

TOWARD AN INTERPRETIVE MODEL OF JUDICIAL INDEPENDENCE: A CASE STUDY OF EASTERN EUROPE

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1. INTRODUCTION

Following the revolutions of 1989 and the disintegration of the Soviet Union, the newly independent countries set out on a programmatic path of reform and transition to democracy and a market economy. The transitions in Central and Eastern Europe ("CEE"), however, were unique in that they consisted of a "triple transition": the simultaneous marketization, democratization, and state-building of a country.¹ An essential, yet underemphasized element of this cumbersome and complex transition process was judicial reform.² The normative residuum of the communist policy

¹ See generally Nicholas Barr, *From Transition to Accession*, in LABOR MARKETS AND SOCIAL POLICY IN CENTRAL AND EASTERN EUROPE: THE ACCESSION AND BEYOND (Nicholas Barr ed., 2005) (discussing social policy reform during and after European Union ("EU") accession and strategic reform policies directed at accommodating constraints imposed by EU accession); LESZEK BALCEROWICZ, SOCIALISM, CAPITALISM, TRANSFORMATION 146 (1995) (highlighting the emergence of democratization before capitalization and the interplay of market-oriented reforms under a democratic regime as distinguishing factors in the Central and Eastern Europe transformations); Claus Offe, *Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe*, 58 SOC. RES. 865 (1991) (discussing the role of democratization in the transition from socialist to capitalist regimes in Central and Eastern Europe). During communism, the countries in Central and Eastern Europe were politicized by the communist monopoly and were perceived as illegitimate by a significant portion of the population. Thus, a major goal of the transition in Eastern Europe was re-legitimizing or rebuilding the state. See ZYGMUNT BAUMAN, INTIMATIONS OF POSTMODERNITY 156-74 (2001); Ken Jowitt, *The Leninist Legacy*, in EASTERN EUROPE IN REVOLUTION 207 (Ivo Banac ed., 1992); Peter Evans, *The Eclipse of the State? Reflections on Stateness in an Era of Globalization*, 50 WORLD POL. 62 (1997); Anna Gryzmala-Busse & Pauline Jones-Luong, *Reconceptualising the State: Lessons from Post-Communism*, 30 POL. & SOC'Y 529 (2002).

² This is not to say that constitutionalism has not been the focus of a rigorous academic debate. See, e.g., JON ELSTER, CLAUD OFFE & ULRICH K. PREUSS, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 63-108 (1998) (discussing constitution making and the emergence of democratic institutions, capital markets, and social policies in Eastern European countries); László Bruszt & David Stark, *Remaking the Political Field in Hungary: From the Politics of Confrontation to the Politics of Competition*, in EASTERN EUROPE IN REVOLUTION, *supra* note 1, at 13 (outlining the influence of electoral structure and competition on transition periods in Eastern Europe); Kim Lane Scheppele, *A Comparative View of the Chief Justice's Role: Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006) (discussing the role of constitutional courts in former Soviet countries); Shannon Ishiyama Smitley & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUNIST & POST-COMMUNIST STUD. 163 (2000) (detailing the design and role of judicial institutions and constitutional powers in post-communist politics); Gerald M. Easter, *Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS*, 49 WORLD POL. 184 (1997) (discussing the institutional choice and comparative

of marginalizing and politicizing the judiciary and its corresponding institutions was a significant obstacle to the establishment of a legitimate legal system capable of independent judicial review.

Precisely how courts establish judicial independence during the transitions in the CEE countries has remained largely unexplored. The most notable empirical and theoretical studies on judicial transition have focused on the formalistic aspects of legal systems.³ According to these studies, the primary determinative factor leading to an independent, legitimate judiciary in a post-communist country has been the formulation of the legal system at the constitutional level.⁴ The dispositive factor in such studies usually is the presence or absence of a constitutional court, insulated from the other components of the judicial system and vested with the sole authority on questions of constitutional interpretation.⁵

However, several empirical studies refute this position. Several authors have demonstrated a statistical link between the de facto

presidentialism in former Soviet countries); Matthew S. Shugart, *Executive-Legislative Relations in Post-Communist Europe*, TRANSITION, Dec. 13, 1996, at 6; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995) (providing an overview of the mechanics of constitution-making); Juan Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990) (discussing the success of parliamentary democracies over presidential democracies in guaranteeing stability). The focus here, however, is a broader perspective on judicial transition. This includes not only de jure constitutionalism, but also the operation of the judicial system after the legal system had been constituted.

³ See, e.g., HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (providing an overview of the establishment and behavior of constitutional courts in transitional regimes); Herman Schwartz, *Surprising Success: The New Eastern European Constitutional Courts*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 195 (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999) [hereinafter Schwartz, *Surprising Success*] (detailing the success of Eastern European Constitutional Courts in establishing rule of law); Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 J. DEMOCRACY 100 (1998) [hereinafter Schwartz, *Eastern European Courts*] (discussing the remarkable performance and stability of Eastern European Courts); Albert P. Melone, *The Struggle for Judicial Independence and the Transition Toward Democracy in Bulgaria*, 29 COMMUNIST & POST-COMMUNIST STUD. 231 (1996) (arguing that separate budget for the judiciary, tenure for judges, method for judicial selection is necessary for an independent judiciary).

⁴ See, e.g., Schwartz, *Surprising Success*, *supra* note 3; Schwartz, *Eastern European Courts*, *supra* note 3.

⁵ See Schwartz, *Surprising Success*, *supra* note 3, at 210 (discussing the importance of having a constitutional court with the power of judicial review over legislative and executive acts).

effectiveness of legal institutions and economic performance measurements.⁶ When compared to measurements of how the legal system is formally composed (*de jure* constitutionalism), several studies have demonstrated that how well a legal system actually functions has a stronger correlation with economic growth, the enforcement of private property rights, and indicators of the rule of law.⁷

However, a theory of judicial independence which incorporates the modus operandi of the court system over time has yet to be developed; the scholarly literature on the subjects lacks a consensus on how legitimate, independent, judicial review is established and even measured.⁸ Substantial questions remain as

⁶ See Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 *ECON. TRANSITION* 325, 328 (2000); Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 *EUR. J. POL. ECON.* 497, 516 (2003) (assessing how judicial independence affects economic growth). This is not to say that that a correlation between *de jure* constitutionalism has not been statistically linked to economic growth. Several studies have measured the legal origin of various economic factors (e.g., investor protection, the quality of legal enforcement, and the concentration of corporate ownership). Various studies have argued that countries with common law legal origins have the strongest creditor protection, and German and Scandinavian legal models have the strongest law enforcement, whereas the French civil-law model performed the worst in terms of legal enforcement and investor protection. Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113, 1117-34 (1998) [hereinafter La Porta et al., *Law and Finance*]; Rafael La Porta et al., *Legal Determinants of External Finance*, 52 *J. FIN.* 1131, 1137-39 (1997) [hereinafter La Porta et al., *Legal Determinants*]. The implication of these studies is that *de jure* constitutionalism retains some explanatory power regarding its effect on economic performance.

⁷ For example, one study demonstrated the high level of *de jure* legal protection in the Commonwealth of Independent States did not correlate with a similar degree of legal effectiveness; suggesting that the law-on-the-books is not a substitute for a de facto legal effectiveness. Pistor et al., *supra* note 6, at 356.

⁸ See Nancy Maveety & Anke Grosskopf, "Constrained" Constitutional Courts as Conduits for Democratic Consolidation, 38 *L. & SOC'Y REV.* 463, 466-69 (2004) (discussing the role and scope of the judiciary in a consolidating versus established democracy). Studies have taken a multitude of approaches to measuring judicial independence. Several studies have looked to the legal tradition on which the constitution is based. See Feld & Voigt, *supra* note 6, at 515; La Porta et al., *Law and Finance*, *supra* note 6, at 1117-26, 1151-52; La Porta et al., *Legal Determinants*, *supra* note 6, at 1138-39. Other studies have measured legal effectiveness by: (1) a rule of law indicator; (2) effectiveness of bankruptcy law; and (3) survey data on the effectiveness of the protection of property rights. See Pistor et al., *supra* note 6, at 332-41. Paolo Mauro looked to the "efficiency and integrity of the legal environment as it affects business." Paolo Mauro, *Corruption and Growth*, 110 *Q. J. ECON.* 681, 684 (1995). Feld and Voigt looked to informal social sanctions, judges' term lengths and judges' income. Feld & Voigt, *supra* note 6, at 516.

to how court, over time, can create their own legitimacy and independence from political and popular pressure on both normative and practical levels. This Article aims to develop an interpretive theory of judicial independence by examining the role of international law in the jurisprudence of constitutional tribunals with differing systems of judicial review in a comparative context.

This Article takes an interdisciplinary approach to unpacking the development of judicial independence as a component of economic, political, and social transition. Rather than employing a strict jurisprudential study of the mechanisms of judicial transitions, I incorporate studies from the economic and political science disciplines which shed light on the confluence of judicial, economic, and political transitions. These empirical studies also provide statistical evidence in support of some of propositions contained within this Article. Thus, Section 2 of this Article will examine the role of judicial independence in both the economic and political transitions unique to the nations of CEE. Indeed, much of the literature on various elements of the economic transitions of CEE focuses on the necessities of good corporate governance, minimizing corruption, and a sound institutional framework. Paramount to this study is investigating the normative environment which existed under communism, in conjunction with that which existed at the commencement of the CEE transitions. To that end, this Article analyzes the communist social, economic, political and judicial legacies from which I hope to extrapolate those variables most central to establishing judicial independence.

Building on the identification of those variables potentially conducive to creating judicial independence, Section 3 outlines a methodology for analyzing how judicial independence is established in practice. This Section examines the systemic effects on democratization and its consolidation as well as a method of measuring judicial independence in practice. Section 3 looks to instances of counter-majoritarian rulings—instances in which courts of a transition country ruled against popular pressure stemming from either the elected government or popular support—as the starting point of how courts establish judicial independence. Juridical patterns can then be identified and examined in light of systemic indicators of judicial reform, such as formal structure of the judiciary and the nexus between domestic and international law.

Section 4 examines two case studies: the Lithuanian Constitutional Court and the Estonian Supreme Court. Both of these countries have similar normative experiences as constituent components of the Soviet Union, yet adopted dissimilar judicial structures and procedures. As such, a comparative study between these two countries will be helpful in deducing conclusions by looking for patterns and dissimilarities in their courts' reasoning while controlling for systemic variables of their legal systems. Specifically, this Article argues that the development of an independent judiciary in Estonia and Lithuania was done through utilizing, what I have termed, "external source legitimacy." By interpreting domestic constitutional norms in light of nonbinding international law, national courts can largely deflect political and popular pressures while simultaneously asserting their own legitimacy as a dispute arbiter. Some concluding remarks follow.

2. JUDICIAL LEGACIES AND REFORMS

Any analysis of judicial reform must necessarily account for two things: the starting point of the reform and the end result. A discussion of the communist legacy and the challenges which the CEE nations faced at the commencement of their transition programs is useful in ascertaining what variables of reform are appropriate for analysis. As will be evident in this Section, any concept of meaningful judicial independence was lacking under the Soviet system of government. Indeed, the concept of judicial review was foreign to domestic courts. Yet it was vital—both economically and politically—that the reform packages of the CEE nations adopted at the outset of their transitions establish judicial review and judicial independence. Thus, the following Sections examine the Soviet judiciary, its normative underpinnings, and its legacy in light of the greater reform packages implemented by the former Warsaw Pact countries and newly independent states after independence from the Soviet Union.

2.1. *The Communist Judicial Legacy*

The newly independent states of CEE had little experience with judicial independence and review because of the legacy of communism. Although some countries had previously

experimented with judicial review, such as Poland,⁹ most of the countries to gain independence from the Soviet Union were devoid of any normative and institutional foundations of an independent judiciary. The transition to democracy, its consolidation, and the creation of a market-based economy required these institutions to be created, maintained, and adapted over time.

Judicial review can be loosely defined as “any judicial action that involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may invalidate or suspend the inferior norm if necessary or desirable.”¹⁰ It is a beautifully simple concept; the judiciary of a nation adjudges the actions of its executive and legislative branches. Yet this concept has evolved and been explored over many generations and in many different societies.

Judicial review in the Soviet Union and in the Warsaw Pact states was conspicuously absent. The communist system rejected law (at least as originating from a judiciary) as a fundamental component of statehood.¹¹ This is evidenced, *inter alia*, by the Soviet Supreme Court’s proclamation that “Communism means not the victory of socialist law, but the victory of socialism over any law.”¹² Legislative bodies were recognized as the ultimate expression of the will of the people and were accordingly beyond

⁹ See Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT’L L. 13 (1995) (discussing the establishment and evolution of judicial review in Poland). In 1985 Poland created the Constitutional Tribunal (“Trybunał Konstytucyjny”) that was empowered to adjudicate certain claims separate from the legislative function of government. *Id.* at 21–24. Although vested with limited jurisdiction, the Tribunal protected legislative acts from inconsistent regulations issued by administrative agencies and established the normative seeds that would germinate into judicial review in a post-communist Poland. *Id.* at 25–30. See also Mark F. Brzezinski, Note, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 51–86 (1991) (reviewing the Polish constitutional history, illustrating Poland’s long-lasting national attachment to constitutional principles); Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 608 (1991) (examining constitutional questions of the institutional structure of the Polish state).

¹⁰ Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 561 (1993).

¹¹ Yuri Feofanov, *The Establishment of the Constitutional Court in Russia and the Communist Party Case*, 19 REV. CENT. & E. EUR. L. 623, 628 (1993).

¹² HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 26 (Rev. ed. 1963).

the reach of judicial restraint.¹³ The legislature was given responsibility for maintaining constitutionality, resulting in the absence of judicial review of legislative enactments. The court system did not adjudicate claims between individuals and the government; citizens were to take their grievance to the bureau with supervisory authority over the body responsible for the harm.¹⁴

Indeed, the concept of separation of powers was foreign to the classical communist system.¹⁵ The conceptualization of communist "law" was synonymous with legislation and other acts of the legislative body. The judiciary was at best a peripheral body with limited influence within the communist system. Countermajoritarian rulings by a judicial tribunal were absent in the communist system in both practice and at a normative level.

This system was maintained despite Gorbachev's reforms aimed at moving the system towards a "law-based state" ("*pravovoe gosudarstvo*").¹⁶ A Committee for Constitutional Supervision was established and began experimenting with basic judicial review, declaring edicts of the Soviet President unconstitutional. However, the fundamental belief that the legislature was the supreme expression of the will of the people persisted throughout the reform process. Consequentially, the

¹³ JOHN N. HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980'S* 32 (1984). As Stalinist-era jurist criticized judicial review by arguing that:

Every sort of statute [in bourgeois countries] is considered as having force until it occurs to some private person or capitalist enterprise to file a petition in court to have it . . . declared unconstitutional. Naturally this right is broadly used by monopolist cliques of exploiters to obtain a declaration of "unconstitutionality" as to laws running counter to their interests.

ANDREI Y. VYSHINSKY, *THE LAW OF THE SOVIET STATE* 339-40 (1948). See also MARY A. GLENDON, MICHAEL W. GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 726-27 (1985) (discussing the rejection of the doctrine of separation of powers in socialist constitutional theory).

¹⁴ Rhett Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 *INT'L & COMP. L.Q.* 89, 90-91 (1988).

¹⁵ GLENDON, ET AL., *supra* note 13, at 726-27. See also RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 226-27 (3d ed. 1985) (describing how Marxist-Leninist doctrine rejects the doctrine of the separation of powers).

¹⁶ Feofanov, *supra* note 11, at 628. See also Ludwikowski, *supra* note 14, at 89-90 (discussing the Marxist-Leninist jurisprudence's rejection of the doctrine of separation of powers).

Commission lacked jurisdiction to review enactments by the Supreme Soviet or the Congress of People's Deputies.

Judicial independence of course presupposes the presence of judicial review. The independence and objectivity of a judge as an adjudicator of disputes is meaningless if he does not have the power to review such disputes.¹⁷ Measurements of judicial independence will be discussed in greater detail *infra*, but for present purposes it can be broadly defined as "a judge's freedom to apply her interpretation of the law to each case before her."¹⁸ In practice, there was no judicial autonomy from the communist Party apparatus, despite provisions in the 1936 and 1977 Soviet Constitutions that "[j]udges and people's assessors are independent and subject only to the law."¹⁹ To the contrary, "telephone justice," in which the Party apparatus approved judicial opinions prior to their being rendered, was the standard practice.²⁰ Judges were required to strictly adhere to standard interpretations of law and adjudicate cases according to "revolutionary legal consciousness."²¹ International law was rarely referenced in opinions as it was considered a bourgeois interference with the creation and maintenance of the communist system.²²

The primacy of the legislature as the supreme expression of the people's will led to the belief that an attempt by the judiciary to

¹⁷ See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 610 (1996) (discussing the importance of a court's legitimacy in answering legal questions).

¹⁸ Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 6 (1996).

¹⁹ Konstitutsiia SSSR (1977) [Konst. SSSR] [USSR Constitution] art. 155. See also Konstitutsiia SSSR (1936) [Konst. SSSR] [USSR Constitution] art. 112 ("Judges are independent and subject only to the law."). Similar provisions were found in other communist constitutions. For example in Poland, the Constitution of 1952 mandated that "[j]udges shall be independent and subject only to the law." CONST. OF THE PEOPLE'S REP. OF POLAND, art. 178(2).

²⁰ Scott P. Boylan, *The Status of Judicial Reform in Russia*, 13 AM. U. INT'L L. REV. 1327, 1327-28 (1998). See also Schwartz, *Eastern European Courts*, *supra* note 3, at 108.

²¹ Donald D. Barry, *The Quest for Judicial Independence: Soviet Courts in a Pravovoe Gosudarstvo*, in TOWARD THE "RULE OF LAW" IN RUSSIA? 257, 258 (Donald D. Barry ed., 1992). See also OLIMPIAD S. IOFFE & PETER B. MAGGS, THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS 8 (1987) (discussing the strict adherence to the standard interpretation of constitutional principles).

²² See Pranas Kūris, *Implementation of International Human Rights Standards in the Lithuanian Legal System and the Problem of the Law-Based State*, in TOWARDS THE "RULE OF LAW" IN RUSSIA?, *supra* note 21, at 367, 368 (discussing the concept of a law-based state and its relationship to international law and the domestic law).

interfere with legislative proclamations was necessarily subversive. Since the people could not act contrary to their own interests, there was no need for judicial institutions to ensure that they did.²³ That is, the majoritarian nature of the legislature could not be overruled by the judiciary in favor of a policy preference advocated by a minority. This would mean that the judiciary had the same standing as the legislative bodies of government. Since this was doctrinally denied, the judiciary was relegated to a subordinate role within the system. This invariably led to a general suspicion and distrust of the judiciary as a “reactionary bourgeois institution.”²⁴

This general distrust of the judiciary was reflected in its day-to-day operations. The classical communist system subordinated the judiciary to other branches of government. Fixed tenure and compensation of judges are two key factors which help establish and maintain judicial independence.²⁵ However, the Party was responsible for judicial appointments and the ministry of justice administered the court budget.²⁶ Furthermore, judges were looked upon as legal experts with very limited authority, rather than participants in the process of government—a symptom of the overall lack of legitimacy of the judiciary.²⁷ Thus, the legal system as it existed under communism in the USSR lacked the normative and institutional foundations associated with a modern judiciary. The majoritarian nature of the legislature precluded outside review, resulting in no independence of judges to objectively adjudicate disputes or examine the constitutionality of legislative enactments.

²³ Robert F. Utter & David C. Lundsgaard, *Comparative Aspects of Judicial Review: Issues Facing the New European States*, 77 JUDICATURE 240, 242 (1994). See also HAZARD, ET AL., *supra* note 13, at 32 (“In a system where the legislature is conceived to be the supreme expression of the will of all the people . . . how can constitutional principles be enforced against a legislature’s will to change them through ordinary legislation?”); VYSHINSKY, *supra* note 13, at 339–40 (contrasting the Soviet system with that in the United States); GLENDON, GORDON, & OSAKWE, *supra* note 13, at 726–27.

²⁴ Utter & Lundsgaard, *supra* note 23, at 242.

²⁵ Plank, *supra* note 18, at 8–9

²⁶ See Boylan, *supra* note 20, at 1334.

²⁷ See Utter & Lundsgaard, *supra* note 23, at 242 (discussing the reasons for and nature of the lack of legitimacy of the judiciary in communist governments). See also Christopher Osakwe, *The Common Law of Constitutions of Communist Party States*, 3 REV. SOC. L. 155, 156, 163–73 (1977) (discussing features shared by constitutions of the Communist party-states).

2.2. Judicial Reform and Economic Transition

Stalin's 1936 Constitution solidified the legal foundations of the communist economic system. Article 4 of the 1936 USSR Constitution provided for the "liquidation of the capitalist system of economy" and "the abolition of private ownership of the . . . means of production."²⁸ As the various communist parties of Eastern Europe solidified their control over their corresponding governments, they placed the means of production under state administration.²⁹ Authorities completed nationalization processes relatively quickly after the end of World War II.³⁰ Soviet Union Poland, for example, established organizations to administer liberated Polish territories prior to the close of World War II.³¹ Authorities implemented the Nationalization Law by the beginning of 1946 and mandated that all enterprises employing fifty or more workers were to be under state control.³² The process culminated with the state economic planning authorities controlling 90 percent of all enterprises by the end of 1947.³³ Czechoslovakia followed a similar pattern. The Soviets sought to nationalize all enterprises administered by the Nazis and assumed control over economic activity by the end of the 1940s.³⁴

²⁸ Konstitutsiia SSSR (1936) [Konst. SSSR] [USSR Constitution] art. 4.

²⁹ IVAN T. BEREND, *CENTRAL AND EASTERN EUROPE 1944-1993: DETOUR FROM THE PERIPHERY TO THE PERIPHERY* 73 (1996). The vast majority of industries were nationalized by the various Soviet satellites by 1946. For example, the state controlled approximately 89 percent of the Albanian economy by the end of 1946. *Id.* Similarly the Yugoslav government administered approximately 82 percent of the economy during the same period. *Id.* Likewise, 80 percent of the economies of Poland and Czechoslovakia were directed and owned by the state. *Id.*

³⁰ *Id.* at 73. By the end of 1948 the vast majority of Czechoslovak firms employing more than fifty people were owned and administered by the State. *Id.* In Poland, state-owned enterprises accounted for approximately 97 percent of economic output. *Id.* By the end of the decade the overwhelming majority of both the Romanian and Bulgarian economies were administered by the state. *Id.*

³¹ See 2 NORMAN DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND* 413 (1982) (demonstrating how two separate Communist organizations existed; one in occupied Poland and one in the Soviet Union); JAN B. DE WEYDENTHAL, *THE COMMUNISTS OF POLAND: AN HISTORICAL OUTLINE* 44-45 (1978) (explaining the shift to active struggle by the Peasant Movement in the run up to World War II in Poland).

³² DAVIES, *supra* note 31, at 426.

³³ *Id.*

³⁴ See JOSEF KALVODA, *CZECHOSLOVAKIA'S ROLE IN SOVIET STRATEGY* 180 (1978) (explaining that Czechoslovakia's move into the Soviet orbit included the Communist takeover of economic enterprises that had been under German control).

Various bureaus of the Communist Party controlled all the rights associated with private property—alienation, control, and residual income. The right of alienation of property is the ability of an owner to transfer, bequeath, or otherwise transfer property without hindrance. In U.S. common law there has traditionally been a presumption against restraining alienation.³⁵ However in the classical communist legal-economic system, the right of alienation cannot be exercised by anyone, including the state. State-owned firms were not tangible objects in the eyes of the state and could not be bought or sold as such.³⁶ Furthermore, the classical communist system mandated that the residual income from state-owned firms flow back into the coffers of the state budget.³⁷ That is to say there was no notion of profit in the sense used in market economies. Rather, the state bureaucracy determined the contribution of each firm's gross revenue paid to the state as "centralized net income."³⁸ The state bureaucracy also exercised control over the firm and its activities. The financial affairs of the firm were organizationally separate from the matters of bureaucratic control.³⁹ This "ownership" paradigm had the effect of depersonalizing property; there was no individual entity that could be identified as the owner of property as there was a complete separation from notions of control and ownership.⁴⁰

³⁵ The Supreme Court of Washington stated concisely that:

The great weight of authority is that where the fee simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon the grantee or devisee is to be treated as void, and the grantee or devisee takes the property free of the void condition.

Richardson v. Danson, 270 P.2d 802, 807 (Wash. 1954); *see also* R.H. Macy & Co. v. May Dep't Stores Co., 653 A.2d 461 (Md. 1995) (holding a restraint on alienation of a fee simple interest void and unenforceable); Horse Pond Fish & Game Club, Inc. v. Cormier, 581 A.2d 478 (N.H. 1990) (requiring that a direct restraint on alienation be reasonable in light of the parties' interests); N.W. Real Estate Co. v. Serio, 144 A. 245 (Md. 1929) (invalidating a grantor consent clause as an unreasonable restraint on alienation of a fee simple conveyance); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS introductory note at 143 (1983) ("Much of modern property law operates on the assumption that freedom to alienate property interests which one may own is essential to the welfare of society.").

³⁶ JÁNOS KORNAL, THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM 74 (1992).

³⁷ *Id.* at 73.

³⁸ *Id.*

³⁹ *Id.* at 74-75.

⁴⁰ *Id.* at 75.

Of course some nations in Central and Eastern Europe deviated from the classical socialist model of economics and property rights. For instance, beginning in January 1968, Hungary implemented the New Economic Mechanism, a series of economic reforms which incorporated market information into the state planning apparatus.⁴¹ Authorities incorporated “auxiliary enterprises” into the Hungarian economy that functioned independent of direct state control.⁴² They recognized various “intermediate property forms” and created financial intermediaries to provide funding for joint ventures.⁴³

The creation of private property, the owner’s secure right thereof, and the transfer of state-owned assets was a principle component of the economic reform because it serves as the foundation of a functioning market economy. An effective judicial system is essential to the establishment and protection of private property. The inadequate protection of property rights leads to lower investment rates and slower economic growth.⁴⁴ Moreover, firms that operate in a legal environment that is effectively able to guarantee property rights have comparably higher reinvestment

⁴¹ See ANDREW FELKAY, HUNGARY AND THE USSR 1956-1988: KADAR’S POLITICAL LEADERSHIP 183, 189-90 (1989). By 1965 Hungary was trading extensively with non-CMEA members and in 1982 became a member of the International Monetary Fund and World Bank. *Id.* at 254-55.

⁴² *Id.* at 81. Auxiliary enterprises were not governed by the same rules as industries but rather as part as collectives. *Id.* Examples of such enterprises are food processing, furniture making quarries, and lumber. *Id.* “Family work organizations”—family-oriented private enterprises—were also permitted to operate outside of state control. *Id.* at 181-82. In the first year of the reform approximately 11,000 new private companies were formed. The 1980 Party Congress declared that:

During their spare time, a certain percentage of the workers participate in work that is useful to the national economy and to the individual. This is a supplementary source of our development that contributes to satisfying ever-widening and changing demands and at the same time enhances the growth of the nation’s wealth.

Id. at 252.

⁴³ *Id.* at 184.

⁴⁴ Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross Country Tests Using Alternative Institutional Measures*, 7 *ECON. & POL.* 207, 210 (1995); Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, 10 *J. ECON. PERSP.* 87, 102 (1996) (“The absence of well-defined and secure property rights . . . clearly contributes to a slower rate of transition.”).

rates.⁴⁵ Thus, the judicial protection of property rights is necessary for economic growth.

Well-functioning judicial institutions are also necessary for the creation and development of capital markets. Sound and effective investor protection provided by courts raises the willingness of consumers to purchase securities by decreasing the probability that such investment will be expropriated in some way. Effective judicial institutions therefore increase the demand for securities, raise investment, increase the size of capital markets, and further growth.⁴⁶ Thus, judicial reform has significant implications for the economic transition in Eastern Europe.

The creation of sound legal institutions, however, does not occur spontaneously; there is no proverbial magic button that is pushed as a constitution is drafted to guarantee private property and investor protections. Rather, laws are written, often at the commencement of economic and political transition, and implemented over time. Technocrats learn, experiment, and repeat based on experiences at both individual and collective levels.⁴⁷ Moreover, law-based economic protections do not exist in a vacuum—they also exist in a sociopolitical environment. Pressures, both external and internal to government, influence how

⁴⁵ Simon Johnson, John McMillan & Christopher Woodruff, *Property Rights and Finance*, 92 AM. ECON. REV. 1335, 1354 (2002) (finding that the reinvestment rate for private firms operating in an environment with secure property rates is 56 percent compared to 32 percent for firms which operate in an insecure legal environment).

⁴⁶ See Feld & Voigt, *supra* note 6, at 516 (concluding that de facto judicial independence positively influences real GDP growth on a per capita basis); La Porta et al., *Legal Determinants*, *supra* note 6, at 1149 (finding a strong legal environment, through legal rules and their enforcement, has the effect of expanding capital markets); Ross Levine & Sara Zervos, *Stock Markets, Banks, and Economic Growth*, 88 AM. ECON. REV. 537, 537 (1998) (finding stock market liquidity and banking development are positively correlated with economic growth); Raghuram G. Rajan & Luigi Zingales, *Financial Dependence and Growth*, 88 AM. ECON. REV. 559, 559 (1998) (discussing the positive relationship between financial-sector development and economic growth).

⁴⁷ See, e.g., Mark Dodgson, *Organizational Learning: A Review of Some Literatures*, 14 ORG. STUD. 375 (1993) (discussing the value in synthesizing different approaches to create an interdisciplinary perspective to study organizational learning); Daniel H. Kim, *The Link Between Individual and Organizational Learning*, SLOAN MGMT. REV., Fall 1993, at 37 (presenting a framework to explain the process through which individual learning advances institutional learning); C. Mantzavinos, Douglass C. North & Syed Shariq, *Learning, Institutions, and Economic Performance*, 2 PERSP. ON POL. 75 (2004) (exploring the link between individual and collective learning and overall economic performance).

law operates. Any understanding of judicial reform in Eastern Europe must account for law as it evolves, and, more specifically, how a legal tribunal can assert independent authority to adjudicate claims in an environment where such a norm has been absent.

2.3. *Judicial Reform and Democratic Consolidation*

Similar to research on the economic transitions in Eastern Europe, studies of democratization and democratic consolidation have not adequately explored how judicial independence and legitimacy are established over time by the courts. A multitude of studies, however, have included judicial independence in their discussion of general factors that lead to democratization and its consolidation in Eastern Europe.

There is, however, no consensus on precisely what democratic consolidation entails, when it is achieved, or what causes it to occur. At a minimum, political scientists have viewed democratic consolidation as a free democratic process (*i.e.* free elections).⁴⁸ Others have seen it more comprehensively as a system of “inter-related arenas”: the presence of a civil society, political society, economic society, state bureaucracy, and the rule of law.⁴⁹ One author described the essence of democratic consolidation as leaving those political actors not engaged in democratic rulemaking out of “the only game in town.”⁵⁰

To complicate matters, there is significant disagreement as to how this vague concept of democracy takes hold in a country after a democratic transition. Some studies have looked to various

⁴⁸ See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 250 (3rd ed. 1950) (“[T]he democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will.”).

⁴⁹ See JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 7–15 (1996) (identifying the five major arenas of a consolidated democracy as civil society, political society, rule of law, state apparatus, and economic society). Robert Dahl has also viewed democracy and the process of democratization in a broader sociological context. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 233 (1989) (discussing the extent to which governments vary in sustaining the democratic processes and institutions necessary for polyarchy). See also ROBERT A. DAHL, *POLYARCHY* 1–33 (1971) (examining the significance of polyarchy and the conditions that increase the chances of democratization); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 84–87 (1956) (discussing the definitional characteristics, measurement, and preconditions for polyarchy).

⁵⁰ GIUSEPPE DI PALMA, *TO CRAFT DEMOCRACIES* 113 (1990).

preconditions, such as levels of economic development, as important variables in explaining successful transitions to democracy.⁵¹ Others have viewed democratization as something that might be crafted or engineered by political actors. Proponents of this perspective emphasize the role of power balances between the opposition and the *ancien régime*,⁵² or among elites.⁵³

Another body of literature discussing democratization and its consolidation focuses on the role of institutions.⁵⁴ Much of this focus, however, has centered on executive-legislative relationships, the relative strengths and weaknesses of presidential and parliamentary systems, and how these systems have come into being.⁵⁵

There seems to be an emerging consensus that an independent judiciary as a guardian of the rule of law is a vital component of both the transition to and the consolidation of democracy.⁵⁶ Many studies have highlighted the crucial role of an independent

⁵¹ See Seymour Martin Lipset, *The Social Requisites of Democracy Revisited*, 59 AM. SOC. REV. 1 (1994) (noting that economic development can help ensure political stability).

⁵² See Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World*, 54 WORLD POL. 212 (2002) (examining the different causal paths that account for post-communist regime changes).

⁵³ See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 109–64 (1991) (examining democratic transitions during the 1970s and 1980s and discussing the role of political elites in bringing about these transitions); John Higley & Michael G. Burton, *The Elite Variable in Democratic Transitions and Breakdowns*, 54 AM. SOC. REV. 17, 17 (1989) (discussing the link between “consensually unified” elites and stable democratic regimes); Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, 2 COMP. POL. 337 (1970) (arguing that the process of democratization begins through a political struggle started by the emergence of a new elite rousing a leaderless group into action).

⁵⁴ See, e.g., JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS, *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* (1998).

⁵⁵ See, e.g., Gerald M. Easter, *Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS*, 49 WORLD POL. 184 (1997); Donald L. Horowitz, *Presidents vs. Parliaments: Comparing Democratic Systems*, 1 J. OF DEMOCRACY 73 (1990); G. Bingham Powell, Jr., *Contemporary Democracies: Participation, Stability, and Violence*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 223 (Arend Lijphart ed., 1992); Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism*, 46 WORLD POL. 1 (1993).

⁵⁶ LINZ & STEPAN, *supra* note 49, at 248. In the authors’ view of democratic consolidation, the rule of law is part of one of five “interlocking arenas” of which an independent judiciary is a principle component. *Id.*

judiciary capable of reviewing executive and legislative decisions as a prerequisite for the creation of a *Rechtsstaat* or “state of law.”⁵⁷ A *Rechtsstaat* occurs when citizens are able to effectively assert their political and civil rights against encroachments by the state, thereby limiting the state’s executive and legislative discretionary power.

Furthermore, an independent judiciary with the power to review government decisions helps lead to a “constitutional culture” whereby state and non-state actors learn that the legal bounds of the system cannot be transgressed.⁵⁸ This is particularly important in the post-communist countries considering that the judiciary was previously viewed with hostility and systematically subordinated to the prerogatives of the legislative and executive components of government. In short, a judiciary capable of independent objective review is the “institutional mechanism to safeguard the rule of law.”⁵⁹

While much of the scholarly work emphasizes the importance of judicial reform, it does not articulate how to achieve this reform. The question remains whether the key to judicial reform lies in the way judicial institutions are *established* or the way judicial institutions *operate*. Moreover, how does international law affect the way a domestic court can shape the new liberal social dynamics of the state?

3. THEORETICAL FRAMEWORK OF JUDICIAL REFORM

The principle aim of this Article is to examine the role of international law in the judicial transition of CEE countries against the formal structure of the judiciary. In order to successfully do so, the case law of the sample countries must be analyzed against the formal structure of the legal system. Lithuania and Estonia serve

⁵⁷ See Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT’L L. 13, 14 (1995) (discussing Poland’s *Rechtsstaat* clause and the Polish Constitutional Tribunal’s use of it to curb legislative and bureaucratic arbitrariness in the post-Communist era); Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7 J. OF DEMOCRACY 14, 18 (1996) (discussing how modern forms of *Rechtsstaat* are fundamental in making democratization possible).

⁵⁸ See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 606 (1996) (explaining that the institutionalization of the rule of law notifies political actors that the bounds of the legal system cannot be transgressed for partisan political purposes).

⁵⁹ *Id.* at 625.

as ideal case studies for such a comparative study. First, both countries were part of the Soviet Union, and thus shared similar normative experiences under communism before facing similar tasks of judicial reform when transition commenced. Lithuania and Estonia gained independence from the Soviet Union at the same time. Second, both applied for European Union ("EU") and Council of Europe ("CoE") membership around the same time. It is important to note that Lithuania and Estonia are located in similar geopolitical positions in Europe, and thus the difference in pressure from international organizations such as the EU and CoE resulting from different geostrategic positions is likely to be negligible. Third, both countries have a monist approach to incorporating international law into their domestic legal regimes.

In short, the variability between the normative, geographic, and historical factors of Lithuania and Estonia is comparatively minimal. However, Lithuania and Estonia adopted dissimilar systems of judicial review. Lithuania opted for the Austrian "centralized" judicial system, including its corresponding institutions, standing requirements, and model of judicial review. Estonia conversely chose a more "diffuse" model of judicial review grounded in the American tradition of jurisprudence. Thus, these two countries provide for an optimal case comparison as we can control for systemic factors between the two countries and then look to patterns in their judicial reasoning to reach conclusions about how the formal structure of the judiciary affects a court's reasoning.

For reasons previously discussed, judicial independence in a transition country can be observed when a court rules against an issue with popular or governmental support, *i.e.* countermajoritarian issues.⁶⁰ Thus, an analysis of such cases can reveal the actual way in which independence was asserted. When the legal reasoning in opinions from two different legal systems—one in the Austrian model and the other in the American—are compared, the significance of the judicial review system can be ascertained. The case law of Estonia and Lithuania will be examined for patterns of legal reasoning. The following outlines the theoretical foundations of judicial review, as well as the post-independent political context in which they take place.

⁶⁰ See *supra* Section 2.1.

A stark pattern emerges from an analysis of the case law from Estonia and Lithuania. Both countries, notwithstanding the systemic differences in the composition of their respective judiciaries, look to international law as a component of their legal reasoning. Thus, in establishing their independence vis-à-vis political pressures from the other institutions of government and wider populations, the national courts utilized international law as an external source of legitimacy. This “external source legitimacy” permitted the national court system to establish itself as a legitimate institution with respect to the popularly elected institutions of government.

This is paramount as there was no pre-existing normative frame by which judicial institutions were popularly perceived as a naturally legitimate component of government. Indeed, policy outcomes are seen as legitimate “to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.”⁶¹ Therefore, in essence, a legitimacy gap transpired at the outset of transition, which made the CEE judiciaries highly susceptible to political pressure. By relying on external source legitimacy, the post-independence Constitutional and Supreme Courts were able to fill that legitimacy gap and establish themselves as independent legal arbiters.

3.1. *Models of Judicial Review*

Judicial institutions created during the process of constitution drafting could be modeled in the tradition of one of the two alternative legal systems: the American or Austrian models.⁶² None of the CEE countries, except Estonia, opted for the American system of judicial review.⁶³ The American model places the Supreme Court as the highest appellate court. The system is “diffuse” in that lower courts have the jurisdiction to declare acts of government unconstitutional.⁶⁴ Courts can only “concretely”

⁶¹ John S. Dryzek, *Legitimacy and Economy in Deliberative Democracy*, 29 *POL. THEORY* 651, 651 (2001).

⁶² Erhard Blankenburg, *Changes in Political Regimes and Continuity of the Rule of Law in Germany*, in *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 249, 308 (Herbert Jacob et al. eds., 1996).

⁶³ Schwartz, *Eastern European Courts*, *supra* note 3, at 100-101.

⁶⁴ Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 *LAW & SOC'Y REV.* 117, 121 (2001).

review a dispute that contains an actual case or controversy at issue.⁶⁵ Additionally, only ex post review is exercised, meaning that an act must have been passed before a court can consider its constitutionality.⁶⁶ Lastly, parties must comply with the complex set of standing requirements in order to question the constitutionality of an act.⁶⁷

In contrast, the Hans Kelsen-inspired Austrian system of judicial review vests the responsibility of constitutional review of legislative acts and executive decrees in a constitutional court.⁶⁸ The constitutional court is a specialized tribunal, distinct from the rest of the judiciary, and the only judicial body with jurisdiction to assess the constitutionality of government acts.⁶⁹ In this sense, the system is “centralized” because the regular judiciary does not possess the ability to determine the constitutionality of legislative enactments. Usually, a lower court is required to refer a constitutional question to the constitutional court prior to concluding a proceeding.

The Austrian system also vests constitutional courts with the authority to engage in ex ante review, allowing them to examine the constitutionality of a government’s policy prior to its effectuation. Moreover, a constitutional court may usually engage in “abstract” judicial review.⁷⁰ This type of judicial review occurs when certain political actors or citizens have the right to challenge the constitutionality of legislation in the absence of an actual controversy.⁷¹ Thus, the right to examine the constitutionality of legislative enactments exists as a general governing principle.⁷² Finally, standing requirements in the Austrian system are less rigorous and grant a multitude of actors—from politicians to

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Herman Schwartz, *The New Eastern European Constitutional Courts*, 13 MICH. J. INT’L L. 741, 744 (1992) (“As opposed to the American ‘diffuse system,’ Europeans concentrate the power to review the constitutionality of legislation in one special tribunal which is not part of the ordinary judiciary and does not adjudicate conventional litigation . . .”).

⁶⁹ See Torbjörn Vallinder, *When the Courts Go Marching In*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 13 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

⁷⁰ Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. THEORETICAL POL. 299, 301 (1998).

⁷¹ *Id.* at 300.

⁷² Leonas Sabaliūnas, *Comparative Perspectives on Judicial Review in Lithuania*, 48 EUR.-ASIA STUD. 783, 787 (1996).

ordinary citizens⁷³ – the ability to challenge the constitutionality of a law before the tribunal. This is in sharp contrast to the American model of jurisprudence, which does not allow members of Congress to initiate a challenge to the constitutionality of a law. Under the Austrian model, relaxed standing requirements allow, and even encourage, such challenges.

3.2. Systemic Effects on Democratization and Consolidation

Much of the scholarship on the role of the judiciary in democratization centers on the institutional design of the legal system. The vast majority of legal systems in CEE have adopted the Austrian-Kelsen model of judicial review as well as its central

⁷³ Germany, Hungary, and Russia grant private individuals access to their respective constitutional courts. In Germany, for instance, any person may file a constitutional complaint (“*Verfassungsbeschwerde*”) alleging that a violation of a constitutional right occurred. See *Grundgesetz für die Bundesrepublik Deutschland* [GG] [Constitution] art. 93(1) (4a) (F.R.G.) (stating that “[t]he Federal Constitutional Court shall rule . . . on constitutional complaints, which may be filed by any person alleging that one of his basic rights. . . has been infringed by public authority.”); *Gesetz über das Bundesverfassungsgericht* [BVerfGG] [Law on the Federal Constitutional Court], Dec. 12, 1951, BGBl. I at 243, amended by Act of 16 July 1998, BGBl. I at 1823, art. 13(8a) (providing that “The Federal Constitutional Court shall decide in the cases determined by the Basic Law, to wit 8a. on constitutional complaints”). Article 90 of the BVerfGG also provides that:

(1) Any person who claims that one of his basic rights or one of his rights under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

(2) If legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted. However, the Federal Constitutional Court may decide immediately on a constitutional complaint lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.

(3) The right to lodge a constitutional complaint with the constitutional court of the Land in accordance with the provisions of the Land constitution shall remain unaffected.

Id. art 90(1)–(3). See also A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32b (Hung.) (outlining the jurisdiction of the The Parliamentary Ombudsman for Civil Rights and the Parliamentary Ombudsman for the Rights of National and Ethnic Minorities); Konstitutsiia Rossiiskoi Federatsii [KONST. RF.] [Constitution] art. 125(4) (1993) (Russ.) (“The Constitution Court of the Russian Federation, upon complaints about violations of constitutional rights and freedoms of citizens and upon court requests shall check, according to the rules fixed by the federal law, the constitutional of a law applied or subject to be applied in a concrete case.”).

institution: the constitutional court. This can be attributed, in part, to the pervasive suspicion of judges during the communist period.⁷⁴ The awesome power to declare legislative acts invalid was not entrusted to normal judges.⁷⁵ The preponderance of constitutional courts in the countries that emerged from communism was also due to unfamiliarity with American-style jurisprudence. Professor Jon Elster argues that constitutional courts in the Austrian tradition are a vital component of democratization and democratic consolidation, especially in fragmented societies where a neutral arbiter of disputes fosters ideas of constitutional supremacy and judicial depoliticization.⁷⁶ Others have asserted that the importance of constitutional courts in post-communist transition lies in the nature of the political transition.⁷⁷ The principal risk to individual liberties is from administrative agencies and “pliant” legislatures, which can violate rights while maintaining the semblance of democratic legitimacy. It is argued that a constitutional court, as a neutral legal arbiter formally insulated from political pressure, is a better protector of individual liberties and the fairness of the political process than the regular judiciary.

Therefore, the Austrian model was viewed as the best available vehicle for institutionalizing judicial independence. The absence of judicial independence under communist rule required going beyond formal guarantees of autonomy regarding the regular judiciary—recall that Article 112 of the 1936 USSR Constitution mandated judicial independence.⁷⁸ A constitutional tribunal, on the other hand, insulated the court from pressures from other government actors. This view was supported by Helmut Steinberger’s Council of Europe study in which he stated:

⁷⁴ See *supra* notes 21–22 and accompanying text (discussing that communist-era judges were required to adhere to standard legal interpretations and discouraged from citing international law precedent).

⁷⁵ See HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 22 (2000) (explaining that, because of the entrenched distrust of ordinary judges as policy makers, ex-Communist countries only authorized special tribunals to annul legislation).

⁷⁶ ELSTER ET AL., *supra* note 54.

⁷⁷ See generally, Schwartz, *Eastern European Courts*, *supra* note 3, at 110 (providing specific examples of the role of constitutional courts in Eastern Europe in the 1990s).

⁷⁸ See *supra* note 19 and accompanying text (discussing how there was no judicial autonomy in practice despite provisions for judicial independence in the Soviet Constitution).

Especially if a state wishes to introduce constitutional jurisdiction to its legal system, for the first time, possibly in connection with a new constitution, it appears preferable to entrust the decision of constitutional issues to a special institution, raised (to that extent) above the ordinary courts. For in this situation the judges of the ordinary courts may be neither trained nor used to dealing with constitutional matters.⁷⁹

Additionally, some argue that the relaxed standing requirement of the Austrian system encourages multiple actors to file challenges regarding an act's constitutionality, including members of the legislative assemblies.⁸⁰ This, in turn, has an "anticipatory effect" of giving the parliamentary majority the incentive to consider minority interests during the legislative process.⁸¹ Logically, a radical policy would inevitably bring a constitutional challenge from the opposition. The Austrian system thus encourages policy compromise and legislative bargaining, which might otherwise be absent.

Alternatively, some scholars posit that judicial institutions further democratic consolidation by "channeling" legislative programs along paths of internationally defined reforms because the courts can translate international norms into concrete constitutional arguments.⁸² Moreover, the model argues that judicial legitimacy can be created because the courts can effectively link the legitimacy of international law and domestic law through legal reasoning. In other words, judicial independence lies in the de facto operation of the court system rather than its formal structure. Courts can best fulfill this role when three conditions are present: (1) the presence of international constraints, (2)

⁷⁹ HELMUT STEINBERGER, *MODELS OF CONSTITUTIONAL JURISDICTION* 3 (1993).

⁸⁰ See Schwartz, *Eastern European Courts*, *supra* note 3, at 102 (noting that all European constitutions encourage constitutional challenges by legislators).

⁸¹ See Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. THEORETICAL POL. 299, 300 (1998) (observing that a system of abstract review encourages majority groups to weigh opposition interests when drafting legislation).

⁸² See Maveety & Grosskopf, *supra* note 8, at 464 (asserting courts can facilitate democratic consolidation through constitutional adjudication that channels legislative initiatives down particular paths and reconstitutes the context in which democratic decision making takes place).

conflicts between majority and minority interests, (3) and the explicit incorporation of international law into domestic law.⁸³

3.3. *Measuring Judicial Independence*

As discussed, judicial review is necessary for an independent judiciary to exist.⁸⁴ Once the judiciary obtains the jurisdiction to review acts of government, the analysis shifts to measure how such review is exercised. That is, how independent is the judiciary in practice once it has received the power to adjudicate disputes? The literature examining judicial independence, in both economic and political contexts, primarily concentrates on the formal, or *de jure*, requirements of judicial impartiality. It considers factors including fixed tenure and compensation for judges, the presence of minimum qualifications for judicial officials, and the extent of judicial immunity.⁸⁵ Other studies have looked to judicial independence by examining the finality of judicial decisions, the type of judicial review, judges' term lengths, the requirements for removal, and formal court procedures.⁸⁶ There is a similar pattern of such measurements in the economic literature discussed above.⁸⁷

However, certain studies have concluded that "court behavior often responds to factors unrelated to its constitutionally defined authority."⁸⁸ These studies have further found that the formal provisions guaranteeing an independent judiciary were "not related significantly" to the way judicial review was exercised in practice.⁸⁹ Thus, measuring judicial independence by considering only the formal guarantees of judicial autonomy without

⁸³ See *id.* at 467-68 (suggesting three contextual attributes of the democratic consolidation process that allow a court to channel legislative initiatives).

⁸⁴ See *supra* note 17 and accompanying text.

⁸⁵ See generally Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1 (1996) (arguing that these institutional arrangements are necessary for the existence of judicial independence).

⁸⁶ See generally Shannon Ishiyama Smithey & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUNIST & POST-COMMUNIST STUD. 163 (2000) (identifying six components that measure judicial power).

⁸⁷ See *supra* note 6 and accompanying text.

⁸⁸ Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. POL. 422, 435 (2003).

⁸⁹ *Id.* at 432.

considering judicial interpretation is insufficient for a complete analysis.⁹⁰

Communist doctrine placed the legislative bodies at the center of government structure, as the expression of the voice of the proletariat.⁹¹ The majoritarian nature of legislative acts trumped the power of the judiciary, thereby denying judicial review and independence.⁹² Given that the judiciary was formally granted jurisdiction to review decisions in the post-communist era, the logical place to examine the exercise of such jurisdiction is instances in which courts have ruled against governments with widespread popular support. Thus, judicial independence can be effectively examined in the post-communist context in cases where the courts have been expressly countermajoritarian.⁹³

This notion, as reflected by studies on judicial independence, is generally defined as follows:

- (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of judicial role (in their interpretation of the law),
- (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and
- (c) particularly when a decision adverse to the beliefs or desires of those

⁹⁰ See generally Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 2 (1987) (“[F]ormal constitutional guarantees of judicial independence have been largely ineffective in much of Latin America because of certain structural features of Latin American politics and legal institutions.”).

⁹¹ See *supra* notes 11–15 and accompanying text.

⁹² See *supra* notes 16–22 and accompanying text.

⁹³ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (explaining that judicial review is a countermajoritarian force). Other scholars have identified the same notion with different language. Robert Dahl referred to the “majority criterion” as a court’s decision to protect “minorities against tyranny by majorities.” Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 281–82 (1957). See also Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL’Y INT’L BUS. 1201, 1216 (1995) (arguing that European constitutional courts’ “abstract review of parliamentary legislation” is a powerful example of “antimajoritarian objection”).

with political or judicial power may bring some retribution on the judges personally or on the power of the court.⁹⁴

Several studies have generally followed the countermajoritarian approach to measuring judicial independence. Professor Owen Fiss, for instance, looked to the “political insularity” of the judiciary—that is the extent to which the judiciary is independent from the influence of political actors and public opinion.⁹⁵ Other studies have similarly argued that in addition to formal guarantees, measures of judicial independence should also include the extent to which the judiciary is perceived as legitimate, and its functional operation.⁹⁶ Indeed, several studies that analyze how constitutional courts foster the protection of individual liberties assume that the judiciary is insulated from the other branches of government.⁹⁷ This implies that a court is independent to the extent that it rules against other branches of government—in other words, countermajoritarian decisions.

3.4. *International and European Law*

3.4.1. *The Relationship between International and Domestic Law*

Marxist ideology viewed international law as bourgeois and accordingly restricted its influence in domestic jurisprudence.⁹⁸

⁹⁴ THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* 144 (1970).

⁹⁵ Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 59–60 (1993). Epstein et al., examines judicial independence as a function of the “tolerance interval[]” of other branches of government to the policy and political ramifications of judicial decisions. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 131 (2001).

⁹⁶ See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 610 (1996) (arguing that “the extent to which [courts] are collectively seen as a legitimate body for the determination of right, wrong, legal, and illegal” should be incorporated in the definition of judicial independence) (emphasis omitted); Sheive, *supra* note 93, at 1225 (arguing that democracy may be diminished in the public’s mind when constitutional courts have broad power to review parliamentary legislation).

⁹⁷ See Schwartz, *Eastern European Courts*, *supra* note 3, at 111 (“Without an institution free from the timidity and stifling judicial deference to legislative supremacy that are still common among the general run of the judiciary in most East European countries, too many dubious laws and official actions would remain unchallenged.”).

⁹⁸ Kúris, *supra* note 22, at 368.

Moreover, none of the Warsaw Pact members regulated the relationship between international law and domestic law through constitutional provisions, leading to variant constructions of the force of international law among the communist countries.⁹⁹ Independence and the framing of new constitutional orders provided the opportunity for the countries under the former sphere of Soviet influence to re-evaluate and clarify the relationship between domestic and international law.

There are two general approaches of transposing international law into domestic jurisprudence. Under a “dualist” approach, international treaties are considered by courts as distinct from domestic law, typically requiring an act of transformation by parliament to render such agreements enforceable in the domestic courts.¹⁰⁰ Alternatively, states can opt for a “monist” system whereby international treaties are automatically considered part of domestic law.¹⁰¹ This allows domestic courts to apply the principles and norms of international law without an additional act from the government.¹⁰²

Some commentators have posited that, jurisprudentially, the independence of a state, in and of itself, subjects that state to the bounds of international law.¹⁰³ Indeed, this “independent nation thesis” even found support in early U.S. Supreme Court opinions and writings supporting the ratification of the United States Constitution. An early American case regarding the repayment of

⁹⁹ See Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427, 432 (1994) (noting the dearth of constitutional provisions or legislation to regulate the effect of international law).

¹⁰⁰ John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314-15 (1992).

¹⁰¹ Konstantin Korkelia, *New Trends Regarding the Relationship Between International and National Law (With a Special View Towards the States of Eastern Europe)*, 23 REV. CENT. & E. EUR. L. 227, 228 (1997).

¹⁰² *Id.*

¹⁰³ See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556 (1984) (“An entity that becomes a State in the international system is *ipso facto* subject to international law.”). See also Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM J. INT'L L. 740, 743 (1939) (stating that the duty to apply international law in federal courts is one imposed upon “the United States as an international person”); Lord Blackstone also alluded to the status of customary international law as enforceable in domestic courts. International law was viewed as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world. . . .” 2 WILLIAM BLACKSTONE, COMMENTARIES *66.

pre-Revolutionary War debts owed to British subjects led the Supreme Court to proclaim that “[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable”¹⁰⁴

The new constitutions of CEE countries demonstrate a “clear tendency towards ‘*de jure* recognition’ of the primacy of international law”¹⁰⁵ There are important implications of this trend for democratization and democratic consolidation. First, the monist approach of incorporating international treaties into domestic law places primacy on international human rights norms. Judicial protection of individual liberties grounded in international law is more resolute when such international treaties are deemed to take precedence over domestic legislation. Second, a monist system gives courts the authority to reference international principles and norms, and allows courts to link their own legitimacy with that of the international treaty.¹⁰⁶ As such, the method of incorporating international treaties into domestic laws is paramount. Generally, the constitutions of Central and Eastern Europe explicitly provide that international law is directly applicable by domestic courts, thereby allowing courts to serve as conduits of democratic consolidation.

3.4.2. *The European Union and Council of Europe*

The collapse of the USSR, the emergence of a unipolar world order, and the presence of the European Union all distinguish the Central and Eastern European economic and political transitions. A principle objective of the post-communist states was a successful accession to the European Union. A successful application for membership required meeting the *Copenhagen Criteria*, part of

¹⁰⁴ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., writing *seriatim*) (emphasis omitted). See also James T. Gathii, *The American Origins of Liberal and Illiberal Regimes of International Economic Governance in the Marshall Court*, 54 BUFF. L. REV. 765, 776–79 (2006) (discussing the background of *Ware v. Hylton*). For a learned commentary on the examination by American courts of international legal sources see David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

¹⁰⁵ Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT’L L. 29, 29 (1996).

¹⁰⁶ Maveety & Grosskopf, *supra* note 8, at 467.

which provides that membership is contingent upon the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”¹⁰⁷ Furthermore, successful accession depends upon a candidate country adopting the *Acquis Communautaire* of the European Union—the entire 80,000 pages of statutes, regulations, and opinions promulgated by the EU.¹⁰⁸ The progress of candidate countries was (and is) monitored by the EU, which delivered yearly regular reports regarding various aspects of the transition.

Indeed, the conditionality of EU membership creates its own dynamics both internal and external to the state. Such conditionality works through a commitment-device mechanism arising out of the power asymmetry between the EU and candidate countries.¹⁰⁹ The governments of candidate countries are less likely to postpone difficult compliance policies for short-term political gains.¹¹⁰ EU conditionality enables national politicians to resist pressure from domestic interest groups as well as gain interim credibility benefits such as lower investment risk premiums and higher foreign investment rates.¹¹¹

¹⁰⁷ Presidency Conclusions, European Council, 13 (June 22, 1993), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/PressData/en/ec/72921.pdf.

¹⁰⁸ Heather Grabbe, *European Union Conditionality and the Acquis Communautaire*, 23 INT’L POL. SCI. REV. 249, 256 (2002) (outlining the process of accession for candidate countries).

¹⁰⁹ See James Hughes, Gwendolyn Sasse & Claire Gordon, *Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government*, 42 J. COMMON MKT. STUD. 523, 523 (2004) (identifying the premise that EU conditionality exists because of power asymmetry). Indeed, the dynamics of conditionality are outside the reach of this Article. However, it suffices to say that candidate countries have tremendous financial power with transition assistance and potential access for post-accession structural funds. See Council Regulation 622/98, art. 4, 1998 O.J. (L 85) 1, 2 (EC) (“[W]hen the commitments contained in the European Agreements are not respected and/or progress towards fulfilment [sic] of the Copenhagen criteria is insufficient, the Council . . . may take appropriate steps with regard to any pre-accession assistance granted to an applicant State.”). See also Alain Guggenbühl & Margareta Theelen, *The Financial Assistance of the European Union to Its Eastern and Southern Neighbours: A Comparative Analysis*, in THE EU’S ENLARGEMENT AND MEDITERRANEAN STRATEGIES: A COMPARATIVE ANALYSIS 217 (Marc Maresceau & Erwan Lannon eds., 2001) (analyzing the EU’s financial transfers).

¹¹⁰ Richard Bronk, *Commitment and Credibility: EU Conditionality and Interim Gains* (European Institute, London School of Economics and Political Science, Working Paper No. 2002-02, 2002), available at <http://eprints.lse.ac.uk/3863>.

¹¹¹ See Richard E. Baldwin, Joseph F. Francois & Richard Portes, *The Costs and Benefits of Eastern Enlargement: The Impact on the EU and Central Europe*, 12 ECON.

The EU's regular reports assess a candidate country's progress toward meeting all of the requirements for membership.¹¹² Specifically, the regular reports and opinions serve a "gatekeeping" function because they are used to determine when further negotiations can commence, and thus provide a constraint on domestic policy.¹¹³ This is especially the case since democracy was linked with access to further membership negotiations at the Helsinki European Council in 1999.¹¹⁴ Notably, the EU was not the only institution to have influence over transition policies in CEE. Membership in the CoE requires ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention of Human Rights and Fundamental Freedoms ("ECHR"). The European Court of Justice often relies on ECHR jurisprudence in making the Council of Europe "a *de facto* condition" for a successful accession.¹¹⁵

POL'Y 127, 139-42 (1997) (examining the effect of EU membership on decreasing investment risk in Central and Eastern European countries).

¹¹² Grabbe, *supra* note 108, at 262.

¹¹³ See Gwendolyn Sasse, *The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours*, 60 EUR.-ASIA STUD. 295, 295 (2008) (likening the EU's regular reports to the ENP Progress Reports because, just as regular reports monitor candidate countries' progress in order to assess whether a candidate country can move further in the process of gaining membership to the EU, ENP Progress Reports help to determine whether the EU can create a stronger, or more intimate, relationship with a particular country); James Hughes & Gwendolyn Sasse, *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*, 1 J. ETHNOPOL. & MINORITY ISSUES IN EUR. 1, 2 (2003) (analyzing the structure and content of the regular reports on candidate countries to determine whether there is a positive correlation between the reports and policy-making in the field of minority rights in these countries).

¹¹⁴ See Grabbe, *supra* note 108, at 256. ("The Helsinki European Council . . . made an explicit linkage between access to negotiations and the democracy condition for the first time . . .").

¹¹⁵ See generally Gwendolyn Sasse, *EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy* (European University Institute, Working Paper No. 16, 2005). Indeed the accession criteria of the EU and CoE are similar in many respects. See EUR. PARL. ASS., *Resolution 1115 on Setting Up of An Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe*, 1997 Sess., DOC. 7722 (1997); EUR. PARL. ASS., *Order 485 on the General Policy of the Council of Europe*, 44th sess., Doc. 7277 (1993); EUR. PARL. ASS., *Order 488 on the Honouring of Commitments Entered Into by New Member States*, 39th Sess., Doc. No. 6682 (1993); EUR. PARL. ASS., *Resolution 917 on a Special Guest Status with the Parliamentary Assembly*, 39th Sess., Doc. 6036 (1989); EUR. PARL. ASS., *Resolution 7037 on the Honouring of Commitments Entered Into by Member States When Joining the Council of Europe*, 45th Sess., Doc. 7037(1994).

4. CASE STUDIES

Lithuania and Estonia offer a unique opportunity for a comparative case study because both countries had the same experiences with the communist judicial system for the same period of time.¹¹⁶ The Baltic countries generally adopted liberal post-WWI constitutional frameworks committed to the democratic ideals that inspired the creation of the League of Nations. The Soviet Union “liberated” Estonia and Lithuania from German occupation in 1944 and 1945, respectively. After Lithuania and Estonia became Soviet republics, Moscow required that the codes and laws of the Russian Soviet Federated Socialist Republic (“RSFSR”) be applied, and subsequently replace all national laws.¹¹⁷ Judicial harmonization between the Estonian and Lithuanian republics and the USSR was complete by the early 1950s and they remained synchronized until independence.¹¹⁸ *Zhdanovschina* – the Soviet policy of asserting complete control through terror – was implemented throughout the Baltic States.¹¹⁹

The constitutional arrangements of both countries were determined by their respective constitutions as well as the constitution of the USSR. Thus Lithuania and Estonia have the same normative legacies as the USSR. Moreover, both countries had similar pre-Soviet experiences with independence. An independent Lithuania adopted a purposefully democratic constitution in the interwar years, which generally guaranteed individual rights and provided for the protection of minorities.¹²⁰

¹¹⁶ See *supra* Section 3.

¹¹⁷ See Deitrich A. Loeber, *Regional and National Variations: The Baltic Factor, in TOWARD THE “RULE OF LAW” IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* 77, 79 (Donald D. Barry ed., 1992) (noting that when Estonia and Lithuania were occupied by the USSR, RSFSR law resumed effect in the nations).

¹¹⁸ See MARKKU SUKSI, *ON THE CONSTITUTIONAL FEATURES OF ESTONIA* 16-17 (1999) (discussing effect of Soviet occupation on Estonia’s legislative and judicial branches); V. STANLEY VARDYS & JUDITH B. SEDAITIS, *LITHUANIA: THE REBEL NATION* 60 (1997) (asserting that politically, Lithuania was “forcibly socialized into Soviet norms and behaviour” and that culturally, Lithuania had to accept Russian personnel as well as the use of the Russian language in the country).

¹¹⁹ See ANATOL LIEVEN, *THE BALTIC REVOLUTION: ESTONIA, LATVIA, LITHUANIA AND THE PATH TO INDEPENDENCE* 92 (1993) (discussing *Zhdanovschina* in the Baltic states).

¹²⁰ See SUKSI, *supra* note 118, at 9-10. All three Baltic States developed liberal constitutional frameworks in the interwar period. Lithuania adopted a “highly democratic” constitution which generally guaranteed individual rights and provided for the protection of minorities. LIEVEN, *supra* note 119, at 64; THOMAS

In the interwar years Estonia became a member of the League of Nations, and, like Lithuania, provided for minority protections, separation of powers, and elaborate guarantees of civil liberties in its 1920 Constitution. The Estonian Constitution was considered advanced among the contemporary constitutions of that era.¹²¹

4.1. Lithuania

4.1.1. Institutional and Contextual Factors

Independence brought the annulment of the Lithuanian SSR and Soviet Constitutions and a reorientation towards a law-governed Lithuania.¹²² Consequentially, motivated by a desire to break away from Lithuania's communist past and the lingering distrust of the judiciary's ability to overrule the legislature, the framers of the new Lithuanian Constitution aimed to establish judicial review in accordance with the classic Austrian system of justice.¹²³ Article 102 of the Lithuanian Constitution establishes the jurisdiction of the Lithuanian Constitutional Court ("*Konstitucinis Teismas*") by providing that the "The Constitutional Court shall decide whether the laws and other legal acts adopted by the Lithuanian Parliament ("*Seimas*") are in conformity with the Constitution and legal acts adopted by the President and the Government, do not violate the Constitution or laws."¹²⁴ Furthermore, Article 104 of the Constitution mandates that the Lithuanian Constitutional Court operate separately from all other State institutions.¹²⁵

Moreover, Article 110 of the Lithuanian Constitution creates a "centralized" model of judicial review by denying trial and regional courts the authority to review the constitutionality of legislative and executive enactments.¹²⁶ In contrast to the

LANE, LITHUANIA: STEPPING WESTWARD 19 (2001). An independent Estonia can be traced to the Nystad Treaty of 1721. Loeber, *supra* note 117, at 78.

¹²¹ SUKSI, *supra* note 118, at 9-10.

¹²² LANE, *supra* note 120, at 132.

¹²³ Sabaliūnas, *supra* note 72, at 786.

¹²⁴ LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 102 (1992) (Lith.) (emphasis added).

¹²⁵ *Id.* art. 104.

¹²⁶ Sabaliūnas, *supra* note 72, at 785 ("Apparently, distrust of the courts associated with the communist past, doubts about the concentration of judicial powers, a belief in the effectiveness of special-purpose tribunals, and favourable

American model, lower courts are required to suspend the proceeding and refer constitutional questions to the Constitutional Court for review. After the Constitutional Court determines the constitutionality of the law in question, the case is then able to proceed in the lower court.

Authority to petition the Lithuanian Constitutional Court regarding the constitutionality of an act of government resides in a number of actors. First, one-fifth of the *Seimas* members or a reference from a lower court may challenge an act of the government or the President.¹²⁷ Furthermore, the President, the government, the courts, as well as the one-fifth of the *Seimas* may also challenge the constitutionality of an act passed by the *Seimas*. In the period from 1993 to 2009, the overwhelming majority of the 432 constitutional challenges were brought by the one-fifth of the *Seimas* and by the courts.¹²⁸ There is also a formal requirement that the reasons a case should be heard by the Constitutional Court be stated in the arguments; in practice, however, it has proven sufficient to merely assert that a given act is unconstitutional.¹²⁹

The framers of the Lithuanian Constitution believed that international law should apply in domestic courts so that domestic law would be harmonious with international norms, especially in the area of human rights.¹³⁰ However, the Lithuanian Constitution makes provisions for the incorporation of international treaties into domestic law, but without specifying supremacy or precedence of such international treaties.¹³¹ Article 138 states that ratified international treaties “shall be of the constituent part of the legal system of the Republic of Lithuania.”¹³² The Constitutional Court has also affirmed this “monist” approach to the incorporation of

impressions of the constitutional courts in Western Europe have combined to predispose the framers to this particular institution.”).

¹²⁷ LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 106 (1992) (Lith.).

¹²⁸ Constitutional Court of the Republic of Lithuania, Statistics on Petitions and Inquiries Received at the Constitutional Court, http://www.lrkt.lt/Statistics1_e_s.html (last visited Oct. 24, 2009).

¹²⁹ Sabaliūnas, *supra* note 72, at 788.

¹³⁰ Kūris, *supra* note 22, at 370.

¹³¹ Vereshchetin, *supra* note 105, at 35.

¹³² LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 138 (1992) (Lith.).

international law into Lithuanian domestic legal framework without any enabling requirements.¹³³

4.1.2. *Case Law*

4.1.2.1. *The Death Penalty*

The death penalty has a long history in Lithuania; the first legal provisions regulating its application go back to the sixteenth century. Although the practice was abolished briefly by the 1920 Constitution, the Soviets re-imposed it for a multitude of crimes deemed to be counter-revolutionary.¹³⁴ Although the Soviet and Lithuanian SSR Constitutions were annulled at independence, the *Seimas* adopted the Soviet Criminal Code which included the death penalty.¹³⁵ A series of amendments were adopted, yet the death penalty was preserved because a large proportion of the public opinion (between 70 and 80 percent) favored the practice.¹³⁶ This led to the *Seimas'* failure to ratify Protocol 6 of the ECHR requiring the abolition of the death penalty.

As permitted by the Constitution, a minority of members of the *Seimas* brought a challenge in the Constitutional Court that the death penalty was incompatible with the Lithuanian Constitution. Specifically, the challenges were based on Articles 18, 19, and 21(3), guaranteeing the natural rights of individuals, granting citizens the right to life, and prohibiting torture or treatment that degrades human dignity, respectively.¹³⁷ The Constitutional Court considered the challenge to the death penalty in the case of December 9, 1998.

The Court's reasoning was grounded in international human rights norms: it utilized a significant amount of international law, not only in direct application, but also in its non-binding dicta and

¹³³ The monist approach to the interaction between international and domestic law was confirmed by the Constitutional Court. On International Treaties of the Republic of Lithuania, Advisory Op., Const. Ct. Lith., Oct. 7, 1995.

¹³⁴ Vaidotas Vaicaitis, Note, *The Constitutional Court of the Republic of Lithuania and the Death Penalty: A Note on the Judgment of 9 December 1988* [sic], 26 REV. CENT. & E. EUR. L. 85, 96-97 (2000).

¹³⁵ *Id.* at 86-87.

¹³⁶ On the Death Penalty Provided for by the Sanction of Article 105 of the Criminal Code (Death Penalty Case), Const. Ct. Lith., Dec. 9, 1998, translated at <http://www.lrkt.lt/dokumentai/1998/n8a1209a.htm>.

¹³⁷ *Id.* § I, paras. 1-5.

legal reasoning. Many of the experts' opinions were grounded in the recognition that most European states and governmental organization favor abolishing the death penalty. The Court acknowledged CoE Recommendation 1246 stating that the "death penalty has no legitimate place in the penal systems."¹³⁸ The Court noted the CoE's Resolution 1044 declaration that ratification of Protocol 6 of the ECHR should be a prerequisite to EU membership.¹³⁹ The decision further acknowledged that the abolition of the death penalty was a de facto requirement for EU membership, and that the general trend in Europe was the abolition of the death penalty (which essentially all European countries had done).

The essence of the concrete legal reasoning beyond that of the non-binding dicta was rooted in a dual reading of Articles 135 and 138 of the Lithuanian Constitution. Article 135 states that the "principles and norms of international law" are to be pursued by Lithuania.¹⁴⁰ Article 138 states that international agreements are automatically incorporated by the Lithuanian legal system.¹⁴¹ These two provisions read together, according to the Court, required it be noted that:

[T]he State of Lithuania, recognising the principles and norms of international norms, may not apply virtually different standards to the people of this country. Holding that it is a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international

¹³⁸ EUR. PARL. ASS., *Recommendation 1246 on the Abolition of Capital Punishment*, Res. No. 1246 (1994). See also EUR. PARL. ASS., *Report 7154 on the Abolition of Capital Punishment*, Rep. No. 7154 (1994); *Death Penalty Case*, § III, para. 10-12 (opining that the death penalty is rarely necessary and society can be protected in other ways).

¹³⁹ *Death Penalty Case*, § III, para. 12. See also EUR. PARL. ASS., *Resolution 1044 on the Abolition of Capital Punishment*, Res. No. 1044 (1994) ("The adequate implementation of the additional protocol to the European Convention on Human Rights should be a matter of continuous concern to the Assembly and the willingness to ratify the protocol be made a prerequisite for membership of the Council of Europe.").

¹⁴⁰ LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 135 (1992) (Lith.).

¹⁴¹ *Id.* art. 138.

community, and naturally integrates itself into the world culture and becomes its natural part.¹⁴²

Yet there was no international law to which Lithuania was a party that mandated the abolition of the death penalty. The 1966 Covenant on Civil and Political Rights sanctions the application of the death penalty for the most egregious crimes.¹⁴³ The 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms also allows the death penalty to be applied for crimes mandated by law.¹⁴⁴ What is interesting about the Court's opinion is that it considers the abolition of the death penalty as part of a process rather than something which has been established.¹⁴⁵

Lastly, the decision cited European Court of Human Rights ("ECtHR") jurisprudence for guidance on the administration of the death penalty.¹⁴⁶ Specifically, the decision noted the definition of punishment in *Ireland v. United Kingdom*,¹⁴⁷ which concerned police abuse and torture of suspects relating to the conflict in Northern Ireland. The Constitutional Court defined what types of treatment and punishment are prohibited.¹⁴⁸

¹⁴² *Death Penalty Case*, § VI, para. 20.

¹⁴³ See International Covenant on Civil and Political Rights, art. 6(2), Dec. 19, 1966, 999 U.N.T.S. 171 ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.").

¹⁴⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 222 ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.").

¹⁴⁵ Vaicaitis, *supra* note 134, at 87-89.

¹⁴⁶ *Death Penalty Case*, § VI, para. 74.

¹⁴⁷ *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. 41 (ser. A) (1978).

¹⁴⁸ *Death Penalty Case*, § VI, para. 74. The Constitutional Court noted that the European Court of Human Rights prohibited:

torture-deliberate inhuman treatment causing very serious and cruel suffering; inhuman treatment or punishment-infliction of severe mental or physical suffering; degrading treatment or punishment-treatment such as to arouse in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.

The ECtHR decision did not consider retributive justice including the death penalty. *Ireland v. United Kingdom* involved only the treatment of pre-trial detainees. Yet the Court was able to link human degradation as a result of torture to the death penalty. The Constitutional Court observed that the Lithuanian Constitution “links the prohibition to torture, injure, degrade, maltreat a person, as well as that to establish such punishments, with the activities of the state and its respective institutions.”¹⁴⁹ The Court then proceeded to hold that:

Assessing the death penalty through the prism of the treatment which is prohibited by the Constitution, its specific aspect is revealed. Degradation of the dignity of the convict derives essentially from the cruelty of the death penalty itself. The cruelty manifests itself by the fact that after the death sentence has been carried out, the human essence of the criminal is negated as well, he is deprived of any human dignity, as the state in that case treats the person as a mere object to be eliminated from the human community.¹⁵⁰

The Court ruled that the death penalty was incompatible with the Lithuanian constitution and, thus, was annulled.¹⁵¹

The main arguments of the Court in striking down the death penalty were rooted in “external validity.”¹⁵² The Court looked to international law in its reasoning but did so in a way that went beyond the Constitution’s “monist” provision of directly applying international law in domestic courts.¹⁵³ The Constitutional Court was under no direct obligation to strike down the death penalty

Id. The Constitutional Court read the European Court of Human Rights’ holding with Article 21 of the Lithuanian Constitution which provides in part that: “The dignity of the human being shall be protected by law. It shall be prohibited to torture, injure a human being, degrade his dignity, subject him to cruel treatment as well as establish such punishments.” LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 21(2)–(3) (1992) (Lith.).

¹⁴⁹ Death Penalty Case, § VI, para. 75.

¹⁵⁰ *Id.* § VI, para. 78.

¹⁵¹ *Id.* § VI, para. 83.

¹⁵² Vaicaitis, *supra* note 134, at 104.

¹⁵³ See LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 138 (1992) (Lith.) (providing in part that “International agreements which are ratified by the *Seimas* of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.”).

because of the inapplicability of Protocol 6 of the ECHR. Rather, the Court looked to CoE and EU non-binding resolutions and the practice of other European nations as external source legitimacy. The Court also framed the opinion in the context of being part of a greater European community in which the death penalty was *becoming* passé. The Court highlighted the 1998 EU Regular Report's identification of the death penalty as an unresolved problem regarding accession.¹⁵⁴ Thus, the Court established its independence and legitimacy by way of international political constraints through the formal and informal utilization of international law.

4.1.2.2. *Criminal Procedure*

The pervasive suspicion regarding laws and judges in the former Soviet Union extended to legal practitioners as well. Defense attorneys ("*advokat*") had to negotiate a precarious position as agents of the state and agents against the state. The legal status of attorneys was formalized and regulated in the early Stalinist years when 8,000 advocates were authorized to serve a population of 191 million.¹⁵⁵ All attorneys were subservient to the Communist Party and required to disseminate propaganda through public lectures, and approximately 60 percent of attorneys were members of the Communist Party.¹⁵⁶ However, the role of defense attorneys was also by its nature anti-State: the defense of clients accused of committing an offence against the state could be seen as an affront to the state itself.

Soviet criminal procedure was an Orwellian amalgamation of an inquisitorial approach and authoritarianism. The desire for high conviction rates led to high discretion regarding what evidence was admitted into the trial and whom to charge with a crime. Much of the pre-trial procedure involved the investigation by an agent of the Office of the Procurator-General, usually a KGB member.¹⁵⁷ A subject of much debate in the former Soviet Union

¹⁵⁴ See European Commission, *Regular Report from the Commission on Lithuania's Progress towards Accession*, at 9, COM(1998) 706 final (noting Lithuania's failure to abolish the death penalty).

¹⁵⁵ Pamela Jordan, *The Russian Advokatura (Bar) and the State in the 1990s*, 50 EUR.-ASIA STUD. 765, 766 (1998) (citing *Polozhenie ob Advokature SSSR* [VVS RSFSR] [Decree on the Bar of the USSR] 1939, 49, item 394).

¹⁵⁶ *Id.* at 766-767.

¹⁵⁷ See Donald D. Barry & Harold J. Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1, 28 (1968) (noting that the procuracy, the civilian police and the

was the role of a defense attorney in the pre-trial process. Because of the quest for high conviction rates (incidentally around 99 percent), and the nature of the inquisitorial system, counsel was denied during criminal investigations and interrogations.¹⁵⁸ Although formal guarantees of attorney-client privilege existed, only around 35 percent of attorneys were present during preliminary investigations.¹⁵⁹

The backlash to authoritarian rule was the widespread desire to state power. One of these expressions was the popular acceptance of the constitutional guarantee that all persons suspected or accused of a crime have a right to legal counsel.¹⁶⁰ Yet in 1994 the police refused to grant two defendants access to council during their preliminary interrogations based on an exception contained within the Code of Criminal Procedure.¹⁶¹ Article 58(3)(2) of the Code stipulated that where the access to counsel jeopardizes an impartial investigation, the investigator can observe correspondence between the accused and their attorney for fifteen days.¹⁶² The Vilnius Second District Court halted its proceedings,

KGB each had investigators who were responsible for objectively considering the evidence against an accused and deciding whether to indict).

¹⁵⁸ See Eugene Huskey, *The Politics of the Soviet Criminal Process: Expanding the Right to Counsel in Pre-Trial Proceedings*, 34 AM. J. COMP. L. 93, 95-102 (1986) (describing the struggle between conservatives and reformists who campaigned for counsel to be involved in pre-trial processes).

¹⁵⁹ *Id.* at 105.

¹⁶⁰ See LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 31 (1992) (Lith.) ("From the moment of arrest or first interrogation, persons suspected or accused of a crime shall be guaranteed the right to defence [sic] and legal counsel.")

¹⁶¹ On the confidentiality of legal counsel (Criminal Procedure Case), Const. Ct. Lith, Nov. 18, 1994, available at <http://lrkt.lt/dokumentai/1994/n4a1118a.htm>. Both defendants were charged with extortion of public property. *Id.*

¹⁶² *Id.* § III, para.7.

The legislator, conforming to the necessity of the control of evidence material, in item 3, part 2, Article 58 of the Code of Criminal Procedure established such a rule by the Law of 10 December 1991: 'In cases when there are grounds for maintaining that such meetings will have negative influence on a thorough and impartial investigation of the circumstances of the case, an interrogator or investigator shall be allowed to participate in the conversations between a counsel and a defendant and control the correspondence with a person suspected or accused of a crime within the first 15 days of detention or arrest; further participation in the conversations of a counsel and a defendant and control of correspondence shall be possible only on the consent of a procurator or a judge.'

Id. (quoting LITH. CRIM. CODE. art. 58(3)(2) (1991)).

and petitioned the Constitutional Court to ascertain the constitutionality of Article 58.¹⁶³ Thus, in the Criminal Procedure Case, the Constitutional Court was confronted with the tricky task of balancing public pressure against government action.

As was the case with the death penalty, the Constitutional Court in this case, in balancing the rights of the defendant against the power of the state, looked to international law for guidance when it was not under an obligation to do so. The opinion first compared the norms of the Code of Criminal Procedure to relevant provisions of international law. The Constitutional Court took note of a United Nations General Assembly resolution declaring that all detained individuals be provided access to legal counsel immediately upon arrest.¹⁶⁴ Specifically, the Court took note of the principles which establish exceptions for exceptional circumstances relating to investigations.¹⁶⁵ Pursuant to the General Assembly's resolution, a detained person's access to counsel may be lawfully delayed "when it is considered indispensable by a judicial or other authority in order to maintain security and good order."¹⁶⁶

The Constitutional Court, moreover, looked to the ECHR provisions dealing with the right to legal counsel.¹⁶⁷ Specifically,

¹⁶³ *Id.* § I, para. 3.

¹⁶⁴ *Id.* § III, para. 11. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 173, at 297 U.N. GAOR, 43rd Sess., Supp No. 49, U.N. Doc. A/RES/43/173 (1988) [hereinafter Body of Principles].

¹⁶⁵ *Criminal Procedure Case*, § III, para. 24.

¹⁶⁶ Body of Principles, *supra* note 164, at 299. Specifically the Constitutional Court took notice of Principles 15, 16 and 18. Principle 15 provides in full that "Notwithstanding the exceptions . . . communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days." *Id.* (internal citations omitted). The two exceptions to providing accused individuals with immediate access to legal counsel are outlined in Principles 16 and 18. Principle 16(4) states that: "Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require." *Id.* Principle 18(3) similarly provides:

The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

Id. See also *Criminal Procedure Case*, § III, para.24 (discussing G.A. Res. 43/173).

¹⁶⁷ *Criminal Procedure Case*, § III, para.12.

the Court looked to Article 6(3) of the ECHR which outlines the right of the accused to obtain access to counsel, to prepare a defense, and to promptly be informed of the “nature and cause of the accusation against him.”¹⁶⁸ However, Article 6 of the ECHR does not contain a special circumstances exception for access to counsel. Interestingly, in order to avoid a conflict between the Criminal Code and the ECHR, the Constitutional Court analogized Article 6 of the ECHR to Articles 17 and 52 of the Lithuanian Criminal Code.¹⁶⁹ Indeed, the Lithuanian Criminal Code does mandate that defendants have access to counsel, are entitled to prepare a defense and have other rights similar to those contained in Article 6 of the ECHR.¹⁷⁰ In so doing, the Court concluded that “[t]he norms of the Code of Criminal Procedure are actually in conformity according to their contents with the international instruments regulating the right to defence.”¹⁷¹

To bolster this conclusion—that the ECHR is in conformity with the Lithuanian Criminal Code—the Court took note of the case of *Campbell v. United Kingdom*.¹⁷² The Constitutional Court noted that the ECtHR stated that the guarantee of access to legal counsel may be given “wider interpretation” in light of the ECHR.¹⁷³ As such, a state may legitimately restrict access to counsel when there is a risk that the defense may abuse its status, thereby hindering the proceedings.

Lastly, the Constitutional Court looked to the laws in other European jurisdictions. The Court observed that Swedish law prescribes that “confidential meetings are possible only on the permission of an investigator, procurator or judge.”¹⁷⁴ The Court also noted an exception to attorney-client confidentiality found in Article 45 of the Austrian Code of Criminal Procedure. Explaining the provision, the Court wrote, “when there are circumstances due to which the conversation between a lawyer and a defendant may

¹⁶⁸ European Convention on Human Rights and Fundamental Freedoms art. 6(3)(a), Nov. 4, 1950, 213 U.N.T.S. 222.

¹⁶⁹ *Criminal Procedure Case*, § III, para. 13.

¹⁷⁰ *Id.* (citing LITH. CRIM. CODE. arts. 17 & 52 (1991)).

¹⁷¹ *Id.*

¹⁷² *Campbell v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1992) (finding the screening of correspondence between Campbell and his attorney by U.K. prison officials to be a violation of Article 8 of the European Convention on Human Rights.)

¹⁷³ *Criminal Procedure Case*, § III, para. 25.

¹⁷⁴ *Id.* § III, para. 23.

have negative influence on the collection of evidence, the order may be given to observe the meetings of a lawyer with his defendant within the first 14 days of arrest."¹⁷⁵ Similar exceptions to attorney-client confidentiality and access were found in the criminal laws of Italy, Germany, Sweden, Belgium, were cited by the Constitutional Court in dicta.¹⁷⁶

All of the foregoing precedent allowed the Constitutional Court to conclude that the "norm of the Code of Criminal Procedure [restricting the right to legal counsel] not only is in conformity with the Constitution but also is in accord with the underlying provisions of the Law on Criminal Procedure and is based on legal practice of foreign states and the logic of the reality [sic] our country's judicial life."¹⁷⁷ However, at the time the opinion was handed down in 1994, Lithuania was not a party to the ECHR. Accordingly, Article 138 of the Lithuanian Constitution mandating that international law be directly incorporated into domestic law did not apply and was not invoked by the Constitutional Court.¹⁷⁸ Indeed, at the time did the EU did not issue regular reports which included the protection of individual rights in the criminal justice system, nor had the EU "pre-accession strategy" been launched at the 1994 Essen European Council.¹⁷⁹

The international political pressure present in the death penalty case was thus absent in this instance. Moreover, the means of obtaining constitutional review differed; the appeal was from a lower court, not members of the Seimas. Still, the Constitutional Court used non-binding international law as external legitimacy in upholding the exception to the attorney-client relationship. The international political context and means of review are insufficient as explanations for the Court's jurisprudence. These 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.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § III, para. 2.

¹⁷⁸ See *supra* note 132 and accompanying text.

¹⁷⁹ See generally Marc Maresceau, Pre-Accession, in *THE ENLARGEMENT OF THE EUROPEAN UNION 9* (Marise Cremona, ed. 2003) (discussing EU enlargement and pre-accession strategies including EU initiatives to align member countries politically, economically, and legally in an effort to promote new-member assimilation to the EU).

4.2. Estonia

4.2.1. Institutional and Contextual Factors

Like their Lithuanian counterparts, the creation of a law-based state was atop the reform priorities of the Estonian Popular Front, which included that goal in their 1988 charter.¹⁸⁰ Yet the desire to create a *Rechtsstaat* did not manifest into the creation of a special Constitutional Court, as it did in Lithuania. All Central and Eastern European countries to emerge from communism adopted a legal system in the Austrian tradition with a constitutional court, with one notable exception: Estonia.¹⁸¹

The Estonian legal system does not, however, operate exclusively in the American tradition. The Estonian National Court (*Riigikohus*) was successful in obtaining constitutional review jurisdiction in a similar vein to the American model of jurisprudence. The amount of constitutional disputes was seen, at the time, as insufficient to require a special tribunal to adjudicate them.¹⁸² This is stipulated in Article 149 of the Estonian Constitution which states: “The Supreme Court is the highest court in the state and shall review court judgments.”¹⁸³ Article 149 of the Estonian Constitution further grants the Supreme Court constitutional review authority.¹⁸⁴ A special tribunal—the Constitutional Review Chamber (“CRC”)—was established within the National Court to be responsible for adjudicating constitutional disputes.¹⁸⁵ Notwithstanding a specialized body within the National Court dedicated to hearing constitutional issues, the nature of the Estonian court system can best be characterized as “diffuse;” in contrast to the “centralized” model adopted by Lithuania in the Austrian-Kelsen tradition.

Article 149 of the Constitution provides that cases are to proceed by “cassation proceedings,” meaning an intermediate

¹⁸⁰ Loeber, *supra* note 117, at 80.

¹⁸¹ Schwartz, *Eastern European Courts*, *supra* note 3, at 198 (stating that Estonia was the only of the emerging Central and Eastern European countries where the new power of constitutional judicial review was successful).

¹⁸² SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE, *supra* note 3, at 253 note 7.

¹⁸³ EESTI VABARIIGI PÕHISEADUS [Constitution] art. 149 (1992) (Est.).

¹⁸⁴ *Id.* art. 149.

¹⁸⁵ *Id.*

court has the right to review the decision of lower courts.¹⁸⁶ The Estonian Constitution further prohibits lower courts from applying acts which contradict the Constitution. Article 152 provides: "In a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution. The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution."¹⁸⁷ Furthermore, the selection of judges for the CRC does not differ in the selection of judges from the National Court.¹⁸⁸ This, according to the CoE, may lead to increased influence of other bodies of government on the CRC, because it is not isolated, as would be the case with a Kelsen-style Constitutional Court.¹⁸⁹ No further provisions are enumerated specifying that lower courts are required, as a matter of procedure, to refer constitutional issues to the CRC, as are enumerated in the Lithuanian Constitution.¹⁹⁰ If the Estonian Constitution contained such a requirement, the legal system could be considered to operate analogously to the diffuse Austrian/Kelsen model. However, Article 149, read in conjunction with Article 152, gives lower courts authority to review constitutional matters, just like lower courts in the American system. For example, in 2005 the Tallinn Circuit Court—an appellate court—reversed a lower court judgment on the grounds that two provisions of the law in question were unconstitutional.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* art. 152.

¹⁸⁸ Sergio Bartole, *European Commission for Democracy through Law, The Reform of Constitutional Justice in Estonia*, (EC) No. CDL (97)053 (1997).

¹⁸⁹ *Id.* at 7 (stating that the establishment of a constitutional court in Estonia is necessary for protecting liberties); Sergio Bartole & Helmut Steinberger, *European Commission for Democracy through Law, Opinion on the Reform of Constitutional Justice in Estonia* (EC) No. CDL (98)059 (1998).

¹⁹⁰ The appellate procedure was confirmed by the CRC in Review of the Petition of the Valga County Court (Valga City Rules), (Valga County Ct. June 9, 1997, No. 3-4-1-3-97, available at <http://www.nc.ee/?id=465&print=1>. In *Valga City Rules*, the Valga administrative judge refused to apply a section of the city rules requiring minors under 16 to be accompanied by an adult between 11:00pm and 6:00am. *Id.* pmb., paras. 1-2. The CRC noted that the "Valga administrative judge . . . did not apply clause 3.19 of Part I of the Valga City Rules . . . to the extent that it prescribed for a restriction of the freedom of movement of persons under 16 years of age . . ." *Id.* pmb., para. 1. The court did this on its own, without referring this constitutional matter to another court.

¹⁹¹ See Petition of Tallinn Circuit Court to Declare Sentences 3 and 5 of § 131(2) of Law of Property Act Implementation Act Invalid (Property Implementation Act II), No. 3-4-1-16-05, § 1, para. 5 (Riigikohus [Supreme Court] Dec. 15, 2005) (invalidating the judgment of the County Court, declining to apply

Additionally the Tallinn Administrative Court—a court of first instance—rendered Section 25(3) of the Property Law Enforcement Act unconstitutional in a case in 1994.¹⁹²

Indeed, the Estonian court system has been criticized for its lack of a Constitutional Court. The CoE has championed the role of the Austrian system of judicial review in Europe.¹⁹³ Others have recommended that Estonia reconfigure its judicial institutions and procedures to incorporate a Constitutional Court.¹⁹⁴ This is because a Constitutional Court, with its special status and increased insularity, is perceived as a better guarantor of individual liberties and observer of government power.

Like the American court system, the Estonian Constitution provides that constitutional review can be done *ex post* through the regular procedure of appealing a lower court decision upwards to the National Court.¹⁹⁵ That is, any party whose case is in either a court of first instance or in an appellate proceeding can challenge the constitutionality of any Act. The lower courts are also given the authority to rule on the constitutionality of any Act *during* the

and declaring unconstitutional the third and fifth sentences of § 131(2) of LPAIA, giving a co-owner of property a right of pre-emption).

¹⁹² Review of the constitutionality of § 25(3) of the Law of Property Act Implementation Act to the extent that it repeals of § 30(2) of the Farm Act of the Estonian SSR (Property Implementation Act I), No. III-4/A-5/94 (Riigikohus [Supreme Court] Sept. 30, 1994). The CRC noted that:

On 27 May 1994 the Tallinn Administrative Court decided to satisfy the request of Elmar Rikmann and not to apply § 25(3) of the Law of Property Act Implementation Act to the extent that it repealed § 30(2) of the Farm Act, as the provision was in conflict with § 10 of the Constitution. The Tallinn Administrative Court held that § 10 of the Constitution establishes the principles of a state based on democracy, social justice and the rule of law as a basis for the legal system of Estonia. Observance of the principles of the rule of law requires the guaranteeing and safeguarding of the people's confidence in the law and in the lawfulness of state authorities.

Id. para. 3. In this case, a statute stated that farms set up on the basis of that statute would be exempt from taxes for five years. A later statute then imposed taxes on those farms within the five years. The Court ruled that the latter statute was unconstitutional.

¹⁹³ See Bartole, *supra* note 188 (stating a preference for the Austrian System of judicial review).

¹⁹⁴ *Id.* at 6.

¹⁹⁵ EESTI VABARIIGI PÕHISEADUS [Constitution] art. 24 (1992) (Est.).

proceeding.¹⁹⁶ As such, the Estonian legal system is characteristic of a diffuse system of judicial review.¹⁹⁷

However, Estonia does provide for abstract review in two particular circumstances, thus distinguishing it from the American system. The National Court may review the constitutionality of a proposed law *ex ante* on request of the President where he or she has used a veto and the Riigikogu had subsequently passed the law without amendment.¹⁹⁸ The National Court can also abstractly review a law *ex post* under authority granted by Articles 142 and 152 of the Constitution.¹⁹⁹ Under those circumstances, the Legal Chancellor has authority to challenge the constitutionality of a law promulgated by a state government or executive authority in the National Court.²⁰⁰ It is to be noted, however, that within a few years of independence, the lower courts have been more assertive in exercising their authority to declare acts unconstitutional. Appeals from lower courts have outnumbered the references from the Legal Chancellor and President since 1997.²⁰¹

Like the Lithuanian Constitution, the Estonian Constitution adopted a monist approach to applying international law in domestic courts. However, Estonia recognizes the supremacy of international law over domestic laws.²⁰² The Estonian Constitution expressly provides that “[i]f laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.”²⁰³ This was expressly recognized by the Constitutional Review Chamber which ruled that domestic laws which conflict with the obligations of international treaties are to be set aside by the courts.²⁰⁴ This is, of course, part of the diffuse nature of the Estonian legal system in

¹⁹⁶ *Id.* art. 152. See also *Valga City Rules*, pmb., paras. 1-2; *Property Implementation Act II*, § 1, para. 5; *Property Implementation Act*, para. 3 (finding an act to be unconstitutional in all of these cases).

¹⁹⁷ SUKSI, *supra* note 118, at 29.

¹⁹⁸ EESTI VABARIIGI PÕHISEADUS [Constitution] art. 107 (1992) (Est.).

¹⁹⁹ *Id.* arts. 142, 152.

²⁰⁰ *Id.* arts. 142, 152.

²⁰¹ Maveety & Grosskopf, *supra* note 8, at 472 n. 9.

²⁰² Vereshchetin, *supra* note 104, at 34.

²⁰³ EESTI VABARIIGI PÕHISEADUS [Constitution] art. 123 (1992) (Est.).

²⁰⁴ Review of the petition of the Tallinn Administrative Court of 12 May 1997 to declare invalid § 41 of the Police Service Regulations (Police Service Regulations), No. 3-4-1-1-97, § II para. 3 (Riigikohus [Supreme Court] June 11, 1997).

that lower courts are given authority to declare domestic legislation unconstitutional. This provision, like that of Lithuania, is also conducive of the courts being able to assert legitimacy and independence.

4.2.2. *Case Law*

4.2.2.1. *The Police Act Case*

Under communism, the police functioned as a militia whose mission it was to protect the existing communist regime with little regard for the rule of law. Under the direction of the Ministry of Internal Affairs, the police compiled secret files and conducted interrogations on the mere suspicion that an individual was engaging in subversive activities, or simply for blatant harassment.²⁰⁵ This normative experience under communism was difficult to reform in light of the clandestine, communist mindset that police duties were extraordinary and that public accountability would only reduce effectiveness.²⁰⁶

Police reform began in Estonia with the Police Act of 1990,²⁰⁷ which was subsequently revised by the Riigikogu in April 1993.²⁰⁸ Contained in its provisions is the authorization of the police to “implement special surveillance measures in performance of their duties, only upon written consent of a National Court justice.”²⁰⁹ The Legal Chancellor appealed to the Riigikogu to revoke the provision of special surveillance, which the Riigikogu refused to do. The Legal Chancellor then petitioned the CRC to invalidate the

²⁰⁵ Sanja Kutnjak Ivković & Maria R. Haberfeld, *Transformation from Militia to Police in Croatia and Poland: A Comparative Perspective*, 23 POLICING: INT’L J. OF POLICE STRATEGIES & MGMT. 194, 195-96 (2000).

²⁰⁶ Bill Heberton & Jon Spencer, *Assessing International Assistance in Law Enforcement: Themes, Findings and Recommendations from a Case-Study of the Republic of Estonia*, EUR. INST. CRIME PREVENTION & CONTROL, Pub. Series No. 37, at 7 (2001).

²⁰⁷ Police Act, 10 Riigi Teataja [State Gazette] 113 (1990) (outlining the role, function, and duties of the police force, with specific details regarding acceptable police behavior).

²⁰⁸ Police of the Republic of Estonia Amendment Act, 20 Riigi Teataja [State Gazette] 355 (1993).

²⁰⁹ Review of the Petition of the Chancellor of Justice, submitted under § 142(2) of the Constitution, for the declaration of invalidity of subindent 4 of Part II of the Republic of Estonia Police Act Amendment Act under § Article 152(2) of the Constitution (Police Act Case), No. III-4/A-1/94, § 1, para. 1. (Riigikohus [Supreme Court] Dec. 15, 2005).

provision on the grounds that it was unconstitutional.²¹⁰ As previously discussed, judicial independence is viewed in light of its insularity from influence and pressure from other branches of government regarding a particular policy consequence. In light of the communist police legacy and parliament members' support of special surveillance provisions, the judicial curtailment of police powers is a policy area which can demonstrate how judicial independence can be established.

The Legal Chancellor asserted that the term "special operative surveillance measures" was undefined²¹¹ in violation of Section 11 of the Constitution.²¹² Specifically, it was argued that the Act "leaves it up to discretion of the security police officers and a justice of the Supreme Court to decide: (1) what is to be deemed a special operative surveillance measure; (2) what are the cases and procedure for application of those special measures which have not been regulated by the law."²¹³ The CRC began its analysis by analogizing "recognized principles" of international law to Section 3 of the Estonian Constitution, which establishes that individual rights and liberties can only be restricted in accordance with the law.²¹⁴ The CRC also took notice of Article 8 of the ECHR regarding privacy in the home, family, and communications.²¹⁵ Accordingly, the CRC held that Part II(4) of the Police Act was incompatible with the Constitution because the scope of police

²¹⁰ *Id.* § 1, para 5.

²¹¹ *Id.* § 1, paras. 2-4.

²¹² EESTI VABARIIGI PÕHISEADUS[CONSTITUTION] art. 11 (1992) (Est.) ("Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.").

²¹³ *Police Act Case*, § 1 at para. 3.

²¹⁴ *Id.* § 4, para. 4.

²¹⁵ *Id.* § 4, para. 6. *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222. Article 8 provides in full:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

discretion to institute special surveillance measures was wider than the Constitution permitted.²¹⁶

As was the case with its Lithuanian counterpart, the Estonian Supreme Court interpreted Estonian Constitutional provisions in light of international law when it was not under an obligation to do so. Estonia became a signatory of the ECHR in 1996.²¹⁷ Just as the Lithuanian Constitutional Court, Estonia became a signatory while its courts were asserting legitimacy and independence against the power of the executive and legislative branches of government.²¹⁸ Thus, the method of incorporation of international treaties into domestic law was inapplicable in this instance for lack of a ratified treaty. Moreover, international political influence had not developed to a significant point by the time the decision was rendered in 1994. Yet the Court looked to international law as an external source of legitimacy in an almost identical way to that which the Lithuanian Constitutional Court did in 1994 and 1998, notwithstanding the systemic differences among their judiciaries.

4.2.2.2. *The Language Act*

Perhaps in no other context is a counter-majoritarian issue more clear than with the contentious minority issues in Estonia. After World War II, the Soviets began a policy of forced Russification within the Baltic countries to counteract the massive population losses of the war.

Soviet policy encouraged the relocation of Russians to the Soviet republics. These migrants brought with them both their language and culture.²¹⁹ Demobilized Russian soldiers were provided with employment throughout the Baltics.²²⁰ *Zhdanovschina*—the Soviet policy of asserting strict cultural control through terror—was implemented throughout the Baltic States.²²¹

²¹⁶ *Police Act Case*, para. 31.

²¹⁷ See EUR. PARL. ASS., *Honouring of Obligations and Commitments by Estonia* 4th Sess., Doc. No. 7715 (1996) (discussing Estonia's ratification of international human rights conventions and membership in the Council of Europe).

²¹⁸ See *supra* Sections 4.1.2.1., 4.1.2.2.

²¹⁹ See generally Claire Messina, *From Migrants to Refugees: Russian, Soviet and Post-Soviet Migration*, 6 INT'L J. REFUGEE L. 620, 622–24 (1994) (discussing Soviet policies designed to encourage Russian migration to the Republics, and how this migration drastically changed the ethnic composition of the Soviet republics).

²²⁰ LIEVEN, *supra* note 119, at 183.

²²¹ *Id.* at 92.

As a result of these factors, the large Russophone minority in Estonia became associated with the communist occupation. Estonia's desire to be "reborn" as a nation-state manifested itself in the resurrection of pre-communist culture and language and a rejection of associations with the communist era.²²² Constitutional issues relating to language or cultural requirements are thus a quintessential countermajoritarian policy response to the strong preferences of politicians and the population at large to reassert an Estonian identity in society after a long period in which it was artificially subdued.

The Estonianization policy institutionalized language as a component of citizenship. Russian and Estonian come from the Slavic and Finno-Ugric linguistic families, respectively. The Estonian Constitution provides formal guarantees of minority rights but has generally been narrowly interpreted due to public opinion and the nationalist Pro-Patria Party's presence in various coalition governments.²²³ The Language Act and the Local Elections Act were policy consequences of this ethno-linguistic dynamic. Section 3(3) of the Local Elections Act mandated that those seeking to hold public office demonstrate an unspecified level of proficiency in the Estonian language.

In 1997, the National Electoral Committee of Estonia refused to officially register Russophone politician Juri Šutenko, thereby preventing him from assuming his seat on the Maardu City Council, on the grounds that he was not proficient in Estonian.²²⁴

²²² See Maveety & Grosskopf, *supra* note 8, at 470 (describing the effort within Estonia in the wake of its independence to re-establish its political elite, language, and culture).

²²³ See, e.g., EESTI VABARIIGI PÕHISEADUS [Constitution] art. 1 (1992) (Est.) ("Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds."); *Id.* art. 50 ("[N]ational minorities have the right, in the interests of national culture, to establish self-governing agencies under conditions and pursuant to procedure provided by the National Minorities Cultural Autonomy Act."); *Id.* art. 51 ("Everyone has the right to address state agencies, local governments, and their officials in Estonian and to receive responses in Estonian. In localities where at least one-half of the permanent residents belong to a national minority, everyone has the right to also receive responses from state agencies, local governments, and their officials in the language of the national minority.").

²²⁴ Review of the petition of the Harju County Court to declare § 3(3) and § 26(7)1) of the Local Government Council Election Act, § 5(1) of the Language Act, and the Government of the Republic Regulation no. 188 entitled "Enactment of the description of the level of proficiency in Estonian necessary to work in the

The petition of the National Electoral Committee was initially dismissed by the Harju County Court on the grounds that the provisions of the Language Act and Local Government Council Election Act requiring Estonian language proficiency were incompatible with the Estonian Constitution.²²⁵ The case was appealed to the Supreme Court.

The CRC's reasoning was somewhat different from that in the Police Act Case. Although Estonia was a party to several international treaties at the time of the ruling that stipulated the protection of minority rights, the CRC did not refer to them explicitly. Rather, the Court set out to reconcile internal political and legal considerations while under international political pressure regarding the rights of the Russian minority.²²⁶ It did so by implicitly referencing ECHR and ECJ jurisprudence as an external source of legitimacy in its elaboration of a requirement of necessary proportionality with regard to language laws.

The Court stressed that the extent of the restriction on liberty must be necessary and "not distort the nature of the rights and freedoms restricted."²²⁷ The decision noted that "the Estonian language is an essential component of the Estonian nation and culture, without which the preservation of the Estonian nation and culture is not possible."²²⁸ Yet the CRC held that election laws are required to be passed by the legislature and thus cannot be

Riigikogu and local government councils" partly invalid (Language Act Case), No. 3-4-1-7-98 (Riigikohus [Supreme Court] Nov. 4, 1998).

²²⁵ *Id.* para 4.

²²⁶ The EU noted that the Language Act may impede the free movement of workers and services. See *Regular Report from the Commission on Estonia's Progress Towards Accession*, at 15, COM (1999) (stating that the Language Act may have a detrimental effect on Community workers and companies, while also potentially constituting restriction in the entry and temporary residence in the territory of Community nationals). The EU and OSCE also noted the problems of Estonian Language Laws in multiple other documents dating from 1993. The first High Commissioner on Minorities visited Estonia in 1993 and the OSCE subsequently established a mission in Estonia. See generally ORG. FOR SECURITY AND COOPERATION IN EUROPE, HIGH COMMISSIONER ON NATIONAL MINORITIES, REPORT ON THE LINGUISTIC RIGHTS OF PERSONS BELONGING TO NATIONAL MINORITIES IN THE OSCE AREA (1999) (discussing the linguistic rights of minority groups in many nations); ORG. FOR SECURITY AND COOPERATION IN EUROPE, HIGH COMMISSIONER ON NATIONAL MINORITIES, THE OSLO RECOMMENDATIONS REGARDING THE LINGUISTIC RIGHTS OF NATIONAL MINORITIES & EXPLANATORY NOTE (1998) (listing Estonia as a nation in which the dispute between ethnic minorities and central authorities may escalate).

²²⁷ *Language Act Case*, § IV.

²²⁸ *Id.* § III, para. 1.

delegated to the executive.²²⁹ Since both Section 3(3) of the Local Elections Act and Section 5(1) of the Language Act empowered the executive to set a procedure for ascertaining the level of language proficiency without the legislature speaking on the issue, the laws were thus unconstitutional grants of legislative power.²³⁰

The result of this decision was to force the Riigikogu to reconsider the enactment while under international pressure. Indeed, the legislative effort to reform the Local Elections Act and Language Act centered on making Estonian policy compatible with international human rights standards. This was expressed by numerous members of the Riigikogu during committee and floor debates who referenced the opinions of European delegates in Estonia.²³¹ The Local Elections Act and Language Act were subsequently amended and codified with precise criteria for language proficiency. The 1999 Act was viewed as incompatible with both international standards and the Constitution.²³² The CRC recast the Local Elections Act and Language Act in terms which did not preclude domestic political objectives from being asserted in an environment which considered the international legal obligations and political ramifications.

5. CONCLUSIONS AND IMPLICATIONS

International law has had a profound effect on the judicial transition in the CEE countries. Courts throughout the transition process utilized international law both formally and informally as a source of external legitimacy when ruling on those issues which could potentially evoke the greatest response from the public and government. This assertion holds true for countries with judicial systems crafted in both the American and Austrian traditions. The similarities in the jurisprudence of the Lithuanian Constitutional Court and the Estonian National Court are observed notwithstanding differing international political contexts; the influence of the EU and CoE was more prevalent during the latter cases than the former. These similarities exist despite differing methods of challenging the constitutionality of a government act.

²²⁹ *Id.* § II, para. 1.

²³⁰ *Id.* § IV, para. 1.

²³¹ Maveety & Grosskopf, *supra* note 8, at 482–85.

²³² *See id.* at 482 (discussing how the CRC's recommendations acted as a catalyst to debate within Estonia over the constitutionality of these legislative acts).

Thus, the use of international law as an external source of legitimacy can be seen as a greater determinant of judicial independence and legitimacy than the formal structure or procedures of the legal system.

The broader implication is that the role of formal guarantees of judicial independence and the design of legal system in the establishment of judicial independence and legitimacy has been somewhat overemphasized in legal thinking and policy approaches. Furthermore, the method of applying international law in domestic courts also seems to be somewhat overemphasized because of the extensive use of non-binding international norms in the courts' jurisprudence. The significance of international law as an external source of judicial independence and legitimacy, as demonstrated by the legal reasoning of various courts, establishes that future studies on judicial, political, and economic transitions should look to the operation of the court system and judicial reasoning therein.