatives; punishment only as provided by law; no double jeopardy; right to an advocate and to a defence from the moment of detention or first interrogation. Constitution of the Republic of Lithuania, adopted by Citizens of the Republic of Lithuania in the Referendum of 25 October 1992, amended 25 April 2006, *Official Gazette* 2006, No 48-1701 (29 April 2006) (Constitution of Lithuania) art 31.

prosecution witnesses; to call witnesses in defence; to free interpretation and translation; to reasoned decisions by the court; and to appeal.[15] Even though the specific procedural rights in Article 6(3) apply only in criminal cases, comparable guarantees have been determined by the European Court to be required in civil cases for the proceedings to have been considered 'fair'.[16] As the Court has indicated, when considering fairness, it is important that the proceeding give the appearance of the fair administration of justice.[17]

When deciding whether a proceeding qualifies for Article 6 protection, the Court will look beyond the manner in which a state has classified a proceeding to make its own evaluation of whether the terms 'criminal charge' and 'civil rights obligations' apply. These terms have autonomous meanings independent of their classification within a given national legal system.[18] Likewise, the Court is not limited to a state's characterisation of whether a proceeding is a 'tribunal', a term it may apply to judicial and quasi-judicial proceedings, as well as administrative hearings and commissions, if they are determined by the Court to be 'tribunals'.[19]

The rights encompassed by Article 6 have been expanded by decisions of the

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[15] ibid arts 6(2); 6(3).

[16] As was the case in *Airey v Ireland* (1979) 2 EHRR 305 para 26 (although no right to legal aid in civil cases, one will arise if domestic proceedings require representation by a lawyer at any stage or by reason of the complexity of the procedure or the case).

[17] *Borgers v Belgium* (1993) 15 EHRR 92 para 24.

[18] *Adolf v Austria* (1982) 4 EHRR 313 para 30 (concept of 'criminal charge' bears 'autonomous' meaning independent of categorizations employed by domestic court).

[19] *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987) paras 50-55*; Ringeisen v Austria* (1979-80) 1 EHRR 455 para 95 (regional commission empowered to consider real property transactions a 'tribunal'); *Belilos v Switzerland* (1988) 10 EHRR 466 para 64 (defining a tribunal, in part, as 'characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner').

Court to include, in both civil and criminal cases, equality of arms,[20] an adversarial proceeding and the immediacy of evidence,[21] effective legal representation,[22] and special protection for children and other vulnerable parties.[23]

Principles developed specifically in criminal cases include the privilege against self-incrimination and the right to silence.[24] An accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned.[25] An accused person is also entitled to self-representation.[26] As part of that representation, fairness requires that the whole range of services specifically associated with legal assistance be available.[27] These include unrestricted access to the fundamental aspects of the defence: 'discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention'.[28] An accused also has the right to be present at hearings and to participate actively in the process.[29]

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[20] *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1 paras 53, 58 (every party to proceeding must have reasonable opportunity to present their case under conditions that do not place him or her at substantial disadvantage with respect to opponent).

[21] *Ruiz-Mateos v Spain* App No 12952/87 (ECtHR, 23 June 1993) para 63 (parties to both criminal and civil trials must know and be able to respond to all case evidence adduced or observations filed). See also *Brandstetter v Austria* App no 11170/84 (ECtHR, 24 August 1991) para 67; *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360 para 78.

[22] *Airey v Ireland* (n 16); *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980); text to nn 827-36 in ch 4 (additional requirements for effective criminal defence).

[23] *Doorson v Netherlands* (1996) 22 EHRR 330, para 70 (recognising rights of witnesses and crime victims and directing member states to organise their criminal proceedings such that those interests are not unjustifiably imperilled); *B and P v UK* App nos 36337/97, 35974/97 (ECtHR, 24 April 2001) paras 32-49 (allowing closed proceedings in family law cases).

[24] *Funke v France* App no 10828/84 (ECtHR, 25 February 1993); *Bykov v Russia* App no 4378 (ECtHR, 19 March 2009).

[25] *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009) para 32.

[26] *Pishchalnikov v Russia* App no 7025 (ECtHR, 24 September 2009) para 77.

[27] *Dayanan v Turkey* (n 25) para 32.

[28] ibid.

[29] *Colozza v Italy* App no 9024/80 (ECtHR, 12 February 1985) para 27-33; *T and V v UK* (2000) EHRR 121 para 88.

There is no literature that evaluates the implementation of Article 6 of the Convention in Lithuania. This research is intended to explore this void by identifying potential benchmarks that indicate areas of concern, propose areas for improvement, and suggest areas for a more comprehensive review.

There is regional literature relevant to the development of Lithuania's contemporary legal system, beginning in the 1990s with descriptions of institutional and policy changes in the post-Soviet states in Eastern Europe.[30] These include comparative reviews of the constitutions adopted in the post-Soviet states,[31] and changes underway in the accession process,[32] including the role of the judiciary in rule of law programs.[33] The literature describes the impact of the Soviet socialist world view in the post-Soviet states, including in Lithuania, observed in the lingering Soviet legal theory and the mindset of its citizens and as they embarked on democratic reform in 1990.[34] Well into the first decade of reform, the literature describes aspects of Soviet

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[30] For example, Neil J Brennan, 'European Integration and Human Rights' Cultures in Eastern Europe: The EU and Abolition of Capital Punishment in Estonia' (1998) 47 UNBLJ 49; Thomas Carothers, 'The Rule of Law Revival' (1998) 77 Foreign Affairs 95-106; William D Meyer, 'Facing the Post-Communist Reality: Lawyers in Private Practice In Central and Eastern Europe and the Republics of the Former Soviet Union' (1995) 26 Law & Poly Intl Bus 1019; Károly Bárd, 'Trial and Sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing Patterns, the Role of the Defence in the Countries in Transition' (1999) 7 EurJCrime CrLCrJ 433.

[31] Rett R Ludwikowski,'Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe' (1995) 3 Cardozo J Intl & Comp L 73 ('Rights in the New Constitutions'); Rett R Ludwikowski, 'Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis' (2004) 33 Ga J Intl & Comp L 1 ('Constitutionalization of Human Rights').

[32] Anton Steen, 'The New Elites in the Baltic States: Recirculation and Change' (1997) 20 Scandinavian Pol Stud 91; Cynthia Clement and Peter Murrell, 'Assessing the Value of Law in Transition Economies: An Introduction' in Peter Murrell (ed), *Assessing the Value of Law in Transition Economies* (University of Michigan Press 2000) 3-4 (on initial reform efforts); Neven Anđelić, 'Big Wave' (2006) YB Balkan HR Net 14.

[33] Gordon Barron, 'The World Bank & Rule of Law Reforms' (2005) London School of Economics and Political Science, Working Paper no 05-70; François Bourguignon and Boris Pleskovic (eds), *Beyond Transition: Annual World Bank Conference on Development Economics - Regional 2007* (The World Bank 2007).

[34] James H Anderson, David S Bernstein, Cheryl W Gray, *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future* (World Bank 2005).

legal culture that survived the transition from a centralized to a market economy, acting to frustrate rule of law reform and the protection of human rights in modern Eastern Europe.[35]

The literature also describes that by 1998 the initial rule of law reform in post-Soviet societies between 1991 and 1995 had been both inadequate and represented only the relatively easy part of reform.[36] Observers began to note that more fundamental change was called for, but was not likely in the near future because these early initiatives toward a human rights cultures were not necessarily motivated by a recognition of human rights values. Instead, their interests were 'secondary to economic reform' and 'relevant largely only as a consequence of Western demands'.[37] As a result, these early reforms did not adequately address the more fundamental problem of leaders who refused to be ruled by the law and failed to include an active role by the public that would fully transform conceptions of law and justice.[38] As one writer described the problem:

> The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.[39]

The impact of Soviet history on the institutions necessary to provide and protect

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[35] Ludwikowski, 'Rights in the New Constitutions' (n 31); Ludwikowski, 'Constitutionalization of Human Rights' (n 31); Bárd (n 30); Meyer (n 30).

[36] 'Rule of Law Revival' (n 30); Louise Shelley, 'Justice Reform in Post-Soviet Successor States: A Comparative Perspective' (2005) in Kauko Aromaa (ed) *Penal Policy, Justice Reform and Social Exclusion* (Hakapaino Oy, Helsinki, Finland).

[37] NJ Brennan (n 30); Clement and Murrell (n 32) 3-4.

[38] 'Rule of Law Revival' (n 30) 96.

[39] ibid.

Article 6 rights in the transition states is found in literature describing processes that were new after independence, such as with the National Integrity System in Lithuania.[40] Institutions of the transition states are described as having skewed configurations, often having inherited large, rule-bound control-focused bureaucracies lacking necessary regulatory institutions and conditions necessary for mechanisms of accountability to function;[41] and weak or no tradition of corruption-proofing, such as for conflicts of interest and embedded key pillars, such as an independent judiciary.[42]

The impact of Soviet legal history within Lithuania is occasionally mentioned in academic literature from Lithuania, but with a few exceptions[43] it is rarely explained in a way that is fully understood without an implicit understanding of how the law functioned in Lithuania during Soviet occupation.[44] This is somewhat surprising given that Lithuanian officials acknowledged early on that during Soviet occupation it was the protection of human rights that suffered the most.[45]

General descriptions of the early legal reforms specific to Lithuania are found in accession and monitoring reports concerning Lithuania's candidacy for the European

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[40] Alan Doig, 'Not As Easy As it Sounds? Delivering the National Integrity System Approach in Practice: the Case Study of the National Anti-Corruption Programme in Lithuania' (2006) 30 PAQ 273, 383-84.

[41] ibid 384.

[42] ibid.

[43] Such as Raimundas Urbonas, 'Corruption in Lithuania' (2009) 9 Connections: QJ 67 (the author is a captain in the Second Investigation Department under the Ministry of National Defence in Lithuania, describing the impact of corruption from Soviet times on Lithuania's contemporary politics, economics, and legal and social spheres).

[44] Aušra Rauličkytė, 'Lithuania's Courts and the Rule of Law' (2001) 32 JBS 182; Ona Balkevičienė (ed), *Human Rights in Lithuania: Situation Assessment*, Project of the Seimas of the Republic of Lithuania 'National Human Rights Action Plan' (Petro Ofsetas, Vilnius 2002).

[45] Balkevičienė (n 44) 10.

Union, which Lithuania joined in 2004.[46] These include the expectations of the international community that Lithuania take on both the benefits and the obligations of membership by adhering to the fundamental principles of human rights, including liberty, democracy, and the elimination of inequalities based upon sex, race, ethnicity or religion.[47]

Except for these Lithuania-specific pre-accession documents, now over a decade old, most information on the implementation of right to fair trial in Lithuania must be inferred from the regionally applicable literature. That is because Lithuania is most often described as sharing the common experience of other countries in the region. To the extent it is addressed at all, Lithuania is included in a variety of descriptions: among other countries in its geographical region of Central and Eastern Europe or the Baltic States; in its shared history as having been occupied by the former Soviet Union; as a recent accession country to the European Union; as a country 'in transition'; or as one of the 'new democracies'.[48] Nonetheless, observations on regional and political developments[49] provide significant context for the conditions affecting the rule of law and Article 6 protections in Lithuania. Among these are comparative analyses of

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[46] Documents assessing Lithuania and the other countries that became a part of the Fifth Enlargement are available at <http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm> accessed 30 August 2012; early NGO monitoring reports include the Open Society Institute, 'Judicial Independence in Lithuania' in *Monitoring the EU Accession Process: Judicial Independence* (Central European University Press, Budapest 2001); Open Society Institute, 'Judicial Capacity in Lithuania' in *Monitoring the EU Accession Process: Judicial Capacity* (Open Society Institute, 2002).

[47] Fernne Brennan, 'EU Enlargement, the Race Equality Directive and the Internal Market' in European Union Studies Association (EUSA), Biennieal Conference (2005) (9th), 31 March-2 April, Austin, Texas.

[48] Cynthia Alkon, 'The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs' 2002 J Disp Resol 327, 333 fn 28 (Lithuania listed as among the Eastern European members of the Council of Europe); Anderson, Bernstein and Gray (n 34) 1 (reorientation of legal and judicial institutions from centralised to market economies as among the biggest challenges in the transition of the countries of Central Eastern Europe and Baltic States).

[49] NJ Brennan (n 30); Kirsti Samuels, 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt' (2006) Social Development Papers, Conflict Prevention & Reconstruction, Paper No 37 (October 2006) <http://go.worldbank.org/JF89HM0830> accessed 30 August 2012; Anđelić (n 32); Bárd (n 30) 322-337; Steen (n 32).

constitutional provisions in Eastern Europe;[50] transitional difficulties for the judicial systems of post-Soviet countries;[51] assessments of the legal system and judiciary in post-Soviet countries;[52] and assessments of the legal and judicial institutional reform projects of the World Bank and other donor organisations in the transition countries of Central Eastern Europe.[53] The challenges in the region were described as 'enormous and complex',[54] as a slow conceptual shift began toward legal and judicial institutions from socialism:[55]

> A hallmark of independent and impartial legal systems is the ability of people and firms to use courts to challenge government actions and decisions. During socialist times the judicial system was geared toward defending the rights of the state. At the beginning of transition, the idea of a court overturning a government decision was simply outside the realm of possibility for many people. By the late 1990s, after a decade of reforms, the idea may have seemed less extraordinary, but in many countries there was still little confidence on the part of the public in the ability of citizens or courts to challenge the government through the legal process.[56]

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[50] Ludwikowski, 'Rights in the New Constitutions' (n 31); Ludwikowski,'Constitutionalization of Human Rights' (n 31).

[51] Zdeněk Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' (2004) 52 AMJCL 531.

[52] Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff Publishers 2011). Zdeněk Kühn has extensive experience in this area as: a Professor at Charles University Law School, Prague; a Justice of the Supreme Administrative Court of the Czech Republic (ibid xii-xiv); and ad hoc judge of the European Court of Human Rights (see *Hlaváček v Czech Republic* App no 11163/06 (ECtHR, 25 March 2008) (decision)).

[53] The World Bank and other donor organisations funded judicial reform projects in several developing and transition economies, in acknowledgement of the importance of sound judicial systems to good governance and economic growth. Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' (1999) 14 World Bank Research Observer 117 (describing research on judicial reform in relation to economic performance); Anderson, Bernstein and Gray (n 34).

[54] The challenge in the early 1990s 'was both enormous and complex', with many of the countries facing 'tremendous macroeconomic instability, with high inflation, a reduction in traditional sources of fiscal revenue, a drying up of traditional trade links, and illiquid enterprises facing major price shifts and a loss of markets.' Anderson, Bernstein and Gray (n 34) 11.

[55] ibid (n 18) 11-13.

[56] ibid 27.

Also relevant is the comparative research of constitutional and human rights provisions in Eastern Europe that describe the transitional difficulties in the legal systems of post-Soviet countries,[57] an area of particular interest in this research. For well over a decade, the Soviet legacy has been identified as having survived the transition from a centralised to a market economy, acting as an influence in the new legal systems in Eastern Europe.[58] As will be discussed in later chapters, in the context of the right to a fair trial, this theme still runs as a strong undercurrent in Lithuania.[59]

The literature as it relates to the impact of nearly 50 years of Soviet occupation specific to Lithuania's efforts to reform its legal system is sparse, with some assertions appearing not well-founded. For example, one author suggested that Lithuania has successfully integrated democratic principles based upon a review of two decisions of Lithuania's Constitutional Court over a decade earlier, finding 'judicial legitimacy and independence'.[60] Another author placed Lithuania in a 'high compliance group' of

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[57] Ludwikowski, 'Rights in the New Constitutions' (n 31); Ludwikowski, 'Constitutionalization of Human Rights') (n 31); Juan E Méndez, 'In Defense of Transitional Justice', in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997).

[58] As in Ludwikowski, 'Rights in the New Constitutions' (n 31) 75 (noting the difficult task of the drafters of the new constitutions in implementing Western ideals while trying to satisfy a people strongly influenced by socialist upbringing); Bárd (n 30) (the impact of socialist distributions of competence, such as of the courts and defence, on criminal procedure); and Meyer (n 30) (in the legal profession).

[59] Text to nn 177-84 in ch 2 (not understanding Western principles), nn 465-91 in ch 3 (effect of Soviet legacy on legal education); Rauličkytė (n 44) 182 (low public trust in the courts a Soviet era legacy) 187 (from when law and the courts served the interests of the Communist Party).

[60] Daniel Ryan Koslosky, 'Toward an Interpretive Model of Judicial Independence: a Case Study of Eastern Europe' (2009) 31 U Pa J Intl L 203, 233-40. After reviewing the two opinions, the 1994 ruling on legal confidentiality and the 1998 ruling on the Death Penalty, Koslosky concludes '[t]hese two cases, read in combination, imply that judicial legitimacy and independence was asserted by the use of international legal references independent of the international political context and means of review', thus not considering (or aware of) the context: the dichotomy in legal methodology between the new Constitutional Court with its limited accessibility and jurisdiction and all other courts in the country that made few changes after independence; text to nn 154-70 in ch 2 (courts maintain narrow, formalistic reasoning); Constitutional Court, 18 November 1994, Ruling on Compliance of Article 58 of the Code of Criminal Procedure with the Constitution [title restated], *Official Gazette* 1994, No 91-1789 (25 November 1994); Constitutional Court, 9 December 1998, Ruling on Compliance of the Death Penalty with the Constitution [title restated], *Official Gazette* 1998 No 109-3004 (11 December 1998); Code of Criminal Procedure, 14 March 2002, No IX-785, amended 21 June 2012, No IX-785, *Official Gazette* 2012, No 78-4030 (4 July 2012) (in Lithuanian).

Central and Eastern European states because it has not been investigated by the Parliamentary Assembly; had met the accession commitments of the Council of Europe; and appeared to be actively and successfully promoting democratic practices.[61] From benchmarks such as these, one might conclude that Lithuania's legal system is functioning well and there is no need of further legal reform. As considered in the chapters that follow, recent adverse judgments in the European Court of Human Rights, academic articles, reporting by non-governmental organisations (NGOs), and media accounts suggest otherwise.

The functioning of the legal system in Lithuania is not well-known outside of Lithuania due in part to the language barrier. The vast majority of the primary and secondary legal sources about Lithuania's domestic courts are in Lithuanian. Of the primary national law, only the decisions of Lithuania's Constitutional Court[62] are routinely published in English, the language most often used for official translations from Lithuanian. This leaves the decisions of the courts of general and other special jurisdiction routinely unavailable to the non-Lithuanian speaker. Statutes are sometimes provided in English, but when they are, they generally do not include the effective date, so it is not possible to tell from the face of the document whether it is current.[63]

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[61] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 119-20.

[62] As described further on, the Constitutional Court has special jurisdiction separate from the national court system; it is not a court of cassation. Text to nn 329-34 in ch 2. Its decisions, while significant, do not reflect the application of every day law in the national courts.

[63] The only way for an English-only speaker to be certain that an English translation is current is to determine whether there is a more recent amendment in Lithuanian. This comparison is included in the citations to the legislation included in this research by using the document search function at the Seimas website using the official date of enactment and number of the act. For example, a search for the Law on Courts with its first enactment date of 31 May 1994 as number I-480, will display links to the law with any subsequent revisions provided the search is not limited to English; translations are indicated with their own links; Law on Courts, 31 May 1994, No I-480, amended 17 April 2012, No XI-1972, *Official*

Secondary legal sources from Lithuania are occasionally available in English, but are generally not comprehensive. Most of the Lithuanian court and government websites have an English language version, but provide significantly less information than those pages provided in the Lithuanian language. Except for a few NGOs,[64] publications written by Lithuanians about the Lithuanian legal system, whether translated or not, rarely offer insight into the functioning of the system. Typically, the author has chosen a narrow aspect of the law, providing historical background and describing new provisions, but without critical analysis or explanation as to how the law in practice affects those who access the system. This pattern is consistent with the critique of the legal education system described in Chapters 2 and 3.[65] Lithuanian authors rely on sources that are nearly always Lithuanian – laws and texts by Lithuanian academics and judges. In more recent years articles more frequently reference cases in the European Court of Human Rights and law of the European Union,[66] but non-Lithuanian references are still absent where they might be expected,[67] and may instead include Soviet legal theory.[68] The quality of work varies, particularly

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Gazette 2012, No 51-2527 (3 May 2012) (in Lithuanian) (most recent English translation 6 November 2008, No X-1772).

[64] Especially the work of two Vilnius-based organizations, the Human Rights Monitoring Institute and Transparency International Lithuania.

[65] Text to nn 177-84 in ch 2 (lack of Western understanding, solopsistic thinking); text to nn 465-91 in ch 3 (Soviet legacy in legal education and methodology).

[66] Laura Gumuliauskienė and Vigintas Višinskis, 'Procedural Actions Taken by Bailiffs Electronically: Opportunities and Problems' (in Lithuanian with English abstract) ('*Antstolio Procesinių Veiksmų Atlikimas Elektroniniu Būdu: Galimybės Ir Problemos*') (2012) 19 Jurisprudencija 507 (referencing both cases in the European Court and European Union law).

[67] Asta Jakutytė-Sungailienė, 'System of Objects of Civil Rights: Problem of Concepts' (2012) 19 Jurisprudencija 143-157 (no discussion of the Convention on Human Rights, European Court or EU, consistent with the observations of the legal education system in Lithuania described in the text to nn 182-84 in ch 2).

[68] Dainius Raižys and Darius Urbonas, 'Legal Issues Concerning Judicial Control of the Legality of Normative Administrative Acts' (2009) 2 Jurisprudencija 167, 175 fn 31(defining compulsory features of '[a]ny dispute concerning a law' based upon Soviet civil procedure from 40 years earlier, in 1966).

in the English translations, which can be awkward, vague, or difficult to follow.[69]

In this submission, all materials referenced from Lithuania are in English unless otherwise indicated. Where the English translation of Lithuanian legislation is outdated, the date of the most recent English translation, if any, is also provided. Following common practise, the decisions of the Constitutional Court of the Republic of Lithuania are referenced according to the date of the decision followed a descriptive topic rather than the verbatim decision title, which can be quite lengthy.

For further insight into the functioning of Lithuania's legal system and the extent to which it is influenced by its relative isolation and cultural history, this assessment draws upon work in management theory and social sciences on implicit knowledge within organisations,[70] and how systems are monitored with data collection and analysis.[71] Reference is also made to studies considering key components of Article 6 and the right to a fair trial, such as the independence of the judiciary,[72] the importance of an independent prosecution service,[73] and indicators for successful implementation of the Convention at the national level.[74]

To better understand the legal culture in Lithuania, this research includes observations from fourteen interviews and related correspondence with the interview

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[69] By way of example is this sentence: 'Human rights (rule of Law) are the criterion which doesn't allow to society to stop longer at the specific state system, to absolutize and dogmatize it because it (the criterion) doesn't allow measures rise over their aim.' Alfonsas Vaišvila, 'Law-Governed State and It's Problems of the Formation in Lithuania' (Summary in English) in (*Teisines Valstbyes Koncepcija Lietuvoje*) [*The Lithuanian Conception of the State*] (in Lithuanian) (Littimo, Vilnius 2000) 615.

[70] Text to nn 519-21 in ch 3.

[71] Text to nn 269-75 in ch 3.

[72] Text to nn 261-63 in ch 3

[73] Text to nn 1051-62 (Carvalho and Leitão study), nn 1063-73 (van Aaken, Feld and Voigt studies on prosecutors) in ch 4.

[74] Text to nn 1204-13 in ch 5.

participants conducted by the author between 2008 and 2012.[75] The participants were chosen for their information about human rights violations and remedies in Lithuania. The purpose for the interviews was to learn from the participants as informants, rather than an exercise in collecting and tabulating responses to standardised questions then formulating conclusions. As a technique used in qualitative research, this type of interview is considered 'ethnographic'.[76] Collectively, the participants provided critical context for this research: to understand the notions of legal principles and implicit knowledge that provide the context in which Lithuania's legal system can be understood, especially given its historical legal culture.[77] This is the reason that the contents of each interview are not reported here. They are not intended as a comprehensive study of the views of all legal professionals or human rights workers in Lithuania. A study of that scope is not the intent of this research, although such an undertaking would aid considerably in understanding this topic.

The informants selected for interview were chosen from among Lithuania's academics, legal professionals and human rights advocates to confirm whether regional descriptions in the literature apply in Lithuania, explore areas that may not have been addressed by the literature, and to understand system processes. Except for the two participants who were interviewed in their official capacities,[78] all were selected for

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[75] Before any interviews could be conducted, approval was applied for and received from the University of Leicester Law Faculty Research Ethics Committee. Approval was contingent upon each participant signing an approved participant information and informed consent form and assuring the Committee of methods that would be taken to protect the anonymity of any participant requesting it.

[76] James P Spradley, *The Ethnographic Interview* (Holt, Rinehart and Winston 1979).

[77] ibid.

[78] Except for two participants interviewed in their official capacity, Elvyra Baltutytė, Agent of the Government of the Republic of Lithuania to the European Court of Human Rights (Vilnius, 13 April 2011) (Baltutytė interview), and Egidijus Kuris, former Justice and President of the Constitutional Court of the Republic of Lithuania (Vilnius, 3 January 2009) (Kuris interview).

their multi-cultural legal experience, either having worked both in the legal system in Soviet Lithuania and in a free Lithuania, or in Lithuania's legal system and that of an older democracy. In addition to context, the informants provided valuable detail and illustrative examples for this research. Due to the sensitive nature of some information provided, several participants requested anonymity. These sources are variously identified throughout this report with respect to their background.[79] Further descriptive profiles are not included because to do so would disclose their identity.

In the chapters that follow, all of these sources provide a more functional assessment of Lithuania's legal system and the prospects for the right to a fair trial than has previously been available. The legal theories and methods of governance that influenced the policy decisions in the region at the time Lithuania regained its independence are reviewed in Chapter 2. These include Soviet legal theories and methods of learning that influenced those who sought to guide their country to democracy and a free market economy. This chapter introduces the influence of unethical behaviour and corruption, touched upon in later chapters relating to the importance of independent judges and prosecution service.[80]

Following this background, the chapters that follow examine Article 6 protections in Lithuania with an emphasis on judicial independence, the rights of the parties, and the level of Convention implementation. Chapter 3 addresses judicial independence, beginning with an overview of Article 6 requirements, then the Lithuanian court system, noting court decisions and legislation that improved judicial independence and the court system after 1991. Also covered are the jurisprudence of

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[79] Those requesting anonymity are listed at the conclusion of the Bibliography at 274.

[80] Text to n 255 in ch 3 (judicial independence a factor in limiting corruption); text to nn 1009-14 in ch 4 (independence of the prosecution service deterring corruption).

the European Court of Human Rights and Lithuania relating to judicial independence and approaches in use by the Council of Europe and others to enhance judicial independence, such as data collection and reporting, judicial councils, and methods used to measure and assess judicial independence.

Chapter 4 considers the rights of the parties in litigation, beginning with Article 6 requirements for access to a court, the ability of Lithuanians to present their claims to a court and to have a fair trial when they are involved in court proceedings. The training and roles of attorneys and prosecutors are described, as are some of the factual circumstances in Lithuanian courts reflected in recent adverse judgments from the European Court of Human Rights, academic articles, NGO reporting, and media accounts.

Chapter 5 considers implementation of the Convention generally, beginning with the supervision of the execution of judgments by the Committee of Minsters and considers the increasing efforts to address systemic deficiencies identified from cases presented to the Court. Also addressed is the implementation of the Convention in Lithuania, both in response to adverse judgments in the Court of Human Rights, and in the general reception of the Convention at the domestic level.

Chapter 6 concludes with an overview of the main findings and recommendations from this review. Although Lithuania has substantially complied with adverse rulings in the European Court through the year 2012, it has shown difficulty in providing general measures in politically sensitive high-profile cases. Lithuania's positive obligation to provide Article 6 protections is in need of substantial improvement. In view of the many troublesome areas, recommendations are limited to the most basic: strengthening ethical standards and accountability within the legal

profession; meaningful civic involvement; and new approaches to solving systemic problems that include data collection and analysis.

Chapter 2. Commitment and Barriers to Securing Human Rights

This Chapter provides an account of the legal theories and methods of governance that influenced policy decisions as Lithuania moved to a democratic form of government, and the lingering corrosive effects of corruption and lack of ethical behaviour, particularly in the legal profession.

I. Disillusionment and Distrust

At the time Lithuania renewed its independence on 11 March 1990, its legal system was far removed from European standards of human rights. Not surprisingly, incorporating human rights into domestic law became an important element of legal reform in Lithuania.[81] The new leaders acted to move Lithuania toward a state based upon the rule of law by incorporating regional and international standards, and has since reformed its legal institutions in several regards.[82] A new Constitution was adopted by referendum on 25 October 1992.[83] The Constitution also created the legal basis for incorporating international standards of human rights into national law,[84] after which Lithuania ratified the Convention on Human Rights and Fundamental Freedoms

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[81] Vilenas Vadapalas, 'Lithuania' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (OUP 2001) 503.

[82] Independence from the Soviet Union was declared 11 March 1990; Lithuania was recognised by the Soviet Union 6 September 1991. United Nations, 'Republic of Lithuania: Public Administration Country Profile' (UN Dept Economic and Social Affairs, doc 023217, May 2004). For a general description of legal reform efforts in the first decade after Lithuania's independence, see 'Judicial Independence in Lithuania' (n 46) 270-72; 'Judicial Capacity in Lithuania' (n 46) 140-41.

[83] Constitution of Lithuania (n 14).

[84] Lithuania's Constitution follows the monist approach to international law, incorporating ratified international treaties directly into the domestic legal order. Constitution of Lithuania (n 14) art 138 ('International treaties ratified by the Seimas ... shall be a constituent part of the legal system of the Republic of Lithuania'); Tadas Klimas and Jurate Vaiciukaite, 'Incorporation of International Agreements into the Law of Lithuania' (2003) 4 Fla Coastal L J 195; Vadapalas (n 81) 504. Between the years 1990 and 1992 the Provisional Basic Law functioned as an interim constitution, with several amendments until the 1992 adoption of the Constitution. Provisional Basic Law, 11 March 1990, No I-14, amended 7 July 1992, No 1-2719, *Official Gazette* 1992, No 22-634 (7 July 1992) (in Lithuanian) (most recent English translation 11 March 1990, No I-14); Kristina Pakalnytė, 'The Lithuanian Constitutional Court: Its Nature, Structure, and Position in the Lithuanian Legal Order' (2005) 2 Intl J Baltic L 30.

in 1993[85] many of its protocols and other international treaties.[86]

Despite these early changes in Lithuania and similar changes in the other post-Soviet nations, by 1993 disillusionment among the population in the region had taken hold to the point it became the subject of a seminar organised by the Secretariat General of the Council of Europe.[87] The changes in the region had been so sudden that societies and political parties were not prepared. Emerging political forces promised immediate and profound changes for a better life without understanding the magnitude of the ideological, political, and economical problems they faced.[88] This is not surprising given the general lack of civic discourse during Soviet occupation, a time when the public was completely disengaged from the functioning of government. For them, government was a mystical process – statutes were written by the ministry and sent to parliament where support was automatic.[89] As a result, instead of producing immediate improvement, new social and political contradictions emerged that had been earlier suppressed by the authoritarian regimes.[90]

These new democracies experienced a total and fearful fragmentation of political forces, leading to a large number of political parties and politicians who

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[85] Lithuania signed the Convention on 14 May 1993, the same day it became a party to the Statute of the Council of Europe (ETS No 1, London, 5 May 1949), but did not ratify and become a party to the Convention until after a two-year transition period, on 20 June 1995. Treaty Office (n 1) <http:// conventions.coe.int> accessed 30 August 2012; Vadapalas (n 81) 503.

[86] The Ministry of Foreign Affairs maintains a collection of the treaties to which Lithuania is a signatory <http://www.urm.lt/index.php?2572939637> accessed 30 August 2012 (select English version at top).

[87] The related papers are published in *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions in Europe: Proceedings, Seminar Organised by the Secretariat General of the Council of Europe in Co-Operation with the Human Rights Centre of the University of Essex, Colchester (United Kingdom) 8-10 July 1993* (Council of Europe Press 1994).

[88] Viktor Mavi, 'The Emerging Democracies in Eastern Europe: Problems and Challenges' in Council of Europe, *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions in Europe* (Council of Europe Press 1994) 68.

[89] Tadas Klimas, 'The Lithuanian Rule of Law', address at the *14th World Lithuanian Symposium on Arts and Science* (29 November 2008).

[90] Mavi (n 88) 68.

entered the public stage with no clear or realistic programme and lacking a connection with a wide strata of society.[91] In the process, civil structures also suffered, with the relatively strong and independent-minded NGOs active before the transition, weakened or ceasing to exist, with many of their leaders and members becoming government officials or politicians.[92] Newly emerging NGOs were viewed with suspicion by the new and fragile political forces, who considered them potential challengers to their role and legitimacy. Without an engaged civil society or an effective NGO network, the new democracies became vulnerable without the participation of a much wider segment of citizens in politics.[93]

The lack of political culture and professionalism considerably strengthened the mistrust and disappointment among the public. Even the more solid and influential political parties showed a lack of 'tolerance, respect for the views of the minority, political ecumenism [and] mutual understanding',[94] which may also explain how a large segment of the population became indifferent toward politics and issues of democracy. The causes of the problems were not simply the need for democratic institutions, because most of the countries introduced new democratic institutions. Instead, the problems were with the culture and mentality of those who participated in the new structures, who remained closely related to the past.[95]

This relationship to the past was evident in the legal profession as it struggled to establish the newly privatised practice of law.[96] There the most pervasive problem was

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[91] ibid.

[92] ibid 69.

[93] ibid.

[94] ibid 70.

[95] ibid 69-70; text to nn 460-615 in ch 3 (residual Soviet influence on the judiciary).

[96] Meyer (n 30) 1019.

the lack of ethical behaviour, due in part to the corruption 'that typically existed in every level and sector of the legal profession'[97] and the 'extraordinary lack of knowledge concerning what constitutes unethical behavior'.[98]

The low regard with which the general population of Lithuania held the judiciary even a decade after independence was attributed to the Soviet past,[99] with surveys of those with court experience showing no statistical difference from those with no court experience:[100]

> Attitudes towards the courts appear to be a residual of the Soviet past when law and the courts served the interests of the Communist Party. Society understood the legal system to be an instrument for maintaining an undemocratic state. No government programs have been directed at overcoming this legacy. Neither the Ministry of Justice nor the courts have engaged in sustained efforts to inform the public about the results of the legal reforms thus far undertaken. Nor has any effort been made to explain the relationship between those reforms and the strengthening of guarantees of citizens' rights.[101]

More recently, public opinion polling indicates that Lithuanians' distrust in their judiciary and law enforcement is on the increase.[102] Among the civil and political rights polled for these years, the right to fair trial was considered to be the most violated.[103] Of the institutions believed to most frequently violate human rights, both the judiciary

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[97] ibid 1058.

[98] Meyer (n 30) 1058; text to nn 980-1008 in ch 4 (describing ethical difficulties in the legal profession).

[99] Rauličkytė (n 44) 182.

[100] ibid 187.

[101] ibid

[102] Henrikas Mickevičius and others (eds), *Human Rights in Lithuania, 2009-2010 Overview* (Human Rights Monitoring Institute, Vilnius 2011) (HRMI 2011) 40 (reporting results of public opinion polls conducted in 2006, 2008 and 2010: on a scale of 1 to 10, with 1 the lowest, the judiciary in 2006 polled at 5.94, in 2008 at 5.99, and in 2010 at 6.61; the Office of the Prosecutor in 2006 polled at 5.5, in 2008 at 5.94, and in 2010 at 6.39).

[103] ibid 39-41.

and the Office of the Prosecutor have steadily increased in the level of public distrust over the years 2006 to 2010.[104] This distrust is openly recognised by Government officials.[105]

A good deal of this distrust has been attributed to the superficial and incomplete transition of Lithuania's judicial institutions to those of a democracy that began about twenty years ago. Observers continue to note the impact of the superficial transition on the contemporary functions of government. As some recognised early in the transition process, these countries established systems with the elements familiar to Western judicial systems, but due to their legal cultural history, they did so with fundamentally different expectations.[106] The participants in the legal system were essentially the same – the courts, judges, lawyers and prosecutors – but their roles, capacities, and expectations were profoundly and fundamentally different. These differences resulted from the different purpose of the legal system under Soviet communism, which was to enforce the interests of the working class as represented by the Communist party, not the courts and judges who were subordinate to Communist party leaders:

> There was no idea of limited government, checks and balances, or individual or corporate rights vis-á-vis the state. Laws in the commercial sphere dealt primarily with relationships between administrative agencies and the regulation of production by state-owned entities to meet centrally coordinated output targets. Most commercial disputes were handled through state-sponsored arbitration, while formal courts and judges handled criminal and civil matters (such as family law and minor personal property issues). The position of judge was not particularly

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[104] HRMI 2011 (n 102) 40.

[105] Gary Peach, 'Justice Elusive in Baltic States 20 Years On' *Associated Press* (17 December 2011) <http://www.guardian.co.uk/world/feedarticle/10000029> accessed 30 August 2012 (quoting Lithuania's Minister of Justice remarking, 'I must say that Lithuania is among those countries where trust in the judiciary ... is lowest in the EU').

[106] Text to nn 127-75 (failure of early reform efforts).

> prestigious and was often staffed on a part-time basis. Courthouses were drab and unwelcoming, designed for an inquisitorial system of criminal prosecution where the defendant was almost always found guilty.[107]

Whether caused by a continued cultural distrust of the system from Soviet times, or based upon actual experience created by the self-fulfilling nature of the cynicism, Lithuanians show great frustration with their court system. The Human Rights Monitoring Institute in Lithuania monitors and regularly reports on human rights issues in the country, undertakes its own research, and provides programmes and events to educate the public on human rights issues. It has consistently reported that among human rights, the right to a fair trial was considered to be the most frequently violated civil right.[108]

That low regard was still evident fifteen years after independence, when most Lithuanians remained distrustful of their own state institutions, were afraid to speak their minds, and sensed that injustice was widespread.[109] Nearly two decades after independence, in 2008, polling data showed such little trust in the judicial system that a significant number of Lithuanians said they did not use it even when they believed they had a claim, and the vast majority of those with a claim said they did not pursue it because they believed they would not achieve effective relief.[110] Of special concern is

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[107] James H Anderson and Cheryl W Gray 'Transforming Judicial Systems in Europe and Central Asia' in François Bourguignon and Boris Pleskovic (eds), *Beyond Transition: Annual World Bank Conference on Economic Development* (World Bank 2007) 329.

[108] HRMI 2011 (n 102) 39; Henrikas Mickevičius and others (eds), *Human Rights in Lithuania, 2006 Overview* (Human Rights Monitoring Institute, Vilnius 2007) (HRMI 2007) 23 (describing earlier reports).

[109] HRMI 2007 (n 108) 5 (reporting 2006 public opinion polling data).

[110] In a public opinion survey conducted at the end of 2008, 40 per cent of respondents believed their rights had been infringed and did not make a complaint or take any legal action; nearly 80 per cent of those gave as their reason that they did not believe they could obtain effective relief. Henrikas Mickevičius (ed), *Human Rights in Lithuania, 2007-2008 Overview* (Human Rights Monitoring Institute, Vilnius 2009) (HRMI 2009) 6.

that of the 40 per cent of those who did seek relief did not go to court, the prosecutor's office, the police, the parliament, or even the media, instead going 'elsewhere'.[111] This, of course, implies any number of possible self-help measures, some of which may involve conduct inconsistent with a society seeking to strengthen the rule of law.[112]

In a separate study of Lithuanian emigres conducted in Ireland, England, Spain and Norway by sociologists at the Vytautas Magnus University in Lithuania, the reason given by most Lithuanian emigrants for not returning to Lithuania is not because of better economic opportunities in other countries, but rather, due to conditions consistent with the provision of human rights and political climate: better security, more freedom, and more respectful relations among people.[113]

Social scientists have documented a strong correlation between public trust and the effectiveness of government.[114] Critics within Lithuania believe the lack of public trust in the courts they still find today is a legacy of the Soviet era that must be addressed, especially because it is not new.[115] This social environment, typical of the post-Soviet states, has been characterised some by scholars as the 'negative rule of law

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[111] ibid.

[112] ibid.

[113] ibid 6.

[114] For example, Peri K Blind, 'Building Trust in Government in the Twenty-First Century: Review of Literature and Emerging Issues' (2007) United Nations Department of Economic and Social Affairs (UNDESA) 7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007, Vienna, Austria <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025062.pdf> accessed 30 August 2012; Kenneth Newton, 'Democratic Pathologies and Democratic Hypochondria' in Council of Europe, *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions in Europe* (Council of Europe, 1994) 27; Kenneth Newton and Pippa Norris, 'Confidence in Public Institutions: Faith, Culture or Performance?' in Susan J Pharr and Robert D Putnam (eds), *Disaffected Democracies: What's Troubling the Trilateral Countries?* (Princeton U Press 2000) (analysing the most complete comparative data available concluding in part that social trust can help build effective social and political institutions, assisting governments in effective performance, thereby encouraging confidence in civic institutions).

[115] Rauličkytė (n 44) 182-92.

myth'[116] in which the illegitimacy of the law and legal institutions is presumed: laws are presumed to benefit only the elite and legal institutions cannot function impartially. As described in 2003:

> Everywhere in the region 'law' has become one of the words most frequently used by politicians and discussed in the media. But in spite of all of this, the positive myth, stipulating that the rule of law generally prevails in society, remains stubbornly absent, while its place continues to be occupied by the negative myth that whatever happens has very little to do with respect for law.[117]

From this cynical point of view, citizens behave in constant expectation of legal failure. They assume that because everyone else ignores the law, whether 'by bending the rules, going through the backdoor, paying bribes, or misusing their public position for personal gain', they should, too.[118] In this environment, no matter the decision or motivation, all official actions are presumed to be the will of the elite. This view is self-reinforcing, with significant consequences on how people behave, including judges.[119]

Corruption is identified by international organisations as having a destructive influence on human rights.[120] It can result in a direct violation of the right to a fair trial

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[116] Brent T White, 'Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies' (2010) 43 Cornell Intl QJ 307-08 fn 5 (noting literature on rampant corruption in Central Asia and Eastern Europe), 308-09 (noting theory that failure of institutional reform results from 'a legacy of disrespect for the law inherited from the Soviet Union' manifests in behaviour taken in 'the expectation of legal failure', including 'paying bribes and using back-door connections to circumvent the law and legal institutions, further reifying the negative view of law').

[117] Marina Kurkchiyan, 'The Illegitimacy of Law on Post-Soviet States' in Denis J Galligan and Marina Kurkchiyan (eds), *Law and Informal Practices: The Post-Communist Experience* (OUP 2003) 33.

[118] White (n 116) 333. The negative rule of law myth contrasts with the 'positive rule of law myth' predominating in Anglo-American and northern European societies, also self-reinforcing, in which everyone assumes that law is good, just, and represents the will of the people rather than that of the elite. ibid.

[119] ibid 335-36; Kurkchiyan (n 117) 32-33.

[120] Magdalena Sepúlveda Carmona (ed), *Corruption and Human Rights: Making the Connection*, (International Council on Human Rights, Switzerland 2009) 27.

when a judge takes a bribe, thereby affecting the independence and impartiality of that judge.[121] It can indirectly interfere with the right to a fair trial when financial resources are diverted and thereby denying needed investment in courts and judges.[122] Diverted funds can impair the state from satisfying its positive obligations under the Convention to maintain a system of courts that will ensure fair trials as required in Article 6.[123]

II. Incomplete Transplantation of Western Legal Concepts

As noted earlier, in Lithuania human rights suffered during Soviet occupation.[124] This is consistent with the legality of the time – when sources and preconditions for individual rights were not found in the law, but in social obligations.[125] Indeed, this was a source of pride in socialist theory exactly because it was not based on the concept of individual rights'.[126]

Following the fall of the Soviet Union, much of the early focus was on moving the new societies toward market economies. For economists, the orthodoxy of the 1980s was that the best way to achieve economic growth was to ensure that economic policies were in place on issues such as budgets and exchange rates. That focus gave way to the need for policymaking, especially as to the rule of law, with the realisation that economic policies without the rule of law could not function:[127]

> This conclusion was strengthened by events in the former Soviet empire. Many post-communist countries got their

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[121] ibid.

[122] ibid 26.

[123] ibid.

[124] Text to n 45 in ch 1; Balkevičienė (n 44) 4, 10.

[125] András Sajó, 'New Legalism in East and Central Europe: Law as an Instrument of Social Transformation' (1990) 17 JL & S 329, 330-31. András Sajó is a Professor at Central European University and judge at the European Court of Human Rights (see *MSS v Belgium and Greece* (n 6)).

[126] ibid 331.

[127] 'Order in the Jungle' *Economist* (13 March 2008) 83.

> policies roughly right fairly quickly. But it soon became clear this was not enough. 'I was a traditional trade and labour economist until 1992,' says Daniel Kaufmann, now head of the World Bank Institute's Global Governance group. 'When I went to Ukraine, my outlook changed. Problems with governance and the rule of law were undermining all our efforts.'[128]

This realisation, together with the desirability of the rule of law for its own sake, led governments and aid agencies to invest money on rule-of-law reforms, such as training judges, reforming prisons and establishing prosecutors' offices.[129]

There was scepticism at the time of this effort, founded in the belief that there was no desire to pay the social cost for a market-oriented transformation or to take the rule of law seriously.[130] This reluctance was based in part on a mental distortion in the minds and actions of legal actors'.[131] The judiciary functioned as bureaucrats who were expected to promote the centrally-determined public interest.[132] Despite the courts being declared independent, the success of judicial careers was bureaucratically determined based on politicized loyalty.[133] Similarly, lawyers played a subservient role in exchange for being among the limited few admitted to the practise of law:[134]

> Legal training, as was true of university education in general, was never independent, and was subject to Communist Party control. The socialization of the lawyers made them vulnerable to external, non-legal values and interests, and they conceived their role as being directly related to general social concerns. Legal texts offered little possibility for independent action; lawyers became

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[128] ibid.

[129] ibid 84; Alkon (48) 336 (describing the training initiatives that followed 'the mania of legislative drafting' in post-Soviet democratization programmes).

[130] Sajó (n 125) 329.

[131] ibid 332.

[132] ibid; text to nn 519-525 (as to the Lithuanian judiciary).

[133] Sajó (n 125) 329.

[134] ibid.

> increasingly dependent on their superiors and political forces.[135]

The distortion was also founded in a system of laws created to achieve targets set in part by strict commands but also in part by prohibitions and hidden constraints.[136] Privileges were promoted by *not* regulating relations, with a 'wide gap left to administrative discretion ... filled by secret regulations granting privileges' to the state and a select few.[137] For them, the law was a 'handy formal façade' that kept most of the actors in a state of dependence.[138] This culture of governance, controlled by hidden constraints, has fostered continued reliance on informal relationships within Lithuania's institutions.[139]

As it developed, the promise of the rule of law initiatives to move countries 'past the first, relatively easy phase of political and economic liberalization to a deeper level of reform' proved difficult to fulfill.[140] The initiatives between 1991 and 1995 were criticised as failures that had not gone far enough.[141] Additional fundamental change was called for, but considered unlikely, due to the more likely motivation of the early reformers – to gain the support of the West as a simple negation of the former system rather than the result of a 'shared community of values'.[142]

Reform efforts were only 'secondary to economic reform ... relevant largely

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[135] ibid.

[136] ibid.

[137] ibid.

[138] ibid 330-32.

[139] Text to nn 197-202 (continued reliance on informal relationships in Lithuania).

[140] 'Rule of Law Revival' (n 30) 95-96.

[141] ibid; Shelley (n 36).

[142] NJ Brennan (n 30) 50; Sajó (n 125) 329; David Seymour, 'The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks' (1993) 8 Conn J Intl L 243, 245.

only as a consequence of Western demands'.[143] The reforms in the Central and Eastern European states after the end of Soviet communism were based principally on the Western European experience, largely by the importation of Western law, including the 'very definition of liberal democracy' and 'the main civil and political rights'.[144] As a result, and consistent with the 1993 discussions on disillusionment in the region,[145] these early reform efforts did not adequately address the more fundamental problems that would fully transform conceptions of law and justice – leaders who refused to be ruled by the law. The problems, as described in 1998, remain relevant in today's Lithuania:

> The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.[146]

Rule-of-law aid providers were criticised for their narrow outlook on the rule of law, for modelling their concepts of the rule of law on their own experience and failing to understand the essence of the rule of law.[147] Their approach was mechanistic, tending to translate the rule of law 'into an institutional checklist, with primary emphasis on the judiciary'.[148] The result was a general failure to comprehend the adequacy of those

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[143] NJ Brennan (n 30) 50.

[144] Catherine Dupre, 'After Reforms: Human Rights Protection in Post-Communist States' (2008) EHRLR 627; Wojciech Sadurski, 'Postcommunist Charters of Rights in Europe and the US Bill of Rights' (2002) L & Contemp Probs 223, 224-26 (Western European constitutions as primary inspiration for post-communist states).

[145] Text to nn 87-93.

[146] 'Rule of Law Revival' (n 30) 96.

[147] Thomas Carothers, 'Promoting the Rule of Law Abroad: The Problem of Knowledge' (2003) Carnegie Endowment Rule of Law Series, Democracy and Rule of Law Project, No 34, 8 <http://www.carnegieendowment.org/files/wp34.pdf> accessed 30 August 2012.

[148] ibid 8.

laws or address the political and human obstacles due to their 'disturbingly thin base of knowledge'.[149] Lacking was an understanding of the connection between the apparent failures in a legal system and potential remedies.[150] As are result, those agencies promoting rule of law programs were unable to oversee the systemic improvements needed.[151]

This inadequate knowledge base was attributed to the traditional methodology of aid organisations and academics: aid organizations tend to look forward to the next project rather than back to the lessons of experience, and scholars are not attracted to applied policy research.[152] The observation in 2003 that little applied policy research had focused on the casual connections between rule-of-law initiatives and democratisation[153] remains true today, as was also observed in conducting this research.

One result of the attempt to transplant Western law directly into Soviet society without addressing the fundamental understanding of the participants is the difference in how the newly implanted Western concepts are applied. This is evident in the dichotomy that developed between the constitutional courts transplanted along with other Western recent concepts and those courts that continue from Soviet times. Constitutional courts, including that in Lithuania, modelled after the courts in Germany and France, are a completely new type of court for the region.[154] Lithuania's Constitutional Court was established by its 1992 Constitution, based upon the Austrian centralized model, in which the Constitutional Court is not incorporated into the general

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[149] ibid 113.

[150] ibid 12-13.

[151] ibid 113.

[152] ibid.

[153] ibid.

[154] Dupre (n 144) 627.

court system.[155]

The first difficulties arose when the concept of constitutional supremacy – establishing the constitution as the highest authority in the legal system – was applied to the existing political culture.[156] The idea of constitutional supremacy was not a straightforward idea for politicians to understand.[157] The relationships of the new constitutional courts to the existing courts were also difficult, particularly because the existing courts had essentially remained unchanged in their competencies and staff, including the judges.[158] As a result, the rulings of the constitutional courts, which began to develop a liberal concept of human rights, were not incorporated in the ordinary courts, impeding the successful transformation to a human rights culture.[159]

This phenomenon is observable in Lithuania, where the lower courts maintain a 'narrow formal-positivistic understanding of the concept of justice'.[160] This can be seen in the intention to introduce the common law doctrine of stare decisis – following principles established in previous decisions – into Lithuania's civil law system.[161] Despite a 2006 ruling of the Constitutional Court and 2008 amendments to the Law on Courts incorporating the doctrine into domestic law,[162] the concept has not taken root in

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[155] Rauličkytė (n 44) 182-92; Constitution of Lithuania (n 14).

[156] Dupre (n 144) 627; Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64 MLR 1.

[157] Dupre (n 144) 627.

[158] ibid 627-28.

[159] ibid.

[160] Vaidotas A Vaičaitis, 'Transitional Democracy and Judicial Review: Lithuanian Case', 2007 Conference Paper, VII World Congress of the International Association of Constitutional Law, Athens, Greece, 11-15 June 2007, 3-4 <http://www.enelsyn.gr/papers/w5/Paper%20by%20Prof%20Vaidotas%20A.%20Vaicaitis.pdf> accessed 30 August 2012.

[161] Vaičaitis (n 160) 4; Stefan Messmann and Tibor Tajti (eds), *The Case Law of Central and Eastern Europe: Enforcement of Contracts* (European University Press, Germany 2009) 15 fn 5.

[162] Dangutė Ambrasienė and Solveiga Cirtautienė, 'The Role of Judicial Precedent in the Court Practice of Lithuania' (2009) 2 Jurisprudencija 61, 67 (describing codification of stare decisis in 2008 amendments to the Law on Courts (n 63)); Constitutional Court, 28 March 2006 ruling on the Court's

the jurisprudence of Lithuania.[163] It is especially difficult for those judges trained in the Soviet era to apply this principle.[164] Although the judgments that have precedence and should be followed in relevant cases are published in a journal of judicial practice, the judges who should follow them instead treat them as abstract interpretations of a statutory rule detached from the facts of the case.[165] Most often the concept of stare decisis is understood as no more than a quotation from the precedential ruling rather than serving as a link between the facts on which the earlier ruling was based and the facts of the case under consideration to achieve a similar result.[166]

This is partly due to most of the judges of the Lithuanian SSR having remained in the general courts of jurisdiction after independence.[167] Even sixteen years later, the majority of sitting judges had been trained during Soviet occupation and found it difficult to adapt to the social and legal changes in society.[168] Continuing as they were trained, especially in the lower courts, their application of the law remains formalistic according to the earlier-prevailing Soviet concept of legal positivism, without taking into account the principles and provisions of the Constitution.[169] Improvement from this formalistic reasoning is further hindered by the absence of a tradition of dissenting

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Powers of Review, Court Financing, and Need for Uniformity in Jurisprudence [title restated], *Official Gazette* 2006, No 36-1292 (31 March 2006); Law on Courts (n 63) art 23(2)(1) (interpretation of legal acts published in the Supreme Court Bulletin 'Court Practice' (in Lithuanian) (*Teismų Praktika*) 'shall be taken into consideration by courts, state and other institutions as well as by other persons when applying these statutes and other legislation'); Vaičaitis (n 160) 3-4.

163 Vaičaitis (n 160) 4.

164 ibid.

165 ibid.

166 ibid.

167 ibid.

168 ibid.

169 ibid.

opinions, which expand the range of legal discourse.[170]

Another impediment to initial reform was that the efforts were largely driven by elite members of the legal profession and politicians who, under Soviet rule, had privileged access to the West and some knowledge of Western law. In many cases, what may have made sense from their perspective did not necessarily make sense to ordinary people, judges and lawyers. The inherent risk in this type of reform is its inability to generate a new legal culture.[171] The failure to provide public education on the reform process in Lithuania was described by one legal scholar who noted:

> No government programs have been directed at overcoming this legacy. Neither the Ministry of Justice nor the courts have engaged in sustained efforts to inform the public about the results of the legal reforms thus far undertaken. Nor has any effort been made to explain the relationship between those reforms and the strengthening of guarantees of citizens' rights.[172]

This gap between expectations and knowledge prevented the new legal knowledge 'from filtering down through the many layers of legal reality'.[173] Only later was it realised that the adoption of Western-style legislation and training for judges and administrators was not enough to achieve fundamental reform or a change in legal culture. As other avenues were sought to achieve this reform, for some the fundamental challenge became 'how to get the people to change'.[174] Civic and institution building programmes were more recently introduced to foster a more general rule-of-law culture

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[170] ibid; Robin CA White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) (2009) 9 HRLR 37, 39 (describing the practise of separate opinions in the ECtHR as providing the reasoning of a dissent or supporting the majority in court decisions).

[171] Dupre (n 144) 628.

[172] Rauličkytė (n 44) 187.

[173] Dupre (n 144) 628.

[174] Frank Emmert, 'Administrative and Court Reform in Central and Eastern Europe' (2003) 9 ELJ 288, 302.

with the expectation that 'a public that believes in the rule of law will demand it from their government'.[175]

There is still a need to improve Lithuania's legal culture and to introduce meaningful public participation. As described by one Lithuanian attorney, lack of public involvement can be seen in the pro forma nature of hearings on legislation.[176] Not understanding Western legal principles still negatively affects the competence of legal professionals.[177] This is especially true in the thinking of those within the system who are unable to see the extreme disconnect from their point of view and that from the outside.[178] They think of law 'in a solopsistic way',[179] knowing only the law as they were trained before they began work in the legal field at the age of 22.[180] A contributing factor is the legal education system, criticised as functioning at a low level of competence, and without training in important areas such as legal methodology.[181] Much of this is perpetuated by the fact that most communication is in Lithuanian.[182] Sources of Western legal information are not generally available in the Lithuanian language, so they absorb it from the culture.[183] 'At best, they will look at a Russian textbook because it is available, and that will not help in Western understanding.'[184]

In the functioning of government, Soviet legal theorists claimed that

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[175] White (n 116) 346.

[176] Interview with a Lithuanian lawyer (telephone 13 July 2008).

[177] ibid.

[178] ibid.

[179] ibid.

[180] ibid.

[181] ibid; text to nn 465-91 in ch 3.

[182] Interview with a Lithuanian lawyer (telephone 13 July 2008).

[183] ibid.

[184] ibid.

government legislative departments were the supreme organs of power.[185] Despite that claim, legislators instead followed the recommendations of the Communist Party, the leading force in Soviet society. That is why the Soviet parliament always had a window-dressing character, because the real power was reserved for a narrow group of party elites. Soviet jurisprudence never recognised the significance of separation of powers or checks and balances.[186] There were no restrictions on the branches of government from acting outside their constitutionally-vested powers, and the branches of government had no ability to limit the powers of the other branches.[187]

Most of the new leaders of the post-Soviet states inherited this understanding of the hierarchy of power and the rights of the individual with respect to the state. When they sought to artificially marry the idea of checks and balances with the principle of supremacy of parliament, striking incoherencies resulted.[188] The new leaders declared parliament as the real source of power, but their actual concern was the continuation of a system that would reserve ultimate control in state affairs for the executive. All other issues, including the protection of rights and freedoms, were beyond their list of priorities.[189]

Consistent with this understanding is an analysis of the programmes of the political parties in the 2008 elections for Seimas (Lithuania's parliament) illustrating

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[185] Ludwikowski, 'Constitutionalization of Human Rights' (n 31) 18 fn 73 (according to Soviet theory, it was through the elected representatives of the soviets that the sovereign will of the people was expressed, not to be usurped by the executive organs of state government or by the officials at any level of the political structure).

[186] ibid 18.

[187] ibid.

[188] ibid

[189] ibid. The Constitution of Lithuania (n 14) art 5(1) provides for a separation of powers of the State between the Seimas (Parliament), the President and the Government, and the Judiciary; the scope of power of state is limited by the Constitution, art 5(2).

that the political parties understand the protection of human rights in a narrow sense, as relating only to the operation of the legal system, law enforcement, and the courts in addressing infringed rights. Traditional social and economic rights, such as the rights to work, education, health care and a clean environment were not perceived as human rights whatsoever. Little attention was given to those rights relating to the changing technological environment, transgressions on privacy, or Lithuania's changing population and the equal opportunities policy of the European Union.[190]

Continued high levels of corruption in post-communist Europe have been well-documented.[191] One reason given for the corruption is the vacuum created when the Soviet Union disintegrated.[192] It was a vacuum so complete that it required Lithuania and the other former Soviet Republics to completely rewrite of the rules of government and the economy. Many in power at the time seized what were '[s]pectacular opportunities for corruption' presented by this vacuum.[193] They were able to write the new rules to benefit themselves such that even when the rules were properly written, those in power could still rely on their informal political connections and take advantage of dysfunctional state institutions and corrupt judiciaries to perpetuate corrupt practices and prevent prosecution.[194] The effects of corruption are significant:

> [C]orruption impoverishes society by reducing economic growth, undermining entrepreneurship and stealing from the state. Corruption also undermines liberal democracy as political elites violate the legal limits of their power,

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[190] HRMI 2009 (n 110) 4-5.

[191] Milada Anna Vachudova, 'Corruption and Compliance in the EU's Post-Communist Members and Candidates' (2009) 47 JCMS 43, 44; Rasma Karklins, *The System Made Me Do It: Corruption in Post-Communist Societies* (ME Sharpe, London 2005) 19-38 (describing the typology of post-communist corruption).

[192] Vachudova (n 191) 44.

[193] ibid.

[194] ibid.

> citizens lose trust in state institutions and civil society is oppressed or co-opted by powerful networks.[195]

Hidden benefits continue from the Soviet era in the connection between personal comfort with one's employment including access to apartments, special shops and cafeterias, vacations, and better medical care.[196]

Informal networks and exchanges were common in Lithuania during the Soviet era, but the word 'corruption' was not used. Instead, other words were used, such as 'blat', to describe those informal exchanges that did not directly involve money, the most noticeable and widespread form of corruption of those times.[197] A typical informal exchange might provide the ability to purchase goods not available in the official state markets, or to receive an unofficial favour.[198]

In Lithuania the concept and practice of blat took the form of corrupt relationships after its independence and transition to a market economy. No longer needed in acquiring daily necessities, unofficial networks and exchanges are still culturally acceptable as an inevitable practise in social and professional activities, such as securing an education, receiving health care, opening and operating a business, and in politics:

> Reliance on informal relations continues to be a culturally legitimate practice in Lithuania, which assures the conditions for shadowy business relationships and guarantees political and financial success. The explicit act of establishing informal networks is accomplished through various leisure activities in clubs or on hunting trips, where the casual atmosphere of trust eases the conclusion of many corrupt transactions. Informal groups try to affect the

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[195] ibid.

[196] Karklins (n 191) 24.

[197] Urbonas (n 43) 88.

[198] ibid.

> legislature by using their accumulated resources, as well as by integrating with governmental institutions. The interconnection of the political elite with far reaching and criminal shadow business structures continues to support the 'economy of favors' in Lithuania.[199]

All levels of contemporary Lithuanian society tend to ignore laws and established procedures, just as in Soviet times.[200] As described by Lithuanian political scientist Kestutis Gurnius, 'the Lithuanian political elite [regard] legal acts in terms of a "buffet" – they choose, based on their taste, which laws are to their taste, and which are not'.[201] Everyday citizens follow this example as well.[202]

In 2008, Lithuania's National Audit Office reported that after six years, its anticorruption programme, launched in 2002, had become stagnant and had failed.[203] The year also saw a number of corruption scandals involving high-ranking municipal officials who were indicted for bribery and graft. Admittedly, the investigation and exposure of corruption and conflict-of-interest allegations had become more open, but there was little follow-through in high-profile corruption allegations. Corruption prevention efforts that year were limited to fragmentary policies, such as a ban on audiovisual political advertising and preparations for the online issue of construction

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[199] ibid. To illustrate how informal relationships can affect university students, an American-born editor working in Lithuania asks: 'Did you know that if you are a university student and your mother is a member of the Lithuanian parliament, you will be able to regularly drink coffee with the dean of the Faculty [ ] and get passing grades no matter how little you do or how poor the quality of your work is?' Alan Hendrixson, 'Life in Lithuania II' in *With a Grain of Druska* (24 October 2011) <http://grainof druska.blogspot.com/2011/10/life-in-lithuania-ii.html> accessed 30 August 2012.

[200] Urbonas (n 43) 88.

[201] ibid 88-89 (quoting Kestutis Girnius, lecturer in philosophy and politics at the Institute of International Relations and Political Science at the University of Vilnius).

[202] ibid 89.

[203] Republic of Lithuania, National Audit Office,'Anti-Corruption Programme Did Not Bear the Expected Results' (18 March 2008 Press Release) (in Lithuanian) ('*Kovos Su Korupcija Programa Nedave Lauktu Rezultatu*') <http://www.vkontrole.lt/pranesimas_spaudai.aspx?id=14854> accessed 30 August 2012; Organisation for Economic Co-Operation and Development, 'Specialised Anti-Corruption Institutions: Review of Models' <http://www.oecd.org/corruption/acn/library/39971975.pdf> accessed 30 August 2012.

permits.[204] In 2009 the national anticorruption programme was updated to provide specific objectives, tasks and assessment criteria, including an increase in the number of electronic online services provided by the State Tax Inspectorate, and anticorruption advertisements in the media. However, as of 2011, implementation of the revisions had not moved significantly.[205]

III. Conclusion

The political change in Lithuania that resulted in regaining independence was sudden and dramatic. Reformers, faced with a complete reorientation in the workings of government, intended to create a new state based upon the rule of law by incorporating regional and international human rights standards. An evaluation of the relative success of this transition, and what it means for the right to a fair trial, necessarily includes consideration of the dynamics in place at the time of independence, particularly those that remain obstacles to rights guaranteed by Article 6 of the Convention. Among these are leaders accustomed to wielding power over all aspects of government, the subordinate positions of individual rights and the courts to the state, and pervasive corruption.

Given these obstacles, questions for this research include: what in the Lithuanian system, if anything, has resisted change from the Soviet legal system that could affect the right to a fair trial consistent with Article 6 standards? If elements of the old regime have resisted change, where are they evident and what does this mean for the right to a fair trial in Lithuania? The answers to these questions are considered in the chapters that follow.

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[204] Aneta Piasecka, 'Lithuania' in *Nations in Transit 2009* (Freedom House, New York 2009) 334.

[205] Aneta Piasecka, 'Lithuania' in *Nations in Transit 2011* (Freedom House, New York 2011) 341-42.

Chapter 3. Judicial Independence

This chapter considers the independence and impartiality of the courts in Lithuania as guaranteed by Article 6(1),[206] beginning with benchmarks set in the Convention and jurisprudence of the European Court.[207] The parameters of judicial independence are then explored using findings by academics and social scientists on the nature and role of judicial independence as an indicator of economic and political freedom[208] and factors that distinguish between judicial independence as it can be deduced from legal documents (*de jure*) and those that are present in fact (*de facto*).[209] The legal framework of the judicial system in Lithuania is then discussed[210] followed by the residual Soviet influences within the system, including in legal education.[211]

I. Requirements of Article 6(1)

It is under Article 6(1) of the Convention that Lithuania is obligated to maintain a system of courts that will ensure fair trials before independent and impartial tribunals:

> In the determination of his civil rights and obligations or of any criminal charge ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[212]

The right to 'an independent and impartial tribunal established by law' applies equally to both civil and criminal cases, and extends to the ability to appeal to a higher court with full jurisdiction. The right to an appeal, however, is not guaranteed unless the state in question provides a right to appeal. If so, the appellate proceedings will also

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[206] ECHR (n 1) art 6(1).

[207] Text to nn 212-41.

[208] Text to nn 261-63.

[209] Text to nn 264-68.

[210] Text to nn 248-59.

[211] Text to nn 460-615.

[212] ECHR (n 1) art 6(1).

be governed Article 6(1).[213] Article 6 also applies to judicial and quasi-judicial proceedings, and will also include administrative hearings and commissions if determined by the Court to be a 'tribunal'.[214]

The Article 6(1) requirement of an independent and impartial tribunal is so fundamental to the right to a fair trial that it is not balanced against other considerations. For example, the requirement that a trial be public may give way to competing collective goals that will allow the press and the public be excluded in the instances of public order or national security, or costs and administrative convenience.[215] The fundamental nature of this provision is reflected in how the Court undertakes its review, for once it determines that a deciding body lacks independence and impartiality, no mitigating considerations will redeem it:

> [A] court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial to the persons subject to its jurisdiction and that, accordingly, it is unnecessary to examine complaints regarding the fairness of the proceedings before that court ...[216]

The Court recognises the need for confidence in an independent judiciary as a requirement in democratic society and, in criminal proceedings, for the accused.[217] The

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[213] *Poulsen v Denmark*, App no 32092/96 (ECtHR, 29 June 2000) 5 (member states not compelled to establish courts of appeal, 'but where such courts do exist, the guarantees of Article 6 must be complied with, for instance, in that it guarantees an effective right of access to these courts').

[214] *Ringeisen v Austria* (n 19) para 95 (finding a regional commission empowered to consider real property transactions a 'tribunal'); *Belilos v Switzerland* (n 19) para 64 (defining tribunal, in part, as 'characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner'); David J Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2d edn, OUP 2009) 228, 285-86.

[215] Greer (n 61) 252.

[216] *Güneş v Turkey* (2006) 43 EHRR 15 para 84 (relying on *Çiraklar v Turkey* App no 19601/92 (ECtHR, 28 October 1998) paras 44-45.

[217] *Cooper v UK* (2004) 39 EHRR 8 para 104.

right to a fair trial is also given the most inclusive interpretation by the Court, and previously by the Commission,[218] both due to this importance and because the fair administration of justice 'holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of the provision'.[219] The appearance of independence must be such that it inspires confidence in the public and, in criminal proceedings, in the accused.[220] This inclusive interpretation has the benefit of allowing the Court to achieve fairness across the variety of legal systems within the Council of Europe and the flexibility to interpret the Convention as a living document.[221]

To be 'independent' a tribunal must be independent of the parties and of the executive, in its functions and as an institution.[222] When deciding whether a tribunal is independent, the Court considers four areas: the manner of appointment of its members; the duration of their terms of office;[223] the existence of guarantees against outside pressures; and whether the body in question presents an appearance of independence.[224] The fact that the members of a tribunal are appointed by the executive does not alone violate the Convention,[225] unless the applicant can demonstrate that the practice of

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[218] Until 1998 when Protocol No 11 came into effect reorganising the Court, the European Commission of Human Rights was the first tier filter for complaints to the Court. All decisions are now made by the European Court of Human rights. Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 351.

[219] *Delcourt v Belgium* (1970) 1 EHRR 355 para 25; *Perez v France* (2004) 40 EHRR 909 para 64.

[220] *Cooper v UK* (n 217) para 104; *Findlay v UK* (1997) 24 EHRR 211 para 73; and *Incal v Turkey* (2000) 29 EHRR 449 para 71.

[221] Text to n 5 in ch 1; text to nn 1080-82 in ch 5 (interpreting the ECHR as a 'living' document).

[222] *Campbell and Fell v UK* (1984) 7 EHRR 165 para 77.

[223] Unrenewable fixed term appointments are generally considered a factor promoting independence as protection from outside pressures. ibid para 78 (fixed three-year terms); *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHHR 1 para 57 (fixed six-year terms).

[224] *Sacilor-Lormines v France* App No 65411/01 (ECtHR, 9 November 2006) para 59; *Cooper v UK* (n 217) para 104; *Findlay v UK* (n 220) paras 73-76; *Bryan v UK* (1995) 21 EHRR 272 para 37 (distilling these elements from previous judgments).

[225] *Le Compte, Van Leuven and De Meyere v Belgium* (n 223) para 57.

appointment as a whole is unsatisfactory or the establishment of a particular tribunal was influenced by motives suggesting an attempt to influence its outcome.[226] Violations are often found in the context of military tribunals that may include judges who are on active military duty and subject to orders by the executive and military discipline.[227]

A corollary of a tribunal's independence is security from removal by the executive, usually measured by the length of its members' term of office. The Court has not required a specific minium term, although to comply with Article 6(1), longer terms are more likely to be found in compliance. A term of three years for a prison tribunal was found to be 'relatively short', but acceptable, due to the difficulty of finding members to serve for longer periods.[228] When members of a tribunal are appointed by the executive, there must be guarantees against outside pressures and any appearance of independence.[229] Similarly, the Court has found a violation of Article 6(1) where there were insufficient guarantees to protect a lower court from pressure to adopt a certain decision by the higher courts.[230]

To be 'impartial' a tribunal and its members but be free from bias.[231] Because independence is closely linked with impartiality, the Court often considers the two

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[226] *Zand v Austria* App no 7360 (ECtHR, 12 October 1978) para 77.

[227] Such as in *Incal v Turkey* (n 220) (three-judge benches with one judge required to be member of the Military Legal Service; although no personal conviction of partiality, military judge's active duty status meant remaining subject to orders from the executive, military discipline, performance reports, and potential for a renewable appointment, resulting in legitimacy of applicant's fear that these considerations might allow undue influence on the tribunal of considerations having nothing to do with the nature of the case, resulting in a violation of art 6(1)).

[228] *Campbell and Fell v UK* (n 222) para 78.

[229] *Lauko v Slovakia* App no 26138/95 (ECtHR, 2 September 1998) paras 63-64.

[230] *Salov v Ukraine* App No 65518/01 (ECtHR, 6 September 2005) paras 80-86.

[231] *Campbell and Fell v UK* (n 222) para 85.

together, with the same reasoning applied to each.[232] For example, there are two aspects to the question of 'impartiality': first, the tribunal 'must be subjectively free of personal prejudice or bias' and second, it must be objectively impartial, 'in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.[233] The Court considers doubts raised by the accused important, but they are not determinative. Lack of independence or impartiality will be found only if those doubts can be objectively justified.[234]

To establish a claim of subjective partiality, that is, bias of a judge, the Court requires proof of actual bias. A judge's lack of bias is presumed unless there is evidence to the contrary.[235] The Court begins its inquiry with a subjective view into whether the personal conviction of a judge in a particular case raises doubts about his or her independence or impartiality. If not, it then seeks to establish whether, in objective terms of structure or appearance, a party's doubts about the tribunal's independence and impartiality may be legitimate.[236] While such proofs would seem difficult, some cases are clear, as in *Belilos v Switzerland*,[237] in which a single-officer police board was used to decide minor offenses. Even though the officer had taken an oath and could not be dismissed, the Court found a violation because he would later return to his duties on the police force and be subject to orders and loyalty to his colleagues, thereby undermining the confidence the tribunal should inspire.[238]

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[232] *Cooper v UK* (n 217) para 104.

[233] *Cooper v UK* (n 217) para 104 (referring to *Findlay v UK* (n 220) para 73).

[234] ibid; *Findlay v UK* (n 220) para 73; and *Incal v Turkey* (n 220) paras 73, 71.

[235] *Hauschildt v Denmark* (1990) 12 EHRR 266 para 47.

[236] *Piersack v Belgium* (1983) 5 EHRR 169; *Hauschildt v Denmark* (n 235); Robin CA White and Clare Ovey, *Jacobs, White, and Ovey: The European Convention On Human Rights* (5th edn, OUP 2010) 266.

[237] *Belilos v Switzerland* (n 19).

[238] ibid paras 66-67.

It is not unusual for the Court to find no violation where, as a whole, otherwise defective proceedings in the national trial court were either outweighed by another aspect of the proceedings,[239] or rectified by a higher national court.[240] It remains, however, that it is the judges in the lower courts who are responsible for ensuring that the proceedings before them comply with Article 6 and should not rely on the possibility that a higher court may rectify their errors.[241]

II. The Nature and Role of Judicial Independence

Before turning to Lithuania's courts in particular,[242] this section reviews various parameters explored by academics and social scientists that provide useful indicators of independence with which to consider Lithuania.

Judicial independence is recognised as central to the proper functioning of the judiciary within the concept of separation of powers.[243] Guarantees of judicial independence are the means to shield judicial decision-making in individual cases from external influence and provide for a genuinely impartial arbiter.[244] As a fundamental component of democratic society, judicial independence is a frequent source of study, evaluated by courts, and measured by social scientists and economists. Although the procedural rules by which courts function will vary from nation to nation, the indicia of judicial independence follow common themes. This research compares the conditions

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[239] *Stanford v UK* App no 16757/90 (ECtHR, 23 February 1994).

[240] *Edwards v UK* (1992) 15 EHRR 417.

[241] *Boddaert v Belgium* (n 7) para 39; text to n 6 in ch 1.

[242] Text to nn 248-459 (section III in this chapter).

[243] Lars P Feld and Stefan Voigt, 'Judicial Independence and Economic Development' in Roger D Congleton & Birgitta Swedenborg (eds), *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (MIT Press 2006) 251-88 (surveying the literature analysing the relative merits of judicial independence).

[244] Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 EPL 99, 101.

in Lithuania against the standards for judicial independence set by the jurisprudence of the European Court of Human Rights and in the common themes developed by the empirical work of academics and analysts.

The judiciary in a democratic society is in the unique position to decide those disputes that the political branches and private individuals cannot or should not, thereby also protecting the rights of individuals and minority groups against the excesses of the majority. Because they are not elected, they must derive their authority and legitimacy from different sources than do the political branches; one of judges' most important sources of legitimacy and authority is their independence.[245]

Although a fundamental concept, judicial independence has no specific set of international standards; its meaning will vary based upon the cultural and historical variations in each country, having risen in response to specific problems.[246] For example, the separation of the judiciary from the executive was a response to the efforts of the sovereign (executive power) to play a role in sentencing.[247] That is, to maintain influence. Later, more elaborate ways of securing judicial independence were developed in reaction to more subtle attempts at influence, such as by control of wages, the case docket, assignment of court premises, and re-election.[248] As a result of these variations, what might be considered an intrusion into judicial independence in one context may be commonplace in another.[249] Despite these variations, judicial independence is uniform in its purpose, to ensure the impartiality of the judge by

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[245] ibid 110, 116; Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence in the EU Accession Process* (Central European University Press, Budapest 2001) 17.

[246] Greer (n 61) 251-52; Bobek (n 244) 101.

[247] Bobek (n 244) 101.

[248] ibid.

[249] ibid 101-02.

shielding the judicial decision-making process from undue external influence.[250] How these dynamics have affected the legal culture in Lithuania are discussed at the end of this chapter.[251]

The various attempts to describe the parameters of judicial independence often share these key features:

> [S]ecurity of tenure; an impartial appointment process based on objective facts and factors, including integrity, ability, and experience; an adequate and protected salary; freedom from transfer; freedom from interference from superior judicial officers in decision-making outside the appellate process; objective and transparent assignment of cases; protection from civil liability; physical security; executive support for judgment enforcement; absence of retroactive legislation; protection from abolition of courts; and sufficient budget to provide reasonable resources for the judges to do their work.[252]

Social scientists have established factors to measure the effect that judicial independence has on society, most often in the context of economic growth.[253] This is because, along with a high quality court system in general, an independent judiciary is considered essential for economic growth. It is assurance that agreements between parties can be fairly enforced, which in turn provides economic stability and encourages economic growth and investment. At its most fundamental level, an independent judiciary assures litigants that courts will not rule in favour of the government or the

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[250] ibid 101; Frank B Cross, 'The Cash Value of Courts' (Berkley Electronic Press, August 2007) 16 <http://works.bepress.com/frank_cross/1> accessed 30 August 2012.

[251] Text to nn 337-615.

[252] Sandra E Oxner, 'The Quality of Judges' in *The World Bank Legal Review: Law and Justice for Development, Vol 1* (Kluwer Law International 2003) 312-14 (reviewing international standards for judicial independence set by the United Nations, International Bar Association, International Association of Judges, and European Association of Judges).

[253] Daniel Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) University of Southern California Law School, Law and Economics, Working Paper Series, Year 2006, Paper 43, 1-2. Some of that research is incorporated into this paper, for example: Cross (n 250); Oxner (n 252); Feld and Voigt (2006) (n 243).

powerful based upon status alone.[254]

Work in this area flows from the strong correlation between the functioning of a nation's judicial system to that nation's economic well-being.[255] It is therefore not surprising that various economic organizations, such as the World Bank, the World Economic Forum, and Business International, a section of the Economist Intelligence Unit, survey and publish rankings on the functioning of national judicial systems. Judicial independence is used as an indicator of a nation's ability to support economic growth, limit corruption, and constrain the size of a nation's underground economy.[256] It follows then that most of the existing research has been performed by economists focused on economic variables and characterised by efforts to measure it by objective factors.[257] Studies comparing indicators in the area of human rights and civil society are less available, but those that are available add important insight into understanding conditions in Lithuania and are included in this report.[258] Attempts at identifying a value for the rule of law have seen relatively recent development, but the process is slow.[259] Capturing the law quantitatively is 'notoriously difficult' because even the

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[254] Klerman (n 253) 1-2.

[255] Cross (n 250) 3-4. Cross describes the 'New Institutional Economics' theory developed by researchers Oliver Williamson and Douglas North, first to attribute practical and economic significance to legal systems in the importance of property rights to economic growth, and of the state in defining and enforcing property rights. ibid.

[256] ibid 2-3 (reviewing empirical research on the law, concluding that most of the research does not truly address the nature of the law or its implementation). For example, the World Economic Forum periodically measures business leaders' perceptions of judicial systems in practice as part of its assessment of national institutional environments. Isabella Reuttner (ed), *The Financial Development Report 2011* (World Economic Forum, Geneva 2008) 6 (presence of legal institutions safeguarding investor interests an integral part of financial development; reforms bolstering legal environment and investor protection likely to contribute to more efficient financial sector).

[257] Cross (n 250) (consolidating the empirical economic research on the law and courts).

[258] Text to nn 261-63 (on judicial checks and balances), 264-68 (distinguishing judicial independence as legally defined from that in practise), 1051-62 in ch 4 (measuring independence of prosecutors), 1063-73 in ch 4 (role of independent prosecutors in deterring corruption).

[259] Cross (n 250) 6, 8.

meaning of 'rule of law' is not determinate.[260]

In a study reported in 2004,[261] researchers analysed data they collected on judicial independence and constitutional review, both of which they identified as elements that act as checks and balances on the power of the parliament and the executive as to the judiciary. Using data from 71 countries, they constructed empirical measures of judicial independence and constitutional review, then examined their impact on economic and political freedom across countries. They found that both judicial independence and availability of constitutional review are predictors of political freedom, that judicial independence matters most for economic freedom, and constitutional review for political freedom. In addition, consistent with theory, judicial independence accounted for some of the positive effects of common law legal origins on measures of economic freedom.[262] They also found strong empirical support for historical theory that the Anglo-American institutions providing checks and balances are important guarantees of freedom, and that some of the central features of government that have profound consequences for human freedom and welfare have common constitutional roots.[263]

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[260] ibid 8; Michael Smith, 'Deterrence and Origin of Legal System: Evidence from 1950-1999' (2005) 7 Am Law Econ Rev 350 (finding common law systems appear better at deterring injury-causing harm); Rafael LaPorta and others, 'Judicial Checks and Balances' (2004) 112 J Pol Econ 445 (nations with greater judicial independence have stronger protection of human rights).

[261] LaPorta and others (n 260).

[262] ibid 6, 12. Economic freedom was measured as having security in property rights; 'lightness' of government regulation; and modesty of state ownership. ibid 2.

[263] ibid 6. The LaPorta group also note the different evolutions of judicial independence and constitutional review, with the development of judicial independence through English history, from the reliance on trials by jury beginning in the 12th century, the Magna Carta in 1215, and the 17th century revolutionary fight against the courts of royal prerogative. The 1701 Act of Settlement granted judges lifetime appointments as well as independence from Parliament. The mechanisms of judicial independence were transplanted by England as part of the common law tradition into its colonies, including the United States. Civil law countries, in which judges have remained in most instances subordinate to the executive, have not adopted this idea in nearly as consistent a way. ibid 4.

In a different approach to assessing judicial independence, two indicators were developed for data collection and analysis:[264] *de jure* independence, a level of independence that can be deduced from legal documents, and *de facto* independence, the level of independence that courts have in fact. These indicators were used to determine that judicial independence is also conducive to economic growth.[265]

The *de jure* indicators were applied to 66 countries. They focused on 23 characteristics that included the establishment, organization, and operation of a country's highest courts as evident from legal documents, such as the country's constitution. They included such factors as the appointment process, salary and salary protection, and material support for court operations. These characteristics were grouped into 12 variables, and incremental values from 0 to 1 assigned to each variable to reach a total score.[266]

A *de facto* indicator was developed based on how well eight of the *de jure* variables were implemented, using a similar scoring system in which each variable offered a possible value from 0 to 1, and where the greater values indicated a higher

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[264] Lars P Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators' (2003) 19 EuropJPolEcon 497-527, 449.

[265] ibid 498. In a separate study, these factors were applied to prosecution services in several countries, including Lithuania. Text to nn 1063-73 in ch 4.

[266] A country with a maximum degree of *de jure* judicial independence would score 12. The *de jure* variables included: the stability of the institutional arrangements within which the judges operated and whether they were established in the constitution (most conducive to independence) rather than ordinary law; whether the appointment process was by other jurists (most conducive to independence) or by one powerful politician, hypothesised as the least independent procedure; whether their appointments were for life (most conducive to independence) or for renewable terms, giving them incentive to please those who would reappoint them; whether their salaries are adequate compared to other legal professionals and protected from reduction (most conducive to independence) or are controlled by another government branch; the accessibility of the court and whether every citizen as access to it (most conducive to independence) or only a few officials; whether the allocation of cases to the members of the court is made pursuant to general rules of assignment (most conducive to independence) or controlled solely by the chief justice; whether the competencies of the highest court include a check on the behaviour of the other branches of government and deciding whether legislation conforms with the constitution (most conducive to independence); and whether their decisions are published and open to public debate. ibid 501.

degree of judicial independence. The *de facto* indicator was applied to 75 countries over the period of time from 1960 to 2002,[267] from which they concluded that while *de jure* judicial independence does not have an impact on economic growth, *de facto* judicial independence does.[268] In other words, their research supports the common sense expectation that the existence of a legal structure with elements of judicial independence does not alone ensure that the judiciary functions independently.

Some of the same variables are applied in programmes to improve court quality, borrowing from management philosophy and practices referred to as 'total quality management' (TQM) and 'continuous quality improvement' (CQI). Briefly described, TQM emphasises continuous improvement to meet customer (or 'user') requirements, reduce rework, create long-range thinking, increase employee teamwork, process redesign, team-based problem-solving, with constant measurement of results. CQI seeks continued improvement of the processes involved in providing goods or services by involving organization members trained in basic statistical techniques and who can make decisions based on an analysis of the data. CQI differs from traditional quality assurance methods in its focus on understanding and improving the underlying work

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[267] The *de facto* variables included (1) the effective average length of term, with the highest possible rating for terms of 20 years or more and lowest for terms deviating from the legal foundation or removing a judge before the end of a term; (2) the number of other members of the court, with higher ratings to those with more judges, thus diminishing the impact of a single judge's influence; (3) whether judicial incomes remained constant, there were provisions for support staff, library size and availability of modern computer equipment; (4) whether the foundational rules governing the court had changed, suggesting low judicial independence; (5) and whether the rulings of these highest courts depended on action by another branch of government to be implemented, and if so, whether cooperation was not granted, again suggesting low independence.

[268] Lars P Feld and Stefan Voigt, 'Unbundling Judicial Independence' (2007) Intl Soc for New Inst Economics (20 June 2007) Washington University, Dept of Economics, St Louis, Missouri, USA, <http://www.isnie.org/assets/files/papers2007/voigt.pdf> accessed 30 August 2012, 2 (results also indicate that the positive impact of *de facto* judicial independence on economic growth is stronger in presidential than in parliamentary systems, and stronger in systems with a high level of checks and balances; further, *de facto* judicial independence appears to be effective independent of the age of a constitution).

process to add value.[269] The general concept is that by identifying the desired elements of a system, data can be collected – usually in response to a standardised questionnaire – and analysed to identify its dysfunctional aspects so that improvements can be proposed to those who set policy. Several initiatives have been undertaken in Europe to improve the quality of courts using these methodologies.[270] As discussed later, the CQI approach is a method for improving aspects of the legal system worth considering in Lithuania because it can also promote change in an insular, self-referential system.[271]

The most developed quality improvement system applied uniformly to courts in Europe is that developed by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, established in 2002.[272] As described by the CEPEJ's Working Group on Quality of Justice, its tasks include improving 'the tools, indicators, and means for measuring the quality of judicial work and the way in which this service is perceived by the users'[273] and developing a system of data collection and analysis that will allow proposal of concrete solutions for policy makers and the courts.[274] The aim is to remedy dysfunctions in judicial activity and balance the obligations of the work of

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[269] Pim Albers, 'The Assessment of Court Quality: Hype or Global Trend?' (2009) 1 HJRL 53 (describes a feasibility test conducted in twelve courts in the United States); Thomas C Powell, 'Total Quality Management as Competitive Advantage: A Review and Empirical Study' (1995) 16 Strategic Mgmt J 15, 16; Stephen M Shortell, Charles L Bennett, and Gayle R Byck, 'Assessing the Impact of Continuous Quality Improvement on Clinical Practice: What It Will Take to Accelerate Progress' (1998) 76 Milbank Q 593, 594.

[270] Albers (n 269) 54.

[271] Text to nn 535-38 (data collection and analysis as improving dynamics of insular, self-referential social systems).

[272] Committee of Ministers, 'Resolution Res(2002)12 Establishing the European Commission for the Efficiency of Justice (CEPEJ)' (adopted 18 September 2002, 808th Meeting of Ministers' Deputies, Council of Europe). Detailed information and reports are provided at the CEPEJ website <http://www.coe.int/cepej> accessed 30 August 2012.

[273] European Commission for the Efficiency of Justice (CEPEJ), '2012-2013 Activity Programme of the CEPEJ' (CEPEJ(2011)6, 8 December 2011, Strasbourg) app III para a.

[274] ibid para b.

the courts with providing quality justice for its users.[275]

The CEPEJ's most recent report on European justice systems was in 2010, compiling survey responses from 45 member states' 2008 data, including Lithuania.[276] Significant to understanding the value of these reports is that they are based upon self-reporting by member states.[277] The CEPEJ then compiles and presents the data reflected in the survey responses using tables and graphs, allowing a 'snapshot' view of each country, and over time, will allow the CEPEJ to note significant trends.[278] The reports, although referred to by the CEPEJ as evaluation reports, are aggregated data noting observable trends, but do not make value assessments on the data reported.[279]

The value of the CEPEJ system of data collection and reporting is that it lays the groundwork for a more comprehensive system evaluating the courts in each member state. The CEPEJ actively encourages member states to undertake their own program of data collection using CEPEJ guidelines based upon the principle that '[a] better understanding of the activity of the courts is indeed necessary to improve the performance of courts'.[280]

The CEPEJ data compilations to date have provided the basis for more in-depth analyses, as was done following the 2006 edition of the report drawn from 2004 survey responses, when five studies were published: a comparative study on monitoring and

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[275] ibid para c.

[276] CEPEJ, *European Judicial Systems, Edition 2010 (Data 2008): Efficiency and Quality of Justice* (Council of Europe 2010) 6-7. The next report will be based on 2010 data, due later in 2012.

[277] ibid 5-6.

[278] ibid 12. For example, Table 13.12 provides the number of disciplinary proceedings initiated against enforcement agents by country, with sub-totals for breach of professional ethics, professional adequacy, for a criminal offence, and 'other'. ibid 263.

[279] ibid.

[280] ibid 179 para 9.13.

evaluating court systems; using information and communication technologies; enforcing court decisions; access to justice; and administration and management of judicial systems.[281]

Still a relatively new process, the ultimate aim is to develop recommendations and offer concrete tools from this regular data collection and evaluation to improve the quality, equity and efficiency of judicial systems within the Council of Europe.[282] The CEPEJ continues to offer its expertise to assist the member states in assessing the efficiency of judicial systems and propose practical tools and measures for working towards an increasingly efficient service to the citizens.[283] This is a resource that policy makers in Lithuania should consider.

III. The Judicial System in Lithuania

It is Lithuania's duty under the Convention is to organise its legal system to 'allow the courts to comply with the requirements of Article 6 (1),[284] yet Lithuania's Constitution[285] and domestic laws provide uneven protection for the requirements of Article 6. At the Constitutional level, for example, 'the right to a fair and public hearing by an independent and impartial tribunal' is provided, but only for criminal cases.[286] The right to a fair trial in non-criminal cases is still not a constitutional guarantee, but has some protection in the Law on Courts, enacted two years later.[287] This lapse is likely due, at least in part, to what is described by Valentinas Mikelenas,

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[281] ibid.

[282] ibid 12.

[283] ibid 5 para 1.1.

[284] Text to n 6 in ch 1.

[285] Constitution of Lithuania (n 14).

[286] ibid art 31.

[287] Law on Courts (n 63) arts 1, 5(1) ('Everyone shall be entitled to a fair hearing by an independent and impartial court established by law.').

former Justice of the Supreme Court of Lithuania, as the lack of planning for a legal system in the intense two years preceding independence:

> There is no surprise that nobody in those two years seriously discussed the model of the future legal system of Lithuania to be introduced in the aftermath of the declaration of independence. So Lithuanian society reached independence without a clear vision for the system of law, including private law, of the future independent Lithuania. The consequence of such inactivity was the temporary retention of the Soviet legal system.[288]

Similarly, the Constitution established a new system of courts of general jurisdiction, but left a great deal of the substance of those courts to a later time, deferring them to adoption of the Law on Courts that did not take place until 1994, leaving in place the existing Soviet court system.[289] As illustrated below, uneven attention to fundamental rights in the drafting of laws has impacted Article 6 rights in Lithuania in several areas, beginning with a court system dependent upon the executive.[290] Then, as discussed in Chapter 4, incomplete drafting the affects the rights of the parties, such as for petitioning a court for a constitutional violation,[291] and rights of the mentally disabled.[292]

As to Lithuania's court system, as described in its Constitution, '[w]hile

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[288] Valentinas Mikelenas, 'The Influence of Instruments of Harmonisation of Private Law upon the Reform of Civil Law in Lithuania' (2008) XIV Juridica Intl 143 (the two years of concentrated change between the national movement for independence from 1998 and ending with the 1990 declaration of independence consisted primarily of 'demonstrations, songs, and national euphoria' rather than rational planning for the future beyond adopting the declaration of independence').

[289] Constitution of Lithuania (n 14) arts 109-18; ibid 111 ('The formation and competence of courts shall be established by the Law on Courts'); Law on Courts (n 63); Mikelenas (n 288) 143.

[290] Text to nn 357-60.

[291] Text to nn 693-98.

[292] Text to nn 723-57. Although not an Article 6 case, incomplete drafting – failing to enact implementing legislation – lead to the violation in *L v Lithuania* (2008) 46 EHRR 22; text to n 1127 in ch 5.

administering justice, judges and courts shall be independent'.[293] To the outside observer, this acclamation may create the impression that Lithuania's judiciary is independent.[294] However, this provision stands alone in the Constitution. Of the articles concerning the courts of general jurisdiction,[295] and the Constitutional Court,[296] those that might have functioned to promote judicial independence are either absent, such as budgetary control, or are left to be 'provided for by law', as with the formation and competence of courts of general jurisdiction[297] and creation of a special institution of judges to advise the President on the appointment of judges.[298] Instead, the 1992 Constitution left in the executive, through the ministries, control over the budget and wages of the judiciary,[299] a factor widely understood as impeding judicial independence.[300] It was only after several rulings by the Constitutional Court that much of this control was taken away from the Ministry of Justice.[301] These developments are

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[293] Constitution of Lithuania (n 14) art 109, providing in relevant part:

> In the Republic of Lithuania, justice shall be administered only by courts.
> While administering justice, the judge and courts shall be independent.
> When considering cases, judges shall obey only the law.

[294] Koslosky (n 60); interview with a former Judge (Vilnius 16 January 2009).

[295] Constitution of Lithuania (n 14) arts 109-17.

[296] ibid arts 102-08.

[297] ibid art 111 (establishing the courts of general jurisdiction and deferring their areas of competence for later: 'The formation and competence of courts shall be established by the Law on Courts'); Law on Courts (n 63).

[298] Such as '[a] special institution of judges *provided for by law shall* advise the President of the Republic concerning the appointment of judges, as well as their promotion, transference, or dismissal from office.' Constitution of Lithuania (n 14) art 112 (emphasis added).

[299] Constitution of Lithuania (n 14) art 94(4) (Government to approve and supervise the execution of the State Budget).

[300] Text to n 248.

[301] Constitutional Court, 21 December 1999 ruling on Appointment of Judges and Norms of the Law on Courts [title restated], *Official Gazette* 1999, No 109-3192 (24 December 1999) 30 (ruling) para 10 and sec I (Constitutional Court Ruling 21 December 1999) (declaring sixteen provisions of the Law on Courts unconstitutional); 'Judicial Independence in Lithuania' (n 46) 273-75; Law on Courts (n 63); 'Judicial Capacity in Lithuania' (n 46) 140.

considered below[302] following a brief overview of the main courts in Lithuania.

A. Courts of General Jurisdiction

Lithuania's courts of general jurisdiction are established in the Constitution,[303] consisting of a four-tiered system: local courts, regional courts, a Court of Appeals, and a Supreme Court.[304] As noted earlier, the formation and competences of these courts were deferred to adoption of the Law on Courts, which followed by several years,[305] leaving the existing Soviet courts of general jurisdiction in place for the interim.[306]

The Constitution requires that judges be citizens, and provides for the selection of judges and appointment by Seimas or the President.[307] It provides grounds for dismissal[308] and impeachment[309] of judges, but is silent on control of judicial discipline and budget. The executive, through the Ministry of Justice, retained considerable control over the judicial hiring and firing, discipline and funding.[310]

The subsequent Law on Courts established the district court as the court of first instance for criminal and civil cases.[311] Appeals from the district courts are taken to the

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[302] Text to nn 337-459.

[303] Constitution of Lithuania (n 14) ch IX (arts 109-114); ibid art 111.

[304] ibid art 111.

[305] Text to nn 288-89.

[306] ibid.

[307] Constitution of Lithuania (n 14) art 112 (Supreme Court justices are appointed and dismissed by Seimas on nomination of the President, justices of the Court of Appeals by the President on nomination of Seimas with provision for dismissal, and all lower court and special court judges appointed and transferred, with no provision for dismissal, solely by the President).

[308] Dismissal upon resignation; expiration of their term of office or reaching pensionable age; due to health; on election or transfer to another office; when they 'discredit the name of the judge by their behaviour'; or when criminally convicted. ibid art 115.

[309] Impeachment for gross violation of the Constitution; breach of oath; or disclosure of the commission of a crime. ibid art 116.

[310] These controls were somewhat lessened, but were not improved significantly until nearly a decade later, following key rulings of the Constitutional Court. Text to nn 360-75.

[311] Law on Courts (n 63) arts 12, 15.

regional courts,[312] and appeals from the regional courts are taken to the Court of Appeals, which has separate civil and criminal divisions.[313] The Court of Appeals is also the court of first instance for recognition of foreign court orders and enforcement of arbitration awards.[314]

The court of cassation for the courts of general jurisdiction is the Supreme Court.[315] It reviews the decisions of the courts of appeal in civil and criminal cases only in exceptional cases, and determines only issues of law.[316] There is no further appeal in the domestic court system; its decisions take effect on the date they are adopted.[317] There are also two areas in which the Supreme Court has original jurisdiction: resolving jurisdictional disputes between a court of general jurisdiction and an administrative court,[318] and the restoration of civil rights to those who were convicted of insurgency

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[312] ibid art 19.

[313] ibid arts 20(2), 21.

[314] ibid art 22.

[315] Law on Courts (n 163) art 12(3); Code of Criminal Procedure (n 60).

[316] Official website of the Supreme Court of the Republic of Lithuania (in Lithuanian) <http://www.lat.lt/en/home.html> accessed 30 August 2012 (Supreme Court Official Website). Until recently there was no right to cassation for civil disputes that did not reach a minimum amount. *Estertas v Lithuania* App no 50208/06 (ECtHR, 31 May 2012) para 13. According to information Lithuania provided to the Council of Europe, this limitation was removed with the 1 October 2011 amendments to the Civil Code, although the effective date is not noted. CEPEJ, 'Recent Developments in the Judicial Field in Lithuania' <http://www.coe.int/t/dghl/cooperation/cepej/profiles/Cepej_recent_%20developments_ Lihuania_ Jan_2012.asp> accessed 30 August 2012; Civil Code, 18 July 2000, No VIII-1864, amended 10 May 2012, No VIII-1864, *Official Gazette* 2012, No 57-2824 (19 May 2012) (in Lithuanian) (most recent English translation 21 June 2011, No XI-1484).

[317] Supreme Court Official Website (n 316). Most cases are heard by a panel of three judges; more complicated cases may be referred to an expanded panel of seven judges or a plenary session of the relevant division. Law on Courts (n 63) arts 366, 378; Code of Civil Procedure, 28 February 2002, No IX-743, amended 21 June 2012, No XI-2090, *Official Gazette* 2012, No 76-3933 (30 June 2012) (in Lithuanian) art 357(1).

[318] Supreme Court Official Website (n 316). In the first six years (1999-2005), 650 decisions were issued. These disputes are assigned to a four-judge Chamber of Jurisdiction, established in 1999 according to the Law on Courts (n 63) art 37.

against the occupational regime (rehabilitation).[319]

B. Administrative Courts

The Constitution, in addition to establishing a single court system, contemplated the development of specialty courts, established by the 1994 Law on Courts.[320] It is in the administrative courts that Lithuanians exercise their constitutional right to criticise the work of State institutions and officials and to appeal against their decisions.[321]

The 1994 Law on the Courts established a special administrative court system for cases challenging the actions of public officials and institutions, with five administrative regional courts.[322] The Administrative Courts began operations on 1 May 1999,[323] hearing cases challenging the lawfulness of the actions of public

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[319] The proceedings were established by the Law on Rehabilitation of Persons Repressed for Resistance to the Occupying Regime, 2 May 1990, No I-180, amended 13 November 2008, No X-1814, *Official Gazette* 2008, No 137-5368 (29 November 2008) (in Lithuanian) (most recent English translation 2 May 1990, I-180). If successful, an applicant is issued a certificate of restoration of civil rights. Appeals from denials or revocations of a certificate are heard by panels of Criminal Division of the Supreme Court. ibid. Between 1989 and 2005, 26,893 certificates were issued in 36,114 application proceedings. Supreme Court Official Website (n 316).

[320] The Constitution of Lithuania (n 14) describes a single court system, comprised of 'the Supreme Court, the Court of Appeal, regional courts and district courts'. It also provides, in art 111:

> For administrative, labour, family and cases of other categories, specialised courts may be established pursuant to law. The composition and competence of courts shall be determined by the Law on Courts of the Republic of Lithuania.

[321] The Constitution of Lithuania (n 14) art 33 provides that:

> Every citizen shall be guaranteed the right to criticize the work of State institutions and their officials, and to appeal against their decisions. It shall be prohibited to persecute people for criticism.

[322] The 1999 Law on the Establishment of Administrative Courts is the enabling legislation enacted pursuant to art 111 of the Constitution of Lithuania (n 14) establishing the competence of this specialised court. This constitutional provision also allows the establishment of other specialty courts, such as for cases related to employment, family matters, and other relationships. The five regional administrative courts are in Vilnius, Kaunas, Klaipėda, Šiauliai and Panevėžys. The Supreme Administrative Court of Lithuania is in Vilnius. Supreme Administrative Court of the Republic of Lithuania <http://www.lvat.lt/en/several-insights-at-f2a2.html> accessed 30 August 2012 (Supreme Administrative Court Official Website); Law on the Establishment of Administrative Courts, 14 January 1999, No VIII-1030, amended 12 March 2002, *Official Gazette* 2002, No 31-1124 (27 March 2002) (in Lithuanian).

[323] Law on Administrative Proceedings, 14 January 1999, No VIII-1029, amended 17 April 2012, No VIII-1029, *Official Gazette* 2012, No 50-2442 (28 April 2012) (in Lithuanian) (most recent English translation 19 September 2000, No VIII-1029).

administrators, including from government ministries, their departments, inspectors, and commissions. Complaints may include challenges to taxes assessed, financial or administrative sanctions, or denials of residence and work permits for non-Lithuanians and refugee status.[324] As noted, the potential for establishing administrative courts is provided by the Constitution,[325] but its competence is defined by statute in the Law on Administrative Proceedings,[326] together with legislation in the substantive areas under its jurisdiction, such as elections, public service, taxes, and zoning.[327]

Appeals from these rulings are heard by the Supreme Administrative Court of Lithuania, which began operations on 1 January 2001. The Law on Administrative Proceedings establishes a Supreme Administrative Court as the appellate court for the decisions of the regional administrative courts. Rulings of the Supreme Administrative Court of Lithuania are final and not subject to any appeal.[328]

C. The Constitutional Court

The Constitution of Lithuania established a Constitutional Court that is independent of all other courts, requiring that its justices 'act independently of any other State institution, person or organisation', observing only the Constitution.[329] Consistent with the classic Austrian system,[330] the jurisdiction of the Constitutional

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[324] Other cases provided for in the Law on Administrative Proceedings (n 323) art 15.

[325] Constitution of Lithuania (n 14) art 111 (specifically provides for the Supreme Court, the Court of Appeals, regional and local courts, and allows the subsequent creation of specialised courts, including administrative courts, that 'may be established according to law').

[326] Law on Administrative Proceedings (n 323) art 3 (to 'settle disputes over issues of law in public or internal administration').

[327] ibid art 15 (itemising the areas of law assigned to the competence of the Administrative Court).

[328] ibid art 145 (giving the decisions of the Administrative Court of Appeals immediate effect and prohibiting any cassation appeal therefrom); text n 720 in ch 4 (as a potential denial of court access).

[329] Constitution of Lithuania (n 14) art 104; arts 102-108) (ch VIII, The Constitutional Court).

[330] Text to n 155; Koslosky (n 60) 234.

Court is limited, reviewing the laws and other acts of the Seimas or the President and the Government.[331] The Constitutional Court describes its role as follows:

> Under the Constitution, the Constitutional Court must secure the supremacy of the Constitution in the legal system. The Constitutional Court administers constitutional justice while considering whether the laws and other legal acts adopted by the *Seimas*, legal acts adopted by the President of the Republic and the Government of the Republic are in conformity with the Constitution.[332]

The Constitutional Court is the only court that may make these determinations and its decisions are final, making it a court of both original and final jurisdiction.[333]

The composition and manner of selection of justices on the Constitutional Court are defined by the Constitution to consist of nine justices appointed for nine-year non-renewable terms, with one-third of the Court being appointed every three years. Grounds for termination of a justice are also defined by the Constitution.[334]

There is no Constitutional provision relating to the budget for the Constitutional Court. The Court's financial provision are regulated by a separate Law on the Constitutional Court, with funding for its operations provided directly from the national

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[331] Constitution of Lithuania (n 14) art 102. Other areas of competence include violations of election laws; challenges to the health of the President; constitutionality of international treaties; and whether actions taken for impeachment of state officials are constitutional. Ibid art 105

[332] Constitutional Court, 12 July 2001 ruling on Remuneration for Work of State Politicians, Judges and State Officials [title restated], *Official Gazette* 2001, No 62-2276 (18 July 2001) sec II, para 3; Law on Remuneration for Work of State Politicians and State Officials, 29 August 2000, No VIII-1904, amended 21 December 2011, No XI-1840 *Official Gazette* 2011, No 163-7750 (31 December 2011) (in Lithuanian) (most recent English translation 15 September 2011, No VII-1904). The amended law before the Court was that of 27 March 2001, No IX-231 *Official Gazette* 2001, No 29-918 (4 April 2001) (in Lithuanian) (2001 Amended Law on Remuneration of State Employees).

[333] 'Judicial Independence in Lithuania' (n 46) 280.

[334] Constitution of Lithuania (n 14) art 103 (appointments made by Seimas from three each presented by the President of the Republic, President of Seimas, and President of the Supreme Court; the President of the Constitutional Court is selected by Seimas from the justices nominated by the President of the Republic), art 108 (expiration of term of office; death; resignation; incapacity due to health; removal by impeachment).

budget as a separate budget line.[335]

Those who may petition the Constitutional Court are restricted to members of Seimas and the President of the Republic, depending upon which authority is challenged; private parties may not petition the Constitutional Court, but if a judge in a lower court has grounds to believe that a law in a specific case conflicts with the Constitution, the judge is to suspend proceedings and request a ruling on its constitutionality from the Constitutional Court.[336]

D. Challenges for Judicial Independence

Lithuania had no significant history of independent courts before it regained independence on 11 March 1990.[337] Before the First World War Lithuania was part of the Russian Empire during which time courts were not independent.[338] In the roughly two decades of independence between the First and Second World Wars (1918-1940),[339] Lithuania had a system of civil law courts that were fairly independent,[340] but those years were followed by 50 years of Soviet rule.[341] The Soviet system was based upon

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[335] Law on the Constitutional Court, 3 February 1993, No I-67, amended 6 December 2011 No XI-1783, *Official Gazette* 2011, No 154-7262 (17 December 2011) (in Lithuanian) (most recent English translation 18 February 1993, No 6-120);'Judicial Independence in Lithuania' (n 46) 280; Constitution of Lithuania (n 80).

[336] Constitution of Lithuania (n 80) art 106 (a challenge to a law or act by Seimas must be by Government, at least one-fifth of Seimas, or judges of the courts in which the law or other act is in question; a challenge to an act by the President must be by at least one-fifth of Seimas or judges of the courts in which the act is in question; a challenge to actions by the Government must be by at least one-fifth of Seimas, judges of the courts in which the act is in question, or the President), art 110 (duty of judges in referring constitutional questions to the Constitutional Court).

[337] 'Judicial Independence in Lithuania' (n 46) 279.

[338] ibid.

[339] Alexandra Ashbourne, *Lithuania: The Rebirth of a Nation, 1991-1994* (Lexington Books, Oxford 1999) 11 (declaration of independence 16 February 1918) 17 (occupation by Soviet officials and troops in June 1940 following the forced declaration by Seimas stating a desire to join the USSR).

[340] 'Judicial Independence in Lithuania' (n 46) 279.

[341] Ashbourne (n 339) 25 (independence was reinstated 11 March 1990 with the declaration of the formal restitution of Lithuania's independence); Lithuanian SSR, Declaration of the Supreme Council, 'On the Mandate of the Deputies' (11 March 1990, No I-10, *Official Gazette* 1990, No 9-220, 31 March 1990) (in Lithuanian).

the principle of unity of power which subordinated the courts, with negative consequences for judicial independence.[342] During that time there was no judicial independence and no judicial review:

> [A]ny concept of meaningful judicial independence was lacking under the Soviet system of government. Indeed, the concept of judicial review was foreign to domestic courts.[343]

The law was not even considered a component of statehood, as evident by the Soviet Supreme Court's proclamation that, 'Communism means not the victory of socialist law, but the victory of socialism over any law.'[344] Instead, the legislative bodies were recognised as 'the ultimate expression of the will of the people'[345] and therefore beyond the reach of judicial restraint.[346] As a result, the conceptualization of law was synonymous with legislation and other acts of the legislative body. At best, the judiciary was a peripheral body with limited influence, where rulings by judicial tribunals never contradicted the majority.[347]

With this background, the legal culture with respect to independent courts and the protection of human rights was vastly different from the ideals embraced in the Convention. The judiciary in Central Europe, with a similar background, continues to face problems of attitude and self-perception that originate in their Communist past,[348] creating a climate in which the line of separation between the powers is not clear. This

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[342] 'Judicial Independence in Lithuania' (n 46) 279.

[343] Koslosky (n 60) 208 (footnotes omitted).

[344] Stated by the Commissar of Justice, Piotr Ivanovich Stuchka. Vladimir Gsovski, 'The Soviet Concept of Law' (1938) 7 Fordham L R 1, 12 fn 42; GM Razi, 'Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe' (1960) 48 California L R 776, 784.

[345] Koslosky (n 60) 209-10.

[346] ibid 209.

[347] ibid 209-10.

[348] Text to nn 492-525 (on judicial self-perception).

background results from the time when individual liberties were discouraged and there was no independent judiciary because decisions were driven by the recommendations of the Communist Party. This lack of clarity makes the independence of the judiciary and the right to a fair trial fragile in contemporary Lithuania.

The Western concept of separation of powers and appellate review was introduced to Lithuania's jurisprudence for the first time in 1992, with the establishment of the four-tiered court system. Until that time, under the Soviet legal tradition, there was never a question as to whether an act was constitutional, because there was never a need to – there was no judicial review.[349] There were also no higher court rulings that took priority over lower court law. Under the Soviet model, still present in today's Belarus, Lithuania's neighbour to the East, it is said that the law does not operate – everything is ruled by the decrees and protocols of the dictator.[350]

Lithuania's modern court system follows the Continental European model of civil law. It was established in the 1992 Constitution modeled after the Austrian-style centralised judicial system, including its corresponding institutions.[351] It shares the Austrian requirements for standing and model of judicial review.[352] The courts operate according to constitutionally-mandated enabling legislation, the Law on Courts.[353]

In keeping with its reform efforts, in 1993 Lithuania made judicial reform a

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[349] Text to nn 342-43.

[350] Pakalnytė (n 84) 32; Constitution of Lithuania (n 14).

[351] Koslosky (n 60) 220; Pakalnytė (n 84) 30-31; Rauličkytė (n 44) 182-83. See Sara Lagi, 'Hans Kelsen and the Austrian Constitutional Court (1918-1929)' (2012) 9 *Revista Co-Herencia* (Co-Inheritance Magazine) 273 (Kelsen's role in first Austrian Constitutional Court after the end of the Habsburg Empire).

[352] Koslosky (n 60) 220.

[353] Constitution of Lithuania (n 14) art 111(4); Law on Courts (n 63).

priority.[354] Seimas adopted an Outline for Reform of the Legal System in 1993 identifying judicial reform as its most important objective, emphasizing conformity with European Union standards.[355] It also restructured the court system in the 1994 Law on Courts. An amended Outline for Reform of the Legal System was approved in 1998 and in the same year the economic court was abolished, transferring its functions to a new system of district and regional courts or to commercial arbitrators, incorporating these functions.[356]

Returning to the opening theme of this section,[357] the independence of Lithuania's judiciary is constitutionally guaranteed by Article 109 of the Constitution,[358] but the Soviet legal system remained in place until the enabling legislation in the Law on Courts followed.[359] Even then, the executive retained control over the judiciary, an aspect of the Law on Courts that the Constitutional Court later addressed by ending political control over judicial dismissal and disciplinary action and judicial salaries.[360]

On 21 December 1999, the Constitutional Court declared several provisions of the Law on Courts unconstitutional because they gave the executive undue influence

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[354] Vadapalas (n 81) 503.

[355] Republic of Lithuania, 'Government Resolution on the Outline of Legal System Reform and its Implementation' (14 December 1993, No I-331, *Official Gazette* 1993, No 70-1311, 18 December 1993) (in Lithuanian).

[356] Law on the Abolition of the Economic Court, 3 March 1998, No VIII-651, *Official Gazette* 1998, No 26-672 (18 March 1998) (in Lithuanian).

[357] Text to nn 285-89.

[358] Text to nn 293-300; Constitution of Lithuania (n 14) arts 109 ('While administering justice, judges and courts shall be independent'), 31 ('Everyone charged with a criminal offence shall have the right to a fair and public hearing by an independent and impartial tribunal'), 104 ('justices of the Constitutional Court shall act independently of any other State institution, person or organisation, and shall observe only the Constitution of the Republic of Lithuania').

[359] Mikelenas (n 288) 143; text to nn 288; Law on Courts (n 63).

[360] Text to nn 361-66, 373-75.

over the judiciary.[361] The issue was presented to the Constitutional Court by members of Seimas,[362] who argued that the provisions created direct and indirect opportunities for the Ministry of Justice to interfere with the activities of the courts in its control over budget issues, disciplinary proceedings, and hiring and firing of the judges.[363] The Court found that while it was properly within the scope of the Ministry of Justice to organise the training of judges, mandate improvement of professional skills, and determine the rules for distribution of cases to judges, with the exception of the Supreme Court,[364] it was not constitutional to control the hiring and firing of members of the judiciary.[365] Among the offending provisions were those permitting:

> (1) dismissal of judges in the district, regional, and appeals court by the President of the Republic at the request of the Minister of Justice;
>
> (2) disciplinary action against judges in the district, regional, and appeals court by the Minister of Justice on the proposal of the Director of the Department of Courts or on his [or her] own initiative, and requiring the targeted judge to be removed from office on the proposal of the Minister of Justice until the outcome of the case 'becomes clear'; and
>
> (3) court funding for the district and regional courts and the Court of Appeal under the control of Minister of Justice.[366]

The immediate effect of this ruling was a significant reduction in the executive's influence over the judiciary, but it also created a significant vacuum, especially in the internal management of the courts previously managed by the Ministry of Justice.[367]

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[361] Constitutional Court Ruling 21 December 1999 (n 301); 'Judicial Independence in Lithuania' (n 46) 273-74.

[362] 'Judicial Independence in Lithuania' (n 46) 273.

[363] ibid 274.

[364] Constitutional Court Ruling 21 December 1999 (n 301) 30 (ruling) para 10.

[365] ibid sec I.

[366] ibid (ruling) paras 1-3, 7, 8.

[367] 'Judicial Independence in Lithuania' (n 46) 270.

For example, not clear following the ruling was which institution or officials could represent the judiciary in its relations with the other branches of government, or who had decision-making authority over the administration of the courts.[368] The court presidents were given wide-ranging managerial power, but had no training in professional court management, thereby threatening the ability of the courts to operate effectively.[369]

This 1999 ruling prompted an effort to comprehensively review and revise the relationship between the executive and judiciary, and for several years following, the judicial system remained in flux. No comprehensive legislation followed to replace the voided provisions of the Law on Courts.[370] Instead, a number of temporary solutions were reached. The task of drafting a new comprehensive Law on Courts began in 2001 but was delayed over disputes between the judicial and non-judicial participants in the process.[371] In the summer of 2001 the working group charged with this task submitted its draft which was finalised by the Supreme Court and forwarded to Seimas for consideration. In Seimas it was referred to the Committee for Legal Affairs without further action being taken that year.[372]

That same summer, on 12 July 2001, the Constitutional Court further defined the role of the executive as to the judiciary when it decided eleven petitions from several courts[373] challenging the actions taken by the Ministry of Justice and Seimas to

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[368] ibid 274-75.

[369] 'Judicial Capacity in Lithuania' (n 46) 149.

[370] 'Judicial Independence in Lithuania' (n 46) 270.

[371] ibid 270, 274.

[372] ibid 274 (also discussing aspects of this draft law).

[373] Petitioners were the Vilnius City Court in seven investigations, the Supreme Administrative Court in three investigations, and the Vilnius Regional Administrative Court in one investigation. Constitutional Court Ruling 12 July 2001 (n 333) sec I, paras 1-11.

reduce the salary of judges.[374] This ruling was generally considered as further securing judges' economic security by precluding political manipulation of salaries.[375]

Early in 2002, two major new laws were promulgated: a revised Law on Courts[376] and a new Law on the National Courts Administration.[377] Together, they created independent institutions with broad authority over all of the courts except for the Constitutional Court, substantially improving the basic regulatory and institutional framework of the court system.[378] They allowed for substantial improvement to institutional independence of the judicial branch, creating a Judicial Council and a National Courts Administration. The Judicial Council is comprised of 24 representative judges from the various courts,[379] and is responsible for a broad range of administrative matters, such as making personnel decisions, developing budgets, and establishing and supervising administrative standards.[380] The National Courts Administration has responsibility for the day-to-day administration of the court system on a national level, for implementing the decisions of the Judicial Council, and providing research and

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[374] Among the actions taken were the 28 December 1999 Government Resolution adjusting downward judicial salary coefficients in the computation of salaries from 2.3 to 1.75, effective 1 January 2000 (Constitutional Court Ruling 12 July 2001 (n 333) sec I), and actions by Seimas that (1) the 2000 State Budget passed 23 December 1999 to decrease the amount for expenditures by legal institutions (13 July 2000) amended app 6; and (2) the 2001 Amended Law on Remuneration of State Employees (n 333) art 7.

[375] Constitutional Court Ruling 12 July 2001 (n 333); 'Judicial Capacity in Lithuania' (n 46) 141 fn 10.

[376] Law on Courts (n 63).

[377] Law on the National Courts Administration, 27 March 2002, No IX-787, amended 15 July 2008, No X-1715, *Official Gazette* 2008, No 87-3472 (31 July 2008).

[378] 'Judicial Capacity in Lithuania' (n 46) 140, 146.

[379] At present, 18 of the Council's 21 members are elected by their colleagues (three each from the Supreme Court, Court of Appeals, Supreme Administrative Court, regional courts, regional administrative courts, and district courts) with the remaining 3 serving ex officio by virtue of their office (the Chairs of the Supreme Court, Court of Appeals, Supreme Administrative Court). Law on Courts (n 63) art 119.

[380] Law on Courts (n 63) art 120 (role of Lithuania's Judicial Council); text to nn 447-57 (general utility and in Lithuania).

analysis support to the Judicial Council.[381]

The promise of this new legislation and the early work that followed their enactment were welcomed, but received with reservation due to the lack of any personnel experienced in court management or public administration. The quality of the administrative capacity of these institutions was considered a major factor in the ability of the reforms to succeed. They would either increase judicial capacity or instead create an inefficient and unaccountable guild. The initial implementing regulations suggested the latter, indicated a move to 'a system tending towards insularity and resistance to professionalisation':[382]

> Still, it is too early to assess whether or not these broad institutional reforms – so important for the judiciary's independence – will increase judicial capacity as well. Practical implementation of the new Laws is essential to ensure that they realise their potential for creating an independent, accountable, and capable judiciary. Indeed, greater institutional autonomy, itself quite a welcome development, makes it imperative that the judiciary also acquire specialised expertise in public administration, as well as enhanced transparency in its operations if the new institutional arrangements are to lead to increased capacity and greater public trust in courts. Lack of management expertise and a closed institutional culture may undermine support for the very idea of a judiciary capable of efficient self-government.[383]

Two years later, the promise of an independent, accountable, efficient and competent court system appeared as yet unfulfilled[384] with critics calling the judiciary too insular and lacking in adequate accountability and professional management,

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[381] Law on the National Courts Administration (n 377) art 2 (scope and functions); 'Judicial Capacity in Lithuania' (n 46) 141 fn 6.

[382] 'Judicial Capacity in Lithuania' (n 46) 146-47.

[383] ibid 141.

[384] Henrikas Mickevičius, Mercedes Sprouse, Dovilė Šakalienė (eds), *Human Rights in Lithuania, Overview 2004* (Human Rights Monitoring Institute, Vilnius 2005) (HRMI 2005) 22-27 (s 5, Right to Fair Trial).

especially in case assignment procedures and sound budgetary practices.[385] By the end of 2004, the gap between justice perceived and as delivered was growing:

> Lithuanians witnessed obvious infringements on certain elements of the concept of a fair trial: violations of the presumption of innocence, improper evidence handling and practices that put in doubt judicial impartiality and equality of arms.[386]

By 2005 the judicial system was openly criticised by officials for its unprofessional management, antiquated hierarchy and insularity, with calls for comprehensive reform of the court system.[387] Valentinas Mikelenas, a judge of the Supreme Court resigned that year due to incompetence in the courts,[388] characterising the courts as a 'swamp' dominated by the personal interests of some of its members while many honest judges are pushed aside, relegated to the court's 'dirty work'.[389]

The need for structural court reform was further highlighted by the Constitutional Court in a 2006 ruling on the judiciary.[390] It recognized the interrelationship of the independence of the courts and judges and the right to a fair trial.[391] The Constitutional Court called for decentralisation of the judicial system and application of principles of democracy and transparency in the courts' daily operations.[392] The ruling had a positive influence on the composition of the Judicial

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[385] ibid.

[386] ibid.

[387] HRMI 2007 (n 108) 23; HRMI 2005 (n 384) 22-25.

[388] HRMI 2007 (n 108) 23; Rimantas Varnauskas, 'V.Mikelėnas: 'Courts Crossed A Dangerous Line' (24 April 2006) (in Lithuanian) ('*Teismuose Peržengta Pavojinga Riba*', *Ekstra*) <http://www.bernardinai.lt/straipsnis/-/28392> accessed 30 August 2012.

[389] Varnauskas (n 388).

[390] ibid; Constitutional Court, 9 May 2006 ruling on the Constitutional System of the Judiciary, its Self-Government, Judicial Appointments, Promotion, Transfers and Dismissal [title restated], *Official Gazette* 2006, No 51-1894 (11 May 2006) (Constitutional Court Ruling 9 May 2006).

[391] ibid.

[392] ibid; HRMI 2007 (n 108) 23.

Council, but did not provide enough momentum to bring about other substantial changes.[393] Still unfulfilled was the initiative of the President of the Republic some three years earlier to improve the judicial system, delayed by disagreements some considered not essential to comprehensive reform.[394] The Seimas working group created in 2001 to propose a comprehensive revision of the Law on Courts had still not issued a public report.[395] Media accounts suggested that there would be no revision to the Law on Courts, but instead only minor changes would be proposed.[396] Given the continued existence of 'old-fashioned' relationships among the branches of the government and subordinated courts, reformers grew even more concerned that these initiatives, if approved, would erode the institutional independence of the judiciary by increasing control of the political branches of government.[397]

The political agenda in 2007-2008 was dominated by two events demonstrating that even those employed in the courts, including the Chief Justice of the Supreme Court, also referred to as the President of the Supreme Court, still refused to be ruled by the law. The Chief Justice defiantly overstayed his term of office, and several court bailiffs were shown to have abused their authority in the enforcement of civil judgments.[398] The matter of the Chief Justice, Vytautas Grečius, was a protracted conflict over his non-departure from office. He simply stayed in his position after his

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[393] HRMI 2007 (n 108) 23; text to nn 452-57 (utility of the Judicial Council).

[394] HRMI 2007 (n 108) 39.

[395] Among the considerations were provisions that would assign the judicial nomination and selection procedure to one institution, the Office of the President. ibid 23.

[396] ibid.

[397] ibid 23-24 (referring to the supremacy of the political elite); 'Constitutionalization of Human Rights' (n 31) 18.

[398] HRMI 2009 (n 110) 36.

term of office expired in July 2008.[399] While seeking to have his term extended, Seimas twice rejected a decree from the President of the Republic that he step down.[400] The President signed a third decree and the Chief Justice still refused to leave.[401] Nine months later, on 9 April 2009, the President petitioned the Constitutional Court requesting a ruling on whether the Chief Justice should be released upon the expiration of his office, or his term could be extended.[402] It was only after a 15 May 2009 Constitutional Court ruling that, yes, the Chief Justice should leave, that he finally left office.[403]

Although a new version of the Law on Courts was finally proposed in 2008, only some of its proposed provisions were passed, becoming amendments to the earlier law.[404] Among the main obstacles to the comprehensive reform was an unresolvable debate on the introduction of appeals of cases heard by the Supreme Administrative Court as the highest court of cassation rather than by the highest court, the Supreme Court of Lithuania.[405] Despite what is viewed as a serious deficiency in the system, reformers were dismayed that the functioning of the administrative courts for a ten-year period had shaped the Western perception that the administrative courts were adequate and that Lithuania had a court system that contributed to the integration of human rights standards into Lithuanian judicial practice.[406] This is most likely due to the lack of

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[399] ibid.

[400] ibid.

[401] Constitutional Court, 15 May 2009 ruling on the Dismissal of a Judge Upon Expiry of Term of Powers [title restated], *Official Gazette* 2009, No 58-2251 (19 May 2009) (Constitutional Court Ruling, 15 May 2009).

[402] ibid.

[403] ibid.

[404] HRMI 2009 (n 110) 40.

[405] ibid 39; Law on Courts (n 63).

[406] HRMI 2009 (n 110) 40.

information about the functioning of Lithuania's legal system noted at the outset.[407] Nonetheless, the 2008 amendments to the Law on Courts were considered positive even without the reforms anticipated. For the first time, audio recording of court hearings was to begin on 1 July 2010, with provisions for producing a verbatim record of the proceedings in regulations to follow.[408] Also new was a requirement that the content of final decisions by the lower courts be published online. Periodic assessments of the performance of judges would be undertaken to measure participation in the institutions of judicial self-governance.[409] The amendments also required judges to adhere to the opinions of higher courts, thereby codifying the application of the common law doctrine of stare decisis to court rulings in this civil law jurisdiction.[410]

While the confrontation of interests and ambitions over the personality of the Chief Justice continued, fundamental problems were ignored. Lithuania's Judicial Council[411] identified, as among the problems requiring attention: ineffective management of the judicial system; lack of transparency in court operations; inadequate procedures for the selection, appointment and transfer of judges; lack of accountability; and insufficient social benefits for judges.[412] This is consistent with regional observations that the equipment used in the courts in post-Soviet countries was generally poor.[413] Although that changed somewhat with financial support from the

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[407] Text to nn 60-69 in ch 1.

[408] Text to nn 703-07 in ch 4 (not yet implemented; planned for 1 January 2013).

[409] ibid; Law on Courts (n 63) art 38 (Recording of the Course of the Court Hearing and Outcome of Cases), art 39 (Official Publication of Court Decisions).

[410] Text to nn 161-66 in ch 2; Ambrasienė and Cirtautienė (n 162) 67; *Nations in Transit 2009* (n 204) 334.

[411] Text to nn 452-57.

[412] HRMI 2009 (n 110) 40, fns 15-16 (noting calls for reform since 2004).

[413] *Judiciary in Central and Eastern Europe* (n 52) 167-68.

European Union's pre-accession programmes in the 1990s,[414] the salaries of support staff remain low in comparison to similar professions. As a consequence, the support staff are, on the whole, not well-qualified. Because of the resulting high staff turn-over rate, judges spend more time that they should on administrative tasks that would be better spent on their proper work.[415]

The reforms of the early 1990s did not include professional court management.[416] Court administrative professionals were overlooked in favour of continuing self-governing by judges. To that end, retired judges are used, viewed by the judiciary as knowing the system better.[417] These conditions have contributed to the ever-increasing workload of the courts and the length of court proceedings, as noted by the Commissioner of Human Rights.[418] The problem has become systemic, but no further steps are being taken other than to recognise the problem. The judiciary remains severely underpaid, which exacerbates a shortage of judges.[419]

The saga of the Chief Justice of the Supreme Court overstaying his term of office illustrated for many the continued attempts by politicians to control the judiciary by giving statutory language interpretations contrary to earlier Constitutional Court rulings. These attempts were viewed as against the constitutional principles of

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[414] ibid; the EU PHARE Programme provided financial assistance to applicant countries of Central and Eastern Europe in preparation for joining the European Union. For the 2005 final report for Lithuania, see <http://www.fntt.lt/uploads/docs/finaleng.pdf> accessed 30 August 2012.

[415] *Judiciary in Central and Eastern Europe* (n 52) 167-68.

[416] 'Judicial Capacity in Lithuania' (n 46) 139, 140; interview with a former Lithuanian judge (telephone 2 November 2008).

[417] Interview with a former Lithuanian judge (telephone 2 November 2008).

[418] The Commissioner's 2004 Report recommended tackling excessive length of judicial procedures, lack of impartiality of certain judges, low level of trust placed by Lithuanian society in its judiciary and insufficient staffing level affecting the judicial system. Council of Europe 'Report By Mr Alvaro Gil-Robles, Commissioner for Human Rights On His Visit to Lithuania 23-26 November 2003' (CommDH(2004)6, Strasbourg 12 February 2004).

[419] HRMI 2009 (n 110) 40.

separation of powers and the rule of law and, by involving the judiciary into political power struggle, further undermined public trust in the institution of court.[420]

Despite Lithuania's widely acknowledged need for court reform, changes have been marginally incremental. In 2010, public opinion backlashed against the judiciary to the lowest point in twelve years, due to lengthy investigations, lengthy trials, and corruption. Criticism by politicians and news media was unrelenting, further damaging the public's opinion of the court system. Proposals for reform made no progress.[421] This lack of trust is consistent with public perception as it was under the Soviet system when policy making was controlled by a select few while the public was completely disengaged. It is difficult to foster respect for the law under such conditions, noted earlier, where 'entrenched elites cede their traditional impunity and vested interests only under great pressure'.[422]

This research has not discovered any reports that establish conclusively that the executive has control over the judiciary. To the extent there is such control, it likely follows the continued reliance on informal communications common from Soviet times. These practices are generally agreed to exist,[423] but are difficult to prove.

One clear example of direct executive interference, however, is provided by the first-hand account of the former President of Lithuania, Valdas Adamkus. In his recent memoirs, he describes a meeting in 2005 during which he compelled the heads of a local district court and of the Supreme Court of Lithuania to change a decision banning

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[420] ibid.

[421] *Nations in Transit 2011* (n 205) 351.

[422] 'Rule of Law Revival' (n 30) 96.

[423] Urbonas (n 43) 88; text to nn 97-202 (informal relationships in contemporary Lithuania).

the continued wire surveillance of diplomats from Belarus suspected of espionage.[424] It was on Thursday, 7 April 2005, that President Adamkus was informed that the municipal court in Vilnius had refused to approve a wiretap request to capture the conversations of agents in the foreign diplomatic core, based on the guarantee of diplomatic immunity in the Vienna Convention.[425] The day before had been the last day under a prior court order allowing permission to listen to the conversations of the suspected agents, from Belarus.[426] According to the reasoning of the Vilnius District Court, from that point on, it was prohibited to spy on them or to observe or otherwise restrict them.[427]

President Adamkus' advisers indicated that the Vilnius court's interpretation of the Vienna Convention[428] was incorrect. Diplomatic immunity, they explained, does not mean that foreign agents can freely spy under cover of diplomatic immunity. President Adamkus then invited the Chief Justice of the Supreme Court Vytautas Greičius and the Vilnius District Court Judge, Artūras Šumskas, to meet with him.[429] At the meeting President Adamkus demanded an explanation for their motives in not permitting the surveillance. He told them directly that the denial 'is a threat to Lithuania'.[430] After half an hour of explanations, President Adamkus had the response he wanted – that the court would allow the wiretapping of the foreign agents.[431]

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[424] Valdas Adamkus and Valdas Bartasevičius, *The Final Term: Presidential Diaries* (in Lithuanian) (*Paskutinė Kadencija. Prezidento Dienoraščiai*) (Tyto Alba, Vilnius 2011) 170.

[425] ibid; Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, entered into force 24 April 1964 (VCDR).

[426] Adamkus and Bartasevičius (n 424) 170.

[427] ibid.

[428] VCDR (n 425).

[429] Adamkus and Bartasevičius (n 424) 170.

[430] ibid.

[431] ibid.

The President of the Republic still has power to influence the judicial branch in the manner of judicial appointments. The President has the right to nominate, and Seimas to approve the nomination of, three justices to the Constitutional Court and all justices to the Supreme Court. The President also appoints, with legislative approval, judges of the Court of Appeals. However, legislative confirmation is not required for the appointment or transfer of judges in local, district, and special courts.[432]

Other interference with the judiciary is not as open, but is considered a 'public secret' among judges.[433] This can happen when judges in Lithuania exhibit personal failings, not disciplined when they should be, and become vulnerable to pressure from outside influence. For example, last year an investigative journalist published an interview with a judge, who asked to remain anonymous, about instances of public drunkeness and bad behaviour on the part of judges that bring discredit to themselves, yet are not punished.[434] The judge explained that such behaviour, along with poor working conditions, makes them vulnerable to pressure by members of the prosecutor's office and national security services:[435]

> [I]t is a public secret among judges. The prosecutor's office and the national security bodies are trying to find a vulnerable spot in a judge in all ways.
>
> In exchange [for] the possibility of working peacefully, the judge becomes their handyman. It means that the cases where suitable decisions are necessary [they] are given to such 'hooked' judges.[436]

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[432] USA Library of Congress, *Country Studies: Lithuania, The Constitutional System* <http://lcweb2.loc.gov/frd/cs/lttoc.html#lt0025> accessed 30 August 2012.

[433] Laima Lavaste, 'Sins of Judges - Public and Concealed' (in Lithuanian) *('Teiseju Nuodemes - Viesos Ir Nutylimos') Lietuvos Rytas* (23 April 2011) <http://m.lrytas.lt/?data=20110423&id=akt23_a1110423&view=2> accessed 30 August 2012.

[434] ibid.

[435] ibid.

[436] ibid.

There is a history in independent Lithuania of the political branches demonstrating their low regard for the judiciary as a separate and independent branch of the government by seeking to improperly control courts' activities. In 1997, for example, the Government issued a decree instructing the Ministry of Justice to control certain criminal cases. In 1999, the President of Seimas appealed to the Minister of Justice to consider disciplinary actions against certain judges who had issued judgments in highly publicised cases that were subsequently overturned on appeal.[437]

> Particularly in matters that have attracted media attention, public officials have on occasion pressed judges to avoid acquittals in criminal cases or to reach decisions favourable to specific parties in civil cases. In one instance, for example, the then President of Parliament forwarded to the President of the Supreme Court the complaint of the plaintiff in a pending civil dispute, indicating how the case should be resolved, and underlining his official right to initiate disciplinary action against judges.[438]

According to a former judge in Lithuania, the Government still maintains a leash of sorts on the courts, especially the Administrative Court, by retaining control over some of its finances.[439] For example, should a court need building renovations or additional furnishings and there is not enough money in the regular annual budget, the president of that court can go to the Government, the Minister of Justice, and ask for additional funds.[440] If the extra funding is provided, it is then considered a favour to the court by the minister, and a chief judge is considered a good chief judge if he or she is able to obtain this additional funding.[441] Even if not verbalised, there is still the

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[437] 'Judicial Independence in Lithuania' (n 46) 276.

[438] ibid 276-77.

[439] Correspondence from a former Lithuanian judge to the author (1 September 2009).

[440] ibid.

[441] ibid.

opportunity that such a favour could affect a litigant's challenge to the Government, and creates the appearance of a lack of independence by the court.[442]

The budgeting scheme provides some insight into how the Government maintains its ability to remind the judges that they are in control.[443] It is not measurable, but when one becomes familiar with the system, the judges understand they are inferior to and dependent upon the Government.[444] This is especially dangerous in the administrative courts, which hear the disputes between citizens and the government.[445]

Significant to the low probability of rapid reform is the 1998 observation that '[e]ven the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centres of authority beyond their control'.[446] Until the political and human obstacles are overcome, respect for the law will not take root.

Judicial councils are common internationally as a device to enhance judicial independence and quality performance by insulating the functions of appointment, promotion and discipline of judges from the partisan political process while ensuring some level of accountability.[447] They are variously structured, described as 'between the polar extremes of letting judges manage their own affairs and the alternative of

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[442] ibid.

[443] ibid.

[444] ibid.

[445] ibid.

[446] ibid.

[447] Nuno Garoupa and Tom Ginsburg,'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 AmJCompL 103, 106.

complete political control of appointments, promotion, and discipline'.[448] The experience with judicial councils in the countries of the former Soviet Union is that they are of questionable usefulness due to many of the cultural influences noted both earlier,[449] and in the section that follows.[450] As they have been described:

> It is clear that the creation of a judicial council alone does not do the trick; the same societal attitudes are just reproduced elsewhere. It becomes even more alarming as it is taking place without any supervision or control from the exterior, since it is happening behind the wall of 'judicial independence'. A more general point might be added with respect to post-Communist judiciaries or by and large post-totalitarian judiciaries in transition: is it wise to gran[t] extensive self-regulatory powers to a profession immediately after the fall of the regime, ie before the necessary personal change and renewal takes place?[451]

Lithuania's Judicial Council, although holding promise as 'a modern, transparent, competitive and accountable judicial power,'[452] by 2006 was criticised by the major human rights NGO in Lithuania as an unused opportunity for reform, due to having entrusted judges alone with the entire responsibility.[453] As indicated at the time:

> Bodies of judicial power are not open to innovations enabling to amend and counterbalance the already achieved high level of independency of courts. Other elements of an efficient reform – implementation of the principle of accountability of courts and judges, acquisition of new competences, professional administration – face problems on their way. It is obvious that judges themselves are not able to implement an integrated reform of courts, as they

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[448] ibid 105 (estimating that over 60 per cent of countries have some form of judicial council, 10 per cent higher than about 30 years ago).

[449] Text to nn 156-205 in ch 2.

[450] Text to nn 460-615.

[451] Bobek (n 244) 104-05.

[452] Henrikas Mickevičius, Asta Radvilaitė and Agnė Kurutytė (eds), *Human Rights in Lithuania, 2005 Overview* (in Lithuanian) (*Žmogaus Teisių Įgyvendinimas Lietuvoje 2005 Apžalga*) (Human Rights Monitoring Institute, Vilnius 2006) 21.

[453] ibid.

lack necessary motivation and competence.[454]

There is little sign that the Lithuania's Judicial Council has played a major role in reforming the independence of the judiciary.[455] By 2009 the Council was faulted for the judicial management system it adopted as ineffective, and taking no further steps to address the systemic increase in court caseloads and length of proceedings.[456] The Council has also not addressed the need for judicial accountability, improved procedures for the selection, appointment and transfer of judges, or provide more public information about court operations.[457]

Rather than relying on judges for administrative functions of the courts, professionally trained court administrators and clerks would greatly assist in the internal functions of the courts. With adequate professional court administration, the Council of Judges, with the cooperation of the National Courts Administration, could serve a critical role in furthering court reform by (1) incorporating problem solving techniques based upon the quality control model of data gathering and analysis already in use in Europe;[458] and (2) including presently missing meaningful civic involvement[459] into its operations.

IV. Residual Conceptual Influences

To briefly restate some of the background provided earlier, in addition to not having significant experience with judicial independence when it regained independence in 1990, the legal professions in Lithuania had no experience with the

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[454] ibid.

[455] HRMI 2009 (n 110) 40.

[456] ibid.

[457] ibid.

[458] Text to nn 272-75.

[459] Text to n 176 in ch 2, n 648 in ch 4.

concept of judicial review.[460] The Soviet judicial system Lithuania inherited had been in place for nearly 50 years was designed to support the Soviet communist principle of unity of power and the subordination of the courts.[461] Despite the early state of flux in the judicial system and gaps in internal court management in the 1990s, the litany of new laws and treaty accessions suggested to the outside world that Lithuania's court system had undergone a process of reform that would ensure the protection of the human rights recognised by international instruments.[462] The mechanisms were in place for local courts, the Supreme Court, the Constitutional Court, district and administrative courts and the Court of Appeals were all functioning. It appeared that every decision made by executive, legislative and judicial bodies could be appealed to a higher court.[463]

Early on, observers close to the system had anticipated the difficulties that followed. For example, in the pre-accession reporting of Lithuania's candidacy for membership in the European Union, the problem was described as follows:

> In the candidate States in particular, the legacy of the judiciary's subordination and dependence and, more broadly, the lasting cultural effects of political dictatorship, may require institutional separation and institutional guarantees of judicial independence that are more far-reaching then in countries with an entrenched culture of judges' independence or a tradition of decision-making based on consensus and negotiation. But any present or future member State which does not provide its judiciary with a reasonable level of autonomy in administering its

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460 Koslosky (n 60) 208.

461 'Judicial Independence in Lithuania' (n 46) 279.

462 For example, in background materials prepared for UK asylum process. UK, 'Lithuania Assessment' (April 2001) Country Information and Policy Unit, Home Office Country Assessment <http://www.asylumlaw.org/countries/index.cfm?fuseaction=showdocuments&countryID=0&offset =7041> accessed 30 August 2012, sec H (itemizing early revisions to the judicial system), sec 5(A) (noting Lithuania's accession to major human rights conventions).

463 ibid.

> own affairs ought to bear the burden of explaining why such a deviation from the norms of Union membership should be accepted.[464]

For reasons that follow in the balance of this chapter, Lithuania's court system only appears independent if the residual effects of the Soviet legal culture are not considered. Several aspects of this culture continue to influence the development of a more functionally independent judiciary in Lithuania, as well as the rule in law in general. The cultural shift has yet to be made, and must include the content of Lithuania's legal education, the selection and training of judges and their working conditions.

A. Legal Education

Attorneys, prosecutors and judges in Lithuania each have separate training and examination requirements, but each begin their professional preparation with a university degree in law at the bachelor level.[465] Despite changes in the universities, education in Lithuania remains heavily influenced by the communist style of rote learning – a skill once appropriate for a judge applying the command theory of law. Modern skills in critical thinking and legal methodologies that apply the law to a set of facts are simply not taught.[466]

As Professor Kühn notes, while the laws have been substantially modified since 1989, 'all-too-often the methods of reasoning about that law remained unaffected'.[467]

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[464] Open Society Institute, *Monitoring the EU Accession Process: Judicial Capacity* (Central European Press, Budapest 2002) 15.

[465] Linas Sesickas, 'Access to Justice in Lithuania' (2000) 24 Fordham Intl L J S159, S162-63; Bruno Nascimbene and Elisabetta Bergamini*, The Legal Profession in the European Union* (Kluwer Law Intl BV, The Netherlands, 2009) 151 para 17(2).

[466] Interview with a Lithuanian lawyer (telephone 13 July 2008); K Jaak Roosaare, 'Practical Aspects of Teaching Law in Newly Independent Central Europe (Experiences in Estonia and Lithuania)' (2007) 4 EJ Legal Educ 121, 125; *Judiciary in Central and Eastern Europe* (n 52) xvi.

[467] *Judiciary in Central and Eastern Europe* (n 52) xvi.

This was not surprising considering that to a substantial extent 'the same persons continued in both judicial offices and academic positions'.[468] The academic institutions that provide legal education in Eastern Europe should have, but did not, reform their curricula and treatment of subject areas following the changes of the late 1980s.[469] Topics such as contract law were not modified despite the profound differences moving from a state with a centralised economy to that of a free market economy.[470]

As described by former Justice of Lithuania's Supreme Court, during the two years of concentrated change between 1988 and 1990 no one had seriously discussed the future legal system of Lithuania'.[471] As a result, independence was achieved 'without a clear vision for the system of law, including private law', resulting in the retention of the Soviet legal system:[472]

> A completely new political, economic, and social situation demanded the complete abolishment of, or at least significant changes to, the laws inherited from the Soviet era. In the area of civil law, the main source has remained the Civil Code of 1964. However, this civil code was a typical example of the Socialist civil law that did not recognise private ownership and private business, freedom of contract, or other main institutes of the Western legal tradition. Thus, the Civil Code of 1964 was not suitable for the new political and economic situation and could not serve as a basis for the new system of civil law .[473]

There have been few changes in the substance of the law or methods of teaching law since Soviet communism. Professors and their teaching methods have remained

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[468] ibid.

[469] Tadas Klimas, 'AALS Panel on Global Legal Education in the New Europe and the USA: Shall the Twain Ever Meet?' (2004) 5 German L J 321-22.

[470] ibid.

[471] Mikelenas (n 288) 143.

[472] ibid.

[473] ibid; Civil Code, 7 July 1964, *Official Gazette*, No 19-138 (in Lithuanian).

essentially the same, still following the model of legal education in which lecturers provide the given rules in each subject area, with no discussion. As described by Professor Kestutis Kaminskas, advisor to Seimas:

> We can't change how professors think overnight. More than half studied during the Soviet era and today teach students who only know an independent Lithuania. Many schools which were built post-Soviet era look like factory buildings, because they were there to spread the ideology. We have to overcome this.[474]

Students expect to be lectured to, and because attendance is not mandatory, they only attend class if they want to, often not having read the assigned reading.[475] Analytical skills are not encouraged in the classroom, so students are not familiar with answering questions about the material or discussing it.[476] Questions that require a general knowledge of the material – answers that synthesise the information – are met with frustration because the answer is not set out in any one place.[477]

The schools in Eastern Europe, including Lithuania, were not reformed at the time the Soviet Union collapsed.[478] As a result, they generally see no reason to reform now.[479] 'They do not know what it is they do not know. And they are proud.'[480] Instead, those persons teaching law stayed the same even though the environment changed.[481] The educational culture continued:

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[474] Marc Sarena, 'Soviet Mentality Brakes Lithuanian Educational Reform' (tr Nabeelah Shabbir) *Café Babel* (11 May 2007) <http://www.cafebabel.co.uk/article/22785/soviet-mentality-brakes-lithuanian-educational-ref.html> accessed 30 August 2012.

[475] Roosaare (n 466) 124-25.

[476] ibid.

[477] ibid.

[478] 'AALS Panel on Global Legal Education' (n 469) 322.

[479] ibid.

[480] ibid.

[481] ibid.

> Against expectations, the old, unqualified, and xenophobic professors did not die out. They reproduced themselves through inbreeding, selecting future teachers from among their students according to the criteria of loyalty and lack of intellectual challenge to the current incompetent professoriate.[482]

In 2008 when the Constitutional Court addressed legal educational requirements in its review of qualifications for judicial office, it mandated certain topics: the judicial system; certain substantive areas such as the theory of law, constitutional and civil law; and some in related fields, such as the social sciences.[483] Notably absent are legal writing and analysis, clinical experience, or the study of professional ethics.[484]

There is a compelling need for education in ethics, and by extension, in professional ethics, given the culture of dishonesty reported in the academic environment in the form of cheating on exams and homework. Cheating is always an issue at any university, but in Eastern Europe it is described as 'pretty well off the scale'.[485] In one example in Lithuania during the week of final exams, a law school dean reported watching as three students sat outside the law school offices 'boldly cutting up crib notes that they had apparently just miniaturized' with no fear of anyone,

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[482] Avieczer Tucker, 'Reproducing Incompetence: The Constitution of Czech Higher Education' (2000) 9 E Eur Const Rev 94-95.

[483] Constitutional Court, 20 February 2008 ruling on the Higher Education Qualifications Requirements for the Judiciary [title restated], *Official Gazette* 2008, No 23-852 (26 February 2008) (most recent English translation 20 February 2008), with corrections 19 March 2011, *Official Gazette* 2011, No 33 (corrections in Lithuanian) (Constitutional Court Ruling 20 February 2008).

[484] ibid. Professional responsibility and ethics are, however, listed as potential topics for the bar examination. The full list of examination topics are at the website of the Lithuanian Bar Association (*Lietuvos Advokatūra*) in the Lithuanian language version, <http://www.advoco.lt/?item=home&lang =1> accessed 30 August 2012 (English version at <http://www.advoco.lt/?item=home&lang=3> accessed 30 August 2012). As reported to a delegation of attorneys from the United States, Lithuania's bar examination is taken in one day with 30 questions covering all areas of law. Those scoring twenty-three or more correct answers return for an oral examination of five additional questions, with pass rates from 33 per cent to 50 per cent. North Carolina Bar Association, 'NCBA Delegation Visits Lithuania and Latvia' (12 May 2012) <http://www.ncbar.org/about/communications/news/2012-news-articles/blog-ncba-delegation-visits-lithuania-latvia.aspx> accessed 30 August 2012.

[485] 'AALS Panel on Global Legal Education' (n 341) 324.

including the dean, observing them.[486] No student at that law school had been expelled for academic dishonesty for at least a six-year period, and perhaps longer.[487] This is consistent with an attitude in Lithuania describing academic dishonesty as a 'victimless' crime[488] not worthy of punishment. Academic dishonesty has received national attention in recent years, including discussions in Seimas in 2010 on the creation of an academic ethics inspector. However, no proposed procedures or penalties were developed and no action was taken.[489]

As with many systems in Lithuania, its universities underwent some structural change since independence, such as in making universities autonomous from state control allowing them to control their programmes of study and administrative methods. According to a prominent professor in a recent interview, the changes made have not improved what he considers a low quality of research and education outcomes in Lithuanian universities.[490] Relating to the matter of academic dishonesty, there is also a 'relatively high level of corruption', that includes student gift-giving to professors at examinations and when performing academic requirements. The tolerance in the universities for this corruption and the low levels of academic ability means that losing

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[486] ibid 325.

[487] ibid.

[488] Loreta Tauginienė, 'Corporate Social Responsibility in the Research Management: Corporate Social Responsibility at a University' (2010) Paper for Presentation at the 16th European Doctoral Programmes Association in Management and Business Administration (EDAMBA) Summer Academy in Sorèze, France, July 2010, 3 <http://www.edamba.eu/userfiles/file/Tauginiene%20Loreta.pdf> accessed 30 August 2012.

[489] ibid.

[490] University of Vilnius Professor Rimantas Mikalauskas, in 'R Mikalauskas: How Can the Quality of Research and Education Be Improved?' *Delfi News* (18 November 2011) (in Lithuanian) (*R Mikalauskas. Kaip Pagerinti Mokslo Ir Studijų Kokybę?*) <http://www.delfi.lt/news/ringas/lit/r-mikalauskas-kaip-pagerinti-mokslo-ir-studiju-kokybe.d?id=51550947> accessed 30 August 2012 (also noting a widespread practice of filling high-ranking administrative positions with unqualified personnel who are nonetheless afforded acquiescence in their policy changes even when they are 'destroying academic values, and students who are not challenged academically).

their reputation in these areas has no effect; the level of knowledge with which students graduate is not a priority.[491]

Without an atmosphere that promotes honesty and integrity at the academic level and enforces rules of academic conduct, it is difficult to envision how an understanding of ethical conduct will suddenly emerge on its own after graduation.

B. Judicial Self-Perception

A structural power separation within the state is significant to evaluating whether a particular judiciary is independent, but that separation does not make judges independent of each other or of their more senior colleagues within the judiciary. Rather, it is the mental independence and personal courage that insulates the judge from influence within. Other than those cases in which a lower court judge is bound by the opinion of a higher court, there is a striking absence of constructive disagreement within the judiciary, such as that which may be seen in the case law of higher and European courts.[492] This is consistent with the judges in the lower courts in Lithuania, for whom improvement from the earlier formalistic reasoning has been hindered in part by the absence of a tradition of dissenting opinions.[493] The overall situation is one in which there is structural judicial independence, but no mentally independent judges.[494]

Technical knowledge of the law, together with experience and wisdom, are indispensable factors in judicial authority and a judge's personal independence:[495]

> Judges lacking knowledge and the ability to reason and explain can hardly be independent; they cannot rely on

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[491] ibid; interview with a Lithuanian lawyer (telephone 13 July 2008).

[492] Bobek (n 244) 108.

[493] Vaičaitis (n 160) 4.

[494] Bobek (n 244) 108.

[495] ibid 110.

> personal authority. The lack of authority is then replaced by force: the decisions is not correct because it is soundly and well reasoned, but because it is 'us' (the court) who made it.[496]

This form of justification is also ascribed to Lithuanian judges. A recent example relates to a former Chief Judge of the Constitutional Court provided by a Lithuanian citizen.[497] When discussing issues of national legal importance, 'he is very emotional':

> He cannot defend his position with facts. When asked why he is of a certain position, he will simply say, 'because that is the way it is'.[498]

This *ipse dixit* attitude – or, 'it is true because I say it is true'– illustrates the difference between the authoritarian approach to legal discourse and the authoritative approach.[499] The authoritarian model tends to decree universal truths from the centre, while authoritative decisions result from a dialogue that leads to a reasoned solution. The willingness to engage in the dialogue contemplated by an authoritative decision is, of course, determined by personal knowledge and ability of the individual judge.[500]

Perhaps the greatest problem in the judiciaries of Central Europe is 'the self-perception and self-image of the judges and the internalization and realisation of their personal independence':[501]

> This type of judicial 'independence' has not been included, for obvious reasons, in the mainstream debate so far: it is difficult to discern, hard to describe, and, contrary to the institutional changes, it is lengthy and painful.[502]

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[496] ibid.

[497] Interview with a Lithuanian legal advocate (Vilnius 10 January 2009).

[498] ibid.

[499] Bobek (n 244) 110.

[500] ibid.

[501] ibid 108.

[502] ibid.

Personal courage has been described as one dimension of individual judicial independence, that 'has been a characteristic heavily lacking in the Central European judiciary'.[503] It was not a characteristic fostered by the Soviet government,[504] evident in the position held by the judiciary.[505] The post-Soviet governments do not endorse it either,[506] as illustrated in Lithuania.[507] Part of the reason may be the overall bureaucratic style of Continental judiciaries and the hierarchical or supervisory model they embrace. In that model, permanent control and supervision by higher courts and the senior judges does not allow much deviation from the judicial mainstream, even if it is in the form of novel ideas.[508] Critical thinking and critical morality that is different from, yet complementary to, what the majoritarian legislature does, is non-existent or very rare.[509]

This research confirms the continued effect of Soviet legal culture in the functioning of its legal system, including the judiciary,[510] as noted in legal academic articles authored by Lithuanians.[511] This is not surprising considering that the judges sitting during Soviet occupation became judges of an independent Lithuania overnight.[512] Nearly all of the judges, attorneys, law professors and lawyers in public

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[503] ibid.

[504] ibid.

[505] Text to n 107 in ch 1 (courts and judges subordinate to Communist party leaders).

[506] Bobek (n 244) 108.

[507] Text to n 444 (judges understand they are inferior to and dependent upon the Government).

[508] Bobek (n 244) n 108.

[509] ibid.

[510] Text to nn 437-44; 466-67.

[511] Rauličkytė (n 44); 'AALS Panel on Global Legal Education' (n 341) 322 (legal education in Eastern Europe changed very little since the fall of the Soviet Union); Tomas Berkmanas, 'On the Academic Understanding of Legal Interpretation in Lithuania' (2005) 2 Intl J Baltic L 60 (difficulty transforming from Soviet mode of dogmatic thinking in legal interpretation).

[512] Interview with a former Lithuanian judge (telephone 2 November 2008).

administration in Lithuania retained their positions, irrespective of their ideological views under the communist regime.[513]

With other priorities to attend to,[514] the newly independent leaders did not substitute other judges in their place, or give immediate attention to rule of law reform other than ensuring the basic framework of documents were in place for a functioning government. Initially, the primary focus was on structure and format, such as whether laws had been passed or the judicial councils established were adequate. However, whether the judiciary is truly independent also depends upon 'the judicial mentality and self-image'.[515]

The predominant judicial culture and self-perception in Central European judiciaries remains one of a well-paid civil servant. The nature of the judiciaries as bureaucratic institutions dates back to the Austrian-Hungarian Empire and the 'Germanic' judicial self-perception. Unlike the German legal tradition, which substantially evolved after the end of the Second World War in 1945, the tendency behind the Iron Curtain was the opposite. There the 'Austrian bureaucratic spirit merged with the rule of the working class, "telephone justice",[516] and the Communist doctrine of unity of state power'.[517] As a result, when the Soviet Union collapsed, the post-communist judges were the same 'judicial cadre [ ] class of subservient technocrats who (still) seek refuge in mechanical and formalistic interpretation of the

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[513] Emmert (n 174) 302-03.

[514] The transition countries in Central and Eastern Europe faced a unique circumstance, simultaneous transition, marketization, democratization and state building. Koslosky (n 60) 204.

[515] Bobek (n 244) 99.

[516] Karklins (n 191) 14 (describing this practise as when 'communist party leaders would pick up the telephone and call prosecutors and judges and tell them what outcome the party expected in specific cases'). Karklins further notes that while there is scattered evidence this practise continues, 'the exceptional political influence of the ruling elites on law enforcement persists". ibid.

[517] Bobek (n 244) 107.

law'.[518]

The Lithuanian judiciary shares these shortcomings in mentality – how they perceive themselves and their role in the process – despite it now having among the best in structurally independent legal institutions, as described by a former judge in Lithuania.[519] He notes that although the courts are reformed in structure, the individuals serving as judges were the same men and women who were judges in Soviet times, and personnel changes since then have been slow, again as a result of the Soviet legal culture, which continues its tacit control. Changes that might otherwise be expected from the passage of time or retirement are impeded by this control – to do well, new judges must adopt the old traditions.[520] As studies in organizational behaviour have identified, the phenomenon described here as 'adopting old traditions' is informal organizational knowledge that is learned by members of an organization in the performance of their duties.[521] This helps explain how, even after over two decades, the culture of the Soviet legal system can survive institutionally.

Even sixteen years after independence, the majority of sitting judges in Lithuania had been trained during the Soviet occupation, adding to the low level of public confidence in the judiciary, with exception of the Constitutional Court.[522] These judges are described as finding it difficult to adapt to the social and legal changes,

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[518] ibid. This was the case in all post-communist countries with the exception of the former Eastern Germany, where '100% of all judges and law professors and a very high percentage of all public prosecutors and high level lawyers in the public administration lost their jobs and were replaced by Western-trained lawyers from the Federal Republic of Germany'. Emmert (n 174) 302.

[519] Interview with a former Lithuanian judge (telephone 2 November 2008).

[520] ibid.

[521] Haridimos Tsoukas and Efi Vladimirou, 'What is Organizational Knowledge?' (2001) 38 J Management Studies 973, 980 (the capability of members in an organization to draw distinctions in the process of carrying out their work by enacting sets of generalizations that depend upon historically evolved collective understandings).

[522] Vaičaitis (n 160) 4.

continuing in their formalistic application of law according to prevailing Soviet concept of legal positivism, without taking into account the principles of the Constitution as a common practise adopted in the ordinary courts, especially the lower courts.[523] The judges in Lithuania are still viewed as functioning as bureaucrats. Reasons for this include that they are chosen at a young age, and are not chosen from the best and the brightest.[524] Once they enter the system, they remain there with little or no engagement with the public.[525]

Assertions of judicial independence have been used to excess in some circumstances in Central Europe, such as to explain the basis for disregarding the established case law of higher courts (thereby turning the judicial process into an unpredictable one); for not displaying the full name of deciding judges in published decisions of the court; why judges cannot be compelled to engage in continuous education after their appointment; or why only judges may keep their higher salaries when public savings measures are adopted for all public employees.[526] As a result, the public can be apathetic to judicial calls for safeguarding 'judicial independence', even when the concerns are well-founded.[527]

The focus on structural reform in Lithuania was not supported by the introduction of measures that would bring a new mentality to the judiciary or institute professional management of judiciary.[528] The lack of professional management of the courts became more acute when, in 1999, the Constitutional Court of the Republic of

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[523] ibid 4.

[524] 'The Lithuanian Rule of Law' (n 89).

[525] ibid.

[526] Bobek (n 244) 112-13.

[527] ibid 112.

[528] Interview with a former Lithuanian judge (telephone 2 November 2008).

Lithuania invalidated many of the judicial administrative functions performed by the Ministry of Justice. Within the country, the court system is seen as controlled by the judges. The judiciary's emphasis on self-governing – without any professional administrative support – is strong.[529]

This emphasis by the judiciaries on their self-governance reflects the phenomenon in the region characterised by an emphasis on structural judicial independence that has been criticised as having hidden judicial shortcomings.[530] Not receiving adequate focus is the need for the judiciary to make the transition 'from a cast of well-paid subservient civil servants to personally independent and critical judges who are ready to make and publicly defend their opinions'.[531] While understandable that the more measurable benchmarks have considered, such as whether laws have been passed, the more difficult assessment of judicial self-image, mentality and ideology, or in fostering the development of more personally independent judges should also be taken into account.[532]

There is not much literature on the impact of the Soviet past on judicial self-perception and self-image.[533] One writer notes that this topic is out of mainstream focus because 'it is difficulty to discern, hard to describe, and, contrary to the institutional changes, it is lengthy and painful.'[534] The difficulty of measuring these aspects of judicial independence in Lithuania is made more difficult by the essentially

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[529] ibid.

[530] Bobek (n 244) 100.

[531] ibid.

[532] ibid.

[533] In-depth writing on this topic includes Bobek (n 244); 'Worlds Apart' (n 51); *Judiciary in Central and Eastern Europe* (n 52).

[534] Bobek (n 244) 100, 108.

closed legal culture. As described by a Lithuanian lawyer, 'because of the insular nature of the Lithuanian legal culture, few within the system see the problem'.[535] This inability to see a problem from within is a product of the system's insular, self-referential character, another concept identified by social scientists that is helpful in the Lithuania context. A system that is self-referential is one confined in its thinking to only those things that reinforce the understanding of its own system.[536] It is resistant to change, but change may occur if the system regularly receives information from its environment or generates information about its own functioning. From that information, it is the role of policy makers to help the system establish new self-understandings using conceptual innovation and management of information.[537] The first step in this process, data collection, is already in use by the Council of Europe's CEPEJ, described earlier in this chapter.[538] The next steps for Lithuania, should policy makers want to move forward, is to modify the data collection processes to suit the system in Lithuania using the expertise and under the supervision of the Council of Europe.

C. Understanding Accountability

When the countries in this region became newly independent, the organisation of the judiciary went from one extreme to the other – from being completely dependent to lacking in any exterior control whatsoever.[539] There was an unreasonably optimistic

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[535] Interview with a Lithuanian lawyer (telephone 13 July 2008).

[536] Haridimos Tsoukas and Demetrios B Papoulias, 'Understanding Social Reforms: A Conceptional Analysis' (1996) 47 J Operational Research Society 853, 855 (social systems interact with their environments in terms of how they are internally organised; having developed their own cognitive categories, values, and appreciative judgment over time, they will perceive only those things that will enable them to maintain their own organization, making them more resistant to change).

[537] Tsoukas and Papoulias (n 536) 855, 857.

[538] Text to nn 272-83 (the functions and reporting of the CEPEJ).

[539] Bobek (n 244) 105.

belief that once the judiciary gained organisational independence, its quality and performance would improve.[540] Unfortunately, the argument for judicial independence from those outside the judiciary was not matched with a similar commitment to ensuring the concomitant development of judicial expertise, competence, and quality.[541] This phenomenon demonstrates the negative impact of failing to address both structural and functional judicial independence explored by social scientist examined earlier.[542]

What many jurists confused was the relationship between independence and accountability.[543] That is, once structurally independent, they were not excused from being professionally accountable. As one writer observes:

> It is again for the judges themselves to realize that judicial independence is not a spell designed to lock oneself away into an ivory tower of irresponsibility. It is a limited privilege that must be repaid with performance, expertise, and willingness to assume individual responsibility.[544]

Independence and accountability normally evolve gradually together, but in Eastern Europe judicial accountability developing more slowly due to the disequilibrium resulting from the implosion of the Soviet Union.[545]

Periodically situations become public knowledge in Lithuania that demonstrate mishandled ethical conflicts or lack of an awareness of conflicts of interest that suggest the continuation of Soviet-era behaviour, characterised by the lack of clarity in the rules and reliance on informal networks.[546] One example is presented in *Daktaras v*

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[540] ibid 111.

[541] ibid.

[542] Text to nn 264-68.

[543] Bobek (n 244) 111.

[544] ibid.

[545] ibid 113.

[546] Text to nn 136-39 in ch 2 (lack of regulation promoting hidden constraints).

Lithuania[547] concerning the internal workings of appellate cassation proceedings and resulting in an Article 6(1) violation. The applicant had successfully appealed his conviction of blackmail, resulting in an amendment of the judgment by the Court of Appeals. At the request of the first-instance judge, who was dissatisfied with the ruling of the Court of Appeals, the President of the Criminal Division of the Supreme Court lodged a petition with the judges of that division to quash the Court of Appeal's judgment and reinstate the initial judgment. The same President then appointed the judge rapporteur and constituted the Chamber to examine the case. The petition was endorsed by the prosecution at the hearing and eventually upheld by the Supreme Court. The European Court determined that the actions by the Criminal Division of the Supreme Court could not be considered neutral from the parties' point of view because the President of the Supreme Court's Criminal Division had, in effect, taken up the prosecution's case by submitting the petition, thus becoming an ally of the opponent. As a result, the cassation tribunal did not appear impartial from an objective viewpoint.[548]

The confusion between judicial independence and accountability in Lithuania is also illustrated in the handling and discussion around the complaint by attorney Jonas Ivoška, filed with law enforcement against a judge he accused of writing an opinion based upon fictitious regulations.[549] The judge, Egidijus Laužikas, was under

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[547] *Daktaras v Lithuania* (2002) 34 EHRR 60.

[548] ibid paras 28, 34-36.

[549] Complaint by Vilnius attorney Jonas Ivoška to the Lithuanian Special Investigation Service (STT) against Judge Egidijus Laužikas (in Lithuanian) (*Skundas Dėl Specialiųjų Tyrimų Tarnybos Administravimo Valdybos*) 29 March 2012; 'The Chair of the Highest Court - With a Suspicious Hump' (in Lithuanian) (*Į Aukštesnę Teisėjo Kėdę – Su Įtarimų Kupra'*) *Lietuvos Rytas* (23 April 2012) <http://www.alfa.lt/straipsnis/14355167/I.aukstesne.teisejo.kede.su.itarimu.kupra=2012-04-23_06-55> accessed 30 August 2012.

consideration for a leadership position as head of the Civil Division in the Supreme Court.[550] When asked why he had filed a complaint with law enforcement rather than the judges' board of supervision, the attorney indicated that he had, without success, and had then filed the complaint with law enforcement as a last resort.[551] Initially, the opinion was appealed to a panel of judges, but similar to the violation found in *Daktaras v Lithuania*,[552] the judge at issue selected the judges who would hear the appeal.[553] The appellate court determined that because the lower court judge was independent, he could not be challenged or controlled by the appellate court.[554] The attorney's separate complaint to the judges' review board received a similar response, except that the judicial review board then filed a complaint against the attorney for failure to show respect for the court.[555] That complaint, however, was later dismissed by the attorney review board.[556]

The experience of Mr. Ivoška also illustrates how judges and the judicial disciplinary apparatus in Lithuania can lack a functional understanding of their obligation to be fair and impartial within the meaning of Article 6 of the Convention. This is reflected in the selection of the hearing panel on Mr. Ivoška's appeal, and in the disciplinary charges against him for failing to show proper respect for a judge when asserting lack of judicial independence or impartiality. There will continue to be no recourse for litigants to challenge the independence or impartiality of the courts in the

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[550] Correspondence with a former Lithuanian judge to the author (26 April 2012).

[551] Interview with a Lithuanian legal advocate (Illinois, 18 May 2012).

[552] *Daktaras v Lithuania* (n 547); text to nn 546-48 (discussing *Daktaras* in the context of impartiality of the court).

[553] Interview with a Lithuanian legal advocate (Illinois, 18 May 2012).

[554] ibid.

[555] ibid.

[556] ibid.

domestic legal scheme if judges continue to believe they and their colleagues are immune from this accountability.

D. Selection and Training of Judges

The judicial profession in the post-Soviet region remains less prestigious and professional in nature.[557] Judges are formally appointed to the bench by their court presidents, but the overall process is openly based on the professional career model of a judiciary in which younger candidates are favoured over older candidates.[558] In this model, those with professional experience outside of the judicial branch are discouraged from applying and those who do are disadvantaged in the selection process.[559] As a result, the cases at the trial court level are adjudicated by the least experienced lawyers, recent graduates who have been given a short period of preparation.[560]

The trend in post-Soviet systems is toward a professional career judiciary. In Hungary for example, described by Professor Kühn as the most autonomous judiciary in the region and one of the most autonomous in Europe, young candidates are also openly preferred without experience in other legal fields over candidates with practice off the bench.[561] The negative side of this model is seen in the increasing insulation of the judiciary, which is generally considered unaccountable and unresponsive to the

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[557] *Judiciary in Central and Eastern Europe* (n 52) 170 (using as an indicator the high percentage of women in the lower courts and low percentage of women in the higher – and more prestigious – courts).

[558] ibid.

[559] ibid 170-71.

[560] ibid 171.

[561] *Judiciary in Central and Eastern Europe* (n 52) 171; Open Society Institute, 'Judicial Independence in Hungary' in *Monitoring the EU Accession Process: Judicial Independence* (Central European University Press, Budapest 2002) 112.

needs of practical life.[562]

This is also the model used in Lithuania, where the judicial selection process is only minimally complete.[563] In 2009, the President of Lithuania approved a new procedure for the Judicial Selection Committee and new criteria for the selection of judges. The new regulations improved the transparency of the process, but the criteria for the selection of judges remains vague, requiring the Selection Committee to review candidates for the assessment of personal qualities, general competence, motivation and 'other criteria ... recognized by the Selection Committee as significant'.[564] This catch-all category leaves the selection process open to subjective evaluations while not assessing those qualities and skills that are essential for judicial work, such as appropriate intellectual abilities, ability to act independently, to think critically and with reason, a desire for improving professional knowledge, equanimity, self-confidence, social sensitivity and empathy, the ability to clearly communicate orally and in writing, and organisational skills.[565]

In the criteria of legal work experience, the most valued is work in the court system, then in the office of the prosecutor, or in private legal practice; the least value is legal experience in state and municipal institutions, and international and non-governmental organisations.[566] Priority is given to young law clerks who frequently have no other professional or life experience than that acquired in the courts. For many, a successful legal clerkship in a widely-criticised judicial system should not

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[562] ibid.

[563] HRMI 2011 (n 102) 7.

[564] ibid 44-45.

[565] ibid.

[566] ibid.

serve as evidence of suitability for judicial office in the same system.[567] Also given preference are those candidates who have received a doctor of philosophy degree, a preference that has no reasonable explanation.[568]

This model is increasingly challenged throughout the region. One of the more severe critics is a Justice of the Czech Constitutional Court, Eliška Wagnerová, who has written:

> Continental Europe has been abandoning exaggerated legal positivism in favor of sociologising lines of thought which necessarily change the institutional framework. A judge untouched by life is no longer sought after. As the law ceased to be a science about itself but is about life then an exponent of the law must know life.[569]
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> A judge educated in the Continental professional career model is the least suitable person to overcome the dogmatism and formalism typical of the Central European judicial profession. A young lawyer is, from the very beginning of her professional career, molded by this outmoded system which understands itself as a bureaucratic machine and emphasizes formalism over substantive values, simplified solutions over more complex ones.[570]

As one legal practitioner describes the judiciary in Lithuania, the lack of impartiality shown is not evidence of corruption in the traditional sense, but instead as a continuation of past practices of the Soviet legal philosophy, combined with lack of understanding of Western legal systems and a general lack of competence.[571] The practice of educating and training judges to take the bench early in their years has long

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[567] ibid.

[568] ibid.

[569] Judiciary in Central and Eastern Europe (n 52) 172 (quoting Czech Constitutional Court Justice Wagnerová).

[570] ibid.

[571] Interview with a Lithuanian lawyer (telephone 13 July 2008) (this source received legal training in the West and has lived and worked in Lithuania's government and legal system for over twenty years).

been the practice in Continental Europe. Modelled after the French system, judges in Lithuania are hired young then stay until their retirement. In Lithuania, however, the practice developed without the accompanying development of judicial accountability that took place elsewhere. This lack of balance is made more uneven by Lithuania having also inherited the communist legal education system and done little to improve it.[572]

As one practitioner describes it, the lack of judges who are well-educated and trained results in uncertainty in court proceedings, primarily due to the application of Soviet legal theory and the mechanistic application of the law that it requires.[573] Another difficulty relates to arguing points of evidence, such as when judges allow unreliable evidence into the proceedings. An attorney can make a soundly-based argument and not be assured the judge will understand it. While this also may be generally true in other systems, in Lithuania it is so to a much higher degree.[574]

One of the populist proposals for making the courts more open to the public is reinstatement of the use of lay judges as triers of fact.[575] So far these proposals, which have not developed into anything concrete, have opposition by some members of the public as an effort by judges preserve their 'clan'.[576] The idea has merit, but it of course depends on the specifics, especially because of the similarity in description of what are two very different processes. Common law-style jury systems have been proposed as a

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[572] ibid.

[573] ibid.

[574] ibid.

[575] Correspondence from a former Lithuanian judge to the author (16 March 2012).

[576] HRMI 2011 (n 102) 45; Arūnas Sutkevičius, 'Report on Judicial Visit to the Supreme Court of Ireland 11-22 October 2010' (2010) 3 <http://www.aca-europe.eu/en/exchanges/exchanges_2010_en. html> accessed 30 August 2012 (noting that Lithuania does not have a jury system, 'but this idea is alive in Lithuanian society and regularly discussed').

remedy for failed institution building efforts throughout the post-Soviet countries to strengthening the rule of law.[577] However, there is also the very different practise from the Soviet system using lay judges as a means to both popularise and control the judiciary. Initially, untrained lay men and women, most of whom became judges and prosecutors, were brought into the judicial system with 'a course at a law faculty lasting only several months, a deep distrust in the old legal methodology and legal scholarship, and the trust of the Communist Party' as their only training.[578] Lay men and women were also brought into judicial proceedings as 'lay assessors' to decide questions of law and fact in any lawsuit, no matter how complex, 'functioning theoretically on par with the professional judges'.[579] As with the lay judges, lay assessors were used as a means of direct control over the older judges who had been trained before the Socialist revolutionary transformation.[580]

E. Residual Influences in Criminal Trials

In 2002 Lithuania established a new position of 'investigating judge', or pretrial judge,[581] following the Continental model that uses examining magistrates in pretrial and investigative matters. The role of Lithuania's investigating judge is to decide matters relating to pretrial detention and monitor the observance of human rights during

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[577] White (n 116) 308-10; ibid 359 ('... in the context of emerging democracies, the possibility of jury nullification is a substantial benefit when the law does not reflect community notions of fairness or social justice, or the law was enacted through anti-democratic means.').

[578] *Judiciary in Central and Eastern Europe* (n 52) 34.

[579] ibid 35 (their participation became more ceremonial and unpopular with the professional judges; considered 'useless dummies', and more like 'Socialist window dressing', but still a part of the Party apparatus).

[580] ibid.

[581] Code of Criminal Procedure (n 60); C Morgenstern and Skirmantas Bikelis, 'Lithuania' in AM van Kalmthout, MM Knapen and C Morgenstern (eds) *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-Trial Detention and the Grounds for Regular Review in the Member States of the European Union* (Wolf Legal Publishers 2010) 605.

the early stages of a criminal case.[582]

Use of the pretrial investigating judge has been a traditional practice in Continental Europe, used in France, Belgium, and the Netherlands. The European Court has found that where the judge is in routine pretrial supervision of a case, there will be no breach of Article 6(1), but if the nature of the decision could suggest some prejudging of the substantive issue, a violation of Article 6(1) could arise.[583] Legal theorists differ on the role of the examining magistrate in the overall criminal proceeding. One view is that the investigation by the examining magistrate is separate from the determinative phase of a criminal case.[584] Another is that when pretrial proceedings are considered in practice, they are part of the determinative phase of the proceedings, particularly in cases in which witnesses who have given evidence during the investigation are not reheard at trial.[585] This is typically the situation in many countries in Europe where police investigations are supervised by magistrates and witness statements are taken by the police or by the magistrates themselves and placed in the official dossier.[586] In most routine cases, the investigation file and its witness statements will form an important part of the judicial decision-making at trial without the testimony of the witnesses.[587]

In post-Soviet States, including Lithuania, the residual influence of Soviet legal

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[582] Morgenstern and Bikelis (n 581) 605.

[583] As was the case in *Piersack v Belgium* (n 236) in which the tribunal's impartiality could appear open to doubt where the judge hearing the case was a former prosecutor who had worked on the case. ibid paras 31-32.

[584] Sarah J Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, Oxford 2007) 27-28, 82-83.

[585] Stewart Field, 'Fair Trials and Procedural Tradition in Europe' (2009) 29 OJLS 365, 367.

[586] ibid 367.

[587] ibid.

culture[588] adds another dimension to the need for caution in considering judicial conduct at trial in cases where the judge may have had a role in pretrial investigation.[589] While a common practise in Continental criminal justice systems, this type of proceeding has created special concern for judicial independence in cases under review in European Court of Human Rights, particularly in the objectivity of the judge hearing the case who may have had a role in pretrial proceedings.[590] Reliance on evidence gathered in the investigation stage of criminal trials poses particular concern in post-Soviet countries which, during Soviet times, used pretrial investigations in a similar fashion, but without the tradition of an independent judiciary or related procedural safeguards. In Lithuania's case, adopting this method raises a heightened concern for judicial independence as understood in older democracies, given that it required no fundamental change from the practice during the Soviet years.

The area in which the socialist model of criminal procedure differed most substantially from that in Western Europe was in the distribution of competence between the courts and the police. In general, Soviet courts had less power and the police had more power.[591] In the pretrial investigation phase of a criminal case, the courts had virtually no power at all. The evidence collected by the police in the course of the investigation served as nearly the entire basis for the decision of the court. In addition, the police, militia, and departments under the competence of the Ministry of Interior were empowered with far broader authority than their counterparts in Western

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[588] For example, text to nn 38-39, 55-56 in ch 1; nn 460-70.

[589] See *Hauschildt v Denmark* (n 235); *De Cubber v Belgium* (1985) 7 EHRR 236; *Ben Yaacoub v Belgium* (1991) 13 EHRR 418; *Fey v Austria* (1993) 16 EHRR 387; *Nortier v Netherlands* (1993) 17 EHRR 273.

[590] White and Ovey (n 236) 267.

[591] ibid 435.

Europe, where the primary role of the police is crime prevention and implementation of court or prosecutor's orders.[592]

Following World War II, each of the former Soviet countries adopted the Soviet model of 'socialist criminal procedure' to some degree, depending on the level of enthusiasm.[593] In Lithuania, examples of surviving tendencies from the Soviet court system are evident in the roles of the police and the judiciary in criminal proceedings. Lithuania's criminal procedure was heavily influenced by the law of Czarist Russia and later, Soviet law.[594] The 1961 Code of Criminal Procedure of the Lithuanian Soviet Socialist Republic was continued by democratic Lithuania, which formally incorporated it into the new Republic in 1990.[595] Lithuania operated under this Soviet era code until amendments were adopted in 1994, 1996, and 1997-1998.[596]

Before 1990, criminal procedure in Lithuania was a combination of the authoritarian control of the state and inquisitorial approach to criminal proceedings.[597] The desire for high conviction rates played a direct role in the discretion provided to the judges as to whether criminal charges would be made, and if so, what evidence could be admitted at trial.[598] Most pretrial proceedings involved an investigation by an agent of

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[592] ibid 435-36.

[593] Bárd (n 30) 434.

[594] Morgenstern and Bikelis (n 581) 603 (Lithuania adopted the Russian Statute of Criminal Procedure of 1864 during its years of interwar independence, the 1940 Code of Criminal Procedure of the Russian Soviet Socialist Federal Republic during Soviet occupation, then the Code of Criminal Procedure of the Lithuanian Soviet Socialist Republic in 1961).

[595] ibid.

[596] Morgenstern and Bikelis (n 581) 603 (changes included dispensing with lay advisory jurors, introducing a new court system and reforming grounds and procedural rules for pretrial detention).

[597] Koslosky (n 60) 240 ('an Orwellian amalgamation of an inquisitorial approach and authoritarianism').

[598] ibid.

the Office of the Procurator General, usually a KGB member.[599]

Despite 2002 changes in procedure that established the position of an investigating judge, the conduct of criminal pretrial investigators was not transferred into the court room as the code revisions anticipated. The position 'is there on paper only'.[600] The idea was that once the prosecutor or investigative judge completed an investigation, prepared an investigation file and sent it to court, the court would conduct a full investigation and reach a decision:[601]

> In fact, nothing has changed. The court receives files from the investigation in which everything already set, even including a decision already made. The judges perceive themselves as the ones who simply check the case file against what they see in the court room. So the case file plays a greater role than intended by the changes. If a witness says something in court that was not reported to the prosecutor or is reported differently, the judge becomes uncomfortable, and sometimes angry, that the witness is not confirming what is already in the case file. Criminal defendants are not sworn for their testimony, but witnesses are. Defendants are not considered witnesses.[602]

The reason the role of the pretrial judge did not change the practice is because of the way judges think.[603] Members of the judiciary still do not consider themselves an equal part of the government politically.[604] In this way, the judges still behave as during Soviet times.[605] The investigative case file plays a greater role than intended by the 2003 code revisions. The negative impact on a criminal defendant's right to a fair

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[599] ibid; Donald D Barry and Harold J Berman, 'The Soviet Legal Profession' (1968) 82 HarvLRev 1, 28 (describing functions of the procuracy, civilian police and KGB, each with investigators responsible for considering evidence against an accused and deciding whether to bring charges).

[600] Interview with a former Lithuanian judge (telephone 2 November 2008).

[601] ibid.

[602] ibid.

[603] ibid.

[604] ibid.

[605] ibid.

trial is great, especially considering the low quality of the pretrial investigations. The majority of the investigative work is done by police officers who typically have no legal education, are poorly paid, have few technical resources, and are doing socially non-prestigious work.[606]

The lack of professional investigative methods has been criticised for years, including by the Chair of the Supreme Court of Lithuania.[607] This criticism was echoed by the Prosecutor General who publicly acknowledged before Seimas that the pretrial investigative officers lack education, motivation, and organization:

> a very desperate situation exists with the pre-trial investigation officers who are directly responsible for the conduct of investigations.[608]

The continuation of the practice by judges to rely heavily on pretrial investigations was confirmed by a long-term criminal trial observation project in 2006, concluding that judges give more weight to the pretrial files than the live witnesses and evidence at trial:

> During the trials, judges often violate the principle of equality of arms and display a biased attitude towards the defendants, according to the results of a long-term trial observation in criminal cases published in 2006 by Human Rights Monitoring Institute. Commonly, evidence obtained at the pretrial stage is considered to have a greater value than court proceedings. Judges tended to urge the accused to confirm statements made during the pre-trial investigation and frequently reject statements contradicting the version of the case construed by the pre-trial investigation officers.[609]

The project also found that the judges showed no interest in hearing witnesses at trial

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[606] ibid.

[607] HRMI 2007 (n 108) 22.

[608] ibid 21-22.

[609] ibid 21.

who had earlier made statements already documented in the pretrial investigation file; those witnesses were not called to testify in person at trial.[610] In the absence of such witnesses, the defendant had no opportunity to question the witnesses, resulting in judgments based upon written summaries of the witnesses' pretrial interviews. Rather than being impartial, the judges appeared to assume the defendant's guilt, guided by the presumptions of guilt made by the investigators rather than reaching that conclusion based upon a hearing of the evidence at trial.[611] As of early 2009, no reforms had been undertaken to improve the quality of pretrial investigations.[612]

Judicial failure to provide fundamental protection to those charged with criminal conduct is not only consistent with the observations of court watchers, it is aggravated by a traditional understanding by judges that because a particular case has reached the court means that the defendant is therefore guilty. Otherwise, they believe, the prosecutor would not send the case to court. With this kind of tradition, the courts are seen as a 'rubber-stamp' for the work of the prosecutors. The essential question becomes: How do you break this tradition?[613]

For Lithuania, establishing the position of an investigating judge required no fundamental change in practice, which may have been its appeal in the sudden transition.[614] However, this did nothing to alter the substantive understanding and functional relationships of the participants from Soviet times, thus allowing the system

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[610] ibid.

[611] ibid 21-22.

[612] HRMI 2009 (n 110) 36.

[613] Correspondence from a Lithuanian lawyer to the author (8 December 2008); interview with a Lithuanian lawyer (Vilnius 14 July 2010).

[614] Text to n 88 in ch 2, n 545 in 3 (sudden transition), 536-37 (establishing new understandings in a closed system), n 603 (no change in pretrial judges' practice).

to resist the change.[615]

It is for these reasons that Lithuania's choice in procedure for pretrial criminal investigations, made in the absence of more robust measures to enhance the quality of pretrial investigations and ensure functional judicial independence, place criminal defendants in jeopardy for the potential of not receiving a fair trial.

V. Conclusion

Whether reviewed in the context of litigation before the European Court of Human Rights or as measured by academics and analysts, a judiciary that functions independently is fundamental to Lithuania as a democratic nation. The structural independence established for Lithuania's judiciary has not been matched by the development of judicial expertise, competence, and quality. Instead, due to the continuation of many practices and procedures that pre-date independence continue, impeding the functional independence of Lithuania's judiciary as required by Article 6(1) of the Convention.

Conditions are such that judges are vulnerable to inappropriate outside influence for a variety of possible reasons: an incomplete understanding of Western legal concepts; a misapprehension of their role in relation to that of the police and prosecutor; and personal failings. The systems that impact the independence of the judiciary continue to function self-referentially and remain resistant to change.

Lithuania's education system, and legal education in particular, remain underdeveloped in critical areas, but could play a significant role in improving judicial independence by including in their curricula legal ethical conduct, critical thinking, and legal writing skills, and by holding students accountable for academic conduct.

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[615] Text to nn 535-37 (dynamics of a closed system).

Lithuania's choice in procedure for pretrial criminal investigations, while structurally inoffensive, does not function as intended because it is without a judiciary that is fully independent. To be fully independent, the judiciary must be independent in practice, cognizant of its role as independent of the prosecution and political forces. Otherwise, those who are accused of a crime, as well as those who seek redress in civil proceedings, are at a high risk for not receiving a fair trial.

Chapter 4. The Rights of the Parties

This chapter considers the rights of litigants in Lithuania pursuant to Article 6 of the Convention, including the role of their counsel, using benchmarks in the Convention and the jurisprudence of the European Court, studies by the Council of Europe and by social scientists, and reports by non-governmental organizations. The studies relied on in this chapter include an assessment of effective criminal defence in Europe[616] and three studies exploring the hallmarks and importance of independent prosecutors.[617]

I. Access to a Court

Among Lithuania's positive obligation to provide parties in civil and criminal cases with a fair trial is the obligation to provide access to a court for those claims deemed justiciable pursuant to Article 6.[618] The right to legal access is not enumerated in Article 6, but is recognised by the Court as essential to a fair hearing. The right was first established in 1975 following a prisoner's inability to make a libel claim or send correspondence complaining of his circumstances.[619] It its judgment, the European Court declared the right to a fair trial 'secures to everyone the right to have any claim related to his civil rights and obligations brought before a court or tribunal', reasoning that 'one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.[620]

The right of access to a court is not absolute, however. Limitations are

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[616] Text to nn 638, 950-77.

[617] Text to nn 1051-62, 1063-73.

[618] *Golder v UK* (n 3).

[619] ibid.

[620] ibid para 32.

permitted by implication, since by its nature the right of access calls for regulation by the state.[621] This, in turn, permits the member states a margin of appreciation in the regulation it provides, subject to a final decision by the European Court as to a regulation's compliance with the Convention.[622] A limitation on access will not be compatible with Article 6(1) 'if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[623] State immunity – in which states have immunity from civil liability in the courts of other states – is one kind of procedural bar that may apply.[624]

An example of state immunity that did not survive the Court's scrutiny was that in the Grand Chamber judgment *Čudak v Lithuania*.[625] The applicant was a Lithuanian employed at the Polish embassy as secretary and switchboard operator, denied access to a hearing because her civil suit for wrongful termination was barred based upon a claim of diplomatic immunity. The Supreme Court of Lithuania applied the immunity provisions because applicant's employment facilitated Poland's exercise of its sovereign functions.[626] The European Court disagreed on the basis that the restriction was not proportionate to the aim that State immunity pursued: to promote comity and good relations between states through the respect of another state's sovereignty.[627]

Further, a limitation on the right of access to a court secured by Article 6(1) will

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[621] *Waite and Kennedy v Germany* (1999) 30 EHRR 261 para 59.

[622] ibid; text to n 12 in ch1.

[623] *Fogarty v UK* (2002) 34 EHRR 302 para 33; *Waite and Kennedy v Germany* (n 621) para 59; *Osman v UK* (1998) EHRR 101 para 147; *Fayed v UK* App no 26958/95 (ECtHR, 21 September 1994) para 65.

[624] *Fogarty v UK* (n 623) para 33. Other restrictions include parliamentary immunity against claims of defamation (*A v UK* (2003) 36 EHRR 917) and a bar to challenging legality of telephone wiretaps while in place (*Klass v FRG* (1978) 2 EHRR 214).

[625] *Čudak v Lithuania* (2010) 51 EHRR 15.

[626] ibid paras 17-18.

[627] ibid para 55.

only be endorsed by the Court if it does not restrict or reduce the access 'in such a way or to such an extent that the very essence of the right is impaired'.[628]

A. Legal Aid

Legal access is assured by Article 6(3)(c) for those accused of a crime, including free legal assistance if needed,[629] but there is no comparable Convention right for free legal assistance in civil cases. That right only exists by creation of the Court, as recognised in *Airey v Ireland*,[630] in which the right to legal aid in a non-criminal case was determined necessary due to the applicant's financial inability to access a court to request a judicial separation from her husband but no legal aid was available for these complex proceedings.[631] Providing free legal aid has thus become a positive obligation if domestic proceedings require representation by a lawyer at any stage or by reason of the complexity of the procedure or the case.[632] Failure to provide legal aid in some civil cases could obstruct access to court.[633]

The Council of Europe encourages development of legal aid systems within the member states and has undertaken a comprehensive study of the availability of legal aid in Europe.[634] Recent data show that all member states comply with the minimum

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[628] ibid para 55; *Waite and Kennedy v Germany* (n 621) para 59; *TP and KM v UK* App no 28945/95 (ECtHR, 10 May 2001) para 98; *Fogarty v UK* (n 623) para 33.

[629] ECHR (n 1) art 6(3)(c).

[630] *Airey v Ireland* (n 16) paras 26-28.

[631] ibid.

[632] ibid.

[633] ibid.

[634] CEPEJ, *European Judicial Systems, Edition 2008 (Data 2006): Efficiency and Quality of Justice* (Council of Europe 2008) (CEPEJ Study 11) 48; Committee of Ministers, 'Recommendation (2005)12 to Member States Containing an Application Form for Legal Aid Abroad for Use under the European Agreement on the Transmission of Applications for Legal Aid (CETS No 092) and its Additional Protocol (CETS No 179)' (Council of Europe); Committee of Ministers, 'Recommendation No R (93)1 on Effective Access to the Law and Justice for the Very Poor' (adopted 8 January 1993, 484ter [sic] Meeting of Ministers' Deputies, Council of Europe).

requirement of the Convention by providing legal aid in criminal cases, with a number of countries, including Lithuania, that also provide some form of legal aid in non-criminal cases.[635]

Lithuania has a system of state-guaranteed legal aid that provides assistance of two kinds: *primary*, which includes consultation and drafting of certain requests; and *secondary*, which includes preparation of court cases and legal representation.[636] Primary legal aid is available to all Lithuanian citizens, nationals of other member states of the European Union, those with lawful residence in Lithuania and other European Union Member States, and others as provided by treaty.[637] However, consistent with the findings of the study on effective criminal defence in Europe discussed below,[638] in Lithuania, potential users of the programme are often without access to information about their eligibility, especially those with disabilities or who are in detention.[639] Further, the eligibility criteria for secondary legal aid is complicated and can be confusing for ordinary people to understand their eligibility.[640] Recent polling of the Lithuanian public confirms this, with one-third of those responding

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[635] CEPEJ Study 11 (n 634) 48, 52.

[636] Law on State-Guaranteed Legal Aid, 28 March 2000, No VIII-1591, amended 19 June 2012, XI-2082, *Official Gazette* 2012, No 76-3929 (30 June 2012) (in Lithuanian) (most recent English translation 6 April 2009, No XI-223); United Nations Human Rights Council, 'Joint UPR [Universal Periodic Review] Submission of Human Rights Monitoring Institute, Center for Equality Advancement, Equal Rights and Social Development Centre, Lithuania – October 2011' <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/LT/JS1-JointSubmission1-eng.pdf> accessed 30 August 2012 (Joint UPR Submission October 2011) para 41.

[637] Law on State-Guaranteed Legal Aid (n 636) art 11(1).

[638] Ed Cape and others, *Effective Criminal Defence in Europe* (Intersentia, Antwerp-Oxford 2010); text to nn 950-77 (discussing this study more fully).

[639] Joint UPR Submission October 2011 (n 636) paras 43-44.

[640] ibid; Vilana Pilinkait-Sotirovic,'Alternative Report Prepared for the United Nations Human Rights Committee on the Occasion of its Review of Lithuania's Third Periodic Report under the International Covenant on Civil and Political Rights' (Lithuanian Forum for the Disabled Global Initiative on Psychiatry, 27 July 2011) 13 para 38 (legal aid application process is long, complex, requires various declarations and certificates, including of personal income and property).

having never heard of state-guaranteed primary legal aid, and just over one-half aware of the availability of free legal representation in court.[641]

As with many aspects of Article 6 guarantees in Lithuania, there is legal framework that provides for legal services to the poor, but it suffers from inadequate implementation – particularly in that the quality of the services – with a substantial impact for those in contact with the criminal justice system. This is due primarily to the legal culture, low compensation and lack of minimum standards for legal aid counsel, and lack of quality assessment or supervision of counsel by the Bar, discussed in more detail below.[642]

B. Legal Access in Europe

Among the Council of Europe's efforts to better understand the availability and efficiency of the judicial systems in the member states is the 2008 CEPEJ Access to Justice Study, reporting collected data on social and private aspects of access to justice in Europe, including Lithuania.[643] It defines access to justice as enabling a maximum number of quality decisions at a reasonable. The value of this study to this research is found in the identification of essential components of access to justice.[644] Although comprehensive in gathering and reporting data, the study does not provide an analysis

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[641] From the public opinion survey, 'The Lithuanian Population's Knowledge About the Law', UAB RAIT (28 December 2009) (in Lithuanian) ('*Lietuvos Gyventojų Teisinė Žinios'*) <http://www.tm.lt/dok/tyrimai/Rait_ataskaita_TM20091228.pdf> accessed 30 August 2012 (conducted at the request of the Ministry of Justice); HRMI 2011 (n 102) 47, 50 fn 18.

[642] Abramaviciute and Valutyte, 'Lithuania' in Ed Cape and Zaza Namoradze (eds), *Effective Criminal Defence in Eastern Europe* (Soros Foundation 2012) 252; text to nn 848 (culture of hostility toward defence), 1006 (inadequate compensation for legal aid lawyers, no minimum standards for their work, or supervision).

[643] CEPEJ, 'Access to Justice in Europe'(CEPEJ Studies No 9, CEPEJ-GT-EVAL(2007)13E, 17 November 2010, Council of Europe) (CEPEJ Study 9).

[644] ibid 13.

of the data beyond compiling survey responses by the member states.[645] Some of the areas surveyed are useful in assessing Lithuania's positive obligation to provide legal access, and are considered below: participation of the public, length of proceedings, expense, and accessibility.

1. Participation of the Public

As the CEPEJ researchers point out, the image of the justice system undeniably helps to set the standards for high-quality justice. For this reason, the public must be considered in understanding the quality of access to justice as an aspect of democratic accountability.[646] The need for public involvement is recognised as important in the CEPEJ study, but unfortunately, the measure of public participation is based on the use of satisfaction surveys, a quantifiable measure. Notable for responses from Lithuania, and consistent with the lack of public participation in Lithuania, in the section for responses from the 'users of justice', respondents were court staff and prosecutors, not members of the public or litigants.[647]

Not included in the CEPEJ study are less quantifiable assessments of public participation, such as the strength of a country's civil society, a significant factor impeding access to justice in Lithuania:

> Civil society in Lithuania is weak and has very little influence in policy making. Collective action through formal organizations or informal networks in Lithuania is still extremely scarce; so is citizen political involvement.

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[645] For example, Table 6 lists those countries that do (28) (including Lithuania) and do not (15) require examination of applicant's income for the granting of legal aid in criminal cases. ibid 62.

[646] ibid 89.

[647] In one area surveyed asking for responses from users of justice, such as 'surveys of citizens / visitors of the courts' and 'surveys of other court users', Lithuania was one of four countries that used justice professionals to respond (court staff and prosecutors, as to question 41). CEPEJ, 'Report on Conducting Satisfaction Surveys of Court Uses in Council of Europe Member States' (CEPEJ Studies No 15, 10 September 2010, Council of Europe) 40.

> Lithuanians are among the last in the EU when it comes to the level of trust in other people and public institutions.[648]

This lack of trust in public institutions, noted earlier,[649] weakens Lithuania's democratic institutions, given that social scientists have documented a strong correlation between public confidence and the effectiveness of government.[650]

Taking public involvement into account in Lithuania's judicial system and political process, given its historical cultural distrust, must be taken more seriously. The continued lack of an engaged civil society that allows participation of a wide segment of citizens in politics allows this new democracy to remain vulnerable.[651] In this area, Lithuania would do well to further support civil organisations and expand their meaningful policy input to rectify the reduction in funding, including those created by tax policies.[652]

2. Length of Proceedings

Whether a criminal or non-criminal case, if a proceeding takes too long, it will violate the 'reasonable time' requirement of Article 6(1), which provides, '[i]n the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ...'.[653] As with determining whether the terms 'criminal charge' and 'civil rights obligations' apply,[654] the Court's evaluation or reasonableness is autonomous from how it is determined by the member states. The Court decides

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[648] Dainius Velykis, 'Civil Society Against Corruption: Lithuania' (September 2010) Hertie School of Governance, 2, 6.

[649] Text to nn 99-105 in ch 2 (public opinion survey results); HRMI 2009 (n 110) 6.

[650] Newton and Norris (n 114).

[651] Mavi (n 88) 69.

[652] Text to n 89 in ch 2; Kaetana Leontjeva, 'Lithuania' in *Nations in Transit 2012* (Freedom House, New York 2012) 339 ('NGOs still struggle to find sustainable sources of funding').

[653] ECHR (n 1) art 6(1).

[654] Text to n 17 in ch 1.

reasonableness 'in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities'.[655]

A review of time frames taken from decisions by the European Court[656] concluded that up to two years in non-complex cases was generally regarded by the Court as reasonable.[657] If exceeding two years, the Court examined whether the national authorities had shown due diligence in the process.[658] At times the Court would depart from the general approach and find a violation in cases it determined were priorities, even if the case had not exceeded two years.[659] More than two years for a proceeding was allowed at times in a complex case, but in permitting the extra time the Court examined periods of inactivity that might have been clearly excessive.[660] Generally, the longer period of time allowed was rarely more than five years and almost never more than eight years.[661] The only time the Court did not find a violation within these parameters was where there was a manifestly excessive duration of proceedings that was due to the applicant's behaviour.[662]

Consistent with the practice of the Court in its judgments, in nearly each case finding excessive delay in cases from Lithuania the Court addressed the complexity of the case; the conduct of the applicant; the conduct of the relevant domestic authorities;

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[655] *Péllisier and Sassi v France* (2000) 30 EHRR 431 para 67.

[656] Françoise Calvez, 'Length of Court Proceedings in the Member States of the Council of Europe Based on the Case Law of the European Court of Human Rights' (CEPEJ, Council of Europe 2006) 3, 9.

[657] ibid 6.

[658] ibid.

[659] ibid.

[660] ibid.

[661] ibid.

[662] ibid.

and often included consideration of what was at stake for the applicant.[663] The only variation in this practice was when the Court did not specifically make a finding as to the complexity of the case.[664] An example of the Court's enumeration of these factors can be found in *Šulcas v Lithuania:*

> The Court will assess the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what was at stake for the applicant has also to be taken into account.[665]

Delays in court proceedings are well known within Lithuania, and are the source for the most Article 6 judgments against Lithuania in the European Court of Human Rights.[666] Observers in Lithuania note that the workload of the domestic courts is ever increasing, adding to the length of proceedings.[667] The problem is recognised within Lithuania as systemic, yet no attempt is underway to understand the problem or make improvements.[668] The systemic nature of the problem has yet to gain the attention of the European Court, despite the number of adverse judgements in Lithuania relating to the length of proceedings.[669]

On the opposite end of the cases reflecting excessive length of proceedings are the fast pace at which some criminal matters are processed. As reported in Lithuanian media, the Supreme Administrative Court of Lithuania undertook a study of the hurried

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[663] ibid 47-50 (describing the main tendencies in the determination of 'reasonable time' from a detailed analysis of numerous judgments and Committee of Ministers' resolutions).

[664] Based on the author's review of the cases.

[665] *Šulcas v Lithuania* App no 35624/04 (ECtHR, 5 January 2010) para 68 (internal citations omitted).

[666] Text to nn 809-10.

[667] HRMI 2009 (n 110) 40.

[668] ibid; HRMI 2011 (n 102) 39.

[669] Text to nn 807-11.

treatment of misdemeanour cases, looking at cases in the first half of 2007. It showed that every third person whose case concerned a theft from a store was convicted for an offence that he or she did not commit.[670] As is typical, following this report, no recommendations were made or corrective action taken to prevent such problems in the future, and no remedial measures were known to have been taken for the wrongly convicted.[671]

3. Expense

When a proceeding requires an unfair expense, particularly in complex cases, it becomes a denial of access to a court in violation of Article 6(1).[672] Access to justice may also be influenced by the existence of court fees that could become obstacles to initiating judicial proceedings.[673] In the majority of countries, litigants must pay a tax or fee to the court to initiate a non-criminal proceeding (40 countries, including Lithuania), but no court fees are required to initiate a proceeding in some countries, such as in France or Spain. In some countries the fees may be dependent upon the overall cost or type of proceedings. For certain criminal proceedings in Austria, Belgium, Cyprus, Germany, Portugal, Switzerland and Ukraine, litigants may also be required to pay a fee.[674]

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[670] HRMI 2009 (n 110) 37 (how this was determined is not clear); Dainius Sinkevičius, 'As Many as 35% of Individuals Were Convicted for Thefts They Never Committed' (in Lithuanian) (*Teismai Net 35 Proc Asmenų Nubaud Už Vagystes, Kurių Jie Nepadarė*) *Delfi News* (18 July 2007) <http://www.delfi.lt/news/daily/law/teismai-net-35-proc-asmenu-nubaude-uz-vagystes-kuriu-jie-nepadare.d?id=13816305> accessed 30 August 2012.

[671] Correspondence from a former Lithuanian judge to the author (1 September 2009). It is not unusual that there was no response – without specific criticism from the President of the Republic or someone of a very high rank, such systemic problems are ignored. Lithuania continues to be a fairly hierarchical society – one must be high on the social ladder to be heard and, moreover, for anyone to react to their remarks. ibid.

[672] *Airey v Ireland* (n 16).

[673] CEPEJ Study 11 (n 634) 54, 59.

[674] ibid 59.

The high cost of litigation in Lithuania was documented by the World Bank Conference on Economic Development in 2007, noted insufficient progress in promoting access to justice in Lithuania and other transition countries.[675] The high cost of both lawyers and notaries were considered a significant reason why judicial proceedings are considered by many firms to be unaffordable. Among the recent members to the European Union, including Lithuania, only 40 per cent of firms surveyed reported the courts as affordable.[676]

4. Accessibility

Accessibility to a court is an important consideration when the Council of Europe considers the obligations of member states to provide access to justice. In the 2008 CEPEJ access to justice study, special attention is proposed for vulnerable persons, such as victims of crimes, children, minorities, and disabled persons.[677] The CEPEJ also considers access to justice in the general sense that courts should be available and understood.[678] New models for organising justices systems, such as mobile courts, itinerant judges, neighbourhood mediators, and the 'virtualisation' of judicial services are considered as potential means to enhance physical accessibility, but due to the symbolic importance of the physical place in which justice is handed down, the study's authors suggest that such virtualisation should not be complete.[679]

A significant role of the member states in providing access to a court is informing users about certain aspects of legal proceedings, including the nature of

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[675] Anderson and Gray (n 107) 340-41.

[676] ibid 339-40.

[677] CEPEJ Study 11 (n 634) 249.

[678] ibid 248-49.

[679] ibid 28.

proceedings that may be brought; their possible duration; the costs and the risks in cases determined as a wrongful use of legal channels; and the availability of alternative means for dispute resolution.[680] The data collected by the CEPEJ show that to some extent, most states provide the public with information on the nature of legal proceedings and the decisions of the higher courts.[681] Information about alternative dispute resolution is less available, the study suggesting that judicial systems could benefit from mediated training on the day-to-day activities of the courts.[682] Few states inform users on the foreseeable length of proceedings.[683]

In addition to providing users with information, access to justice is facilitated by simplifying legal documents used in court actions to demystify the language used and reducing the distance between the system and its users.[684] Of the data collected by the CEPEJ, most states responding (40 of 43) indicate that they have simplified procedures for small claims, fewer (35 of 43) have simplified procedures for juvenile offences, and roughly half (21 of 41) have simplified procedures for administrative proceedings. Simplified proceedings and forms are recommended for optimising access to justice in

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[680] ibid 28-29; Council of Europe, 'Opinion No 6 (2004) of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers on Fair Trial Within a Reasonable Time and Judge's Role in Trials Taking into Account Alternative Means of Dispute Settlement' (CCJE (2004) OP No 6, 24 November 2004, Strasbourg) (CCJE Opinion No 6 (2004)) para 13.

[681] In 2006 all 47 states consulted responded to the query, indicating that 45 states have official websites or portals (such as the Ministry of Justice) that provide free public access to legal texts, and 41 states provide free public access to the case law of the higher courts. CEPEJ Study 9 (n 643) 29.

[682] ibid.

[683] ibid; in 2006, six of the 47 states reported no obligation to provide information to the parties concerning the foreseeable time frame of the proceeding, some noting such information as not compulsory but given in practice. CEPEJ, 'European Justice Systems: Edition 2006 (2004 Data)'(CEPEJ Studies No 1, CEPEJ(2006)EvaluationE 05 October 2006, Council of Europe) (CEPEJ Study 1) 54. In 2008 more states (8 of 48) reported no such duty, including Lithuania. CEPEJ Study 11 (n 634) 61 (also noting victims of crime as a category of citizen in need of special attention in this regard).

[684] A recommendation of the Consultative Council of European Judges. CCJE Opinion No 6 (2004) (n 680) para 18 and sec A3.

minor disputes and for minor offences, reducing costs for both the state and users.[685]

Limitations on court accessibility for the general public are exponentially compounded for those with physical disabilities. This is the case in Europe, and certainly a problem in Lithuania, where the lack of commonly available accessible public buildings is a major barrier for physically disabled persons. Public buildings, public transportation, housing, recreational and entertainment facilities, public areas and services, and employment are essentially inaccessible. 'It goes without saying – if people cannot [have] access, then they cannot participate.'[686] A law on the social integration of the disabled adopted in 1991 established guarantees for the physically disabled, including that buildings are to be accessible.[687] Two years later the law had not been implemented,[688] and according to 2009 data from Lithuania's Department of Statistics, 38 per cent of housing was still inaccessible.[689]

A study of the physical environment in the city centres in three of Lithuania's largest cities (Vilnius, Kaunas and Šiauliai) concluded that while much has been done in establishing the necessary legal foundation for accessibility for the physically

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[685] CEPEJ Study 9 (n 643) 31. Some reports indicate savings to users of nearly 50 per cent, and for the states, savings in staff time and greater case flow. Ugo Mattei, 'Access to Justice: A Renewed Global Issue?' (2007) Elec J Comp L 1.

[686] Donna Majauskas, '1993 American-Lithuanian Disability and Rehabilitation Exchange Program May 15-25, 1993' (1994) 40 Lituanus 2.

[687] Law on the Social Integration of the Disabled, 28 November 1991, No I-2044, amended 21 June 2011, No XI-1488, *Official Gazette* 2011, No 85-4134 (13 July 2011) (in Lithuanian) (most recent English translation 28 November 1991, No I-2044) (for new construction or renovation, 'it is necessary to adapt them for the specific needs of the disabled'). ibid art 12(1).

[688] Majauskas (n 686) 2.

[689] USA Department of State, *Country Reports on Human Rights Practices for 2011 - Lithuania*, 24 May 2012, 11-12 (no permanent link; searchable database is <http://www.state.gov/j/drl/rls/hrrpt/index.htm> accessed 30 August 2012, 17. The 2003 Law on Equal Treatment also prohibits discrimination against persons with disabilities, but does not specify what kind of disabilities, or make any reference to physical disabilities, accessibility, or provision for making buildings and public places barrier-free. Law on Equal Treatment, 18 November 2003, No IX-1826, amended 17 June 2008, No X-1602, *Official Gazette* 2008, No 76-2998 (5 July 2008).

disabled, work to physically modifying the environment has not been accomplished, and 'does not meet the needs of people with physical disabilities'.[690]

The European Court has yet to find lack an Article 6(1) violation for denying physical access to a court or counsel by a person who is physically disabled, fairly recently declining to do so in a 2010 decision rejecting a claim brought by a man with muscular dystrophy.[691] The grounds for denial included that other feasible steps could have been taken through other people or by post, a position disability advocates note as out of step with international developments on the rights of the physically disabled to live independently as equal citizens.[692]

C. Legal Access in Lithuania

In addition to the conditions studied by the CEPEJ in court access, there are additional barriers to legal access peculiar to Lithuania, discussed in this section: standing to make individual constitutional claims; have access to the record of proceedings; pursue claims against state institutions and officials; pursue a cassation appeal from the Supreme Administrative Court; access for vulnerable persons denied standing – the mentally disabled and children in civil disputes; and the inability to challenge unlawful arrest, detention and denial of bail.

1. Standing for Constitutional Claims

Articles 6 and 30 of Lithuania's Constitution provide the rights to

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[690] Saulius Žukauskas and Marius Daugėla, 'Accessibility of Physical Environment of Downtowns of Lithuanian Cities for People with Physical Disabilities' (2006) 2 Special Education 122-34 (also describing the 2003 study, 'The Infrastructure of Kaunas City through the Eyes of the Disabled' that examined more than 400 public buildings in Kaunas (Lithuania's second-largest city) and found 69 per cent had no modifications for the disabled, and the remaining 31 per cent had only partial modifications.

[691] *Farcaş v Romania* App no 32596/04 (ECtHR, 14 September 2010) (in French).

[692] Constantin Cojocariu, 'Farcas v Romania – A Missed Opportunity to Address the Lack of Access to Justice and Social Exclusion Faced by People with Disabilities' (2011) INTERIGHTS <http://www.interights.org/farcas/index.html> accessed 30 August 2012.

defend their rights by invoking the Constitution and the right to apply to a court if their constitutional rights or freedoms are violated.[693] The Constitution is silent as to how that might take place, and there is no implementing legislation that permits an individual's claim of a violation of a constitutional or treaty-protected human right.[694] There are also no provisions for the participation of interested groups as *amicus curiae*.[695] Those petitioners who file a claim seeking the determination of the constitutionality of a law or act must depend upon the judge to refer the matter to the Constitutional Court because procedure does not allow participation of interested parties in constitutional questions.[696] Without this ability, Lithuanian citizens are denied fundamental access to a court pursuant to Article 6(1) and denied the available remedies provisions of violation of Article 13.[697] Discussions underway in 2009-2010 for legislation that would allow an individual complaint or amicus participation before the Constitutional Court did not survive the Seimas committee process.[698]

2. Access to the Record of Court Proceedings

During Soviet occupation, the functioning of the court system was opaque; court decisions were not publicly available and proceedings were not recorded.[699] As in

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[693] Constitution of Lithuania (n 14) art 6 (the Constitution is 'an integral and directly applicable act'; '[e]veryone may defend his [or her] rights by invoking the Constitution'), art 30 (a person 'whose constitutional rights or freedoms are violated shall have the right to apply to court').

[694] HRMI 2011 (n 102) 46.

[695] ibid.

[696] Text to nn 336 in ch 3.

[697] ECHR (n 1) art 13 provides: 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

[698] HRMI 2011 (n 102) 46.

[699] Interview with a former Lithuanian judge (Vilnius 11 April 2011); proceedings were still not recorded as of the close of 2011, as described by the National Courts Administration:

> For the moment, the court process is drawn up in records written by the secretaries of the hearings. However, written protocols can not assure publicity and transparency of

Soviet times, the only record of court proceedings has been the notes, or minutes, taken by a court clerk and placed in the court file not accessible to the public.[700] Court decisions were also not accessible to the public. It has only been in the past several years that some of Lithuania's higher courts now publish their decisions, some now online, including the Constitutional Court and the Supreme Court.[701] However, as in the past, the court system remains opaque to litigants to a large degree.[702]

It has only been since early in 2012 that there have been verbatim recordings of court proceedings, resulting from amendments to the Law on Courts in effect from 1 July 2010.[703] However, there have been delays implementing this change, first due to budgetary and practical limitations.[704] Instead of the two million Lithuanian Litas (about 481,580 pounds) planned for the first year, less than half of that, about 700 thousand Litas (about 168,553 pounds) was allocated for the implementation of the requirements of the legislation.[705] The working group also determined that the necessary equipment could not be installed in every court, with about 30 per cent of courts not having the requisite practical requirements.[706]

> the court hearings so disputes regarding the precision of the protocol occur very often. These problems could be avoided by audio recording of the court hearing.

'Audio Records of Court Hearings Are Going to Be Kept', National Courts Administration <http://www.teismai.lt/en/courts/judicial-system> accessed 30 August 2012 (National Courts Administration Official Website); text to n 394 in ch 3 (audio recordings to be available from 1 January 2013).

[700] HRMI 2011 (n 102) 45-46.

[701] See Constitutional Court of the Republic of Lithuania <http://www.lrkt.lt/Documents1_e.html> accessed 30 August 2012; Supreme Court of the Republic of Lithuania (in Lithuanian) <http://www.lat.lt/lt/titulinis.html> accessed 30 August 2012

[702] Interview with a former Lithuanian judge (Vilnius 11 April 2011).

[703] National Courts Administration Official Website (n 699).

[704] ibid.

[705] ibid.

[706] National Courts Administration Official Website (n 699).

The record of court proceedings still remains unavailable to litigating parties and the public despite the legislative intent to ensure transparency of the proceedings and accuracy in the assessment of evidence.[707] Even when recordings are made, the record is restricted by the courts for 'administrative purposes' only.[708] The recordings are available to the judges and court administration, but 'the parties must, as before, rely on incomplete and often inaccurate hand-written transcript of the hearings'.[709] This restriction is further compounded by the timing of when the handwritten records become available – the day after judgment is rendered.[710] Since a case is considered concluded with the entry of the judgment, the parties are unable to call the court's attention to any inaccuracies in the record before the judgment.[711] There is no procedure that allows for correction of the record.[712]

The situation may improve as the result of additional amendments to the Code of Civil Procedure in effect from 1 October 2011 providing that each civil court hearing will be recorded and the audio recording will be made available to the participants of court proceedings.[713] It remains to be seen whether the implementation of this

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[707] HRMI 2011 (n 102) 40, 45-46 (the regulations to provide immediate access to recordings of court proceedings required by the 2008 amendments to the Law on Courts (n 63) have not been implemented).

[708] HRMI 2011 (n 102) 45-46.

[709] ibid 46. As of 5 April 2012, a July 2010 posting on the National Courts Administration Official Website (n 699) explained the continued use of handwritten secretarial notes rather than provide a verbatim record of proceedings:

> For the moment, the court process is drawn up in records written by the secretaries of the hearings. However, written protocols can not assure publicity and transparency of the court hearings so disputes regarding the precision of the protocol occur very often. These problems could be avoided by audio recording of the court hearing.

[710] HRMI 2011 (n 102) 46.

[711] ibid.

[712] ibid.

[713] Code of Civil Procedure (n 317). Implementation is presently set for 1 January 2013. Recent Developments in the Judicial Field in Lithuania (n 316). Lithuania has been slow in adopting modern technology as a means to reduce the expense and delay of litigation: it will also not be until January 2013

amendment will be timely and adequate for the parties.

3. Litigation Against State Institutions and Officials

Lithuanians have a constitutional right to criticise the work of their State institutions and officials, and to appeal against their decisions.[714] To exercise that right, the Constitution established a unified court system, allowed for the establishment of specialty courts, including administrative courts, and mandated additional legislation defining the competence of the specialty courts in a separate Law on Courts.[715] The subsequent 1994 Law on the Courts established, among other courts, the administrative court system to challenge the actions of public officials and institutions.[716]

Although the Law on Administrative Proceedings contemplates an individual's right to bring actions *in actio popularis*, in defence of the public interest, its application is virtually impossible.[717] That is because necessary enabling legislation was never

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that court documents can be filed in electronic form, or allow questioning of court participants by electronic means, such as by video and telephone conferencing. ibid.

[714] The Constitution of Lithuania (n 14) art 33, provides in relevant part, that:

> Every citizen shall be guaranteed the right to criticize the work of State institutions and their officials, and to appeal against their decisions. It shall be prohibited to persecute people for criticism.

[715] Constitution of Lithuania (n 14) art 111 (describing a single court system comprised of 'the Supreme Court, the Court of Appeal, regional courts and district courts' and '[f]or administrative, labour, family and cases of other categories, specialised courts may be established', the composition and competence of which shall be determined by the Law on Courts).

[716] The Law on the Establishment of Administrative Courts (n 322), enacted pursuant to the Constitution of Lithuania (n 14) art 111, establishes the competence of the Administrative courts, which includes consideration of applications raising the lawfulness of legal acts passed and actions performed by the entities of public administration (eg, ministries, departments, inspections, services, commissions) or the legality their refusal or delay in performing their duties; compensation for material and moral damage to a natural person or organisation by unlawful acts or omissions by state or municipal institutions, agencies, and their employees; disputes with the State Tax Inspectorate; office-related disputes where one of the parties is a public or municipal servant possessing the powers of public administration; violation of the election laws; complaints by aliens for refusal to issue residence and work permits in Lithuania or revocation of such permits and determination of refugee status; and complaints against administrative sanctions. The official description is at the Supreme Administrative Court Official Website (n 322).

[717] Law on Administrative Proceedings (n 323) art 56(1) ('[i]n the cases established by law ... natural persons may apply to the court with a petition for the protection of the public interest in the manner prescribed by law').

enacted, leaving the legal framework for this type of claim incomplete. A draft Law on Defence of Public Interest in Civil and Administrative Proceedings was presented in Seimas in 2006 but the matter has seen no action since then. As a result, complaints filed by applicants seeking to lodge claims on the grounds of protection of the public interest are rejected by the courts.[718] The continued absence of this implementing legislation is recognised outside of Lithuania as a 'legal uncertainty ... identified as a potential obstacle for access to justice'.[719]

4. Appeals in Administrative Cases

Even though the Constitution provides for one court system, according to the Law on Administrative Proceedings, the court of last resort for administrative cases is the Supreme Administrative Court, not Lithuania's Supreme Court.[720] This short-coming was nearly corrected in a revised Law on Courts proposed in 2008. However, allowing a cassation appeal from the Supreme Administrative Court to the Supreme Court became one of the obstacles to adopting the new law,[721] and it was not enacted. Instead, only some amendments were adopted, leaving the jurisdiction of the Supreme Court limited to reviewing only those decisions, judgments, rulings, resolutions and

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[718] For example, the 23 January 2004 Ruling of the Supreme Administrative Court of Lithuania in *Žvėrynas Community v Vilnius City Council and Administration*, Case No A-03-11-04 (in Lithuanian). At present, the only action that can be brought by a natural person is one to defend the public interest in the environmental context, not the result of any domestic legislation, but due to the now-ratified regional environmental agreement. United Nations Economic Commission for Europe, 'Public Participation in Decision-Making and Access to Justice in Environmental Matters' (Convention on Access to Information, Aarhus, Denmark, 25 June 1998); HRMI 2009 (n 110) 15; HRMI 2011 (n 102) 45.

[719] Ester Pozo Vera, 'An Inventory of Member-States' Measures on Access to Justice in Environmental Matters' Paper for the Aarhus Convention: How Are its Access to Justice Provisions Being Implemented? (Belgium 2 June 2008) 3, 7 <http://ec.europa.eu/environment/aarhus/pdf/conf/milieu.pdf> accessed 30 August 2012.

[720] Supreme Administrative Court Official Website (n 322).

[721] Dainius Sinkevičius, 'Law on Courts: For the People or for Strengthening the Clout of V Greičius?' (in Lithuanian) (*'Teismų Įstatymas: Žmonėms Ar Prarastai V Greičiaus Įtakai Stiprinti?'*) *Delfi News* (26 June 2007) <http://www.delfi.lt/archive/article.php?id=13614262> accessed 30 August 2012; Law on Courts (n 63).

orders of the courts of general jurisdiction.[722]

5. Rights of the Legally Incapacitated

The concept of protections for persons without legal standing is underdeveloped in Lithuania, such as for adults who are mentally ill or children. In Lithuania, as in most countries, judicially determined legal incapacity results in losing all civil, economic, political and other rights usually enjoyed by others. However, in Lithuania, the law is underdeveloped, such that the laws do not recognise that personal skills, health status, or severity of mental disorder may vary in time, and that a changes in circumstances might make some forms of care no longer necessary or allow a person to be recognised as competent. There is no guardian *ad litem* equivalent in cases of legal incapacitation, so that the individuals who are the subject of proceedings that will determine their competency have no representation.[723] The laws do not recognise any form of limited guardianship for persons with intellectual and mental disabilities less than full incapacity, or foresee a periodic review of established incapacity and guardianship.[724]

Lithuania's Mental Health Act[725] provides a patient the right to be heard and to participate in court in proceedings on involuntary hospitalization and treatment, but this does not happen because there is no procedural mechanism to implement this right.[726] There are no provisions to ensure the patient's right to be heard by a judge, no

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[722] 'The Supreme Court shall be the only court of the cassation instance for reviewing effective decisions, judgements, rulings, resolutions and orders of the courts of general jurisdiction.' Law on Courts (n 63) art 23(1).

[723] Interview with a Lithuanian lawyer (Vilnius 14 July 2010).

[724] Pilinkait-Sotirovic (n 640) 4.

[725] Law on Mental Health Care, 6 June 1995, No I-924, amended 30 June 2005, No X-298, *Official Gazette* 2005, No 85-3142 (14 July 2005).

[726] Pilinkait-Sotirovic (n 640) 9 para 18.

procedure providing how or who should bring the patient before the judge, and no standards for when decisions may be made solely by the psychiatric health institutions rather than by the courts. Patients are not informed about their right to a hearing or asked whether they would like to participate. Because of the lack of regulation, some institutions determine their own procedures.[727]

In a one year period ending in May 2010, 268 people were involuntarily hospitalised in nine health care facilities in Lithuania.[728] Despite the more stringent requirements for involuntary hospitalization enacted in 2010, the majority of hospitalised psychiatric patients reported that during their care they were pressured to accept inpatient care, and when they refused, they were involuntarily hospitalised anyway.[729] The standards of proof to support an involuntary commitment are also inadequate. In one 2009 example, an involuntary commitment was made on the opinion of the psychiatrist at Vilnius Central Clinic based solely on a review of medical records, without having examined the patient.[730]

There are also no provisions in Lithuania's Code of Civil Procedure for a patient to appeal against the extension of involuntary hospitalisation and treatment. Unlike restrictions on a person's liberty in the context of a criminal case which can be appealed, forced hospitalisation cannot.[731] This was also the finding of the European

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[727] HRMI 2011 (n 102) 95; 'Report to the Lithuanian Government on the Visit to Lithuania Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2008' (CPT/Inf (2009) 22, 25 June 2009, Council of Europe) (CPT 2009 Report to Lithuania); *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) paras 86-87.

[728] HRMI 2011 (n 102) (describing Seimas Ombudsman findings).

[729] ibid 94-95; Law on the Rights of Patients and Compensation of the Damage to their Health, 13 July 2004, No IX-2361, *Official Gazette* 2004, No 115-4284 (24 July 2004) (in Lithuanian).

[730] HRMI 2011 (n 102) 95.

[731] *DD v Lithuania* (n 727) para 165 ('Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him [or her] in an institution like the Kedainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived

Court in *DD v Lithuania*[732] in which the Court also found many of these practices to amount to serious legal and practical shortcomings in the Lithuanian system of protection of the rights of persons with mental disability

The Court found a violation of Article 6(1) in the failure to provide DD with the opportunity to participate in the court proceedings determining her legal capacity; was not informed that her personal autonomy in almost all areas of life was at issue, including her liberty; and involuntary placement into institutional care.[733] The facts established that she was not present at hearings on the appointment of her legal guardian and denied an attorney when she requested a reopening of the proceedings.[734]

The Court determined that the 2005 hearing on applicant's request for reconsideration of the decision making her adoptive father her legal guardian was unfair, due primarily to the conduct of the judge.[735] Two incidents in particular concerned the Court, neither of which are reflected in the hearing record, but are evident from the court filings.[736] First, at the start of the hearing, the judge ordered the applicant to leave her place next to her friend, a psychologist and her former guardian,

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of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.').

[732] ibid. The judgment became final on 9 July 2012 after denial of applicant's request for referral to the Grand Chamber to reconsider the use the report of a social worker, who had not seen applicant in person, as the basis for placement in the social care home. ibid paras 22-23, 159; correspondence from a Lithuanian lawyer to the author (3 March 2012).

[733] ibid 120. Not discussed here is her also successful claim that her involuntary admission to a psychiatric institution was in breach of art 5(1) and (4) of the Convention. ibid 53 paras 3, 4.

[734] ibid paras 19, 49, 50, 122.

[735] ibid para 126.

[736] The Court periodically refers to the transcript of the domestic proceedings, but the meaning of 'transcript' is not the equivalent to a verbatim record here, as indicated by the denial of Applicant's request to the judge for an audio recording; because neither court reporters nor audio recordings were commonplace in courtrooms at the time (in 2005); and the 2008 law mandating verbatim transcripts is not due for implementation until 1 January 2012. HRMI 2011 (n 102) 46 (hearing transcripts prior to introduction of audio recordings in 2011 consisted of 'incomplete and often inaccurate hand-written transcript of the hearings'); text to n 394 (verbatim transcripts of proceedings not due for introduction until 1 January 2013); *DD v Lithuania* (n 727) para 40.

to sit next to the judge, ordering the friend 'to keep her eyes off' the applicant.[737] Second, during a break in the proceedings, after the applicant refused an order to follow the judge to her private office, she was threatened with restraint by psychiatric personnel and relented.[738] Once in private with the judge, the judge instructed the applicant not to say anything negative about her adoptive father (whose continued position as guardian was at issue), and should she not comply, her friend and former guardian would also be declared legally incapacitated.[739] The applicant was then taken away, and the transcript indicates that after the break, applicant agreed to keep her adoptive father as guardian.[740]

Assessing the proceedings as a whole, the Court found that the spirit of the proceedings were not fair:[741]

> [T]he Court is not able to overlook the applicant's complaint, although denied by the Government, that the judge did not allow her to sit near DG, the only person whom the applicant trusted. Neither can the Court ignore the allegation that during the break the applicant was forced to leave the hearing room and to go to the judge's office, after which measure the applicant declared herself content. Against this background, the Court considers that the general spirit of the hearing further compounded the applicant's feelings of isolation and inferiority, taking a significantly greater emotional toll on her than would have been the case if she would have had her own legal representation.[742]

In addition to the applicant's circumstances, the European Court recounted

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[737] *DD v Lithuania* (n 727) para 39.

[738] ibid para 42.

[739] ibid.

[740] ibid paras 42, 43.

[741] ibid paras 126-27.

[742] ibid para 126 (internal citations omitted); *CG v UK* App no 43373/98 (ECtHR, 19 December 2001) para 35.

findings by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) indicating denial of Article 6(1) rights as to the mentally ill in Lithuania. Abuses were found when voluntary hospitalisations became involuntary when voluntarily-admitted mental health patients are not permitted to leave when they wished, and in the actions of the Lithuanian judiciary terminating existing guardianships held by family and friends in favour of the custodial institution.[743] These conditions were found at the same facility in which DD was confined, the Skemai Residential Care Home.[744]

This was the situation for 69 residents the CPT found who had been admitted on their own application or that of their guardian through the district authority (Panevėžys District Administration).[745] The decision on placement was taken by the social affairs unit on the basis of a report prepared by a social worker and a medical certificate issued by a psychiatrist stating that the applicant's mental health permitted his or her placement in a social welfare institution of this type.[746] An agreement was then signed between the applicant and the authorised representative of the local government for an indefinite period.[747] When Lithuania was visited by the CPT delegation in 2008, they found legally competent residents who had ben admitted using this procedure were not always allowed to leave the home when they so wished.[748] Instead, their discharge

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[743] Both circumstances were found at the same state social care home in which DD was institutionalised. CPT 2009 Report to Lithuania (n 727) para 125 ('even legally competent residents admitted on the basis of their own application were not always allowed to leave the home when they so wished) para 127 (for the majority of the 69 residents deprived of their legal capacity, 'existing guardianship arrangements had been terminated by a court decision upon admission to the establishment and guardianship of the person concerned entrusted to the home'); *DD v Lithuania* (n 727) para 89.

[744] ibid paras 86-89.

[745] ibid paras 88-89.

[746] ibid para 87.

[747] ibid; CPT 2009 Report to Lithuania (n 727) para 125.

[748] *DD v Lithuania* (n 727) 87.

could only take place by decision of the social affairs unit of the Panevėžys District Administration.[749] The reason given by the state was to ensure that discharged residents had a place and means for them to live in the community, but this meant that these residents were *de facto* deprived of their liberty, on occasion for a prolonged period.[750]

In the view of the CPT, placing incapacitated persons in a social welfare establishment that they cannot leave at will based solely upon the consent of the guardian entailed a risk that such persons will be deprived of essential safeguards.[751] Additional Article 6 implications arise because each of the 69 residents found by the CPT to have been deprived of their legal capacity in this manner were under the guardianship of the social care home.[752] This was because in most of these cases, existing guardianship arrangements had been terminated by a court decision once the person was admitted to the facility, whereupon guardianship was given over to the Home.[753]

Given that the role of a guardian is to defend the rights of incapacitated persons with respect to the hosting social welfare institution, it is obvious that granting guardianship to the very same institution could easily lead to a conflict of interest and compromise the independence and impartiality of the guardian.[754] Lithuanian authorities were urged to find alternative solutions to better guarantee the independence and impartiality of guardians.[755] Related to this finding and this research, but not at

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[749] ibid.

[750] ibid para 87; CPT 2009 Report to Lithuania (n 727) para 125.

[751] *DD v Lithuania* (n 727) para 88.

[752] ibid para 89.

[753] ibid.

[754] ibid.

[755] ibid; CPT 2009 Report to Lithuania (n 727) para 127.

issue before the Court in *DD v Lithuania*,[756] is the profound failure of the judge or judges who transferred these guardianships to understand this potential unethical behaviour as a conflict of interest by the care home.[757]

Although legal representation is mandatory for juveniles in criminal cases, there is no provision for legal representation for children in civil proceedings, the equivalent of a guardian ad litem, such as in the determination of custody.[758] When custody determinations are made, in addition to not having legal counsel, judicial determinations of placement are made without consideration of the best interest of the child.[759] A recent example is the highly-publicized custody dispute between a mother and aunt over a child believed to have been a victim of sexual assault involving a paedophile ring.[760] The local district court awarded custody to the natural mother despite the possibility of the mother having provided access to the child for the abuse.[761] The girl's father, who had custody before his death and was an outspoken advocate against the alleged paedophile ring, was later found dead.[762] After his death, the girl lived with the father's sister.[763] For the determination that granted a change of custody

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[756] *DD v Lithuania* (n 727).

[757] See text to nn 97-98 (pervasive lack of ethical behaviour or understanding ethics), 136-39 (lack of regulation promoting hidden constraints) in ch 2.

[758] Correspondence from a Lithuanian legal advocate to the author (28 April 2012).

[759] Interview with Regina Narusis (State of Illinois, USA, 19 May 2012) (Narusis interview). Ms Narusis is former President of the World Lithuanian Community (2006-2009), an organization representing the interests of Lithuanians living outside of Lithuania, also active in Lithuania. She is an attorney in the United States where she has served as a prosecutor in the Illinois juvenile courts; Ms. Narusis was interviewed on this topic in the Lithuanian media: Rasa Kalinauskaitė, 'Who Will Defend The Interests of the Girl?' (in Lithuanian) ('*Kas Apgins Mergaitės Interesus*?') *Lithuanian News* (3 May 2012) <http://www.lzinios.lt/Lietuvoje/ Kas-apgins-mergaites-interesus> accessed 30 August 2012.

[760] This is in the aftermath of the already highly-publicized murders discussed below in relation to the presumption of innocence. Text to nn 905-07.

[761] Narusis interview (n 759).

[762] ibid.

[763] ibid.

to the natural mother, the child did not have separate legal representation and the judge did not consider either the mother's potential criminal conduct or weigh what was in the best interest of the child.[764] Over the course of the proceedings, including unsuccessful appeals, several public figures commented on the need for obeying the order of the court or the 'whole system will fail', despite the legal proceedings' failures to fully consider the equities.[765]

6. Pretrial Detention and Denial of Bail

The Convention provisions for release pending trial are provided by Article 5(3),[766] but also relate to the Article 6 right to a fair trial in two ways. First, because the Article 6(3)(c) right to counsel in criminal cases includes counsel's ability to support an accused in distress and check on conditions of the accused while in detention,[767] and because pretrial detention and the reasons for it are at odds with an accused's right to be presumed innocent.[768] If an accused has no ability to challenge the legal propriety of pretrial detention, that limitation functions to deny access to a court.

In Lithuania there are situations in which pretrial detention cannot effectively be challenged. Lithuania's Code of Criminal Procedure still reflects the Soviet statutory scheme lacking in systemic protection for individual rights in that it allows the use of

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[764] Narusis interview (n 759); Kalinauskaitė (n 759).

[765] Narusis interview (n 759) (recounting opinion expressed in 2012 by a constitutional law professor in Lithuania).

[766] ECHR (n 1) art 5(3) provides: 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be ... entitled to trial within a reasonable time or to release ending trial. Release may be conditioned by guarantees to appear for trial'; Ed Cape and others (n 638) 30-31.

[767] *Dayanan v Turkey* (n 25) para 32.

[768] *Öcalan v Turkey* App no 46221/99 (ECtHR, 15 May 2005) para 140 (essentially requiring provisional release once the suspect's detention is no longer reasonable).

arrest and detention as an investigative and interrogative technique.[769] Soviet practice did not require that a judge rely on criteria in denying bail; a person could be ordered incarcerated from the time criminal charges were made through trial without a showing of probable cause that he or she might flee or commit a crime unless incarcerated.[770] Lithuania's Code of Criminal Procedure allows this practice to continue in the form of a provisional arrest, which can be ordered by either the pretrial police officers or the prosecutor.[771] Judges routinely order pretrial detention without considering either the individual circumstances of the accused or information in the case file, focusing almost entirely on the seriousness of the offence and potential punishment.[772] Law enforcement and judges in Lithuania still routinely order persons arrested and detained without bail as a coercive measure to elicit confessions.[773]

Although there is a procedure that allows an appeal against such an arrest, the practical implementation of a challenge to temporary detention does not provide an effective means of protection against arbitrary detention.[774] Pursuant to the Code of Criminal Procedure, a complaint against the arrest is made to a prosecutor supervising

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[769] Tadas Klimas, 'Introduction to Arrest and Denial of Bail Under Lithuanian Law and the European Human Rights Convention' October 2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1484686> accessed 30 August 2012; Tadas Klimas, 'Arrest and Denial of Bail Under Lithuanian Law and the European Human Rights Convention' (in Lithuanian) ('*Sulaikymas Bei Kardomoji Priemonė Pagal Lietuvos Istatymus Iki 2001 Metų; Ir Europos Žmogaus Teisių Konvenciją*') (2004) 1 Intl J Baltic L 96 (concept of arrest was not understood at the time due in part to earlier versions of Code of Criminal Procedure treating arrest as merely another investigative step); Code of Criminal Procedure (n 60) art 140; text to n 838 (criminal pretrial investigations bear no features of an adversarial system).

[770] ibid; *Grauzinis v Lithuania* (2002) 35 EHRR 7 (art 5(4) breach where applicant repeatedly not brought before judge and thus could not contest lawfulness of detention; although represented by counsel in his absence, without applicant's presence, his counsel was unable to receive proper instruction).

[771] 'Introduction to Arrest and Denial of Bail' (n 769); Code of Criminal Procedure (n 60) art 140 (allowing for provisional arrest of a person caught committing, or having just committed a crime, only in exceptional circumstances); Abramaviciute and Valutyte (n 642) 202.

[772] Abramaviciute and Valutyte (n 642) 253.

[773] ibid; 'Introduction to Arrest and Denial of Bail' (n 769); *Grauzinis v Lithuania* (n 770).

[774] HRMI 2011 (n 102) 44.

this pretrial investigation, not a judge, and an appeal from the decision of the prosecutor must be appealed to a higher prosecutor.[775] It is only at the third level that a complaint may be lodged with a judge.[776] The prosecutor and the judge each have five days to decide the complaint. In the meanwhile, the duration of a provisional arrest must not exceed 48 hours, so predictably, there are very few complaints lodged against the legality of arrests.[777] The pretrial investigation judges do not examine this practice as a breach of the Code of Criminal Procedure or of the Convention.[778]

Not only does this practice violate Article 5 of the Convention requiring only lawful arrest and detention and the presumption of innocence of Article 6, most alarming for Article 6 purposes is that judicial orders for arrest and pretrial detention are not subject to cassational appeal and therefore not subject to review by the highest court, the Supreme Court of Lithuania.[779] Further, the lack of appeal prevents the courts or any reviewing body from understanding the extent of the problem and providing the potential for addressing it in a system-wide basis.

The misuse of pretrial arrest and detention are exacerbated by the lengthy period of time that a pretrial investigation can take and the conditions in confinement. In June 2010 when the Criminal Code was amended to extend the time limitations for criminal convictions, legal experts were sceptical of the need for the amendments.[780] They argued that the existing time limitations, from 2 to 20 years, were long enough, and that

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[775] ibid 39.

[776] ibid.

[777] ibid; Code of Criminal Procedure (n 60) art 140; Abramaviciute and Valutyte (n 642) 202.

[778] Abramaviciute and Valutyte (n 642) 202.

[779] Kestutis Lipeika, 'Problem: Justification of Pretrial Incarceration' (in Lithuanian) (*Problema: Suemimo Taikymo Pagristumas*) 2009 Lithuania's Bar (*Lietuvos Advokatura*) no 2, 31;'Introduction to Arrest and Denial of Bail' (n 769).

[780] HRMI 2011 (n 102) 43.

more time would not be necessary if the pretrial investigation bodies were more active in their investigations.[781] The amended limitations, from 3 to 30 years, now 'allow carrying out investigative actions for a longer period of time, creating preconditions for abuse and violation of the right to a hearing within a reasonable time'.[782]

Figures from the Public Prosecutor's Office indicate that suspects detained pending an investigation that was later terminated spent an average of nearly a month (29.5 days) in custody before they were released.[783] In 2009, statistics indicated that for nearly all districts except in the Klaipėda District, the number terminated investigations had increased, suggesting an increased use of arrest and detention as an investigative technique.[784]

Criminal pretrial investigations can take a long time in Lithuania, limited only by the statute of limitations. In 2010, the Criminal Code was amended to lengthen the statute of limitations from a range of 2 to 20 years to 3 to 30 years.[785] For critics, the additional time would not be needed if the pretrial investigations were more purposeful. Instead, they argue, the additional time in the limitations will permit investigative actions to be conducted over a much longer period of time, 'creating preconditions for abuse and violation of the right to a hearing within a reasonable time'.[786]

Lengthy pretrial investigations in Lithuania can also prolong the suffering of

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[781] ibid.

[782] ibid.

[783] HRMI 2009 (n 110) 39 (based on 2007 statistics published by the Office of the Prosecutor General).

[784] ibid.

[785] An amendment to the Statute of Limitations for Criminal Liability extended the limitations from 2 to 3 years for misdemeanors; 5 to 8 years for negligent or minor premeditated crimes; 8 to 12 years for less serious premeditated crimes; 10 to 15 years for less serious crimes; 15 to 20 years for the commission of grave crimes; and 20 to 30 years for premeditated homicide. Criminal Code Amendment, 15 June 2010, No XI-901, *Official Gazette* 2010, No 75-3792 (29 June 2010) (in Lithuanian) art 95.

[786] HRMI 2011 (n 102) 43.

victims of crime who are expected as witnesses at trial, which has Article 6 implications in light of the Court's recognition of the rights of vulnerable parties in the organisation of criminal proceedings.[787] This is especially true in human trafficking cases, which have come to be characterised by their prolonged duration.[788] Pending the investigation the victims of trafficking suffer repeated victimization and violence, often by the perpetrators under investigation, without protection.[789] They remain unprotected from the perpetrators who have sold them.[790] Without an efficient and accessible victim protection system, in their terror they frequently change their testimony and ask that the investigation be closed.[791] Throughout, the investigators add to the victimization in their openly negative treatment of the victims.[792]

Lithuania's foremost human rights organisation has also reported poor conditions in detention[793] contrary to the principle of proportionality in the application of coercive measures during pretrial investigation, as codified in the Code of Criminal Procedure.[794] As reported by the CPT in June 2009, detainees in police custody are subjected to poor housing conditions and physical violence, and the CPT's recommendations on conditions in police detention – made on an earlier visit – had not been addressed.[795] Although the majority of individuals interviewed by the CPT indicated they had been treated properly, there were a number of allegations of recent

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[787] *Doorson v Netherlands* (n 23) para 70.

[788] HRMI 2011 (n 102) 18.

[789] ibid.

[790] ibid.

[791] ibid.

[792] ibid.

[793] HRMI 2011 (n 102) 12, 14-15.

[794] HRMI 2009 (n 110) 39.

[795] CPT 2009 Report to Lithuania (n 727) 9.

mistreatment during questioning by police officers, often apparently intended to produce confessions.[796] The CPT noted that juveniles appeared to be particularly at risk.[797] The report described the ill-treatment as mainly consisting of 'kicks, punches, slaps and blows with truncheons or other hard objects (such as wooden bats or chair-legs)'; some reported 'extensive beating and asphyxiation using a plastic bag or gas mask' sometimes when apprehended, after the person had been brought under control.[798] The CPT delegation gathered medical evidence consistent with the allegations made, including the claim by a detainee at Police Department No 2 in Vilnius the he had been severely beaten a few hours earlier by two police officers in an office of the police department.[799] He claimed the officers had struck him with a wooden stick and a metal tube in the abdomen area and on his back and legs.[800] The medical members of the CPT delegation examined him to find several recent injuries consistent with repeated blows with a blunt object.[801]

The CPT delegation also received allegations that prosecutors and judges did not act on claims of mistreatment when these were brought to their attention.[802] In response to the 2009 CPT Report, Lithuanian authorities declined to make changes, responding only that human rights training for police personnel was an ongoing policy.[803]

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[796] ibid 12 para 10.

[797] ibid.

[798] ibid.

[799] ibid para 11.

[800] ibid.

[801] ibid.

[802] ibid 13 para 14.

[803] 'Responses of the Lithuanian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its Visit to Lithuania from 21 to 30 April 2008' (CPT/Inf (2009) 24, 15 September 2009, Council of Europe)

Major shortcoming were also found in the conditions of confinement in the police detention centres the CPT visited, some of which could be considered inhuman and degrading.[804] At Šiauliai city police headquarters the CPT found the majority of cells were filthy and in a poor state of repair, with poor ventilation, little or no access to natural light, and dim artificial lighting.[805] At the same location the delegation found a juvenile detainee who had been in a cell with two adults for more than a week.[806]

II. Article 6 Judgments in the European Court of Human Rights

The adverse judgments against Lithuania finding Article 6 violations since 2008 include unduly lengthy court proceedings, one-sided use of police information and expert testimony, hearings that proceed without both parties present, improper police investigation practices, and improper guardianship proceedings for a mentally incapacitated adult.

During this period there have been 46 judgments in cases brought against Lithuania,[807] with 39 of the 46 finding one or more violations of the Convention. In these 39 cases, Article 6 was the basis for both the most violations claimed (34) and the most violations found (27).[808] As illustrated by the judgments finding Article 6 violations in Table 1 below, the most frequent basis for the violation resulted from an

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(Lithuania's Response to the CPT 2009 Report) 8 (recommendation to redouble efforts to combat ill treatment by police 'is constantly being implemented' as 'included in both vocational training programmes and special further training course programmes for police officers', similarly declining to adopt the recommendation that officers not openly carry truncheons in detention areas as creating a counter-productive effect because it is permissible equipment according to law).

[804] CPT findings at Jonava, Rokiškis, Kupiškis, Šiauliai, and Trakai. 2009 Report to Lithuania (n 727) 18 para 26.

[805] ibid.

[806] CPT 2009 Report to Lithuania (n 727). This report also describes other ongoing poor conditions in Lithuania not included here except to the extent they may impact art 6 rights. ibid.

[807] 2008 (13), 2009 (9), 2010 (8), 2011 (10), 2012 until 30 June (6).

[808] The second largest category of judgments finding violations were violations of respect for private life (art 8), with a total of 6.

unreasonable delay in civil or criminal proceedings (16 of 27 cases);[809] seven of these were in criminal cases and nine were in non-criminal cases.[810]

Some of the excessive length cases against Lithuania were determined to be complex cases, in which the Court gives more consideration for the length of time. Some of these would have been longer delays except there were periods excluded as having transpired before the Convention was in force in Lithuania. In each excessive length case, the Court found sufficient mistake or inertia by the domestic authorities to support the finding of an excessive delay in the proceedings. The delays in these cases ranged from 6 years and 1 month to 10 years and 6 months.[811]

Table 1: Adverse Judgments Against Lithuania Finding An Article 6 Violation
1 January 2008 until 30 June 2012

Applicants	Sections Violated
Aleksa App no 27576/05 (ECtHR 21 July 2009)	Art 6(1) (length)
Balsytė-Lideikienė App no 72596/01 (ECtHR, 4 November 2008)	Art 6(1) (unable to question experts)
Butkevičius App no 23369/06 (ECtHR, 17 January 2012)	Art 6(1) (length; civil)
Četvertakas and others App no 16013/02 (ECtHR, 20 January 2009)	Art 6(1) (length)
Čudak App no 15869/02 (ECtHR, 23 March 2010); (2010) 51 EHRR 15	Art 6(1) (access) 23 Mar 2010

[809] Article 6 violations were claimed in 34 of the 46 judgments, with 27 adverse judgments including an Article 6 violation, displayed in Table 1:

Total Judgments	46
No violations at all	7
Violation of some kind	39
Article 6(1)	
Including an Article 6 claim	34
Article 6 violation found	27
Finding excessive delay	16

[810] Based upon the author's review of the 46 judgments in cases brought against Lithuania between 1 January 2008 and 30 June 2012.

[811] ibid.

Table 1: Adverse Judgments Against Lithuania Finding An Article 6 Violation

1 January 2008 until 30 June 2012

Applicants	Sections Violated
DD App no 13469/06 (ECtHR, 14 February 2012)	Art 5(4) (held in psychiatric facility); Art 6(1) (unfair guardianship hearing)
Estertas App no 50208/06 (ECtHR, 31 May 2012)	Art 6(1) (res judicata violation)
Igarienė and Petrauskienė App no 26892/05 (ECtHR, 21 July 2009)	Art 6(1) (length)
Impar Ltd App no 13102/04 (ECtHR, 5 January 2010)	Art 6(1) (length)
Jelcovas App no 16913/04 (ECtHR, 19 July 2011)	Art 6(1) (no participation at hearing); Art 6(1), (3) (no assistance of lawyer)
Kravtas App no 12717/06 (ECtHR, 18 January 2011)	Art 6(1) (length)
Lalas App no 13109/04 (ECtHR, 1 March 2011)	Art 6(1) (fairness)
Malininas App no 10071/04 (ECtHR, 1 July 2008)	Art 6(1) (incitement)
Maneikis App no 21987/07 (ECtHR, 18 January 2011)	Art 6(1) (length)
Naugžemys App no 17997/04 (ECtHR, 16 July 2009)	Art 6(1) (length)
Norkūnas App no 302/05 (ECtHR, 20 January 2009)	Art 6(1) (length)
Novikas App no 45756/05 (ECtHR, 20 April 2010)	Art 6(1) (length)
Padalevičius App no 12278/03 (ECtHR, 7 July 2009)	Art 6(1) (length)
Pocius App no 35601/04 (ECtHR, 6 July 2010)	Art 6(1) (equality of arms)
Ramanauskas (2010) 51 EHRR 11	Art 6(1) (incitement)
Rikoma Ltd App no 9668/06 (ECtHR, 18 January 2011)	Art 6(1) (length)
Stasevičius App no 43222/04 (ECtHR, 18 January 2011)	Art 6(1) (length)
Šulcas App no 35624/04 (ECtHR, 5 January 2010)	Art 6(1) (length); Art 13 (effective remedy)

Table 1: Adverse Judgments Against Lithuania Finding An Article 6 Violation
1 January 2008 until 30 June 2012

Applicants	Sections Violated
Švenčionienė App no 37259/04 (ECtHR, 25 November 2008)	Art 6(1) (equality of arms)
Užukauskas App no16965/04 (ECtHR, 6 July 2010)	Art 6(1) (equality of arms)
Vorona and Voronov App no 22906/04 (ECtHR, 7 July 2009)	Art 6(1) (length)
Zabulėnas App no 44438/04 (ECtHR, 18 January 2011)	Art 6(1) (length)

III. Adversarial Proceedings in Civil and Criminal Cases

One of the basic tenets of justice protected by Article 6(1) is the concept of equality of arms. It is one of the elements of the broader concept of a fair hearing, requiring that each party have 'a reasonable opportunity to present his or her case under conditions that do not place the litigant at a substantial disadvantage vis-à-vis the opponent'.[812] This includes the opportunity for the parties 'to have knowledge of and discuss all evidence adduced or observations filed with a view to influencing the court's decision'.[813]

Denial of adversarial proceedings (equality of arms) is the second most frequent type of Article 6(1) violation against Lithuania, only after judgments for excessive delay in proceedings. Three cases in the time period reviewed included a denial of equality of arms: *Pocius v Lithuania*,[814] *Užukauskas v Lithuania*,[815] and *Švenčionienė v Lithuania*.[816]

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[812] *Pocius v Lithuania* App no 35601/04 (ECtHR, 6 July 2010) para 51; *Kress v France* App no 39594/98 (ECtHR, 7 June 2001) para 72; art 6(1).

[813] *Pocius v Lithuania* (n 812) para 51; *Fretté v France* (2004) 38 EHRR 21 para 47.

[814] *Pocius v Lithuania* (n 812).

[815] *Užukauskas v Lithuania* App no16965/04 (ECtHR, 6 July 2010).

[816] *Švenčionienė v Lithuania* App no 37259/04 (ECtHR, 25 November 2008).

Two of these, *Pocius* and *Užukauskas*, arose from similar factual backgrounds, in which the Court was called upon to evaluate the practice by Lithuania's law enforcement authorities of maintaining 'operational records files' in a database containing information gathered about individuals who are considered a potential danger to society.[817] In both cases the information in the applicant's operational file was opened and used to revoke and deny firearms licensing in non-criminal proceedings. Each was informed that they were to hand in their arms and be compensated with monetary payment.[818] Both applicants challenged the entry of their names into the operational records and asked that their names and information be removed. The domestic courts rejected their requests, basing their decisions on the classified evidence presented by the police to the judges that could not be disclosed to the applicants.[819] The European Court determined that while the data fell within the scope of Article 8 (private life), the proceedings fell within the scope of Article 6(1) under its civil head as a determination of a civil right.[820] The undisclosed evidence related to an issue of fact, and the data in the operational file were of decisive importance to the applicants' cases, thus the decision-making procedure did not comply with procedures for adversarial proceedings or equality of arms.[821] The Court agreed with the Government that the information constituted state secrets, but found that it had been used unfairly. That is because even

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[817] Authorised by domestic law, 'operational activities' are intelligence and counter-intelligence activities conducted by institutions authorised by the State to combat organised crime; an 'operational records file' contains data on individuals, events and other targets obtained during the process of operational activities, collected with the intention of providing information to operational entities. *Pocius* (n 812) para 24; Law on Operational Activities, 20 June 2002, No IX-965, amended 27 March 2012, No XI-1941, *Official Gazette* 2012, No 42-2043 (7 April 2012) (in Lithuanian) (most recent English translation 12 May 2011, No IX-965).

[818] *Pocius* (n 812) para 6; *Užukauskas* para 10.

[819] *Pocius* (n 812) para 50; *Užukauskas* (n 815) para 35.

[820] *Pocius* (n 812) para 45; *Užukauskas* (n 815) para 39.

[821] *Pocius* (n 812) paras 55, 58; *Užukauskas* (n 815) paras 49, 51.

under Lithuanian law the use of classified information is barred from use against anyone as evidence without it first being declassified, and even then it cannot be the sole evidence upon which a decision is based.[822] In both cases, the domestic courts had based their decisions primarily on the content of the operational files examined behind closed doors, and as a result, adequate safeguards were not in place to protect the right of either applicant to adversarial proceedings or equality of arms, in violation of Article 6(1).[823]

In a somewhat different situation, the applicant in *Švenčionienė* was not present for the appeal of her divorce proceedings because she had not been notified of the hearing, after which the appeal court ruled against her and reducing the compensation initially awarded to her. A violation of Article 6(1) was found in the failure to properly inform the application about the process and that she be given the opportunity to comment on the submission of her opponent.[824]

Given the lack of literature on the functioning of Lithuania's legal system[825] and apparent lack of interest in investigating or correcting systemic problems when they become known[826] it is difficult to know how representative these cases and whether they represent systemic problems.

IV. Protections in Criminal Proceedings

A. Article 6 Provisions Specific to Criminal Cases

Of course, in order for the criminal provisions to apply, the applicant must have been charged with a crime, a determination of which depends upon an initial evaluation

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[822] *Pocius* (n 812) paras 54-55; *Užukauskas* (n 815) paras 48-49.

[823] *Pocius* (n 812) paras 56, 58; *Užukauskas* (n 815) paras 48, 51.

[824] *Švenčionienė v Lithuania* (n 816) paras 28-30.

[825] Text to nn 64-65 in ch 1.

[826] Text to nn 670-71 (wrongful convictions), n 803 (conditions in police detention), nn 1223-27 in ch 5 (as to the mentally ill) .

of three criteria: the domestic classification; the nature of the offence; and the severity of the potential penalty which the person concerned risks incurring.[827] To make its determination, the Court begins its analysis with how the domestic law classifies an act, and gives its own autonomous meaning to the term 'criminal charge' independent of any meanings assigned by the national legal system under review.[828] The Court defines 'charge' as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'.[829] This may take place at the time of arrest, on the date when the person concerned was officially notified that he would be prosecuted, or the date when the preliminary investigation was opened.[830]

When applicants seek redress under the criminal-only procedural protections in Articles 6(2) or 6(3), the Court will, nonetheless, consider them in the context of the overall fair trial guarantee in Article 6(1). This was the analysis of the Court in *Balčiūnas v Lithuania*,[831] in which recorded statements of the applicant's two accomplices, taken during the pretrial investigation, were used in the trial proceedings after the two were released from criminal liability and had left the country by the time of trial. Although applicant raised an Article 6(3) claim, the Court considered the application within the context of the general requirements of the right to a fair trial:

> As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under Article 6 §§ 1 and 3 (d) taken together.[832]

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[827] *Engel and Others v Netherlands* (n 3) paras 82-83.

[828] *Adolf v Austria* (n 18) para 30; text to n 18 in ch 1.

[829] *Eckle v Germany* (1983) 5 EHRR 1 para 73.

[830] ibid.

[831] *Balčiūnas v Lithuania* App no 17095/02 (ECtHR, 20 July 2010).

[832] ibid para 101 (citations omitted).

For persons charged with a crime, Article 6(3) guarantees minimum rights essential to the preparation and conduct of a criminal defence on equal terms with the prosecution. The minimum rights are elements of the wider concept of the right to a fair trial in Article 6(1) and because of this, the Court commonly decides cases on the basis of Article 6(1) together with the relevant specific right in Article 6(3) or based on Article 6 taken as a whole.[833]

A person is considered charged with an offence from the moment he or she is 'substantially affected' by the steps taken against him or her as a suspect, although there are exceptions.[834] Article 6(3)(a) requires that a person charged with a criminal offence be promptly informed of the nature and cause of the accusation in detail in a language that is understood. The right to be so informed is similar to the Article 5(2) provision under which a person detained pretrial is entitled to this information to assist in challenging the detention. Although both provisions respond to the right of a person to know why the state has acted against him or her, the information required to meet Article 6(3)(a) is evaluated in view of the accused's right to prepare a criminal defence as guaranteed by Article 6(3)(b), calling for greater specificity. The provision of full and detailed information of the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair,[835] although the promptness of when that information is provided is less strictly construed for those persons already charged with

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[833] For example, where the applicant claimed the proceedings in her case had been unfair because the domestic courts had wrongly assessed the evidence, in *Moskal v Poland* (2010) 50 EHRR 22 para 86:

> [The] Court has no jurisdiction under art 6 of the Convention to substitute its own findings of fact for the findings of domestic courts. The Court's only task is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Convention.

[834] *Deweer v Belgium* App no 6903/75 (ECtHR, 27 February 1980) paras 42, 46; *Foti and Others v Italy* (1983) 5 EHRR 313 paras 52-53.

[835] *Péllisier and Sassi v France* (n 655) para 52**.**

a crime.[836]

B. Implications in Lithuania's Criminal Proceedings

The differences between traditional common law and civil law systems of criminal justice play an important role in understanding conditions in Lithuania. First, because of the significant differences between the two systems in their methods of criminal investigation and trial, most notably as they relate to the rules of evidence, the use of a case file, the permissibility of trials *in absentia*, and plea bargaining.[837] Second, because having transplanted the civil law system into its tradition of Soviet criminal procedure, the pretrial phase of a criminal case bearing no features of an adversarial system and a trial that is only in concept adversarial.[838]

In traditional common law jurisdictions, investigation of criminal behaviour is conducted entirely by the police, such as under English and Irish law.[839] When the investigation is complete, the suspect is identified, evidence gathered, and the matter is turned over to the prosecuting authorities for formal charges, arrest and trial.

In the typical civil law jurisdiction, however, the investigation in a criminal case takes longer. It is investigated by the police only until attention is focused upon a particular individual, then it is then referred over to an investigating judge, public prosecutor, or other officer who questions the suspect and other witnesses, as in the law of France and Germany.[840] Witness statements are taken by the police or the

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[836] *Kamasinski v Austria* (1991) 13 EHRR 36 (notification requirement was met when the information was given at the time of the indictment hearing, eleven days after arrest).

[837] Harris and others (n 214) 203.

[838] Text to nn 581-606 (development of pretrial proceedings); Abramaviciute and Valutyte (n 642) 199-200 (the Code of Criminal Procedure remains inquisitorial in nature, no adversarial features in the pretrial phase), 253 (lack of application of adversarial principles at trial).

[839] Some non-common law jurisdictions have adopted this system. *Hauschildt v Denmark* (n 235); Harris and others (n 214) 292.

[840] Harris and others (n 214) 203.

magistrates, then placed in the official dossier.[841] In most cases, the witnesses is not heard from again while the dossier together with the witness statements will form a key basis for judicial decision making at trial.[842]

The civil law system permits detention of a suspect during the preliminary investigation, which can take a long time. When the investigation is complete, the investigating judge determines whether a prosecution should be brought.[843] Article 6 protections apply to this investigative phase of proceedings, and requires the investigations to be conducted thoroughly and effectively. In the 1998 case of *Kaya v Turkey* for example, the Court found serious deficiencies in a murder investigation where no tests had been performed on the deceased's hands or clothing for gunpowder residue and the weapon was not dusted for fingerprints, which were particularly serious given that the body was released to the villagers, after which no further tests could be performed, including retrieval of the spent bullets lodged in the body.[844]

The benefit of the civil law approach is that it is designed for the investigating judge to act independently of the police and brings a fresh look at the facts of the case. The typical disadvantage of the civil law investigation process is that it usually takes longer than the police-only investigations in common law systems, during which time the accused may spend several years in detention.[845] The civil law approach to criminal cases as used in Lithuania appears to realise only the disadvantages of the lengthy

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[841] Field (n 585) 367.

[842] ibid (providing examples of supervision in France, Belgium and the Netherlands).

[843] Harris and others (n 214) 203.

[844] *Kaya v Turkey* (1999) 28 EHRR 1; *Vera Fernández-Huidobro v Spain* App no 74181/01 (ECtHR, 6 January 2010) (lack of impartiality found in investigating judge within the scope of Article 6, but cured by subsequent new investigation by judge from different court).

[845] Harris and others (n 214) 203.

process, and because of the heavy reliance by judges on the pretrial investigation files, none of the advantage of a fresh look by a judge.[846]

C. Pretrial Investigations and Protecting Attorney-Client Communication

There are long-standing complaints in Lithuania from many sources as to the poorly conducted criminal pretrial investigations, characterised by lack of professionalism, with no measure taken to improve their quality.[847] The conduct of pretrial investigations has been a consistent subject of complaints by legal practitioners and NGO investigators. There is a continued hostility by law enforcement and the judiciary toward the defence against criminal charges, who treat the defence as an obstruction to the pursuit of justice.[848] In addition, the presumption of innocence is ignored by law enforcement as well as the media. It is not unusual for law enforcement officers to offer public commentary on pretrial investigation material and the guilt of the accused.[849]

In addition to the delays and improper conduct by investigating authorities reflected in the cases that have reached the European Court, the following situation implicating the confidentiality in lawyer-client relations is making it through the domestic court system.[850] In May 2008 while reading the case file in preparation for representing a client in a criminal case, a lawyer found records of his own conversations with his client that had taken place within the premises of prosecutorial office; records of his telephone conversations with other suspects in the case; and an itemised record of

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[846] Text to nn 609-11 in ch 3 (reliance on pretrial investigation files).

[847] HRMI 2009 (n 110) 36-37; HRMI 2011 (n 102) 42-43.

[848] Abramaviciute and Valutyte (n 642) 246; HRMI 2011 (n 102) 39.

[849] HRMI 2011 (n 102) 39.

[850] Interview with a Lithuanian lawyer (Vilnius 14 July 2010).

two days of his telephone contacts – the numbers he called, the numbers that called him, the duration of each call, and where was he located during the conversations.[851]

The attorney challenged the illegality of these measures to the Office of the Prosecutor General, which rejected his complaint. He then took his complaint to the local court where it was also rejected.[852] On appeal from the local court, it was rejected. Each of the courts rejecting his complaint found that the prosecutor had recorded the attorney-client consultation legally because it was pre-approved by a judge.[853] However, the permission given by the judge was only for permission to record the conversations of the suspects in the case, not the attorney's conversations with his client.[854] The courts have argued the records of conversations have not been used against the attorney, but only in pursuit of efficient investigation, and it will be up to the judge who will hear a case on its merits as to whether the records of the conversations are admissible as evidence in the case.[855] A lawyer familiar with this case believes this is not a matter of the prosecutors and judges being unaware of the relevant standards.[856] It is a 'habit of mind' that captures it perfectly.[857]

According to a public account of this general practice, lawyers examining the policy were surprised that the Attorney General's Office saw nothing wrong with the practise by prosecutors of secretly recording attorneys' conversations with their

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[851] ibid.

[852] ibid.

[853] ibid.

[854] ibid.

[855] Interview with a former Lithuanian judge (telephone 2 November 2008).

[856] Correspondence from a Lithuanian lawyer to the author (8 December 2008).

[857] ibid.

clients.[858] However, the Chairman of the Seimas Legal Affairs Committee, Julius Sabatauskas, was quoted as calling the situation 'alarming'.[859]

The practise is contrary to the jurisprudence of the European Court of Human Rights which guarantees protection to the privileged communication between a lawyer and his or her client in the application of Article 6, together with Article 8, and to a limited extent, Article 10.[860] The Court regards it an accused's right to communicate with his or her advocate out of hearing of a third person[861] as 'part of the basic requirement of a fair trial in a democratic society'.[862] Legal consultations should be done under conditions that allow for a free exchange of information:

> It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S v Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.[863]

One perception is that, in essence, the police are thinking, 'we have to be efficient, we have to find out the truth whatever it takes, [and] criminals should be

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[858] 'Lawyers Believe They are Spied On' (in Lithuanian) (*Advokatai Pasijuto Sekami*) *ELTA* (10 July 2008) <http://www.delfi.lt/archive/article.php?id= 17674465> accessed 30 August 2012; HRMI 2009 (n 110) 38.

[859] ibid.

[860] *Kopp v Switzerland* App no 23224/94 (ECtHR, 25 March 1998).

[861] *S v Switzerland* (1992) 14 EHRR 670, para 48.

[862] ibid; *Golder v UK* (n 3) para 26.

[863] *Campbell v UK* App no 13590/88 (ECtHR 25 March 1992) para 46 (internal citations omitted) (the Court also referring to *Campbell and Fell v UK* (n 222) paras 111-113). The Court has also addressed procedures taken to ensure this rule is respected in practice, and differentiating those situations in which the lawyer is the suspect. *Iordachi v Moldova* App no 25198/02 (ECtHR, 10 February 2009) para 50.

sentenced whatever it takes'.[864] In their minds, because criminal defence attorneys are paid by their clients, somehow the attorneys are 'dirty' or 'unreliable', and all of the human rights standards and human rights defenders are simply unavoidable noise and nuisance in comparison to their pursuit of justice.[865] Prosecutors and judges also know that if the issue comes before the European Court and Lithuania loses, there will be no consequences for them individually.[866] This is precisely what is expected to happen. If the issue reaches the European Court, it will be Lithuania that loses, not them.[867]

D. Police Use of Crime Simulation Models

The conduct of police during their undercover investigations can result in an Article 6(1) violation for incitement if the initiative and plans in a criminal scheme were induced by the police.[868] In evaluating the conduct during the investigation, the Court typically considers whether the defendant was afforded procedural safeguards – such as adversarial proceedings and equality of arms – rather than undertaking a re-examination of the relevant facts.[869]

In the 2008 Grand Chamber judgment *Ramanauskas v Lithuania*[870] the Court elaborated on the concept of entrapment in breach of Article 6(1) as distinguished from

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[864] Correspondence from a Lithuanian lawyer to the author (8 December 2008); Abramaviciute and Valutyte (n 642) 246 (generally understood that pre-trial investigation officers and prosecutors have little respect for defence lawyers, treating them like a suspect or accused).

[865] Correspondence from a Lithuanian lawyer to the author (8 December 2008); Abramaviciute and Valutyte (n 642) 246 (judges tend to regard criminal defence lawyers as a formal requirement).

[866] Correspondence from a Lithuanian lawyer to the author (8 December 2008).

[867] ibid.

[868] *Butkevičius v Lithuania* App no 48297/99 (ECtHR, 26 March 2002) 21; *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000) para 36.

[869] *Edwards and Lewis v UK* App nos 39647/98, 40461/98 (ECtHR, 27 October 2004) 16-17; *Bernard v France* (n 9) para 37. Exceptions can be found in *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998) and *Vanyan v Russia* App no 53203/99 (ECtHR, 15 December 2005) in which the Court considered the behaviour by the police or investigators sufficient to violate Article 6(1).

[870] *Ramanauskas v Lithuania* (2010) 51 EHRR 11.

the use of legitimate undercover techniques in criminal investigations. Here there had been an inappropriate use of a criminal conduct simulation model to induce a bribery offence and therefore a violation of the right to a fair hearing. The applicant, a prosecutor, committed an act of bribery but claimed police incitement (entrapment). The crime arose after he agreed to secure the acquittal of a third party for the sum of 3000 US Dollars (about 1900 GBP) after being approached several times by a person he did not know through a private acquaintance. The person who approached him was in fact an anti-corruption officer, who only then informed the Ministry of Interior that the prosecutor had agreed to accept a bribe. The Ministry applied for and received authorisation to use a criminal conduct simulation model, allowing the bribe to be offered without risk of prosecution. The domestic courts dismissed the allegation, relying on the fact that there had been authorisation for the criminal conduct simulation model, and the act was in progress when approval was given, demonstrating the prosecutor's willingness to accept a bribe.[871]

The European Court did not agree, determining that there had been incitement because there was no evidence that the applicant would have committed the offence in the absence of the repeated offers of the undercover officer, and thus the applicant's trial was deprived of the fairness required by Article 6.[872] National authorities could not be exempted from their responsibility for the actions of their police officers by simply arguing that the officers were acting in a private capacity yet carrying out police duties. It was particularly important to the Court that the authorities should have assumed responsibility, as the initial phase of the operation took place in the absence of any legal

[871] ibid paras 26-27.

[872] ibid para 73.

framework or judicial authorisation.[873] Furthermore, by authorising the officer to simulate acts of bribery and by exempting him from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results.[874] The Court found no satisfactory explanation for the reasons or personal motives that could have led the officer to approach the applicant on his own initiative without first bringing the matter to the attention of his superiors, or why he was not prosecuted for his acts during the preliminary phase. On that point, the Government simply referred the Court to the fact that all the relevant documents had been destroyed.[875]

Shortly after *Ramanauskas*, the Court decided another case finding improper police conduct in Lithuania involving a drug purchase by an undercover agent, in *Malininas v Lithuania*.[876] The applicant claimed a violation of Article 6(1) both because he had been entrapped by the police into committing an offence, and because essential evidence had not been disclosed at his trial. The drug transaction in *Malininas* was also organised according to an approved 'Criminal Conduct Simulation Model' in which a policeman acting as an undercover agent planned a purchase psychotropic drugs from the applicant.[877] That plan did not materialise due to the agent's hospitalization, but the agent later telephoned the applicant requesting more drugs for a sum of 3000 US Dollars (about 1900 GBP). When the applicant provided 250 grams of amphetamines to the agent, the applicant and his accomplice were arrested.[878] In proceedings that followed, the agent was questioned as an anonymous witness outside the courtroom via an audio

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[873] ibid paras 26, 44.

[874] ibid para 63.

[875] ibid para 64.

[876] *Malininas v Lithuania* App no 10071/04 (ECtHR, 1 July 2008).

[877] ibid paras 8, 13.

[878] ibid para 9.

relay, anonymous for the protection of the witness and the functioning of the police drug squad. The defence did not put any questions to the officer at that point, but after his testimony was read out by the trial judge, the defence was permitted to propose supplementary questions that were asked by the judge and answered.[879] The documents relating to the authorisation of the model were classified as secret and were also not disclosed to the defence, the prosecution asserting they would have disclosed the identity of the police officers involved and the operational methods of the drug squad. It was the Government's view that what information was provided about how the model was executed was adequate.[880] In the proceedings before the European Court, the Lithuanian Government disclosed that the model that included police information about the applicant's large scale drug dealings was nicknamed 'Malina' and that two police officers were authorised to contact the applicant and procure drugs from him if their suspicions were founded.[881]

Relying on *Ramanauskas*, the Court in *Malininas* determined that the aggregate of the elements presented undermined the fairness of the applicant's trial in violation of Article 6(1) of the Convention: there was no evidence that the applicant had committed any drug offences beforehand; there were no objective, judicially-verified materials demonstrating good reason for the authorities to suspect applicant of drug dealing or of being pre-disposed to commit such an offence until approached by the officer; and the criminal conduct simulation model was not fully disclosed to the applicant for trial, particularly regarding the purported suspicions about applicant's previous conduct.[882]

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[879] ibid para 10.

[880] ibid para 11.

[881] ibid.

[882] ibid paras 37-39.

E. The Role of State Security in Pretrial Investigations

Two recent cases illustrate the active involvement by Lithuania's State Security Department in cooperation with Office of the Prosecutor General and the Russian Foreign Security Service (FSB) in two cases brought by Lithuania's prosecution service that suggest Article 6 implications: the case of an ethnic Chechnyan couple, the Gataevs, and that of a young Lithuanian woman, a Muslim convert, Eglė Kusaitė. The facts in these cases suggest the probability that a subsequent trial will be unfair. Not only would questions arise as to the availability of material evidence to ensure a truly adversarial proceeding,[883] but the use to which any evidence obtained through torture might be regarded at trial.[884] The Court has determined that where evidence has been gathered in fundamental breach of the Convention in earlier stages of criminal proceedings, such as confessions extracted through torture in violation of Article 3, the use of that evidence at trial will violate Article 6.[885]

The prosecution of the Gataevs for criminal conduct against their dependents, orphans of the conflict in Chechnya, led to an unprecedented situation in which the Gataevs applied for asylum in Finland, another EU Member States. They were convicted in a Kaunas on evidence in a trial closed to the public and sentenced to imprisonment, based in part on the evidence of one of the young women in their care who had been dating a member of Lithuania's State Security Department and with the cooperation of the Russian Foreign Security Service.[886] While on appeal, they were

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[883] See text to nn 20-21 in ch 1 (equality of arms and adversarial proceedings).

[884] As in *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007) (conviction on basis of confessions extracted through torture).

[885] ibid.

[886] HRMI 2011 (n 102) 41; Supreme Court of Lithuania, judgment of 23 March 2010, criminal case no 2K-122/2010 (in Lithuanian).

detained past their sentence on a request of the prosecutor. On 23 May 2010, the Supreme Court of Lithuania reversed the trial court, finding fair trial errors in the trial having been conducted behind closed doors without any justifiable reason, and that the couple had been detained past their sentence.[887] After their release pending completion of a period of supervision and additional prison time to serve, they fled to Finland where they remained in custody from early January 2011 on the basis of a European Arrest Warrant.[888]

The other case is that of Eglė Kusaitė, a young woman arrested and held by the Lithuanian State Security Department on suspicion of planning to become a suicide bomber in the cause of Chechen separatists. In addition to close cooperation between the security services of Lithuania and Russia, she claimed that her statements were obtained using physical and psychological pressure, in that agents of the Russian Federation were permitted to attend and participate in the interrogations, and during one interrogation when only Russian agents took part, they 'smash[ed] her head into the wall'.[889]

For many, these two cases demonstrate that the bodies of Lithuanian security and Ministry of Justice are still closely cooperating with Russia:

> Perhaps this is the result of the unqualified personnel, deeply-rooted soviet ways of thinking, or lack of institutional dignity. What is more important is that the relations are far too intimate. The case of the Gataev family and that of Egle Kusaite – the resident of Klaipeda – clearly showed that the

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[887] HRMI 2011 (n 102) 39, 41.

[888] 'Gataev Husband and Wife May Soon Be Freed from Detention in Finland: Lithuanian Supreme Court Has Ordered Retrial for Benefactors of Chechnya War Orphans' *Helsingin Sanomat - International Edition* (4 November 2011) <http://www.hs.fi/english/article/Gataev+husband+and+ wife+may+soon+ be+freed+from+detention+in+Finland/1135254924131> accessed 30 August 2012.

[889] Rokas M Tracevskis, 'Prosecutors Digest Alleged Pedophilia and Terrorism Cases' *The Baltic Times* (16 June 2010) <http://www.baltictimes.com/news/articles/26438> accessed 30 August 2012.

> Prosecutor's Office as well as the State Security Department crossed the limits of decency in trying to please Moscow. It is almost unconceivable that the General Prosecutor's Office allowed three FSB officers to interrogate Kusaite, and that it is submissively cooperating with Russia even though Moscow refuses to cooperate with Lithuania regarding [incidents against the Lithuanian state].[890]

F. Denial of Confrontation

In *Balsytė-Lideikienė v Lithuania*,[891] the applicant was found in violation of the administrative offence of publishing and distributing a calendar which, according to the conclusions of experts in the first-instance proceedings, promoted ethnic hatred in violation of administrative law.[892] She was issued an administrative warning and the unsold copies of the calendar were confiscated. Relying on Article 6(1) and 6(3)(d) the applicant complained that her case had been examined by the court of first-instance without the experts being summoned to the hearing despite the fact that their conclusions had central value for the merits of the case, and that on appeal the Supreme Administrative Court did not hold a hearing.[893] The Court determined that the although characterised by Lithuania as an administrative proceeding, after applying the factors used to evaluate the nature of the proceeding, the matter was criminal in nature and therefore within the scope of Article 6(3)(d).[894] The Court found a violation of Article 6(1) based on the fact that, when finding applicant guilty, the first-instance court had relied on the experts' conclusions. Because applicant was not given the opportunity to

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[890] Kestutis Girnius, 'Having Stumbled One-and-a-Half Times ... by Girnius' *The Lithuania Tribune* (23 August 2011) <http://www.lithuaniatribune.com/2011/08/23/having-stumbled-one-and-a-half-times-by-girnius> accessed 30 August 2012.

[891] *Balsytė-Lideikienė v Lithuania* App no 72596/01 (ECtHR, 4 November 2008).

[892] ibid.

[893] ibid para 3.

[894] ibid paras 53-61 (the three factors considered were the legal classification of the offence in domestic law; the nature of the offence; and the nature and degree of severity of the possible penalty); *Engel and Others v Netherland*s (n 3) para 82; *Lauko v Slovakia* (n 229).

question the experts in open court and subject their findings or credibility to scrutiny, the proceedings failed to meet the requirements of Article 6(1) of the Convention.[895]

G. Violating the Presumption of Innocence

The presumption of innocence required by Article 6(2), also an element of a fair trial required by Article 6(1), prohibits premature declarations of guilt by any public official, whether a statement to the press about a pending criminal investigation;[896] or a procedural decision within criminal or even non-criminal proceedings.[897] The Court recognises the balance that must be drawn between Article 6(2) and the freedom of expression guaranteed by Article 10 of the Convention, which includes the freedom to receive and impart information.[898] Article 6(2) does not prevent authorities from informing the public about criminal investigations in progress, but does require that it be done with discretion and circumspection so as to respect the presumption of innocence.[899]

In *Butkevičius v Lithuania*[900] statements impugning guilt were made by the Prosecutor General (confirming that he had 'enough sound evidence of he guilt of the applicant', and qualified applicant's offence as 'an attempt to cheat)[901] and the Chairman of the Seimas (stating that he had no doubt that applicant had accepted a bribe, had taken money 'while promising criminal services', and was a 'bribe-taker')[902] outside of the

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[895] ibid para 64.

[896] *Karakaş and Yeşilirmak v Turkey* App no 43925/98 (ECtHR, 28 June 2005) para 49; *Deweer v Belgium* (n 834) para 56.

[897] *Daktaras v Lithuania* (n 547) paras 42-45.

[898] *Karakaş and Yeşilirmak v Turkey* (n 896) para 50.

[899] ibid.

[900] *Butkevičius v Lithuania* (n 13).

[901] ibid para 52.

[902] ibid para 53.

criminal proceedings by way of an interview to the national press.[903] Although the statements in each case were brief and made on separate occasions, the Court determined they 'amounted to declarations by a public official of the applicant's guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority'.[904]

Prosecutors in Lithuania are thought to breach the presumption of innocence at times by making public comments on pretrial investigations material and the guilt of the accused, calling into question the independence of the office of the prosecutor. Statements and actions by prosecutors and public figures alike can appear motivated solely in response to public pressure, especially in high-visibility cases, when the legal system strains under the pressure from the public, politicians, and media coverage.[905] A recent case in point, referred to as the Kedys paedophile case, led to four murders, including that of a district court criminal trial judge, and widely reported in Lithuania. The prosecution's handling of the was seen as lowering public respect for the prosecutors as the main suspect was found dead in 2010 and the prosecutor publicly declared it was the child's father who had committed the then two murders.[906] The case

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[903] On the other hand, comments by a prosecutor made during pretrial court proceedings to explain the reasons for a continued investigation were not a violation of Article 6(2). *Daktaras v Lithuania* (n 547) paras 44-45.

[904] *Butkevičius v Lithuania* (n 13) para 53.

[905] HRMI 2011 (n 102) 39; 'Stories That Made the Headlines in 2010' *The Baltic Times* (23 December 2010) <http://www.baltictimes.com/tools/print_article/27619> accessed 30 August 2012 (describing disbelief of 'a big part' of Lithuanian society in the prosecutors' claim that there was no evidence of child molestation in the Kedys case); Rokas M Tracevskis, 'Prosecutor General Resigns' *The Baltic Times* (10 February 2010) <http://www.baltictimes.com/news/articles/24319> accessed 30 August 2012 (describing the chief prosecutor's resignation following a street protest over the prosecution's handling of the Kedys case).

[906] Rokas M Tracevskis, 'Double Murder Shatters Lithuania' *The Baltic Times* (14 October 2009) <http://www.baltictimes.com/news/articles/23677> accessed 30 August 2012; Vygandas Trainys, 'Prosecutor: Shots were fired by D Kedys' (in Lithuanian) ('*Prokuroras: „Šaudė D Kedys"*') *Lietuvos Rytas* (22 May 2010) <http://m.lrytas.lt/?data=20100522&id=akt22_a2100522&view=2> accessed 30 August 2012; Julius Girdvainis and Alia Zinkuvienė, 'The Kedys Story Was Quickly Concluded' (in Lithuanian) ('*Skubiai Baigta D Kedžio Istorija'*) *Respublika* (26 May 2010) <http://www.respublika.lt/lt/

'revealed serious procedural flaws in pre-trial investigations and widespread defiance of professional duties among law and order officials'.[907] Faced with public demonstrations against the prosecutor for failing to bring an investigation,[908] the President accepted the resignation of the Prosecutor General, an act widely believed to have been compelled. The father, the publicly claimed murderer, was later found dead a few months before a fourth related murder was discovered.[909] Later, and faced with public demonstrations against the enforcement of a custody order in a related matter, the country's President[910] and a former President[911] both expressed their opposition to the ruling of the judge and the enforcement of the order on the eve of its execution.[912] In addition to the Prosecutor General appearing to have been forced from office as a result of this case, so it was also true for the children's rights ombudsman,[913] followed by her successor the following

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naujienos/lietuva/nusikaltimai_ir_ nelaimes/skubiai_baigta_dkedzio_istorija> accessed 30 August 2012.

[907] *Nations in Transit 2011* (n 205) 351.

[908] Rokas M Tracevskis, 'Pedophilia Case Provokes Street Protests' *The Baltic Times* (10 February 2010) <http://www.baltictimes.com/news/articles/24265> accessed 30 August 2012.

[909] 'A Fourth Death in Kedys Case' *The Lithuania Tribune* (14 June 2010) <http://www.lithuaniatribune.com/2010/06/14/a-fourth-death-in-kedys-case> accessed 30 August 2012.

[910] 'V Nekrošius: In Lithuania Justice Is Administered by the Courts, Not the President' (in Lithuanian) *('V Nekrošius: Lietuvoje Teisinguma; Vykdo Tik Teismai, O Ne Prezidente') Delfi.lt* (29 December 2011) <http://www.delfi.lt/news/daily/kedys/vnekrosius-lietuvoje-teisinguma-vykdo-tik-teismai-o-ne-prezidente.d?id=53515681> accessed 30 August 2012.

[911] On 30 December 2011, speaking on public television and radio, Vytautas Landsbergis, former President of the Republic and current member of the European Parliament, expressed his doubts about the decision of the judge in the custody order, quoted as saying the girl's removal for the Christmas season was 'an evil plan'. Rokas M Tracevskis, 'People Power in Garliava' *The Baltic Times* (4 January 2012) <http://www.baltictimes.com/news/articles/30255> accessed 30 August 2012.

[912] Narusis interview (n 759).

[913] 'Child Protection Ombudsman Sacked' *The Lithuania Tribune* (16 March 2010) <http://www.lithuaniatribune.com/2010/03/16/child-protection-ombudsman-sacked> accessed 30 August 2012 (describing the departure of Rimantė Šalaševičiūtė and noting that during her tenure the Kedys saga unfolded in which a man and woman who allegedly abused Kedys' child were shot dead, and Kedys, the key suspect in the case, had disappeared, prompting politicians 'to start pointing fingers and the country's prosecutor general stepped down as a result').

year.[914] Ironically, the sentiment that public pressure should not effect the affairs of government and the judiciary was more recently echoed by another former President, Valdas Adamkus: 'Can people in the street tell the courts what to do or simply ignore their decisions? When the crowd starts to dictate to the state, it is a tragedy.'[915]

Another recent high-visibility case is that of Eglė Kusaitė, described earlier, who was held on suspicion of planning to become a suicide bomber in the cause of Chechen separatists.[916] During her lengthy periods of detention, and after the prosecutor denied human rights advocates a meeting with her, the prosecutor launched a verbal attack on the human rights advocates, telling the court in a pretrial hearing that the concerns expressed over the protection of Kusaitė's human rights were in and of themselves a potential crime that should be investigated. The prosecutor was later removed from the case after advocates objected to his statements and the manner of his conduct of the investigation as biased.[917]

Another highly reported series of events relates to the failure and nationalization of the Snoras bank, in which two of the bank principals are the subject of a criminal investigation. The President of Lithuania has publicly claimed that one of the two

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[914] 'Children's Rights Ombudsman Resigning' *The Lithuania Tribune* (13 February 2010) <http://www.lithuaniatribune.com/2010/10/20/childrens-rights-ombudsman-resigning> accessed 30 August 2012 (Edita Žiobienė announced her resignation due to 'pressure from the crowd and the politicians in relation to the pedophilia scandal. "The resignation is a wake-up call for the state to realize that the crowd and changing political winds are not the ones who can pressur[e] me."').

[915] 'V Adamkus: When the Crowd Starts to Dictate to the State, it is a Tragedy' (tr Rūta Strolyė) *The Lithuania Tribune* (10 July 2012) <http://www.lithuaniatribune.com/2012/07/10/v-adamkus-when-the-crowd-starts-to-dictate-to-the-state-it-is-a-tragedy> accessed 30 August 2012; the irony is in President Adamkus' willingness when president to contact a judge directly to compel a different outcome of a decision, described earlier (text to nn 306-07in ch 3).

[916] Text to nn 517-18.

[917] Rokas M Tracevskis, 'Controversy Over Alleged Young Female Islamist Terrorist' *The Baltic Times* (28 July 2010) <http://www.baltictimes.com/news/articles/26644> accessed 30 August 2012; HRMI 2011 (n 102) 42; 'Prosecutor Laucius removed from Kusaite's case' 23 July 2010, *ELTA* <http://www.baltic-pages.net/news/law-and-order/prosecutor-laucius-removed-from-kusaites-case/14740> accessed 30 August 2012.

suspects is a 'swindler'[918] and the Prime Minister has characterised the suspects as accomplices along with the bank.[919]

These situations indicate that captures the interest of the public and the media, the basic rights of those involved are at risk, whether as a potential suspect for whom the presumption of innocence is violated, or as an apparent victim who is under the age of ten years. Lithuanian politicians and business owners have also demonstrated a willingness to rely on the press using corrupt methods to further their desires to improve their own position.[920]

When a virulent press campaign develops in the context of a criminal case, it can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused.[921] It also risks having an impact on the impartiality of the court under Article 6(1) the presumption of innocence under Article 6(2).[922] Given the competing interests of Article 10 and the press coverage of current events as an exercise of freedom of expression, where there has been a virulent press campaign surrounding a trial, the Court will not look to the subjective apprehensions of the suspect, although understandable, but to whether, in the

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[918] Irmanto Gelūno, 'Prime Minister calls former Snoras Head Raimondas Baranauskas a Swindler' (in Lithuanian) *('Premjeras Buvusį "Snoro" Vadovą Raimondą Baranauską Vadina Aferistu') 15 Minutes* (25 November 2011) <http://www.15min.lt/naujiena/pinigai/lietuvos-naujienos/premjeras-buvusi-snoro-vadova-raimonda-baranauska-vadina-aferistu-194-181795#axzz1n8bF6vi5> accessed 30 August 2012.

[919] Justina Juršytė, 'Kubilius: It Would Not Be Surprising if Snoras Bank is V Antonov's and R Barnanauskas' Accomplice' (in Lithuanian) (*'A Kubilius: Nebūtų Stebetina, Jei "Snoro" Banke Yra V Antonovo Ir R Brarnausko Bendrininkų'*) *Delfi* (23 January 2012) <http://verslas.delfi.lt/snoras/akubilius-nebutu-stebetina-jei-snoro-banke-yra-vantonovo-ir-rbaranausko-bendrininku.d?id=54552599> accessed 30 August 2012.

[920] Text to nn 925-42.

[921] *T and V v UK* (n 29) paras 9, 83-89 (jury trial preceded and accompanied by massive national and international publicity, combined with lack of participation by the defendants); *Hauschildt v Denmark* (n 235) paras 45-53 (as to a potential jury); *Butkevičius v Lithuania* (n 13) para 8 (to a lesser extent the impartiality of the professional courts, as is Lithuania's case, where there are no jury trials).

[922] *Ninn-Hansen v Denmark* App no 28972/95 (ECtHR, 18 May 1999) (decision); *Anguelov v Bulgaria* App no 45963/99 (ECtHR, 14 December 2004) (decision).

circumstances of the case, the applicant's fears can be objectively justified.[923]

The impact of media coverage is magnified by the peculiar nature of the media market in Lithuania, which is a product of the increasing power of media institutions in post-communist societies related to their developing into business activities. It is also a small and highly competitive media market that is 'rather aggressive' in its production, 'as more emphasis is put on the consumer entertainment rather than provision of well-balanced news'.[924]

The presumption of innocence is often ignored by the media in its reporting. When it is, the violation is also not protected by the enforcement of journalism standards of ethics, which are weakly regulated in Lithuania. Media accounts also report details from criminal investigations, the contents of which are considered confidential, and include commentary or description suggesting the probability of guilt of the subject of the investigation.[925] For example, during the years 2007-2008 in a highly publicised case of the murder of two young children, journalists often described the suspect as responsible based upon material from the pretrial investigation, even though by law this material cannot be disclosed without authorization from a judge, prosecutor or pretrial investigation officer.[926] Yet the public was regularly updated from the pretrial investigation and with the substance of witness testimony, along with conclusions

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[923] *Beggs v UK* App no 15499/10 (ECtHR, 16 October 2012) (decision) para 123; *Butkevičius v Lithuania* (n 13) para 8; *GPC v Romania* App no 20899/03 (ECtHR, 20 December 2011) para 46.

[924] Kristina Juraitė, 'Media Power in the Lithuanian News Market Reconsidered' (2008) 47 Information Sciences (*Informacijos Mokslai*) 121, 122, 130. Juraitė also notes the Council of Europe's general concern with the increasing role of the media 'which in many cases tend functionally to replace political parties by setting the political agenda'. ibid 121.

[925] HRMI 2011 (n 102) 42.

[926] Lithuania's Criminal Code penalises such unauthorised disclosure a misdemeanor punishable 'by community service or by a fine or by restriction of liberty or by arrest'. Criminal Code, 26 September 2000, No VIII-1968, amended 22 December 2011, No XI-1861, *Official Gazette* 2012, No 5-138 (7 January 2012) art 247 (in Lithuanian) (most recent English translation 11 February 2010).

regarding the information.[927] In that case the Inspector of Journalist Ethics determined that one media outlet had violated the presumption of innocence when it described the mother as a 'murderess' who had 'killed two of her children' before she had been found guilty in court.[928] However, even after that violation, the same media outlet continued its descriptions presuming her guilt in its subsequent publications.[929] In other situations, when the Journalist and Publishers Ethics Commission finds an ethical violation, media outlets often do not run the required retractions. In the context of corruption reporting, Lithuania's media watchdogs have been described by diplomats as useless:[930]

> Lithuania's toothless media watchdogs do little to stop corruption. The 1996 law on public information[931] was watered down in 2002. The maximum fine that any media regulatory agency can impose is 10,000 litas (about 4,000 USD). In 2006, the largest fine levied was 3,000 litas (1,200 USD) for airing a program unsuitable for children early in the evening. When the Journalist and Publishers Ethics Commission finds an ethical violation, media outlets often do not run the 'required' retractions. The Commission then announces the retraction or correction on the national radio network.[932]

Media reporting in Lithuania has an even greater risk for Article 6(1) rights

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[927] HRMI 2009 (n 110) 38.

[928] ibid (describing the case of Alma Jonaitienė, convicted of murdering her two sons and the extensive media coverage); after the boys were found dead and it appeared that the mother was likely responsible, the media 'sought their revenge'; '[t]he woman was judged not only in the [court of law], but also in the newspapers' pages, [and on] the screen.' Gintaras Aleknonis, 'Our Justice' *The Lithuania Tribune* (12 October 2009) <http://www.lithuaniatribune.com/2009/10/12/gintaras-aleknonis-our-justice> accessed 30 August 2012.

[929] HRMI 2009 (n 110) 38.

[930] USA Diplomatic Cable 07VILNIUS648 (published 2011) para 5 (USA 2007 Diplomatic Cable) (at the time, the maximum fine a media regulatory agency could impose was 10,000 Litas (about 2,000 GBP), with the largest fine levied at 3,000 Litas (about 600 GBP) for airing a programme unsuitable for children early in the evening).

[931] Referring to the Law on the Provision of Information to the Public, 2 July 1996, No I-1418, amended 14 June 2012, *Official Gazette* 2012, No 76-3924 (30 June 2012) (in Lithuanian) (most recent English translation 20 December 2011, No XI-1820).

[932] USA 2007 Diplomatic Cable (n 930) para 3; 10,000 litas is about 2300 GBP; 3,000 litas about 686 GBP.

because of the documented instances in which media coverage is based upon deliberate falsehoods in situations that might invoke civil or criminal liability. As described by embassy officials of the United States in Vilnius, some media outlets in Lithuania extort politicians and businesses for positive coverage or to prevent negative coverage.[933] These practices 'damage media credibility, undermine Lithuania's democratic institutions, and intimidates politicians, businesses, and civil society'.[934] The cable describes Lithuania's media as 'scandal-focused and sensational', and documents interviews and complaints of corruption from a wide spectrum of Lithuanian society. In addition, '[m]edia owners, with business and/or political interests, have a heavy hand and often operate as de facto editors'. A former journalist and then-adviser to the Prime Minister reported: '[Y]ou must buy the right not to be attacked ... a daily can replace a minister – any daily[,] any minister.'[935]

An example of how that can happen is the experience of the general manager of the Lithuanian office of Pfizer, an American pharmaceutical firm, who reported being approached by the owner and de facto editor of one of the major daily newspapers, Respublika, and told that for one million litas his newspaper would 'kill' Pfizer's competition.[936] The general manager was given two weeks to think about the offer, after which he was approached by the advertising staff from Respublika to whom he reported that Pfizer had nothing to advertise.[937] The retaliation followed:

> Shortly after that, Respublika carried an article about people dying from Viagra, one of Pfizer's products. The paper

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[933] ibid para 1.

[934] ibid.

[935] ibid paras 2, 4.

[936] ibid para 7.

[937] ibid.

> followed up with stories about Pfizer charging too much for its products, taking advantage of poor hospital patients and sick people. They put Voishka's picture on the front page.[938]

Respublika then ran an article that said the general manager had beat up a child, which was true to the extent that he had, in fact, had an altercation with a neighbourhood boy.[939] After the prosecutor's office and internal company investigations cleared him of any wrongdoing, Respublika published another story claiming that the general manager had bribed Lithuanian officials and Pfizer management.[940] In another story, Respublika claimed that a Pfizer executive got drunk with one of the Prime Minister's advisors and, in the early hours of the morning, urinated on a restaurant window.[941] Police came to investigate, the story continued, but the two drunkards bribed them to avoid arrest. Pfizer investigated, questioning police and restaurant workers and examining the scene of the alleged incident. They found no evidence that the incident occurred.[942]

According to one of the reporters quoted in that diplomatic report who was interviewed again on the topic in 2011, the situation has not improved since the 2007 report was written. The ethical standards of the Lithuanian media have been further compromised by the recent financial crisis and the media's loss two years ago of its Value Added Tax (VAT) exemption, now requiring a 21 per cent VAT payment, as with all other companies. 'This has increased the culture of corruption, and is a disaster for our country.'[943]

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[938] ibid.

[939] ibid para 8.

[940] ibid.

[941] ibid.

[942] ibid.

[943] 'Can We Trust Lithuanian Media?' *Vilnews* (7 June 2011) <http://vilnews.com/?p=6452> accessed 30 August 2012.

Advertising money also influences whether or not a story is reported. In 2007, an editor for the regional Baltic News Service recalled that even after his agency repeatedly reported on poisoned rice being sold in Lithuania's biggest supermarket in early 2007, the Lithuanian press did not report on the events.[944] He attributed the absence of a media reaction to the large investment in advertising in the Lithuanian media by the market's holding company.[945] In another situation, the person responsible for public relations for the Yukos gas company in Lithuania also reported that there is political influence in media advertising.[946] This involvement comes from government purchases of space in publications and publishes articles that are written in the ministries without any indication that they are either ministerial texts or advertisements.[947] This practice was confirmed by others politicians and reported by foreign diplomats working in Lithuania.[948] The response to this conduct has not resulted in serious penalty. In 2007 Lithuania's Chief Ethics Commission ruled that for over two years the Minister of Agriculture had inappropriately promoted herself and her party in a public education campaign that ran advertisements in newspapers. However, when the matter was brought before Seimas, it voted not to reprimand her.[949]

V. Effective Defence in Criminal Proceedings

In a 2010 report, researchers evaluated nine European countries for Convention

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[944] ibid.

[945] Lena Meier, 'Goodbye Media Transparency? Lithuania's Corrupt Press Corps' (tr Sarah Turpin) *Café Babel* (31 October 2007) <http://www.cafebabel.co.uk/article/22718/goodbye-media-transparency-lithuanias-corrupt-press-corps.html> accessed 30 August 2012.

[946] ibid.

[947] ibid.

[948] USA 2007 Diplomatic Cable (n 930) para 5 (confirming these paid political advertisements misleadingly appear as original journalism).

[949] ibid para 6.

requirements that contribute to an effective criminal defence and fair trial,[950] finding that many people suspected or accused of crimes across Europe are unaware of their rights and are routinely prevented from mounting an effective defence.[951] Lithuania was not among the countries evaluated, but two that were – Poland and Turkey – share Lithuania's background as post-Soviet states. Even though not included, this finding is consistent with other sources indicating that few Lithuanians are aware of their right to legal aid.[952]

The researchers concentrated on Convention elements essential to ensuring access to effective criminal defense, most noted earlier,[953] including the presumption of innocence, the right to silence and prohibition of self-incrimination, the right to bail or be released pending trial, equality of arms and an adversarial trial, receiving information about the accusation, and to defend and participate in the proceedings.[954] The aim of the study was to take these requirements from the case law of the European Court,[955] considered them for their interrelationships[956] to argue that:

> [E]ffective criminal defence is an integral aspect of the right to fair trial, and that it requires not only a right to competent legal assistance but also a legislative and procedural context, and organizational structures, that enable and facilitate effective defence as a crucial element of the right to fair

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[950] Cape and others (n 638). The nine European jurisdictions are Belgium, England and Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey, chosen as examples of the three major legal traditions in Europe – inquisitorial, adversarial and 'post-state socialist' (notably, a category of its own). ibid 15. The study was prompted by opposition in 2007 to attempts by the European Union to set minimum procedural rights for criminal suspects and defendants. ibid 613.

[951] ibid 1.

[952] Text to nn 638-41.

[953] Text to nn 14-15, 24-29 in ch 1, nn 827-36.

[954] Cape and others (n 638) 25-61.

[955] ibid.

[956] ibid 614.

trial.[957]

They considered the rights as framed in domestic legislation, whether standards set by the European Court were met, how these rights were implemented in practice, and whether there were structures and systems in place to enable the effective exercise of these rights.[958] For example, if legislation provides for the right to a lawyer immediately on arrest but there is no system by which a lawyer can be contacted on a 24 hour basis, the arrested person may not be able to exercise his or her right to counsel effectively.[959] The project also explored the legal and professional cultures because of their impact on providing effective criminal defence – an inquiry pertinent to this research. For example, if the domestic law provides for a right to cross-examine witnesses and introduce evidence at trial, without judges who will allow it and lawyers who are able to actively use these rights, litigants will not have equality of arms.[960]

The study also provides detailed suggestions for setting overall standards as well as specific recommendations concerning policy in nine focus countries and throughout the European Union.[961] While some of the relevant case law was clear in its requirements, there were areas in which the Convention is silent or the Court has not addressed.[962] It also noted that many systems leave detainees without Article 6 protection early in the process, when they are most vulnerable to pressure and intimidation by police.[963] The study recommends that a Directive include requirements

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[957] ibid 5.

[958] ibid 614.

[959] ibid.

[960] ibid.

[961] ibid 613-25, 625-31.

[962] ibid 547.

[963] ibid 584.

that a Letter of Rights be given to a person when they are made aware by the authorities that their situation may be substantially affected by criminal proceedings, no later than their arrest, that highlights the right to remain silent and how to obtain legal aid.[964]

As described by the director of the Open Society Justice Initiative's Budapest office, commenting on this study:

> Legal aid for the poor, who constitute a majority of defendants, is a problem in nearly every jurisdiction ... Without a system in place guaranteeing access to counsel and mandatory notice of their rights, people are not given a fair chance to defend themselves.[965]

The study concludes that despite the provisions in the Convention and the case law of the Court, there are practical and systemic limitations on the Court's ability to provide detailed standards for all of the essential components of effective criminal defence, or to enforce those standards.[966] The study demonstrates that even with the variation across the nine jurisdictions considered in the study, there are important limitations on access to effective criminal defence in each of the countries.[967] The researchers conclude that from a policy perspective, in addition to the consequences for those who are caught in criminal justice processes, these limitations have significant implications for mutual trust and recognition.[968] The study notes the shared responsibility of the governments and member states, including the European Union, for compliance with the standards of the European Convention on Human Rights.[969] In this

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[964] ibid 628.

[965] 'EU Must Fix Flawed Criminal Justice Systems: States Fail to Deliver on Defendants' Rights' *Soros Foundation* (24 June 2010) <http://www.soros.org/press-releases/eu-must-fix-flawed-criminal-justice-systems> accessed 30 August 2012.

[966] Cape and others (n 638) 610-11, 625.

[967] ibid 614-25.

[968] ibid 625.

[969] ibid.

regard, the European Union has undertaken a programme of action to improve access to effective criminal defence,[970] recently adopting a Directive on the right to information in criminal proceedings.[971]

As emphasized by the researchers who conducted this study, the right to effective criminal defence must be realised as an essential element of the right to fair trial. In this regard, criminal justice professionals share responsibility in respecting the rights of those suspected or accused of crime.[972] As the study concludes:

> For criminal defence to be effective there must exist a constitutional and legislative structure that provides for the rights set out in the ECHR, institutions and processes that enable them to be practical and effective, and legal and professional cultures that facilitate them.[973]

This is no less true in Lithuania, where the right to a criminal defence is recognized in the law,[974] but is not always practical and effective. From the accounts of superficial involvement of some criminal defence counsel in Lithuania referred to below[975] there is a substantial need for practical and legal cultural improvement in defending the accused.[976]

V. The Role of the Legal Profession

The right to counsel and the presumption of innocence were among the concessions that the Soviet Union purported to make to international standards of

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[970] ibid. See Council of the European Union, 'Roadmap With a View to Fostering Protection of Suspected and Accused Persons in Criminal Proceedings' (DG H 2B, 1 July 2009); Cape and others (n 638) 13.

[971] European Parliament, 'Directive on the Right to Information in Criminal Proceeding' (Directive 2012/13/EU, 22 May 2012) (including information on the charges, legal aid, interpretation and translation).

[972] Cape and others (n 638) 625, 626-31.

[973] ibid.

[974] Constitution of Lithuania (n 14) art 31.

[975] Text to nn 984-1008.

[976] Cape and others (n 638) 625.

justice. A handful of individuals within the system did strive to realise these and other ideals, and were occasionally successful. But overall, the Soviet system failed to embrace these standards in substance, rendering them 'hollow'.[977] The challenge in today's post-Soviet states is 'to infuse these long-dormant standards of justice with meaning and force ... contributing to the legitimization of the laws and courts'.[978] Also a challenge is addressing the need for improving the quality of academic performance and ethics in legal studies to contemporary standards addressed earlier, since the attorneys and prosecutors begin with the same initial educational training as the judiciary, profoundly affecting the judicial system.[979]

Service as an *advokat* in the Soviet system was seldom professionally fulfilling. It was the role of lawyers to serve the state, not their clients. Rules, laws, and ethics were routinely disregarded.[980] Significant decisions were not based on the law, but on dictates of party leaders who controlled the system, who advised the courts in telephone calls, meetings or secret instructions. *Advokats* faced the constant minimization of the law knowing that at any time the effect of the law could be reduced by some extralegal method.[981]

After the collapse of the Soviet Union, the private practice of law was essentially a new profession with little historical precedent. The most pervasive problem affecting post-Soviet *advokats* was in their lack of ethical behaviour.[982] This is due to several

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[977] Valerie Wattenberg, 'Making Way For Justice: Breaking with Tradition in the Former Soviet Bloc' in *Justice Initiatives* (Open Society Justice Initiative 2004) 9.

[978] ibid.

[979] Text to nn 465-91 in ch 3 (legal education in Lithuania).

[980] Meyer (n 30) 1042.

[981] ibid.

[982] ibid 1058-59.

factors, the first of which was the continuation of the corruption that was typical at every level and in every sector of the legal profession. Many in the profession, particularly those who were older, had only been able to function playing by the rules of the Soviet regime. For them, shifting to more ethical behaviour had no advantage.[983]

Another reason is their extraordinary lack of knowledge concerning what constitutes unethical behaviour. Concepts such as 'conflict of interest' have neither linguistic nor theoretical equivalents in many languages in the region:[984]

> Too many *advokats* view the democratic changes as an opportunity to make money rather than as an opportunity to promote social reform. When one discusses Western ethical standards with *advokats*, their interest often turns to grave concern when they learn what is prohibited. Some *advokats* are perplexed by the very notion that lawyers voluntarily would adopt and enforce a code of conduct that would reduce their ability to make money.[985]

An example of the understanding of professional ethics for contemporary Lithuanian attorneys was recently demonstrated at a January 2012 seminar at which attorneys from Lithuania expressed the strong conviction that it is against professional ethics to challenge either another attorney or the Constitutional Court.[986] And similar to the confusion by the Lithuanian judiciary on the application of stare decisis, codified in Lithuanian law since 2008, Lithuanian attorneys at the same January 2012 gathering held similarly strong convictions that there is no operation of stare decisis in Lithuanian law.[987]

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[983] ibid.

[984] Meyer (n 30) 1058. Even now, professional ethics is not in the core legal curriculum in Lithuania. Text to n 484 in ch 3.

[985] Meyer (n 30) 1058.

[986] Interview with a Lithuanian legal advocate (telephone 29 January 2012).

[987] ibid. The doctrine of stare decisis was codified in 2008 following a 2006 opinion of the Constitutional Court. Text to nn 161-66; Ambrasienė and Cirtautienė (n 162); *Nations in Transit 2009* (n 204) 334

A. Criminal Defence Counsel

In the Soviet Union, defence lawyers practised as individually licensed practitioners under the aegis of the Collegia of Advocates, a state-sanctioned quasi-independent bar association that authorised attorney appearances and monitored the payments to them, with mandatory deductions for space and utilities, such as Collegia dues and social welfare.[988] Although portrayed as a non-governmental agency, the Collegia monitored the work of attorneys.[989] If their activities in representing a clients were considered contrary to the interests of the Soviet state, that could be grounds for exclusion from the Collegia, membership which was required for trial lawyers.[990]

It was the non-governmental legal profession that suffered as a result of the distortions of justice in which lawyers and others were forced to take part.[991] Defence lawyers' prestige was at times inferior to that of prosecutors and police investigators, who, even if they were not universally admired, at least had some power.[992] Defence lawyers were regarded as legally required, but often peripheral to the system:

> Judges would pre-empt their cross examinations; hold ex parte meetings with prosecutors and police on case substance and outcome; and capriciously deny defense requests with no foundation – defense attorney protests rarely prevailed. Although many attorneys courageously fought for their clients, particularly when they could hang their hats on procedural errors and timelines missed by the prosecution, more succumbed to the many incentives to keep a low profile, tow the party line, and offend as few as possible.[993]

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[988] Wattenberg (n 977) 9 (noting also that except for a few foreign law firms in the region, there were no joint or shared practices).

[989] ibid.

[990] ibid.

[991] ibid 10.

[992] ibid.

[993] ibid.

Although the pay rate for criminal defence counsel under the Soviet model of criminal procedure was relatively high, they were considered as having minor importance given the general rejection of formalism to make the criminal law understandable for the entire population; the influence of the communist notion that it is the duty of the courts, not counsel, to discover the 'material truth'; and a general reservation toward lawyers as servants of the former ruling class.[994]

Attorneys' reputations were at their lowest at the point in time when the Soviet Union dissolved.[995] Once considered brokers of expedited justice 'proceedings' pre-arranged behind closed doors, attorneys came to be considered unprincipled go-betweens for corrupt clients.[996] This image only worsened when private practice was permitted at the end of the Soviet period.[997] Those lawyers who were wealthy were considered successful and savvy, but inherently suspect, while those who were not as affluent were presumed to simply have no talent.[998]

As of 2004, and despite the disintegration of the Soviet Union, many of its administrative and governing structures continued in place, including justice agencies, in which institutional memory outlived the departure of the personnel of the former state:

> The attitudes burned into that memory linger in many remaining legal professionals – bureaucratic rules and procedures all but etched in stone [with] the presumption of guilt and police superiority over the individual.[999]

There are two forms of legal professionals in contemporary Lithuania, in addition

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[994] Bárd (n 30) 436-37 (defence counsel were also under constant danger of discipline or criminal prosecution as a result of the obscure and poorly formulated legal provisions that applied to them).

[995] Wattenberg (n 977) 10.

[996] ibid.

[997] ibid.

[998] ibid.

[999] ibid.

to judges and prosecutors: *advokats* (*advokatai*) and jurists.[1000] These classifications date back to the times of Czarist Russia, but the experience of these professionals was long lost by the late 1980s when the effort began to create democratic institutions in the republics of the former Soviet Union.[1001]

The practice of law was one of the first sectors in which privatization was largely accomplished early after 1990, at least on paper.[1002] Difficulties have arisen because, as with the judiciary, Lithuania and the region were without lawyers experienced in a non-Soviet system at the time of democratic reform.[1003] Similar to the quality of the judiciary in post-Soviet countries, there is a deep continuity in the methods of legal reasoning employed by lawyers in the region, beginning in the era of Stalinism of the 1950s through the post-Soviet period, 'manifesting in the problems of 1990s and 2000s'.[1004]

The role of criminal defence counsel in the representation of their clients did not change significantly in Lithuania following independence. Even fourteen years later, in 2004, it had remained essentially unchanged. The criminal process is still dominated by the state, and client-oriented defence was almost absent from the system such that 'the principle of equality of arms often rings hollow'.[1005] Due to the extremely low compensation for legal aid lawyers, lack of active advocacy, lack standards or supervision of the quality of their work, most criminal defendants received a minimal

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[1000] There are also notaries who function similarly to those in other European countries; they do not have a significant impact on the fairness of court proceedings and are not included in this research.

[1001] Meyer (n 30) 1021.

[1002] ibid 1019.

[1003] ibid 1021.

[1004] *Judiciary in Central and Eastern Europe* (n 52) xv.

[1005] Zaza Namoradze, 'Lithuania' in *Justice Initiatives* (Open Society Justice Initiative 2004) 5.

presence of a lawyer, no more than to satisfy the formal requirements of the Code of Criminal Procedure.[1006] As described by an organiser of a pilot public defender office programme:

> A system in which defense counsel have little incentive to do more than show up often amounts to no legal defense at all – a de facto failure by governments to fulfill their constitutional and international obligations. The continuation of such an inefficient, formalist system not only deprives the majority of criminal defendants of the right to fair trial, it makes a mockery of the equality of arms. The prosecution habitually dominates the legal process, the police can act without fear of rigorous scrutiny, and imprisonment becomes the default outcome for both pre-trial and post-trial processes. Vulnerable groups, such as racial and ethnic minorities, are often disproportionately prosecuted and convicted. Under these circumstances, for most criminal defendants the presumption of innocence is but a formality.[1007]

Since then, there have been modifications to the legal aid system, but practitioners and the literature agree that substantial improvements must still be made.[1008]

B. The Prosecutor

A prosecutor service that is independent is recognised internationally and in Europe as safeguarding the rule of law and serving to bolster public confidence in the justice system.[1009] Due to the inherently partial role of a prosecutor, a prosecutor's

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[1006] Abramaviciute and Valutyte (n 642) 230-31 (inadequate pay to legal aid lawyers at ten times less than privately retained lawyers), 245-46 (legal aid lawyers do poor quality work, do not aggressively advocate), 247 (no standards for legal aid lawyers or supervision by the Bar); Namoradze (n 1005) 5-6l; Code of Criminal Procedure (n 60).

[1007] Namoradze (n 1005) 6.

[1008] Human Rights Monitoring Institute, 'Free Legal Aid – A Jewel in the Crown of Justice?' (19 December 2011) <http://www.hrmi.lt/en/new/725> accessed 30 August 2012 (reporting disagreement by criminal justice practitioners in Lithuania with the Vice-Minister of Justice's claim that the free legal aid system is 'a jewel in the crown of justice'); Abramaviciute and Valutyte (n 642) 254-55 (recommendations); text to nn 636-42 (legal aid in Lithuania).

[1009] United Nations, Human Rights Council, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (UN doc A/HRC/20/19, 7 June 2012) para 2, 26 ('lack of autonomy and functional independence can erode the credibility of the prosecutorial authority and undermine public confidence in the judicial system'); Council of Europe, Parliamentary Assembly Recommendation 1604 (2003) 'Role of

independence is not the same as that of the judiciary. Prosecutors must be independent in the sense that they guarantee the fair, effective and impartial prosecution of criminal offices in defence of the public rather than in response to individual or political interests, and be 'accountable in the discharge of their function and the imperative that they operate independently and without fear, pressure, threats or favour'.[1010] Lack of impartiality in the role of a prosecutor implicates the right to a fair trial guaranteed by Article 6. A claim of impartiality may arise in the form of a claim of selective prosecution, or politically motivated prosecution.[1011] To date, however, there have been no findings of Convention violations by the European Court on this ground.

Empirical studies have shown a connection between power over prosecutors and the corruption of the politicians who control them. Researchers began with the hypothesis that prosecution agencies that are dependent on the executive have fewer incentives to prosecute crimes committed by government members which, in turn, increases their incentives to commit such crimes. Using techniques similar to those described in the application of these factors to judicial independence, they tested their hypothesis focused on the crime of corruption, creating indicators measuring *de jure* as well as *de facto* independence of the prosecution agencies. Their analysis shows that *de facto* independence of prosecution agencies 'robustly reduces corruption of officials'.[1012]

In a separate study, the same researchers tested the hypothesis that those

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the Public Prosecutor's Office in A Democratic Society Governed by the Rule of Law' (Council of Europe 2003) paras 1-2.

[1010] 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (n 1009) para 2.

[1011] *Khodorkovskiy v Russia* App no 11082/06 (ECtHR, 8 November 2011) (decision).

[1012] Anne van Aaken, Lars P Feld, Stefan Voigt, 'Power Over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator' (March 2008) CESifo Working Paper No 2245 <http://ssrn.com/abstract=1097675> accessed 30 August 2012, 205; text to nn 264-68 in ch 3 (application of these factors to the judiciary).

prosecution agencies dependent on the executive have fewer incentives to prosecute crimes committed by government members which, in turn, increases the government members' incentives to commit such crimes. The hypothesis was empirically tested using the crime of corruption, again creating indicators measuring *de jure* and *de facto* independence of the prosecution agencies. Their analysis finds that the *de facto* independence of prosecution agencies 'robustly' reduces corruption of officials.[1013] These factors are considered in more detail below as they apply in Lithuania.[1014]

The model for prosecuting criminal cases in Lithuania and the other post-communist countries follows the European mixed system, which has elements of the inquisitorial and adversarial, or party, processes. In the pretrial phase of a case, the proceedings are dominated by inquisitorial elements, such as their ex officio nature, lack of strict separation of the functions between the investigators, prosecutors and pretrial judges, and secrecy. In the trial phase of a case, the proceedings are of an adversarial nature. There are separate functions for the prosecution, defence and the judiciary, strict adherence to the prosecutor's charge, and the trial is conducted in public.[1015]

Under the Soviet legal system, prosecutors were part of the state apparatus and were unquestionably the most influential members of the legal profession.[1016] Contemporary Lithuania has established the framework for an independent prosecution service, establishing it constitutionally as an integral part of judicial authority mandated

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[1013] Anne van Aaken, Lars P Feld, Stefan Voigt, 'Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation Across Seventy-Eight Countries' (2010) 12 ALER 204-44.

[1014] Text to nn 1050-73.

[1015] Bárd (n 30) 436; Abramaviciute and Valutyte (n 642) 199-200 (no adversarial features in the pretrial phase of criminal proceedings in Lithuania).

[1016] Meyer (n 30) 1035.

to be independent and observe only the law.[1017] As described below, there are several features of Lithuania's prosecution service that implicate fair trials in Lithuania, including their power in relation to the courts and defence counsel, and a system of mandatory prosecution, which in practical terms results in exercising unregulated discretion.

According to practitioners, the prosecutor remains the most decisive institution in criminal justice in Lithuania. Prosecutors, or police officers supervised by prosecutors, gather all the evidence, evaluate it and decide whether or not to send the case to the court. They have an incredible amount of discretion and are said to visibly misuse it.[1018] Combined with a tradition in which the judiciary relies heavily on the pretrial investigation[1019] and attorneys who do not aggressively defend their clients, the presumption of innocence and fairness to the defendant suffer.[1020]

1. Lithuania's Office of the General Prosecutor

Lithuania has a national prosecutor, the Prosecutor General of the Republic, created on 27 July 1990 in the Provisional Basic Law,[1021] now operating pursuant to the

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[1017] Constitution of Lithuania (n 14) ch IX (arts 109-114 on the Court). 'According to the Constitution, the prosecutors are a component part of the judiciary, therefore, the principles defining the independence of courts are applicable to them, but only with due consideration of the approach specified by the Constitutional Court.' Constitutional Court, 6 December 1995 ruling on Government Resolutions on Remuneration of Officers of the Courts and Certain Officers of the Legal Profession [title restated], *Official Gazette* 1995, No 101-2264 (13 December 1995). 'When performing his [or her] functions, the prosecutor shall be independent and shall obey only the law.' Constitution of Lithuania (n 14) art 118.

[1018] Correspondence from a Lithuanian lawyer to the author (8 December 2008); interview with a Lithuanian lawyer (Vilnius 14 July 2010).

[1019] Text to nn 600-10 in ch 3.

[1020] Abramaviciute and Valutyte (n 642) 245-46 (lack of advocacy); correspondence from a Lithuanian lawyer to the author (8 December 2008); interview with a Lithuanian lawyer (Vilnius 14 July 2010).

[1021] Provisional Basic Law (n 84), the amendment establishing the Office of the General Prosecutor was adopted 27 July 1990, No I-419, *Official Gazette* 1990, No 23-557 (20 August 1990) (in Lithuanian).

Law on the Public Prosecutor's Office.[1022]

The Constitution provides that the President of Lithuania appoints and dismisses the Prosecutor General with the consent of the Seimas,[1023] according to procedures established in the Law on the Public Prosecutor's Office.[1024] Seimas establishes the priorities for the prosecution system and is charged with exercising control over those activities.[1025] The office is financed from the State budget and its expenditures are controlled by the Prosecutor General.[1026] The State is required to provide the financial, organisational and technical support to the prosecutor's service that will ensure appropriate working conditions, guarantees of independence, and social guarantees established by law.[1027]

The Prosecutor General is appointed for a term of seven years and can be dismissed from office by the President of the Republic with the approval of the Seimas.[1028] Despite the length of the term, the role of the Prosecutor General in Lithuania has seen a relatively high turnover rate, due in part to the manner of candidate selection and poor performance:

> As a consequence of political favouritism in the process of appointments and growing dissatisfaction with the sluggish

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[1022] Law on the Public Prosecutor's Office, 13 October 1994, No I-599, amended 30 June 2011, *Official Gazette* 2011, No 91-4333 (19 July 2011) (in Lithuanian) (most recent English translation 27 May 2010, No XI-855).

[1023] Constitution of Lithuania (n 14) art 118.

[1024] Law on the Public Prosecutor's Office (n 1022) arts 22-23.

[1025] Aleksandras Dobryninas and Gintautas Sakalauskas, 'Country Survey: Criminology, Crime and Criminal Justice in Lithuania' (2011) 8 EJC 421, 428. The State is required to provide the financial, organisational and technical support to the prosecutor's service that will ensure appropriate working conditions, guarantees of independence, and social guarantees established by law; and provide financing from the State budget that are then controlled by the Prosecutor General. Law on the Public Prosecutor's Office (n 1022) arts 57(1) and 57(3).

[1026] Law on the Public Prosecutor's Office (n 1022) art 57(1).

[1027] ibid art 57(3).

[1028] ibid art 22(2).

> performance of particular appointees, the position of the Prosecutor General has already changed hands seven times since the restitution of the country's independence. Indeed, not a single appointee has stayed in office for the entire tenure.[1029]

The prosecutors' duties are constitutionally defined as 'organising and directing pretrial investigations, and prosecuting criminal cases on behalf of the State, and to defend the rights and lawful interests of individuals, society and the State.[1030] Seimas sets the priorities for the activities of the prosecutor's office and exercises parliamentary control over its activities.[1031]

Officially, prosecutors in Lithuania must investigate all cases brought to their attention,[1032] making it a jurisdiction of mandatory prosecution. Prosecutorial duties in a mandatory prosecution jurisdiction differ in a critical way from prosecutors in many countries because they do not have the ability to exercise prosecutorial discretion. They are obliged to investigate all cases brought to their attention.[1033] This is true in the post-communist countries, including Lithuania: prosecution is mandatory.[1034] Internationally, there is a wide range of discretion granted to prosecutors to initiate investigations and to decide whether to prosecute, halt, or discontinue prosecutions, with standards that encourage clear rules and guidelines on the use of that discretion. The Council of

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[1029] Dobryninas and Sakalauskas (n 1025) 428.

[1030] Constitution of Lithuania (n 14) art 118.

[1031] Law on the Public Prosecutor's Office (n 1022) art 4(2); Dobryninas and Sakalauskas (n 1025) 428.

[1032] Code of Criminal Procedure (n 60) sec 3.

[1033] Laima Čekelienė and Vaida Urmonaitė, 'The Prosecution Service of Lithuania' (Country Report Lithuania, Eurojustice Network of European Prosecutors-General in the European Union, circa 2004) 560 <http://www.euro-justice.com/member_states/lithuania/country_report/country_report_lithuania> accessed 30 August 2012. At the time of the article, the authors were the Chief Prosecutor, Dept of Intl Relations and Legal Assistance, and Deputy Prosecutor General, respectively. ibid.

[1034] Organisation for Economic Co-Operation and Development, 'Anti-Corruption Specialisation of Prosecutors in Selected European Countries' (Working Paper, September 2011) <www.oecd.org/countries/lithuania/49540917.pdf> accessed 30 August 2012 (OECD 2011) 9.

Europe promotes the principle of prosecutorial discretion, proposing that where it is not already in use, that it be introduced in principle.[1035] The Council of Europe further recommends that a prosecutor's decision to waive or discontinue a prosecution be based on specific criteria, such as the seriousness of the offence or the effects of conviction on the alleged offender, and that a decision to waive prosecution should not act as a bar to a victim seeking civil damages from an alleged offender.[1036]

The concern regarding the prosecutors in Lithuania, as is the case when any prosecutor has a mandatory requirement to investigate and prosecute, is that this leaves room for abuses and for disingenuous use of discretion, with preference given to 'more easily verifiable facts' and simple cases, as well as to the use of administrative rather than criminal sanctions.[1037] The hidden ability of prosecutors in mandatory prosecution jurisdictions to nonetheless act with discretion has been noted in the studies on prosecutorial independence:

> The existence of discretion in individual decisions regarding prosecution is likely to have an impact on the chances of public figures being prosecuted. The degree of discretion is influenced by the adoption of the mandatory principle, but also by 'hidden' components of discretion, such as the ability to drop a case due to insufficient evidence or not concentrating enough efforts to conduct serious investigations.[1038]

Keeping in mind that the distribution of competencies under the 'socialist'

[1035] The Committee of Ministers has recommended the introduction or application of the principle of discretionary prosecution 'wherever historical development and the constitution of member states allow' or otherwise devise '[m]easures having the same purpose as discretionary prosecution'. Committee of Ministers, 'Recommendation R (87) 18, Concerning the Simplification of Criminal Justice' (adopted 17 September 1987, 410th Meeting of Ministers' Deputies, Council of Europe) ss I(a)(I), 1(b); OECD 2011 (n 1034) 9.

[1036] OECD 2011 (n 1034) 9.

[1037] ibid.

[1038] 'Power Over Prosecutors Corrupts Politicians' (n 1012) 10.

procedural law granted to the courts a far less significant role,[1039] this special system of competence also empowered the police, the militia and organs under the competence of the Ministry of Interior with far broader licences than their counterparts in Western Europe.[1040] The historical expectations for criminal convictions is reflected in the fact that it has only been in the past few years that prosecutor performance evaluations in Lithuania no longer presume that an acquittal is a professional flaw – an isolated improvement among sporadic initiatives to improve criminal proceedings.[1041]

2. Complaints of Lack of Independence

The position of Prosecutor General's Office in several matters over the past few years has led to allegations of lack of independence, including in two matters involving the country's terrorism policy.[1042] The most well known of these relates to Lithuania's involvement in the extraordinary rendition programme for suspected terrorists operated by the United States of America's Central Intelligence Agency.

In early 2010, Seimas approved the findings of a 2009 parliamentary investigation revealing that between 2004 and 2006, Lithuania's national security agency had helped the CIA to set up two secret facilities in Lithuania capable of holding terrorism suspects. The investigation confirmed that United States' aircraft had flown into the country, but no evidence was found regarding actual confinement or interrogation of prisoners.[1043]

In December of 2010 the Human Rights Monitoring Institute (HRMI) wrote to

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[1039] Bárd (n 30) 435.

[1040] ibid.

[1041] HRMI 2011 (n 102) 42.

[1042] ibid 13; *Nations in Transit 2011* (n 205) 352.

[1043] ibid.

the Prosecutor General requesting a pretrial investigation into the alleged violation of the provisions of the Criminal Code when creating preconditions for transportation of CIA detainees into Lithuanian territory and their unlawful imprisonment.[1044] Rather than initiate an investigation, the Prosecutor indicated in response that the decision on whether or not to conduct a pretrial investigation would be made after receiving and assessing the findings of the inquiry then under way in Seimas.[1045]

Following the recommendations of the Commission of Inquiry, in the beginning of 2010, the Prosecutor General's Office opened an investigation for potential abuse of power by the State officials under Article 228 of the Criminal Code. The investigation was closed after a year due to lack of evidence by the officers of the State Security Defence. Critics suggest that this investigation was superficial, inefficient, closed on 'dubious grounds', and demonstrating a lack of independence.[1046] The requests to extend

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[1044] HRMI 2011 (n 102) 13; Criminal Code provisions potentially breached included art 291 (Illegal Crossing of the State Border), art 292 (Unlawful Transportation of Persons across the State Border), art 146 (Unlawful Deprivation of Liberty) and art 100 (Treatment of Persons Prohibited under International Law). Human Rights Monitoring Institute, 'Written Replies to the List of Issues by the Human Rights Monitoring Institute in Lithuania' to the United Nations 'Human Rights Committee: List of Issues for Lithuania' at the 105th Session, 9-27 July, Geneva (Human Rights Monitoring Institute, June 2012) 2 (HRMI 2012) <http://www.hrmi.lt/uploaded/PDF%20dokai/HRMI_Written%20Reply_List%20of%20Issues_June%202012_20120615_FINAL_1.pdf> accessed 30 August 2012.

[1045] HRMI 2011 (n 102) 13.

[1046] Application of *AZ v Lithuania* (application pending before the European Court of Human Rights dated 27 October 2011) (provided online by INTERIGHTS, one of the organisations representing the applicant) <http://www.interights.org/document/181/index.html> accessed 30 August 2012) para 19 ('[a] superficial criminal investigation conducted by the Prosecutor General at the instigation of parliament, was closed on 14 January 2011 after the prosecutor concluded that "no data has been obtained" indicating that the CIA planes illegally transported detainees and that "no data was received to suggest that" persons were detained in Lithuania') (provided online by INTERIGHTS, one of the organisations representing the applicant) <http://www.interights.org/document/181/index.html> accessed 30 August 2012); INTERIGHTS,'Abu Zubaydah, Victim of CIA's Extraordinary Rendition, Seeks Accountability at the European Court of Human Rights' Press Release (27 October 2011) <http://www.interights.org/document/180/index.html> accessed 30 August 2011; Amnesty International, 'Unlock the Truth in Lithuania: Investigate Secret Prisons Now' (Amnesty International 2011) <http://www.amnesty.org/en/library/info/ EUR53/002/2011> accessed 30 August 2011, 5 (prosecutor's investigation 'closed on dubious grounds'); HRMI 2011 (n 102) 13 (lack of independence demonstrated by failure to initiate investigation of possible state and international crimes), 14 (prosecutor's inquiry superficial and inefficient because it did not extend beyond Seimas' inquiry to include other allegations made by Zubaydah).

the scope of investigation to encompass the full range of other alleged criminal activities based upon additional information on the alleged detention in Lithuania and torture of the Palestinian Abu Zubaydah were ignored. The decision to terminate the investigation, once it was issued, was identical in scope to that of the parliamentary inquiry.[1047]

The number of allegations of cruel violence against detainees and prisoners has increased, as have complaints of violent interrogation methods, yet prosecutors are reluctant to investigate such allegations.[1048] When allegations of serious human rights violations arise, state institutions have a positive duty, in accordance with its international obligations, to carry out a full and thorough investigation in order to identify perpetrators and compensate damages to the victims. Yet to many, this procedural obligation remains unfulfilled in Lithuania.[1049]

3. Independence of the Prosecution Service

Studies reported in recent years are instructive in understanding the level of independence of the prosecution service in Lithuania, both institutionally (*de jure*) and factually (*de facto*). Similar to measuring the independence of the judiciary,[1050] social scientists have applied the methodology of quantitative analysis to the study of prosecutorial independence.

In a study reported in 2011, researchers Ernani Carvalho and Natália Leitão measured the institutional characteristics in the agencies of prosecution (procuracies) in

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[1047] HRMI 2011 (n 102) 13-14.

[1048] ibid 14.

[1049] ibid.

[1050] Text to nn 253-68 in ch 3 (several methods used to measure judicial independence).

78 countries, including Lithuania.[1051] As the basis for their study, they considered institutional independence as having 'the ability to make decisions without interference from other actors'.[1052] Using a principal component model, they estimate the dimension of prosecutorial independence using two dimensions of institutional characteristics: (1) the appointment process, and (2) tenure in office of the head of the institution.[1053]

In setting the values for the appointment process, the lowest value for independence was assigned to those situations in which the selection process is dominated by legislators, with appointments by a group with a mixed participation of different agencies ranking somewhat better.[1054] Although Generally, and the point to be made in the case of Lithuania, independence levels increase significantly where the nomination process is conducted by judicial institutions without interference of politicians. The highest levels of independence, however, are in those situations where the process is dominated by civil society, such as commissions that include academics and legal practitioners.[1055] By these measures, the involvement of both the President of Lithuania in the appointment of the Prosecutor General and Seimas in providing consent for that appointment, Lithuania falls in the category of 'mixed' appointments that ranks 'somewhat better', but still toward the lower end of the spectrum of independence.[1056]

The categories ranking the appointment process, from least independent to most

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[1051] Ernani Carvalho and Natália Leitão, 'A Factor Analysis Model to Measure Procuracy Office's Independence' (Working Paper, 7 May 2011) 1 (using a principal component analysis model as to *de jure* characteristics) 12 (figure 3 illustrates Lithuania's placement following the analysis) <http://ssrn.com/abstract=1881043> accessed 30 August 2012.

[1052] ibid 1.

[1053] ibid.

[1054] ibid 2.

[1055] ibid.

[1056] ibid; Constitution of Lithuania (n 14) art 118.

independent, 0 to 9 respectively, are as follows:

Legislative-dominant
0. Legislative majority only
1. Legislators, with opposition participation
Mixed
2. Legislators and elected president
3. State entity other than legislature or elected president
4. Judges and politicians
5. Civic groups and politicians
Judicial-dominant
6. Supreme Court or council of judges with participation by state entity other than legislature or elected president
7. Supreme Court or council of judges
Civil-society-dominant
8. Commission of lawyers, academics, etc., with participation by state entity other than legislature or elected president
9. Commission of lawyers, academics, etc [1057]

In considering the second dimension, tenure in office of the head of the institution, the researchers assigned the lower level of independence to situations in which two elected branches or two legislative chambers are involved in the process. Those situations in which a term of office of the head of the institution can be easily terminated by a legislative majority score the lowest. Generally, longer mandates increase the chance of independence, and decrease with the likelihood of punishment by the elected branches.[1058] However, the degree of independence was diminished by the possibility of punishment by the elected branches. Where tenure is for life, or can only be terminated by the extraordinary process of impeachment, the independence level was ranked high. Likewise high are those situations in which politically insulated councils are alone responsible for the appointment.[1059]

Using these two dimensions – members' independence and institutional

[1057] Carvalho and Leitão (n 1051) 2.

[1058] ibid.

[1059] ibid.

independence – totals for prosecutors in the 78 countries were calculated and categorised to fall into four possible groups. Lithuania's prosecutors ranked above average in institutional independence, but below average for independence in fact.[1060] This placement is consistent with this empirical study of Article 6 rights in Lithuania that indicate the selection of prosecutors and their decision making is influenced by political considerations rather than the law.[1061] As Carvalho and Leitão recognise, in addition to these two dimensions there may be other important internal institutional variables that would further enhance an understanding of the independence of prosecutors.[1062]

In two other studies, another team of researchers – Anne van Aaken, Lars Feld, and Stefan Voigt – applied the institutional independence (*de jure*) and factual independence (*de facto*) variables to prosecutors. They tested two related hypotheses, finding that: 1) power over prosecutors corrupts politicians;[1063] and 2) independent prosecutors deter political corruption.[1064] Data from Lithuania is reported in both of their studies, but no separate discussions or findings were made.

In their 2008 study on the corrosive effect of political power over prosecutors, they used the crime of corruption as a focus testing the hypothesis that prosecution agencies that are dependent on the executive have fewer incentives to prosecute crimes committed by government members which, in turn, increases their incentives to commit

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[1060] ibid 12, figure 03. Based upon the data, the countries fall into one of four categories: 1) above average in both dimensions; 2) below average in members' independence and above average in independence of the institution; 3) below average in both dimensions; or 4) above average in members' independence and below average in independence of the institution. Lithuania falls in group 2, as below average in members' independence and above average in institutional independence. ibid.

[1061] Text following n 331 in ch 3 (conclusions).

[1062] Carvalho and Leitão (n 1051) 3.

[1063] 'Power Over Prosecutors Corrupts Politicians' (n 1012).

[1064] 'Do Independent Prosecutors Deter Political Corruption?' (n 1013).

such crimes.[1065] Using indicators measuring both *de jure* and *de facto* independence of the prosecution agencies, their regression analysis showed that factual independence of prosecution agencies robustly reduces corruption of officials.[1066]

In 2010 the same researchers reported their study on the independence of prosecutors as determining whether the organizational structure of prosecuting authorities affects corruption levels.[1067] Their working hypothesis was that if prosecutors are subject to the directives of government members, then these government members could misuse this power to prevent the prosecution of crimes committed by people like themselves, thereby making crime more attractive and more likely.[1068] Alternatively, if prosecutors are independent from the directives of government, then corruption levels would be lower.[1069]

From the compilation of the indicators for *de jure* and *de facto* prosecutorial independence for 78 and 76 countries respectively, the researchers concluded that *de facto* prosecutorial independence is 'highly and robustly significant for explaining variation in perceived corruption: the more independent the prosecutors factually are, the lower the expected level of corruption'.[1070] In this study, independence exists when prosecutors do not have to anticipate negative consequences as the result of their behaviour 'such as (a) being expelled, (b) being removed against their will to another

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[1065] 'Power Over Prosecutors Corrupts Politicians' (n 1012) 2.

[1066] ibid 2 (*de facto* prosecutorial independence is 'highly and robustly significant for explaining variation in perceived corruption: the more independent the prosecutors factually are, the lower the expected level of corruption'), 12 para 7.

[1067] 'Do Independent Prosecutors Deter Political Corruption?' (n 1013) 205.

[1068] ibid.

[1069] ibid.

[1070] ibid 206-06.

position or location or (c) being paid less'.[1071] The authors of the study conclude that it is the factual independence that is crucial to determining the independence of prosecutors.[1072] This independence in fact is a necessary pre-condition for prosecutors prosecuting crimes committed by members of government, but alone it is not sufficient, because that independence could also be misused. Here the study explores the importance of the interrelationship between the need for independence of both the judiciary and the prosecutor:

> If judges are not independent from government, then corruption cases might be brought to court by prosecutors but not be sanctioned by judges. This means that an independent procuracy is primarily expected to have beneficial effects if the judges are also independent from government interference. This argument can also be turned around: in many countries, the procuracy acts as a gate-keeper to the courts. Judges cannot initiate proceedings but often depend entirely on prosecutors to bring a case before they can become active. This means that – at least with regard to criminal cases – an independent judiciary can only be expected to have any beneficial effects if the procuracy is also independent from government interference.[1073]

From these factors, the actual functioning of the prosecutor service in Lithuania appears to lack independence in significant measure. Further study by social scientists, working specifically in the environment in Lithuania, would certainly aid in understanding the level of independence and potential areas for improvement.

VI. Conclusion

It cannot be said that Article 6 protections extend to the parties to litigation in Lithuania. There are barriers to court access for parties to litigation in Lithuania due to

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[1071] ibid 209-10.

[1072] ibid 210.

[1073] ibid.

the length of proceedings, lack of of an accessible record, for the disabled and children. The length of pretrial investigations, particularly in domestic violence and human trafficking cases, leaves witnesses without protection from those committing crimes against them. Protections for the mentally ill are inadequate, with the mentally incapacitated have no standing before any court, and court proceedings lacking in protections against conflicts of interest in the appointment of legal guardians. Persons suspected of criminal activity are without procedural protections in some pretrial arrest and detention practices. Members of the media and public officials can impact the fairness of fair proceedings when they inappropriately comment on pending cases.

The legal profession, similar to the judiciary, has a cultural history that plays a role in contemporary Lithuania. Defence attorneys, particularly legal aid attorneys in criminal cases, operate in a formalistic manner, having limited incentive beyond appearing in court where the process is dominated by the prosecution. Prosecutors are required to prosecute all cases that come to their attention, leaving them without officially recognised and regulated discretion as to criminal charges that are made, which likely adds to the public perception that their decisions are motivated by political considerations. The complaints made from within Lithuania that prosecutors are not independent are consistent with the application of indicators from research of social scientists examined in this review. Independence in the institution of the prosecutor without independence in fact is a character Lithuania's prosecutors share with Lithuania's judiciary. That is, while there is the appearance of independence, independence does not in fact extend to its members.

As with the judiciary, the shortcomings in the legal system for the parties are often only evident in how the law functions. To the extent these conditions signal

systemic problems, they require attention that may be beyond the present capabilities of the judiciary and the legal profession, suggesting the need for outside expertise and supervision.

Chapter 5. Convention Implementation

The preceding chapters illustrate that it is in the informal mechanisms of knowledge and practice that Lithuania is most challenged in its ability to fully implement Article 6. This indicates a critical need for a more thorough reception of Article 6 rights in the national system and suggests the need for guidance and monitoring by the Council of Europe. As described in this chapter, the Council of Europe's external monitoring in Lithuania has been limited to supervising the execution of adverse judgments in the European Court. This supervision could expand as the Committee of Ministers and Parliamentary Assembly undertake increased attention to systemic issues as part of their supervisory roles.

What, then, might serve as indicators for assessment and monitoring of a more thorough reception of Article 6 in Lithuania? It is tempting to extrapolate from the number of adverse judgments against Lithuania in the European Court, but due to the varied scope and statistical unreliability of each judgment, that would not produce a reliable measure.[1074] This chapter considers other indicators for this assessment: studies that test theories for successful Convention compliance,[1075] the role of national officials in coordinating national law with the European Court,[1076] and factors that promote state compliance with adverse judgments of the European Court.[1077] The level of Lithuania's Article 6 implementation is then evaluated using indicators from these studies. The result is that while Lithuania has complied with the vast majority of adverse judgments against it in the European Court of Human Rights, by standards relevant to the informal

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[1074] Text to nn 1163-70.

[1075] Text to nn 1180-92.

[1076] Text to nn 1204, 1206-10.

[1077] Text to nn 1205, 1211-25.

mechanisms of knowledge and practice in Lithuania, implementation of Article 6 in the domestic legal system is inadequate.

I. The Judgment Supervision Mechanism in Strasbourg

The European Court of Human Rights enforces the Convention by its judgments,[1078] and enforcement of those judgments is under the supervision of the Committee of Ministers, the main political body of the Council of Europe.[1079] This project is not intended to explore the theoretical development of enforcement in the European Court, but it worth noting here that overall, the Court is sensitive to establishing common human rights standards on the one hand, while recognising national differences on the other.[1080] In this regard the Court applies two concepts, the first of which is the 'margin of appreciation', which is the discretion afforded to domestic authorities in responding to adverse judgments on the basis that they are closer to the problem than the international judges.[1081] The other is the Court's treatment of the Convention as a 'living instrument', founded in the understanding that problems in contemporary society could not have been foreseen when the Convention was adopted, thus allowing human rights protection to evolve with changes in European societies.[1082]

The Committee of Ministers considers the implementation of each judgment against three questions: whether any *just satisfaction* awarded by the Court has been

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[1078] White and Ovey (n 236) 52; ECHR (n 1) art 44 (finality of judgments).

[1079] Phillip Leach, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights' (2006) 3 Public Law 443, 444.

[1080] Special historical and political consideration was given, for example, in post-Soviet Hungary which, given the historical connection between the police and the Communist Party, was found not to violate the Convention by prohibiting members of the police force from belonging to a political party. *Rekvenyi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) para 41.

[1081] Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights* (Martinus Nijhoff Publishers 2007) 21; text to n 12 in ch 1, n 622 in ch 4.

[1082] Arold (n 1081) 21; text to n 5 in ch 1.

paid, including any default interest; whether any needed *individual measures* have been taken that will put an end to the violations; and whether any *general measures* have been adopted to prevent new similar violations.[1083] Compliance is only achieved after payment of any just satisfaction and any required individual and general measures have been taken.[1084]

Faced with an adverse judgment, it is usually a state's first obligation to pay just satisfaction to the applicant. This is the only remedy mandated by the terms of the Convention.[1085] The other two forms of remedy, individual and general measures, flow from the provisions of Article 46, in which the member states agree to abide by the final judgments of the Court in any case to which they were parties, with execution of the judgments supervised by the Committee of Ministers.[1086]

In some cases the only effective means of redressing individual measures for an applicant will require the respondent state to re-open the domestic proceedings,[1087] such as to correct a violation caused by unfair proceedings;[1088] rectify a decision found

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[1083] Committee of Ministers, 'Rules of Supervision of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements' (CM/Del/Dec(2006) 964/4.4/appendix4E /12 May 2006, adopted 10 May 2006, 964th Meeting of Ministers' Deputies, Council of Europe) (Rules of Supervision) r 6(2)(a); Harris and others (n 214) 873-74; David C Baluarte and Christian M De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions, Open Society Initiative* (Open Society Foundations 2010) 39-41.

[1084] Rules of Supervision (n 1083) rr 3, 4; Shaw (n 218) 359-60.

[1085] Baluarte and De Vos (n 1083) 39; ECHR (n 1) art 41 ('if the Court finds that there has been a violation ... and the [domestic] internal law allows only partial reparation ... the Court shall, if necessary, afford just satisfaction to the injured party'); ibid arts 46(1), 46(2); Committee of Ministers, 'Monitoring of the Payment of Sums Awarded by Way of Just Satisfaction: an Overview of the Committee of Ministers' Present Practice' (Ministers' Deputies Information Documents, CM/Inf/DH(2008)7 final, 15 January 2009, Council of Europe).

[1086] ECHR (n 1) art 46; Rules of Supervision (n 1083) r 6(2).

[1087] Committee of Ministers, 'Execution of Judgments of the European Court of Human Rights – Introduction' (H/Exec(2004)2 Update 2006, Council of Europe) (Execution of Judgments, H/Exec(2004)2) 4; Harris and others (n 214) 875.

[1088] *Barberà, Messegué and Jabardo v Spain* (n 21); Committee of Ministers' Resolution DH (94) 84 (Council of Europe 1994).

incompatible with the substance of the Convention;[1089] require that police destroy files containing information obtained in breach of the right to privacy,[1090] or to introduce previously non-existent legislation giving access to the Court.[1091]

Until recently, only the Committee of Ministers made the determination as to whether individual or general measures were required in addition to any just satisfaction ordered in the judgment. After payment of any just satisfaction, states were expected to propose to the Committee of Ministers the nature and scope of measures they would take to address any individual or general measures compatible with the Court's judgment.[1092] The proposal would be subject to approval and monitoring by the Committee of Ministers, assisted by the Department for the Execution of Judgments.[1093] More recently, the Court has included specific remedies as part of its judgments.[1094]

Since 2004 the Court has also begun to identify in its judgments those systemic problems that underlie the violations it finds and to suggest the execution measures required.[1095] The Court has gradually expanded its approach to redress, supplementing its Article 41 powers by relying on Article 46 as the central component of the 'pilot

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[1089] *Open Door Counselling Ltd v Ireland* (1993) 15 EHRR 244; Committee of Ministers' Resolution DH (96) 368 (Council of Europe 1996).

[1090] *Kopp v Switzerland* (n 860); Committee of Ministers' Final Resolution ResDH(2005)96 (Council of Europe 2005).

[1091] *Holy Monasteries v Greece* (1998) 25 EHRR 640; Committee of Ministers' Resolution DH(97) 577 (Council of Europe 1997).

[1092] Constantin Cojocariu, 'Improving the Effectiveness of the Implementation of Strasbourg Court Judgments in Light of Ongoing Reform Discussions' (2010) 1 J Eur Roma Rights Centre 9, 11.

[1093] *Scozzari and Giunta v Italy* (2002) 35 EHRR 12 para 249.

[1094] Greer (n 61) 159-60.

[1095] It did so for the first time in 2004 largely in response to a Resolution by the Committee of Ministers revealing underlying systemic problems in two cases, *Assanidze v Georgia* (2004) 39 EHRR 653 and *Ilascu and Others v Moldova and Russia* (2005) 40 EHRR 46, ordering the release of applicants arbitrarily detained in breach of art 5; Execution of Judgments, H/Exec(2004)2 (n 1087) 2-3.

judgment procedure,'[1096] which aims to manage repetitive applications more efficiently by taking a general problem and adjudicating it in a specific case.[1097] This procedure has a significant potential to encourage or require that states resolve human rights violations which arise from systemic problems.[1098] It has also contributed significantly to improving the execution process.[1099] By making the required systemic action a part of the judgment, the remedy is less open to political negotiation in the Committee of Ministers. It is also easier to objectively monitor by the Committee and others, such as NGOs, and it is easier in principle to enforce any failure of domestic authorities to comply.[1100]

The nature of the remedy required to satisfy general measures will depend on whether the Convention breach is 'contingent' or 'structural'.[1101] 'Contingent' breaches are those caused by specific conduct within an otherwise compliant system and are likely to result in one or a few applications to the Court.[1102] The more serious violations are 'structural' or 'systemic' in nature, resulting from a defect in the character or design of a

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[1096] ECHR (n 1) art 41 (allows just satisfaction to injured party), art 46 (members' agreement to abide by final judgments with execution supervised by Committee of Ministers); Philip Leach, 'On Reform of the European Court of Human Rights' (2009) 6 EHRLR 725, 730; a pilot judgment will result from a judgment in a case selected by the Court as a priority case, chosen from among a significant number of applications received derived from the same root cause and in which a solution extends beyond the particular case chosen to cover all similar cases raising the same issue. European Court of Human Rights, 'The Pilot-Judgment Procedure: Information Note Issued by the Registrar' (Council of Europe 2009) para 1.

[1097] Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 Nomiko Vima [The Greek Law Journal] 1890-1902; Harris and others (n 214) 851; David Milner, 'Codification of the Pilot Judgment Procedure' Presentation at the Conference, 'Responding to Systemic Human Rights Violations: Pilot Judgments of the European Court of Human Rights and Their Impact at National Level,' Strasbourg, 14 June 2010; Stuart Wallace, 'Much Ado about Nothing? The Pilot Judgment Procedure at the European Court of Human Rights' (2011) EHRLR 71-72.

[1098] 'On Reform of the European Court of Human Rights' (n 1096) 730.

[1099] Greer (n 61) 159-61.

[1100] ibid.

[1101] ibid 60.

[1102] ibid.

state's public institutions or processes and likely to generate many applications.[1103] To remedy a system-wide defect, the state will most likely be required to provide a system-wide remedy that would apply to everyone in the same category.[1104]

Due in large part to the nature of the remedy, general measures may take more time to accomplish than will payment of just satisfaction or taking individual measures, particularly when national legislation is required and is subject to the political climate.[1105] Over half of the general measures taken by respondent States in response to adverse judgments have involved changes to legislation; the remaining measures have involved 'administrative reforms, changes to court practice or the introduction of human rights training for the police'.[1106] It is therefore not surprising that the Committee's review of whether general measures have been taken is the principal reason a case may remain on its agenda well after the other remedies in a judgment are resolved. It is also where most of the Committee's efforts are directed.[1107]

Adverse judgments in Lithuania are coordinated with the Committee of Ministers by a Representative, or Agent, who is designated by statute to represent Lithuania before the European Court of Human Rights and is accountable only to the Government.[1108] The office of the Agent functions within and with the assistance of the Ministry of

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[1103] ibid.

[1104] Harris and others (n 214) 872; Shaw (n 218) 360.

[1105] Harris and others (n 214) 879.

[1106] White and Ovey (n 236) 58.

[1107] Harris and others (n 214) 878.

[1108] The position of Agent of the Government of the Republic of Lithuania to the European Court of Human Rights (Agent) was established shortly after 20 June 1995, when the European Convention on Human Rights came into force in Lithuania. Republic of Lithuania, 'Government Resolution No 929 on the Government Representative in the European Court of Human Rights' (3 July 1995, No 929, amended 18 September 2008, No 914, *Official Gazette* 2008, No 110-4195, 25 September 2008) (in Lithuanian); Ministry of Justice, 'Representation Before the European Court of Human Rights' <http://en.tm.lt/tm/apie_atstov> accessed 30 August 2012.

Justice,[1109] and is described by the Agent as legally independent of the Ministry of Justice.[1110] The Agent is appointed and discharged by the Government on the joint recommendation of the Minister of Justice and the Minister of Foreign Affairs.[1111]

Lithuania's Ministry of Justice provides organizational and technical service to the Agent, who is assisted by the Ministry's division of representation at the European Court of Human Rights, established for this purpose.[1112] Lithuania's first Agent to the European Court was appointed on 25 September 1995. The current Agent is Elvyra Baltutytė, appointed on 1 February 2005. In addition to representing Lithuania before the Court in response to applications, the Agent coordinates the Government's response to adverse judgments.[1113] For example, in those cases where just satisfaction has been ordered by the Court, the Agent will coordinate the payment, writing to the Ministry of Justice requesting the amount of judgment, which is paid from the budget of the Ministry of Justice.[1114]

In Lithuania, any individual measures that call for relief other than money will be coordinated by the Agent, such as when individual measures required that an apartment be provided to the applicants,[1115] and the Agent coordinated the property transfer with the city.[1116] The authority of the Agent in Lithuania to satisfy the terms of a judgment is limited, however, and does not include participation in reopening proceedings. This is

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[1109] Baltutytė interview (n 78).

[1110] ibid.

[1111] Ministry of Justice, 'Representation Before the European Court of Human Rights' (n 1108).

[1112] ibid.

[1113] ibid.

[1114] ibid.

[1115] Baltutytė interview (n 78).

[1116] ibid.

normally done by the attorney for the applicant.[1117] The Agent will monitor any national litigation taken to satisfy the individual measures required by a judgment.[1118] This was the case when Article 6 violations were found in several applicants' rights to a fair trial in criminal proceedings.[1119] One defendant had been convicted based entirely upon anonymous testimony and the other two defendants were convicted on partially anonymous testimony, with no defendant having the opportunity to question the anonymous witnesses.[1120] They were sentenced to 6 to 10 years' imprisonment.[1121] Following the European Court's judgment, national proceedings were reopened in the Supreme Court. As of April 2011, the third applicant, whose conviction was based solely on anonymous testimony, had been released, while the case as to the remaining defendants was still pending before the Court of Appeals, but both remained in prison serving sentences imposed in separate unrelated criminal proceedings.[1122]

According to Lithuania's Agent, general measures taken by Lithuania in response to the adverse judgments involving crime simulation models resulted in significant internal changes to the operations of the courts and required that prosecutors be advised of the changes.[1123] For example, after *Ramanauskas v Lithuania*[1124] was decided, on the request of the applicant, the Supreme Court of Lithuania reopened the case and

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[1117] ibid.

[1118] Petitions to reopen proceedings can also be made by the Supreme Court, the Prosecutor, or a Chief Judge. ibid. See also Committee of Ministers, 'Examples of Requests for the Reopening of Proceedings in Order to Give Effect to Decisions by the European Court of Human Rights and the Committee of Ministers' (Ref H(99)10rev, Council of Europe 1999) (Reopening Proceedings, Ref H(99)10rev).

[1119] *Birutis and Others v Lithuania* App nos 47698/99, 48115/99 (ECtHR, 28 March 2002).

[1120] ibid.

[1121] ibid.

[1122] Reopening Proceedings, Ref H(99)10rev (n 1118).

[1123] Baltutytė interview (n 78).

[1124] *Ramanauskas v Lithuania* (n 870); text to nn 870-75 in ch 4.

formulated procedures to be followed when a crime simulation model is used in a criminal investigation. In response to violations based on the use of secret evidence, the Supreme Court prohibited its use.[1125]

In April 2011 there were nineteen cases listed by the European Court of Human Rights as unresolved as to Lithuania, but according to Lithuania's Agent, general measures in all but two cases were resolved and pending the Court's review of the related correspondence.[1126] Both cases were pending resolution of general measures: the 2011 judgment in *Paksas v Lithuania*[1127] (requiring a constitutional amendment to modify the lifetime ban on holding office after having been impeached from the Office of President), and *L v Lithuania*[1128] (requiring enactment of enabling legislation that would allow transsexuals to change the indication of their sex in official documents). Both remained unresolved in the year 2012.

Although neither judgment found Article 6 violations, these two cases offer insight into Lithuania's inability to address general measures in cases that are high profile with politically sensitive elements. As seen earlier, sensational cases in Lithuania tend to result in actions by public officials that conflict with Article 6 of the Convention.[1129] It is therefore not surprising that general measures in these two cases, both highly publicised, have met with opposition.

[1125] Baltutytė interview (n 78).

[1126] ibid. Five months after this interview, the Court still showed 22 pending cases against Lithuania, with an additional 19 closed in principle and awaiting a Final Resolution. Committee of Ministers. Council of Europe, Search Portal <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp> accessed 30 August 2012 (Portal Search for Current State of Execution).

[1127] *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011); Baltutytė interview (n 78).

[1128] *L v Lithuania* (n 292); Baltutytė interview (n 78).

[1129] Text to nn 905-20 in ch 4.

The applicant in *Paksas v Lithuania*[1130] was impeached from the Office of President of the Republic of Lithuania for actions in violation of his oath of office of the President. He was later prohibited by a lifetime ban from running for the Presidency or Parliament by legislation adopted after his impeachment proceedings. Following the unsuccessful challenge to his impeachment in the domestic courts, he appealed to the European Court of Human Rights which determined that the lifelong disqualification from being a member of Parliament is contrary to Protocol No 1(3) (free elections).[1131] In the 2011 Action Plan submitted to the Committee of Ministers, the government of Lithuania indicated that an amendment to its Constitution of would be required to satisfy the requirement of general measures, but as of July 2012 the Court had not been notified of a constitutional amendment.[1132]

The other case pending resolution of general measures is *L v Lithuania*,[1133] in which the Court found that Lithuania had failed in its positive obligation to adopt implementing legislation that would allow a transsexual to undergo gender re-assignment surgery and to change official documents that indicate gender contrary to Article 8 (respect for privacy).[1134] Although gender re-assignment surgery is allowed by Lithuania's Civil Code, Seimas never enacted the corresponding implementing

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[1130] *Paksas v Lithuania* (n 1127).

[1131] ibid paras 97-112 (his other claims were found inadmissible). His claim for costs and expenses was dismissed because no itemised particulars had been submitted. ibid para 122.

[1132] Baltutytė interview (n 78). As of 31 July 2012 the Court had not been notified of a constitutional amendment, indicating only receipt of the Action Plan on 14 June 2011, with updated information still awaited. Committee of Ministers, 'Action Plan / Action Report - Communication from Lithuania Concerning the Case of Paksas against Lithuania (Application No 34932/04)' (DH-DD(2011)484E 20 June 2011, Council of Europe); *Paksas v Lithuania* (n 1127).

[1133] *L v Lithuania* (n 292).

[1134] Civil Code (n 316) pt 2 art 2(27) (right to the change designation of sex); Kuris interview (n 78) (Justice Kuris was on the Constitutional Court at the time of the judgment in *L v Lithuania* (n 292)).

legislation.[1135] In the judgment the Court recognised that there may have been delays in the implementation of the rights of transsexuals under Lithuania's Civil Code, but found that after a four year delay, Lithuania did not strike a fair balance between the general interest and the rights of the person.[1136] The judgment that became final on 31 March 2008 required that Lithuania immediately pass the required legislation, or be subject to 40,000 euros in pecuniary damages.[1137] The legislation was not enacted,[1138] Seimas instead requiring only the fine to be paid.[1139]

Although the Agent and the Minister of Justice had proposed legislation that would eliminate the gap in legislation, it was opposed, with members of Seimas quoted as saying they would never pass it.[1140] One member of Seimas introduced legislation to completely revoke the section of the Civil Code that established the right to gender reassignment.[1141] Another, the Chair of the Health Committee, introduced legislation that would prohibit physicians from performing gender reassignment surgery. In response, the Parliamentary Assembly issued a declaration urging the Lithuanian government and Lithuania's delegation to the Assembly to ensure rejection of this proposal as 'an egregious attack on the fundamental rights of a highly vulnerable minority, who are in any event at risk of violence and discrimination on a regular

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[1135] Civil Code (n 316) pt 2 art 2(27); Kuris interview (n 78).

[1136] *L v Lithuania* (n 292) para 59. The applicant was still considered as belonging to the female gender under the law, and although he was eventually allowed to choose a new name that was not sexually marked, his personal code on his new birth certificate, passport, and university degree, continued to indicate him as being female. Portal Search for Current State of Execution (n 1126); *L v Lithuania* (n 292).

[1137] Akvile Mikelenaitė, 'Taking Counsel: Lithuania's Reaction to the Judgement in the Case of L vs Lithuania' *The Baltic Times* (29 January-24 February 2009) 6.

[1138] Kuris interview (n 78).

[1139] 'Lithuanian Parliament Refuses to Remove Conditions Violating Human Rights' *Human Rights Monitoring Institute* (1 July 2008) <http://www.hrmi.lt/en/new/526> accessed 30 August 2012.

[1140] Baltutytė interview (n 78).

[1141] Mikelenaitė (n 1137).

basis'.[1142] Neither measure succeeded, but the crux of the problem is evident in the public discussion: the hostility in Lithuania to non-heterosexuals.[1143]

The Government has since represented to the Committee of Ministers that repeal of the relevant provision in the Civil Code would not prejudice the potential treatment of transsexuals.[1144] The Agent and the Minister of Justice have proposed to Seimas that the matter be taken out of the legislative sphere to be treated as a health issue under the Ministry of Health, thus avoiding further political debate.[1145] The matter is yet to be resolved, with no further information having been provided to the Committee of Ministers as of mid-2012.[1146]

A case to watch is Lithuania's response to the 2012 adverse judgment in *DD v Lithuania*,[1147] when it proposes general measures to correct the infringement of Article

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[1142] Parliamentary Assembly, 'Lithuania - Proposal to Prohibit Gender Reassignment Surgery' (Written Declaration No 493, Doc 12753 (2d edn) 9 February 2012, Council of Europe) (initially signed by 14 members of the Parliamentary Assembly, expanding to 22 in the second edition).

[1143] Amnesty International, 'Lithuania: Parliament Moves to Criminalize Homosexuality' EUR 53/008/2009 (8 September 2009) describing the 14 July 2009 amendment to the Penal Code, 'Law on the Protection of Minors Against the Detrimental Effect of Public Information', despite an earlier Presidential veto, that bans materials that 'agitate for homosexual, bisexual and polygamous relations' from schools or public places and media where they could be viewed by children' entering into force on 1 March 2010. As written, the law criminalises almost any public expression or portrayal of, or information about, homosexuality. ibid; Law on the Protection of Minors Against the Detrimental Effect of Public Information, 10 September 2002, No IX-1067, amended 21 October 2011, No XI-1624, *Official Gazette* 2011, No 132-6277 (5 November 2011). Media accounts suggest that gender reassignment surgery is highly controversial in Lithuania. One of the arguments against is that it would be too expensive for Lithuania's state-funded health care because of a lack of required specialists and cost for life-time hormone treatment after the surgery. Mikelenaitė (n 1137).

[1144] Government of Lithuania's Correspondence to the Committee of Ministers (10 January 2008) as to *L v Lithuania* (n 292); Mikelenaitė (n 1137).

[1145] Baltutytė interview (n 78).

[1146] The Committee of Ministers' case status report as of 31 July 2012 indicates that although just satisfaction was paid and no other individual measures are necessary, general measures have not been taken, the Court awaiting information on general measures 'in the light of the requirements set by the Court especially in [paras] 59 and 74 of the judgment'. Portal Search for Current State of Execution (n 1126) as to *L v Lithuania* (n 292).

[1147] *DD v Lithuania* (n 727).

6(1) for the mentally ill, discussed in detail in Chapter 4.[1148] That judgment became final on 9 July 2012, indicating that Lithuania's proposed Action Plan will be due in January 2013. This Action Plan will be a telling indicator: will the proposed general measures be taken as an opportunity to address other badly needed protections for the mentally ill? Or will they be taken in the most narrow sense, with the most minimal possible response to satisfy the judgment in this case?

It is worth noting here that the Council of Europe's Parliamentary Assembly is playing an increasingly active role in judgment implementation through its Committee on Legal Affairs and Human Rights (CLAHR). The Committee makes general recommendations for improving the effectiveness and efficiency of the system, as well as exerting pressure in individual cases, focusing on 'particularly problematic instances of non-execution'.[1149] CLAHR sees its role as complementary to the existing system of supervision,[1150] and 'duty-bound' to contribute to the supervision of the implementation of the Court's judgments.[1151] CLAHR considers those judgments and decisions not fully implemented after five years and those raising important implementation issues. It engages with national authorities to further implementation, making site visits to examine the reasons for dilatory execution or non-compliance and meeting with national

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[1148] ibid (finding art 6 violations in the involuntary commitment proceedings due to mental illness); text to nn 731-42 in ch 4.

[1149] 'The Effectiveness of the Committee of Ministers' (n 1079) 449; CLAHR, 'Implementation of Judgments of the European Court of Human Rights: Introductory Memorandum' (AS/Jur (2008) 24, ajdoc24 2008, 26 May 2008, Council of Europe) 1 para 2.

[1150] CLAHR, 'Implementation of Judgments of the European Court of Human Rights, 2009 Progress Report' (AS/Jur (2009) 36, ajdoc36 2009, 31 August 2009, Council of Europe) (CLAHR 2009 Progress Report) 16.

[1151] CLAHR, 'Implementation of Judgments of the European Court of Human Rights: Report' (Doc 12455, 20 December 2010, Council of Europe) (CLAHR 2010 Report, Implementation of Judgments) 2 paras 1-2.

decision-makers to stress the need for solutions to the problems.[1152] Recent issues taken on by the Committee were the 'major structural problems' resulting in delays in proceedings and implementation in nine countries: Bulgaria, Greece, Italy, Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine.[1153] Topics examined included excessive length of judicial proceedings (endemic in Italy); chronic non-enforcement of domestic judicial decisions (widespread in the Russian Federation and Ukraine); deaths and ill-treatment by law enforcement and a lack of effective investigations related to these incidents (in the Russian Federation and Moldova); and unlawful detention and excessive length of detention on remand (in Moldova, Poland, the Russian Federation, and Ukraine).[1154]

The CLAHR 2010 Report concludes with a reminder that the primary responsibility for reducing the Court's case backlog rests with the member states, which in some cases have allowed long-standing systemic problems to generate numerous 'clone' applications to threaten the effectiveness of the European human rights protection system.[1155]

It is due to the continuing increase in cases that the Committee announced that 'the Assembly and national parliaments must now play a much more proactive role'.[1156] Otherwise, the supervisory mechanism of the Convention and the Council of Europe, intended to guarantee the effective protection of human rights in Europe, is 'likely to be

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[1152] ibid 2 para 3.

[1153] ibid. The report notes several other states in need of priority attention and solutions to outstanding problems of non-compliance, including Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia and Serbia. ibid para 4.

[1154] ibid para 5.

[1155] ibid 41 para 209 (excessive length of judicial proceedings violations now represent nearly half of all cases pending before the Committee of Ministers with nearly a third of those from Italy).

[1156] ibid 2 para 2.

put in jeopardy'.[1157] Should the Court's situation not improve, the Parliamentary Assembly could seek yet a further role in the implementation of the Court's judgments. The Rapporteur concludes the CLAHR 2010 Report with reminder that the Assembly, as well as national parliamentarians, has a duty to help supervise the execution of the Court's judgments:

> We, the Assembly, as a statutory organ of the Council of Europe (and at the same time national parliamentarians), should not meekly accept the premise that the Committee of Ministers has 'exclusive jurisdiction' on this subject. When the Court judgments are not fully and rapidly executed, we – parliamentarians – also have a duty to help supervise the execution of the Court's judgments. The credibility and viability of our European system of human rights cannot be left solely in the hands of the executive organ of the Council of Europe (in effect, diplomatic representatives of governments).[1158]

The Rapporteur also suggests that, should a national parliament fail to seriously exercise control over the executive in cases of non-implementation of judgments of the European Court of Human Rights, the Parliamentary Assembly might consider suspending the voting rights of the relevant national delegation as a sanction.[1159] Given the political nature of the enforcement process, it is difficult to gauge how serious a possibility that could be. Bringing the offending countries into compliance, especially the older democracies, is important as an encouragement to the newer member states such as Lithuania. Common sense dictates that tolerating these chronic violations of the Convention in the older democracies sets a bad example for the newer members of the European Council.

For the moment, Lithuania's Article 6 implementation appears not to be the

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[1157] ibid 2 paras 1-2.

[1158] ibid 42 para 213.

[1159] ibid.

subject of scrutiny of the Council of Europe, but that may not always be the case. Future involvement of the CLAHR or other organs of Strasbourg should not be ruled out, especially given its focus in recent years on overly lengthy proceedings, a weakness in Lithuania's legal system. It is therefore important that Lithuania's policy makers realise the possibility of external monitoring and undertake improvements to avoid outside supervision. Most importantly, a more active attempt to achieve reception of Article 6 in the national system will have a substantial benefit for those within Lithuania's jurisdiction. Unfortunately, recent history suggests that policy makers do not address shortcomings in their legal system when they are recognised.[1160]

Enforcing implementation of the Convention is especially important for those whose national laws do not adequately protect them:

> There can be no question that these procedures matter. They represent not only the last, best hope for many people whose national laws have failed them but, more fundamentally, they manifest 'a shift of emphasis towards the more effective implementation and enforcement of existing human rights standards'.[1161]

The argument for better enforcement is further supported by several studies described in Section II that follows.

II. Assessing Implementation

This section begins with a review of various indicators for assessment of Convention compliance taken from several studies and concludes with an application of indicators from these studies to assess the level of Lithuania's Article 6 implementation.

One indicator of a member states's noncompliance with the Convention is an

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[1160] Text to nn 802-03, 1231-36.

[1161] Baluarte and De Vos (n 1083) 11; Andrew Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law' in Ann F Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2001) 139.

adverse judgment in the European Court. Judgments statistics are reported by the Court on a regular basis and are easily available.[1162] These data present an inviting opportunity to draw conclusions about the level of Convention compliance by member states. Without more information, however, the data do not translate directly into an objective determination of either a nation's level of compliance with adverse judgments, or with Convention implementation generally.[1163]

There are several reasons for this. Most significant is that an applicant faces daunting odds in bringing a case before the Court – the number of applications filed represents only a small fraction of potential claims due to the lengthy and often expensive process in the domestic courts that precedes an application.[1164] Then, having made an application, there is only about a 2 per cent chance that a complaint will be heard. In addition, by the time of a judgment, the circumstances that gave rise to the violation may have been corrected or the issues become moot.[1165]

Another reason not to consider judgment data alone is that a single adverse judgment provides no indication of its seriousness. It may represent a Convention breach as to a single individual or a systemic problem that affects many.[1166] A nation's rate of adverse judgments may also distort actual state behaviour, either positively or negatively. The violations may reflect a greater awareness and reporting of human rights violations on the one hand, or specific structural problems within an entire sector

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[1162] For example, see Committee of Ministers, 'Supervision of the Execution of Judgments of the European Court of Human Rights, Annual Report, 2011' (April 2012, Council of Europe) app 2. Judgment statistics are available at the Court's official website dating from 1959 <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports> accessed 30 August 2012.

[1163] Greer (n 61) 69-70, 73.

[1164] ibid 72.

[1165] ibid 72-73.

[1166] ibid.

of the system, such as the excessive length of proceedings violations, on the other.[1167]

In addition, the science is simply not available. There are no universally accepted methods to reliably numerically score the human rights record of any state or a state's compliance with human rights treaties.[1168] Without an objective statistical measure of compliance, the work of social scientists has provided some insight on national compliance levels, applying a variety of theories.[1169] The reliability of the various efforts to quantitatively examine human rights conditions in Europe has been questioned, however, due to inadequate sourcing and their 'often vague, subjective and impressionistic, character'.[1170]

Finally, underlying the inability to measure state compliance is the lack of a clear determination of what constitutes compliance.[1171] Each study addressing Convention compliance proposes its own description of compliance, including distinguishing between the terms 'compliance', as behaviour in conformity with requirements, and 'implementation', the extent to which requirements are put into practice.[1172] The two terms are often used interchangeably, but should be distinguished. Implementation

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[1167] Dia Anagnostou and Alina Mungiu-Pippidi, 'Why Do States Implement Differently the European Court of Human Rights Judgments? The Case Law on Civil Liberties and the Rights of Minorities' (JURISTRAS Project Comparative Report, funded by the European Commission Research Directorate, Contract FP6-028398, 2009) 10 <http://www.juristras.eliamep.gr/?p=301> accessed 30 August 2012 (noted as work in progress; used with permission). The main portal for the project is, 'The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, State Implementation and Domestic Reform (JURISTRAS)' <http://www.juristras.eliamep.gr> accessed 30 August 2012.

[1168] Greer (n 61) 69-70, 73.

[1169] ibid 60-83 (describing various behavioural studies and their respective methodological problems).

[1170] ibid 74.

[1171] ibid 70, 73.

[1172] ibid 70; Michael Zürn, 'Introduction: Law and Compliance at Different Levels' in Michael Zürn and Christian Joerges (eds), *Law And Governance In Postnational Europe: Compliance Beyond The Nation-State* (CUP 2005) 1-39, 8-9.

embodies the impact of a judgment on state behaviour.[1173] States may implement judgments in order to achieve compliance, but compliance can also exist without implementation. This occurs when a commitment already matches current practice, making implementation unnecessary. Implementation, on the other hand, occurs in response to international obligations.[1174]

A. Explaining Implementation

The inexact nature of the subject has not deterred behavioural scientists from trying to explain state compliance with international human rights norms. Theories of behaviour have include those of the 'rational actor' and the 'normative' accounts, or combinations thereof.[1175] Behaviour developed over many states or within a region is described as 'the diffusion of normative behaviour', a gradual development of cultural behaviour that contemporary Lithuania was denied in the abrupt transition process of the late 1980s.[1176] Without the gradual development of social norms in Lithuania along side the Western countries it later joined in the Council of Europe, developing new behaviour consistent with the Convention on Human Rights is considered in the context of other theories. One of these is 'social constructivism', described as the 'process of rule-making on the international level [that] often leads to norms constraining and shaping the future behaviour of states through obligating them to observe such norms'. In other words, by taking part in the process of creating the norm, state actors begin to understand compliance with that norm.[1177]

[1173] Greer (n 61) 70.

[1174] ibid.

[1175] ibid 63-73 (overview of theories and studies relating to treaty compliance).

[1176] Text to n 88 in ch 2, n 545 in 3.

[1177] Pamela A Jordan, 'Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms' (2003) HRQ 660-88, 664-65.

Another set of theories in norm diffusion can collectively be considered 'constructivist approaches'.[1178] These stress the interaction between domestic and international forces based upon the assumption that ideas influence decision making, not only tangible goals or interests. Contructivists argue that agents or states are engaged in a social learning process driven by their sense of what behaviour would best produce a desired effect. Constructivist approaches may help explain how Council of Europe Member States used their agency to allow countries of the former Soviet Union and Eastern Europe to enter the Council by collectively deciding that accession would persuade the new entrants 'to observe certain human rights standards out of a mutual interest in fostering the growth of liberal democracies, and out of an agreed notion of what an expanded European identity is'.[1179]

Behavioural theories of 'enforcement' and 'management' in judgment compliance were study reported by Barria and Roeper in 2010.[1180] The study intends to explore state noncompliant behaviour by using the Court's judgments as an indicator, measuring the frequency of Convention violations over time, then applying these two competing behavioural theories on the effectiveness of international cooperation.[1181] The 'enforcement' theory stresses a coercive strategy of monitoring and sanctions that yields results.[1182] According to this theory, noncompliance is promoted when the noncompliance has a greater benefit than any sanction for non-compliance. Compliance

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[1178] ibid 664-65.

[1179] ibid 665.

[1180] ibid.

[1181] ibid 7, 12-13. Interesting for the theories applied, this study is not convincing because relies heavily on adverse judgments as a measure of states' human rights behaviour, which is not reliable as an indicator in this context, as noted earlier. Greer (n 61) 69-70, 73; text to nn 1163-72.

[1182] Lillian A Barria and Steven D Roper, 'Government Commitments to International Criminal Justice: The Case of the European Court of Human Rights' (2010) 7-9, prepared for the Academy of Criminal Justice Sciences Annual Meeting, 23-27 February 2010, San Diego, California.

in this situation is best achieved by increasing the likelihood and cost of noncompliance through monitoring and threat of sanctions.[1183] Application of the enforcement theory would be evident in the number of member states' Convention violations generally remaining the same.[1184]

The second theory applied in this study is the 'managerial' theory, which stresses problem-solving.[1185] It is based upon the assumption that states have a desire to comply with their international commitments, but that noncompliance arises from rules that are not clear or from the limited capacity of the states to comply.[1186] Here, compliance is best achieved by ensuring that the rules are clear and transparent, and the state has the capacity to comply. For the managerial theory to apply, over time the member states would develop greater institutional capacity to fulfill their obligations and instances of non-compliance would decrease.[1187]

Barria and Roeper identified repeating violations from adverse judgments in two time periods.[1188] Judgment data from Lithuania played no significant role due to the relatively shorter period of time it was a member state to the Convention. Using a trend analysis, they conclude that as to Article 6(1) compliance, the enforcement model emphasizing the cost-benefit analysis made by states seemed to 'fit best with the data' because the states had 'not modified their behaviour over time even when they have continuously been found to be in violation of the Convention'.[1189] They conclude

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[1183] ibid.

[1184] ibid 12-13.

[1185] ibid 7, 9-13.

[1186] ibid.

[1187] ibid.

[1188] ibid 13.

[1189] ibid 15-16.

similarly in each and every provision analysed: the enforcement theory best captures the nature of member-state compliance to treaty obligations as to the European Court. That is, for theses states, 'it is less costly to pay just satisfaction and provide individual measures than to re-adjust domestic legislation'.[1190] As a secondary observation, the researchers also hypothesise that the repeated and consistent violations have a signal effect, not only to the individual member-state, but to the entire membership, that encourages continuation of this cost-benefit analysis and resulting noncompliance.[1191]

The reliability of the Barria and Roper study is highly suspect because it is based upon adverse judgments as an indicator of a states' human rights behaviour, noted earlier as an unreliable indicator.[1192] The enforcement theory is appealing in the Lithuania context, not as because of this study, but because it is consistent with information provided by human rights advocates in the field that, with no consequences for noncompliance, those in leadership positions have no interest in complying with the European Convention where it conflicts with their currently-held beliefs.[1193]

Looking beyond judgment data to understand treaty compliance has not considered by many researchers. Over the past decade, international legal scholars and advocates have empirically examined state compliance with the mandates of international human rights conventions, but only a few look beyond judgment data to considered the degree to which, and under what conditions, states implement the

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[1190] ibid 19.

[1191] ibid 15-16, 19.

[1192] Greer (n 61) 69-70, 73; text to nn 1163-72.

[1193] Interview with a senior staff person in a Lithuanian NGO (Vilnius, 11 April 2011); text to nn 864-867 (prosecutors and judges have no fear of honouring the rights of criminal defendants because it is Lithuania that loses in the Court of Human Rights, not them).

judgments of the legal bodies that interpret and enforce those conventions.[1194]

A problem common to the major human rights organizations is the inability to implement the reform anticipated by important decisions. In a 2010 study, Baluarte and De Vos report on the dynamics of implementing international human rights cases in the world's four human rights systems: the Inter-American, European, African, and in the several international and regional courts of the United Nations.[1195] The goal of the study was to identify factors that promote implementation of human rights obligations. Using case studies and interviews conducted with court personnel, human rights advocates and academics, they found several points of concern in common among the regions evaluated. Most notably, in many cases, landmark decisions did not yield meaningful reform.[1196]

Baluarte and De Vos also concluded, consistent with what has been common knowledge to many, that with few exceptions, compliance with the European Court's awards of just satisfaction is quite high, but there is much lower compliance in the individual and general measures required.[1197] Among the recommendations of this study is greater cross-system dialogue in areas such implementation and how the member-states of the regional systems respond domestically once a decision is issued.[1198]

Non-compliance with adverse judgments of the European Court can be persistent and recurrent, most notably in the Article 6 violations against Russia for the widespread

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[1194] Baluarte and De Vos (n 1083) 12.

[1195] ibid 9.

[1196] ibid 139-40, 10 (giving as an example from the European Court the continued segregation of Roma children in Czech 'special schools' almost four years after the Grand Chamber judgment in *DH and Others v Czech Republic* (2008) 47 EHRR 3 ordering the Czech government 'to end its discriminatory education practices and provide redress to those affected'.

[1197] ibid 20.

[1198] ibid 139-40, 142-43, 56-61.

non-enforcement of judgments that resulted in the pilot judgment in *Burdov v Russia (No 2)*,[1199] and the length of proceedings cases against Italy.[1200] The Committee has continued to exert pressure on both Italy and Russia, welcoming statements of political will, but noting that expressions of political will have not been matched by 'action on the ground.'[1201] For Lithuania, the persistent and recurring basis for Convention violations has been the length of both criminal and non-criminal proceedings.[1202] In order to design effective methods of correction and supervision, it is essential that the reasons for continued compliance or non-compliance be understood.

Few studies have considered the reasons for domestic cooperation with international obligations at the domestic level and what influences this behaviour.[1203] Two recent comparative studies have explored this topic in the implementation of the decisions of the European Court of Human Rights. Neither study includes Lithuania, but both provide an analytical framework for understanding the intangible elements of knowledge and practice critical to promoting Convention implementation, areas in which Lithuania has demonstrated weakness. It is in these informal mechanisms that Lithuania must improve.

Both of these studies are soundly-based and convincing in their methodology, and offer insight to understanding the practicalities of Lithuania's Convention implementation. Rather than performing exercises in arithmetic, they evaluate national

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[1199] *Burdov v Russia (No 2)* (2009) 49 EHRR 2; White and Ovey (n 236) 60.

[1200] Parliamentary Assembly, Resolution 1787 (2011), 'Implementation of judgments of the European Court of Human Rights' (Res 1787 (2011) Final, 26 January 2011). The problem in Italy has been described as 'so deep-rooted and pernicious that there is a limit to what the Italian Government can do to bring about effective reform'. White and Ovey (n 236) 60.

[1201] White and Ovey (n 236) 60.

[1202] Text to nn 807-11 in ch 4.

[1203] Barria and Roper (n 1182) 1.

responses to selected adverse rulings of the Court, recognising that implementation of adverse judgments in the European Court is only one aspect of domestic implementation of the Convention. They provide insight to how and to what extent national leaders of the Member States of the Council of Europe adjust to the jurisprudence of the European Court and the positive obligations of the Convention, also described as reception of the Convention in the domestic legal order.

First is the study reported by Keller and Stone Sweet in 2008,[1204] a focused comparison in eighteen states of how various actors within national legal systems make decisions that either promote or hinder the status of the Convention. Second is the report by Anagnostou and Mungiu-Pippidi in 2008,[1205] a comparison of selected categories of Convention provisions across nine countries seeking to explain differences in how expeditiously national authorities execute adverse judgments.

In the study edited by Keller and Stone Sweet, three dimensions of Convention reception were assessed in eighteen countries to see whether and how national officials institutionalise specific mechanisms for ongoing coordination of national law with the European Court of Human Rights.[1206] They considered the national legal order as consisting of the legislature, the executive, and the judiciary, evaluating (1) development of preventive procedures for assessing future compliance problems; (2) development of new practices that will further reception, such as to comply with rulings and monitor future compliance, translate and disseminate judgments, implement recommendations of

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[1204] Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

[1205] Anagnostou and Mungiu-Pippidi (n 1167).

[1206] Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in *A Europe of Rights* (n 1204) 3-4. Each of the nine substantive chapters compares two countries' reception of the Convention by considering responses to two similar cases, but does not include Lithuania. ibid 15, 17.

the Council of Europe, and amend laws and practices to include responses by officials to interest of the public, scholars and media; and (3) at a more general level, the effect on legal scholarship and education, media coverage and public awareness, and how police officers, judges, members of parliament, and other officials are trained.[1207]

Conclusions drawn from this study most relevant to Lithuania are found in the informal mechanisms of knowledge and practice. First, the less knowledgeable national officials were of the Convention, the less likely they were to properly perform their duties.[1208] Second, although teaching and scholarly research about the Court and its jurisprudence had steadily increased among the states studied, knowledge of the Court's case law and access to translations of decisions involving other States remains poor, especially among lawyers and lower court judges. This limited knowledge 'weakens the judiciary's overall capacity to guarantee the ECHR's effectiveness'.[1209] Third, the networks of non-governmental organizations, expected to grow in tandem with the importance of the Convention at the domestic level, did not increase. Although some organizations were relevant in some states, in no state did they regularly exercise decisive influence on important outcomes.[1210]

The 2008 report by Anagnoustou and Mungiu-Pippidi[1211] considers conditions and factors that promote state compliance with international human rights law in implementing the adverse judgments of the Court finding violations of several core

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[1207] ibid 17.

[1208] Alec Stone Sweet and Helen Keller, 'Assessing the Impact of the ECHR on National Legal Systems' in *A Europe of Rights* (n 1204) 688.

[1209] ibid 688-89.

[1210] ibid (noting the prominent exception of the Warsaw Helsinki Foundation of Human Rights).

[1211] Anagnostou and Mungiu-Pippidi (n 1167).

human rights in nine member states.[1212] A separate study was conducted for each state, assessing the same elements in each: the existing national litigation system; the national actors and institutions involved in implementation of the Court's judgments; the adverse judgments against the member state; and the process from implementation to legislative and policy change.[1213] It considered the process of implementation of adverse judgments in the most general sense, in the reactions of domestic officials, legislators, administrators and judges.[1214] The related comparative report[1215] identifies the conditions that promote implementation, finding that in countries where the quality of public services is high and independent from political pressures, the likelihood is high that the Court's decisions will be implemented.[1216]

A relationship was also found between rule of law – an indicator developed by

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[1212] ibid 2, 6. The nine countries were Austria, Bulgaria, France, Germany, Greece, Italy, Romania, Turkey, and the United Kingdom. ibid 13. The study did not consider art 6, but instead the substantive rights in arts 8-11 (right to family and private life, religious freedom and conscience, freedom of expression, and freedom of association) in conjunction with art 14 (the non-discrimination provision). ibid 12. Each country report is available at the project portal, 'The Strasbourg Court, Democracy and the Human Rights of Individuals and Communities: Patterns of Litigation, State Implementation and Domestic Reform (JURISTRAS)' <http://www.juristras.eliamep.gr> accessed 30 August 2012.

[1213] Taken from the report on Germany which reflects the topics addressed for each of the nine countries. Christoph Gusy and Sebastian Müller, 'Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: a Case Study of Germany' (JURISTRAS Case Study Report funded by the European Commission Research Directorate, Contract FP6-028398, June 2008) <http://www.juristras.eliamep.gr/?p=181> accessed 30 August 2012 (each country is assessed for (1) how human rights law is mobilised, examining resources offered to those who might wish to pursue a violation in the European Court, description of litigants by nationality and gender, main themes of the cases brought, and any efforts at strategic litigation; (2) implementation and policy impact of rulings from the Court, including the actors and institutions involved; (3) state of execution reflected in the resolutions of the Committee of Ministers and factors considered decisive for implementation; (4) legislative and policy changes in areas relevant to judgments, including evidence for political or social efforts at human rights discourse and overall impact of Strasbourg case law on national policies toward persons in the minority; and (5) conclusions and findings).

[1214] Anagnostou and Mungiu-Pippidi (n 1167) 6.

[1215] ibid.

[1216] ibid 19.

the World Bank and employed in this study – and implementation of judgments.[1217] The concept of the rule of law, referred to frequently early in this paper, reflects the extent to which citizens have confidence in and abide by the rules of society, and the degree to which they have confidence in the legal framework and the independence of the judiciary.[1218] It also refers to enforceability of contracts and property rights, perceptions of the police, the courts and crime. In this regard, solid institutions are consistent with the likelihood of enforcing the Court's decisions,[1219] a finding that has not gone unnoticed by the Council of Europe.[1220]

The authors conclude that parties with strong implementation records are regularly characterised by active involvement of parliamentary actors in the execution process.[1221] In seven of the nine countries, the domestic structures for execution of judgments involved parliamentary actors only minimally, if at all.[1222] In these countries, while parliamentarians may discuss and vote on legislation relating to judgments, they have no active role preparing the legislation, assessing their laws or policies, or in promoting the reform that an adverse decision may require. They found it rare for parliamentary bodies to discuss or debate Strasbourg case law.[1223]

[1217] ibid 18. On the other hand, economic indicators alone, such as the level of gross domestic production, did not inform the study results in a significant way as to a country's capacity to enforce the Court's decisions. ibid 19.

[1218] ibid 18-19; text to nn 2-4, 30, 30-39, 46-47, 69 in ch 1, nn 82, 89, 112, 116-18, 127-30, 140-51, 173-75 in ch 2 (rule of law and early rule of law reform efforts).

[1219] Anagnostou and Mungiu-Pippidi (n 1167) 19.

[1220] CLAHR 2009 Progress Report (n 1148) 7 para 24 (noting this report as finding 'state parties with strong implementation records are regularly characterised by active involvement of parliamentary actors in the execution process').

[1221] Anagnostou and Mungiu-Pippidi (n 1167) 23; Andrew Drzemczewski and James Gaughan, 'Implementing Strasbourg Court Judgments: the Parliamentary Dimension', in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2010* (European Academic Press 2010) 239.

[1222] Anagnostou and Mungiu-Pippidi (n 1167) 22.

[1223] ibid 22-23.

Looking at the variations between the implementation levels in the countries studied, domestic factors such as these tended to have more relevance than those that were case-specific.[1224] In this regard, full domestic implementation of the Convention requires that a state has established 'preventive procedures to review compatibility of draft legislation with the Convention and relevant case law, including case law against third states', as well as concurrent development of related legal scholarship and raising of public awareness.[1225]

B. Indications as to Lithuania's Implementation

If applied to Lithuania, either approach used in the studies by Keller and Stone Sweet[1226] or Anagnostou and Mungiu-Pippidi[1227] would add considerably to understanding Lithuania's reception of the Convention. Given what is known about Lithuania's legal system from this research, it likely that the need for improvements will be indicated.

Consider the quality of Lithuania's public services and level of the rule of law, for example. In the study reported by Anagnostou and Mungiu-Pippidi, domestic governance indicators were found to contribute significantly in predicting the likelihood of swift and effective implementation of judgments in the European Court.[1228] These indicators measure the quality of public services and civil service, the degree of independence from political pressures, quality of policy formulation and implementation, and credibility of the government's commitment to these policies.[1229] In

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[1224] ibid 6.

[1225] ibid; 'The Reception of the ECHR in National Legal Orders' (n 1199) 25.

[1226] Keller and Stone Sweet (n 1204).

[1227] Anagnostou and Mungiu-Pippidi (n 1167).

[1228] ibid 18.

[1229] ibid.

two critical public services meant to safeguard the right to a fair trial addressed in this research, Lithuania's judiciary (other than the Constitutional Court) and prosecution service both exhibit indications that they lack independence and lack of competence in Western human rights standards. The status of the rule of law is clearly frail simply considering the high level of distrust Lithuanians have in their institutions year after year.[1230]

One of the first areas investigated in the nine-country comparative study of implementation of the Convention is the manner in which human rights law is mobilised.[1231] This entails an examination of the resources and legal support offered to individuals who may wish to pursue a violation in the European Court.[1232] As noted earlier, Lithuania is weak in this area for those might qualify for legal aid.[1233] To some extent, this circumstance arises from the disregard for international obligations during the period of Soviet administration of justice:

> Although several 'socialist' countries acceded to international agreements governing, among others, the status of individuals affected by the criminal process, they failed to recognize the competence of international bodies to deal with domestic affairs and due to the national provisions on the relation of international and domestic law, international human rights norms could almost never be invoked before national authorities.[1234]

Also important to understanding implementation of the Convention at the domestic level is knowing the actors and institutions involved in responding to the

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[1230] Text to nn 99-113 in ch 2.

[1231] Description of the topics included in the study in n 1213; as illustrated in Gusy and Müller (n 1213) 6-7.

[1232] Gusy and Müller (n 1213) 6-7.

[1233] Text to nn 629-42 in ch 4.

[1234] Bárd (n 30) 439.

adverse rulings from the European Court.[1235] In Lithuania, the office of the Agent bears the responsibility of coordinating the responses to the judgments,[1236] with no parliamentary body to review violations found or otherwise assess its judicial system against the requirements of the Convention. In this aspect, Lithuania's process for responding to adverse judgments places it among countries least likely to be compliant. As the research illustrates, nations with strong implementation records are regularly characterised by active involvement of parliamentary actors in the execution process.[1237] In Lithuania, when an adverse judgment requires action by the Seimas, it is prepared and presented by the Minister of Justice working with the Agent, but the actions by Seimas in response to the judgments in *Paksas v Lithuania*[1238] and *L v Lithuania*[1239] have not been supportive.[1240]

Even without undertaking a separate study, Lithuania has demonstrated the reluctance to meet its positive obligations under Article 6 even when it is aware of significant deficiencies. Recent examples are documented in *DD v Lithuania*,[1241] the factual circumstances of which were known to Lithuania's authorities for a considerable period of time, both from the work of NGOs[1242] and visits and reporting to the

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[1235] Gusy and Müller (n 1213) 11-19 (from the national government to the domestic court system, attitudes of the actors, knowledge and implementation of the ECHR and the judgments, and the domestic legal culture).

[1236] Baltutytė interview (n 78).

[1237] Anagnostou and Mungiu-Pippidi (n 1167) 23 (strong implementation records characterised by active parliamentary involvement).

[1238] *Paksas v Lithuania* (n 1127).

[1239] *L v Lithuania* (n 292).

[1240] Text to nn 1126-46 (difficulties providing general measures in these cases).

[1241] *DD v Lithuania* (n); text to nn 802-03 (other deficiencies documented by the CPT noted in *DD v Lithuania*).

[1242] Such as the joint report of the Human Rights Monitoring Institute, Global Initiative on Psychiatry, Viltis: Lithuanian Welfare Society for Persons with Mental Disability, and the Vilnius Centre for Psychological and Social Rehabilitation, 'Human Rights Monitoring in Closed Mental Health Care Institutions: Project Report' (Vilnius 2005) <http://www.hrmi.lt/uploaded/PDF%20dokai/mental

Lithuanian Government by the CPT. As reflected in its reports, the CPT has attempted to work with Lithuanian authorities since 2004 on several matters, including recommendations on emergency involuntary civil psychiatric commitments.[1243] Facts gathered by the delegation during its 2008 visit indicated its earlier recommendations had not been implemented.[1244] In many of its responses, Lithuania indicated that various conditions were 'being addressed' or were the subject of ongoing training.[1245] Also raised in the CPT's 2004 visit, and still not clarified in Lithuania's responses, is whether its domestic courts are now seeking the opinion from a psychiatrist not affiliated with the hospital concerned during civil involuntary placement procedures.[1246]

Having reliable information regarding Convention violations and not addressing them suggests a general lack of regard for Convention protections absent an adverse judgment in the European Court. At a minium, it does not require a leap in logic to consider Lithuania's failure to address these known Convention violations and others noted throughout this paper as anything other than a fundamental lack of appreciation of the rights of 'others'.

III. Conclusion

This chapter has considered Lithuania's level of implementation of Article 6 of the Convention in the adverse judgments against it in the European Court and against indicators developed in comparative studies and empirical research. Lithuania has, for the most part, implemented the provisions of the judgments against it, with general

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%20health%20care%20inst.en_1.pdf> accessed 30 August 2012.

[1243] CPT 2009 Report to Lithuania (n 727) para 133.

[1244] ibid para 121.

[1245] Lithuania's Response to the CPT 2009 Report (n 803).

[1246] CPT 2009 Report to Lithuania (n 727) para 122.

measures remaining open in two politically sensitive cases, *L v Lithuania*[1247] and *Paksas v Lithuania*,[1248] with one case recently decided that should provide valuable insight into Lithuania's commitment to human rights and the Convention in the speed and scope of the remedies taken, *DD v Lithuania*.[1249]

Lithuania has not been the subject of scrutiny by the Committee of Ministers for systemic problems that have been evident in the cases before the Court in the past, most notably in cases of excessive delay. That very well may change as the result of a combination of new circumstances: the Committee of Ministers' increased attention on systemic issues; publicly available information about the execution process in individual cases, and the ability of civil society to proffer information as part of the supervision of the execution of judgments. Information from civil society will be critical in the execution process given the insular nature of Lithuania's legal system.

Finally, the indicators developed in comparative studies and empirical research indicate the need for substantial improvement in Lithuania's reception of Article 6 of the Convention into its domestic systems.

[1247] *L v Lithuania* (n 292).

[1248] *Paksas v Lithuania* (n 1127).

[1249] *L v Lithuania* (n 292); *Paksas v Lithuania* (n 1127); *DD v Lithuania* (n 727).

Chapter 6. Implications Going Forward

This research is an assessment of the level to which the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights is available in the Republic of Lithuania. Three aspects of Article 6 protections are considered: judicial independence; the rights of the parties; and implementation of the Convention. Also considered is the impact of the Soviet legal culture of the recent past. Each of the areas considered appears to bear the residual effects of this history to the detriment of the right to a fair trial.

The material relied upon includes academic literature, official documents of the Council of Europe and the Republic of Lithuania, and reports by governmental agencies and non-governmental organizations (NGOs). The written material is augmented with information collected in research interviews of legal professionals and human rights advocates familiar with the functioning of the legal system in Lithuania.

I. Findings

The Western legal concepts that inspired Lithuania during the sudden transition from a Soviet society to a democracy were not widely understood at the time they were adopted. The lack of a more wide-spread education on these new concepts resulted in an incomplete transformation of the legal culture. This, combined with the continuation of a pre-existing lack of public involvement – vital to a democracy – has impaired development of a robust legal culture consistent with a democratic state.

Overall, the ability to have a fair trial appears significantly challenged due to the lack of a tradition of independent judges and lingering attitudes and behaviour that prevailed in the Soviet legal system. The judiciary in Lithuania appears structurally independent, but is not functionally independent. This is due in large part to the same

incomplete transformation of the legal culture, leaving judges vulnerable to inappropriate outside influence. Reasons for this include an incomplete understanding of Western legal concepts; a misapprehension of the role of a judge in relation to that of the police and prosecutor; failure to distinguish between judicial independence and accountability for being independent and impartial; and the general tolerance for the personal failings of judges. In the court room, there are times when judges do not apply the correct law, either failing to understand Western legal concepts or not applying rulings from cases with precedent. In criminal cases, judges are likely to over-rely on the information gathered during poorly conducted pretrial investigations over direct evidence presented at trial and to defer to the prosecution, as was the practice pre-independence. Personal shortcomings of members of the judiciary, such as public drunkenness during working hours and lax discipline tolerating these shortcomings, also leave judges vulnerable to outside pressure.

Without a judiciary that is independent in practice – cognizant of its role as independent of the prosecution, free from outside influence, and willing to avoid conflicts of interest and remain independent – the risk will remain high that trial proceedings will not be fair as understood in the jurisprudence of the European Court of Human Rights and internationally.

For those individuals with actionable claims, or who are parties to litigation, the ability to access an independent and impartial tribunal and receive a fair trial is also problematic. Barriers to accessing the court are created by the length of proceedings, lack of a reliable court record, and lack of procedural protection for the most vulnerable – the physically disabled, the mentally ill, and children. Physical alterations to public buildings required by law have not been completed, continuing the physical barriers to

access court buildings by the disabled. Those persons who are adjudged mentally incapacitated have no standing before any court, can be involuntarily committed to a psychiatric facility without being present in court and without legal representation. There are no protections in place against conflicts of interest for legal guardians, or any periodic review. Child custody determinations are made without legal representation for the children.

In criminal cases, pretrial investigations are often slow and poorly handled. Members of the media and public officials, including investigating authorities, are known to disregard the presumption of innocence by publicly suggesting guilt in criminal matters without effective response by those enforcing legal and ethical standards. The length of the investigations leaves potential witnesses who are victims vulnerable to their perpetrators and individuals vulnerable to repeated arrest and detention for investigative purposes without judicial review.

The legal profession, as with the judiciary, has a cultural history that influences the functioning of its members. Representation by criminal defence attorneys is often formalistic, with little involvement beyond minimum requirements, particularly where the defence is provided by legal aid. Criminal proceedings are dominated by the prosecution. Prosecutors are required to investigate all cases, with little latitude in deciding whether criminal charges are brought. Without a formal recognition of discretionary prosecution, the system is left open to abuse for disingenuous use of discretion. Public complaints that prosecutors do not function independently as they are constitutionally required thus appear supported, as do the other indicators established by social scientists.

Lithuania has complied with the vast majority of the adverse judgments against it

in the European Court of Human Rights except for two highly-public and politically sensitive cases in which general measures remain open: *L v Lithuania*[1250] and *Paksas v Lithuania*.[1251] Open for evaluation in the near future will be Lithuania's response to remedy the Article 6 defects found in relation to involuntary psychiatric commitment in *DD v Lithuania*.[1252]

Reception of Article 6 of the Convention into Lithuania's national order requires substantial improvement. This is evident in the Lithuania-specific areas reviewed in this research, and in the application of factors developed in comparative and quantitative research. The need for improvement is also suggested by an absence of political will to address system problems after they become known. Lithuania has not yet received increased scrutiny by the Committee of Ministers for its systemic problems, but that may change in light of the Committee of Ministers' increased attention on systemic issues in future judgments.

II. Recommendations

There are three basic areas of recommendation proposed by this research to improve the reception of Article 6 of the Convention in Lithuania.

First, increase public education and civic involvement across the full spectrum of society. This should include a multi-tiered program of education – from children to all branches of government – that actively addresses all Convention requirements, including jurisprudence relating to other countries. For Article 6 requirements, this should include meaningful civic participation in the selection of judicial candidates. To ensure that there is a cadre of well-informed civic representatives over a broad range of social

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[1250] *L v Lithuania* (n 292).

[1251] *Paksas v Lithuania* (n 1127).

[1252] *DD v Lithuania* (n 727).

issues, this participation should include knowledgeable members of NGOs and their experts. Meaningful civic involvement will also enhance the public trust that is lacking today.

Second, improve the quality of public services and civil service by addressing the substantive deficits in legal education and training, including professional ethics. For the right to a fair trial, this means improving legal education and training in all legal professions, beginning with the content and ethics in academic studies and continuing into professional life. All legal professionals must be willing and able to hold themselves and each other accountable to ethical standards; members of the judiciary must recognise that they are accountable to the public for their independence or impartiality. Legal professionals require the education and training that will enable them to identify and avoid unethical situations. Adequate procedures should be in place to independently and objectively address unethical conduct, for both professional licensing and redress for any affected parties. There should be no retaliation for raising arguable claims challenging professional conduct.

Implicit in strengthening ethical behaviour and accountability is the potential for reducing opportunities for corrupt behaviour, such as inappropriate pressure, financial gain, or personal favours. A strong system of ethics will strengthen the independence of the judiciary, the prosecution system, and the bar. It may also halt, and perhaps repair, the erosion of public trust in the system.

Enhancing public services includes protection of matters protected as confidential, including the subjects of criminal pretrial investigations and the communications between attorneys and their clients. Members of law enforcement and legal professionals who violate this confidentiality should be professionally accountable

apart from any criminal or civil liability. In this regard, prosecutors should reconsider the practices of publicly announcing the undertaking of a criminal investigation, and openly discussing the findings or identity of the targets of an investigation underway.

Third, adopt an ongoing approach to problem solving that incorporates work already underway in Europe. This should include direct consultations with and supervision by Council of Europe experts. For improvements to the functioning and independence of its courts and prosecution service, Lithuania would benefit from instituting ongoing quality assurance evaluations, such as those developed by the Council of Europe founded in behavioural science methods of total quality management. This approach can suggest ongoing improvements for its systems that will also reduce its insularity and, by relying upon data collection and analysis, focus on areas that need correction rather then assigning fault. These techniques can also apply to improve those systemic conditions negatively affecting fair trial rights when they are identified, whether found domestically in the work of NGOs and others, or identified by representative bodies of the Council of Europe or other international organizations to which Lithuania belongs.

In closing, unless the courts and government in Lithuania work in a transparent way to make improvements in the areas of meaningful civic involvement, professional legal education and ethics, and a new approach to problem solving, it is unlikely that the provisions for Article 6 rights to a fair trial can be improved, and more likely they will decline. This would result in continued jeopardy for all human rights enforcement in the country, do nothing to improve public trust in the courts and the government, and encourage continued high levels of emigration.

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Research Interviews and Correspondence

Anonymity Requested

Correspondence from a former Lithuanian judge to the author (1 September 2009)

Correspondence from a Lithuanian lawyer to the author (8 December 2008)

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