CONSIDERING FAIR TRIAL IN LITHUANIA

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1. The Importance of a Legal System That Provides a Fair Trial

Ensuring the right to a fair trial by an independent and impartial tribunal is essential to a democracy for many reasons. First and foremost, it provides the mechanism to protect all of the other rights under the Constitution, national laws, and treaties. The right to a fair trial is one of the human rights protected by Article 6 of the European Convention, enforced by the European Court of Human Rights. Article 6 requires that in any civil or criminal case, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in public proceedings.[2] Without Article 6, it would be impossible to vindicate any of the substantive Convention rights.

The right to a fair trial and the right to be presumed innocent are also a fundamental expression of the Rule of Law'.[3] The rule of law has recently been defined in Europe as requiring that everyone:

> be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures.[4]

The concept of the rule of law is a founding principle of the European Convention, as

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[1] This article is based on the author's qualitative study of the right to a fair trial in Lithuania as understood under Article 6 of the European Convention on Human Rights and Fundamental Freedoms ('ECHR', or 'the Convention'), adopted in 1995 for her Ph.D. research, 'Fair Trial in Lithuania: From European Convention to Realisation', August 2012, Department of Law, University of Leicester. Dr. Streeter's research was supervised by Professor Malcolm Shaw, QC.

[2] ECHR art 6(1) (also allows closed proceedings in some cases). The balance of Article 6 relates specifically to the rights of persons accused of a crime, ECHR art 6(2)-6(4).

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

[4] European Commission for Democracy Through Law (Venice Commission) 'Report on the Rule of Law', adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011) CDL-AD(2011)003rev, para 16.

stated in its preamble, and is inherent to all articles of the Convention.[5] Because of the connection between the right to a fair trial in protecting the rule of law and the substantive rights enumerated in the Convention, the status of Article 6 rights in a country can predict its ability to protect the human rights protected by the Convention.

Independence of the judiciary also provides a benchmark for good governance, economic development and stability.[6] This is because, along with a high quality court system in general, an independent judiciary is considered essential for economic growth. It is assurance that agreements between parties can be fairly enforced, which in turn provides economic stability and encourages economic growth and investment. At its most fundamental level, an independent judiciary assures litigants that courts will not rule in favour of the government or the powerful based upon status alone.[7]

When considering Lithuania's obligations to comply with the provisions for a fair trial under the European Convention, most people are familiar with the occasional decisions by the European Court against Lithuania. Less understood is the mechanism used to enforce the judgments by the Committee of Ministers, the main political body of the Council of Europe.[8] After an adverse judgment is announced, it is a nation's first duty to pay any money that is awarded in the Court's decision. In addition, the Ministers may also require modification of

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[5] *Golder v UK* (1975) 1 EHRR 524 para 34; *Engel and Others v Netherlands* (1976) 1 EHRR 647 para 69.

[6] Gordon Barron, 'The World Bank & Rule of Law Reforms' (2005) London School of Economics and Political Science, Working Paper no 05-70; Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' (1999) 14 World Bank Research Observer 117; James H Anderson, David S Bernstein and Cheryl W Gray, *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future* (World Bank 2005); Frank B Cross, 'The Cash Value of Courts' (Berkley Electronic Press, August 2007) 16 <http://works.bepress.com/frank_cross/1> accessed 12 August 2013; Lars P Feld and Stefan Voigt, 'Judicial Independence and Economic Development' in Roger D Congleton & Birgitta Swedenborg (eds), *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (MIT Press 2006) 251-88.

[7] Daniel Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) University of Southern California Law School, Law and Economics, Working Paper Series, Year 2006, Paper 43, 1-2.

[8] Phillip Leach, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights' (2006) 3 Public Law 443, 444.

national law to ensure that the specific violation is corrected (individual measures), and system-wide corrections to prevent new similar violations (general measures).[9]

What is even less understood is Lithuania's positive obligation to organize its legal system to ensure that trials are fair.[10] This obligation stands apart from any judgment of the European Court. The fairness is measured against the specific language of Article 6 along with the additional rights the Court has found in its judgments over the years, such as a proceeding that is adversarial and provides fair and reasonable access to the evidence;[11] effective legal representation;[12] the equality of arms;[13] and special protection for children and other vulnerable parties.[14] This means that even without a specific judgment, Lithuania has the duty to provide a legal system that is consistent with the decisions of the European Court, not only in the cases against Lithuania, but in all of the Court's judgments. Furthermore, providing a system that ensures a fair trial requires a system that functions in practise.

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[9] Committee of Ministers, 'Rules of Supervision of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements' (CM/Del/Dec(2006) 964/4.4/appendix4E /12 May 2006, adopted 10 May 2006, 964th Meeting of Ministers' Deputies, Council of Europe) (Rules of Supervision) r 6(2)(a); David J Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2d edn, OUP 2009) 873-74; David C Baluarte and Christian M De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions, Open Society Initiative* (Open Society Foundations 2010) 39-41.

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

[11] *Ruiz-Mateos v Spain* App No 12952/87 (ECtHR, 23 June 1993) para 63 (parties to both criminal and civil trials must know and be able to respond to all case evidence adduced or observations filed).

[12] *Airey v Ireland* (1979) 2 EHHR 305; *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980).

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

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

2. Effects of the Soviet Legacy on the Legal System

Many of the complaints about Lithuania's legal system connect the problems to Lithuania's Soviet legacy. These complaints are well-founded and common to the entire post-Soviet region. They result from the dramatic implosion of the Soviet Union and the sudden need to make the transition to a democracy. Changes were so abrupt that societies and political parties were not prepared. Emerging political forces promised immediate and profound changes for a better life without understanding the magnitude of the ideological, political, and economical problems they faced.[15] This is not surprising given the general lack of civic discourse during Soviet occupation, a time when the public was completely disengaged from the functioning of government.[16] The Western concepts of democracy used as a model for the new system were understood by the main policy makers, but they were not widely understood by society as a whole including judges and lawyers.[17] This transformation was not followed by wide-spread education on these new ideas, preventing a reform in the legal culture.

Not addressed was the corrosive effect of corruption and lack of ethical behaviour, particularly in the legal profession, including the 'extraordinary lack of knowledge concerning what constitutes unethical behaviour'.[18] As a result, these early reforms did not adequately address the more fundamental problem of leaders who refused to be ruled by the law and failed to include an active role by the public that would fully transform conceptions of law and justice:

> The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it

[15] Viktor Mavi, 'The Emerging Democracies in Eastern Europe: Problems and Challenges' in Council of Europe, *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions in Europe* (Council of Europe Press, 1994) 68.
[16] Tadas Klimas, 'The Lithuanian Rule of Law', address at the *14th World Lithuanian Symposium on Arts and Science* (29 November 2008).
[17] Catherine Dupre, 'After Reforms: Human Rights Protection in Post-Communist States' (2008) EHRLR 627, 628.
[18] William D Meyer, 'Facing the Post-Communist Reality: Lawyers in Private Practice In Central and Eastern Europe and the Republics of the Former Soviet Union' (1995) 26 Law & Poly Intl Bus 1019, 1058.

> gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.[19]

The new democracies experienced a total and fearful fragmentation of political forces, leading to a large number of political parties and politicians who entered the public stage with no clear or realistic programme and without a connection to a wide strata of society. In the transition, civil society also suffered. The relatively strong and independent-minded NGOs that were active before the transition were weakened or ceased to exist. Many of their leaders and members became government officials or politicians. The newly emerging NGOs were viewed with suspicion by the new and fragile political forces, who considered them potential challengers to their role and legitimacy. Then, without an engaged civil society or an effective NGO network to bring a wider range of opinion into public discussion, the new democracies became vulnerable without the participation of a much wider segment of citizens in politics.[20]

Lithuanians maintained a low regard for their government well after independence. They remained distrustful of their own state institutions, afraid to speak their minds, and believed that injustice was widespread.[21] Polling data nearly two decades after independence showed that trust in the judicial system was so bad that a significant number of Lithuanians said they did not use it even when they believed they had a claim, and the vast majority of those with a claim said they did not pursue it because they believed they would not achieve effective relief. Of special concern is that of the 40 per cent of those who did seek relief did not go to court, the prosecutor's office, the police, Seimas, or even the media, instead going 'elsewhere'. This, of course, implies

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[19] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 Foreign Affairs 95, 96.
[20] Mavi (n 15) 69.
[21] Henrikas Mickevičius and others (eds), *Human Rights in Lithuania, 2006 Overview* (Human Rights Monitoring Institute, Vilnius 2007) (HRMI 2007) 5 (reporting 2006 public opinion polling data).

any number of possible self-help measures, some of which may involve conduct inconsistent with a society seeking to strengthen the rule of law.[22]

A related phenomenon is the high numbers of emigration from Lithuania. A study of Lithuanian émigrés conducted in Ireland, England, Spain and Norway by sociologists at Vytautas Magnus University found that the reason given by most Lithuanian emigrants for not returning to Lithuania is not – as many propose – because of better economic opportunities in other countries. Instead, it is due to conditions consistent with the provision of human rights and political climate: better security, more freedom, and more respectful relations among people.[23]

Social scientists have documented a strong correlation between public trust and the effectiveness of government.[24] In Lithuania, critics connect the public's distrust in the court system as a legacy of the Soviet era that must be addressed.[25] This social environment, typical of the post-Soviet states, has been characterised some by scholars as the 'negative rule of law myth'[26] in which the illegitimacy of the law and legal institutions is presumed: laws are presumed to benefit only the elite and legal institutions cannot function impartially. As described in 2003:

> Everywhere in the region 'law' has become one of the words most frequently used by politicians and discussed in the media. But in

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[22] Henrikas Mickevičius (ed), *Human Rights in Lithuania, 2007-2008 Overview* (Human Rights Monitoring Institute, Vilnius 2009) (HRMI 2009) 6 (2008 public opinion survey).
[23] ibid.
[24] For example, Peri K Blind, 'Building Trust in Government in the Twenty-First Century: Review of Literature and Emerging Issues' (2007) United Nations Department of Economic and Social Affairs (UNDESA) 7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007, Vienna, Austria <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025062.pdf> accessed 12 August 2013; Kenneth Newton, 'Democratic Pathologies and Democratic Hypochondria' in Council of Europe, *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions in Europe* (Council of Europe, 1994) 27; Kenneth Newton and Pippa Norris, 'Confidence in Public Institutions: Faith, Culture or Performance?' in Susan J Pharr and Robert D Putnam (eds), *Disaffected Democracies: What's Troubling the Trilateral Countries?* (Princeton U Press 2000).
[25] Aušra Rauličkytė, 'Lithuania's Courts and the Rule of Law' (2001) 32 JBS 182-92.
[26] Brent T White, 'Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies' (2010) 43 Cornell Intl QJ 307-08 fn 5, 308-09.

> spite of all of this, the positive myth, stipulating that the rule of law generally prevails in society, remains stubbornly absent, while its place continues to be occupied by the negative myth that whatever happens has very little to do with respect for law.[27]

From this cynical point of view, citizens behave in constant expectation of legal failure. They assume that because everyone else ignores the law, 'by bending the rules, going through the backdoor, paying bribes, or misusing their public position for personal gain', they should, too.[28] In this environment, no matter the decision or motivation, all official actions are presumed to be the will of the elite. This view is self-reinforcing, with significant consequences on how people behave, including judges.[29]

In addition, during the move toward independence no one had given serious thought to the future legal system that would support the new democracy. As a result, Soviet law and practices continued:

> There is no surprise that nobody in those two years seriously discussed the model of the future legal system of Lithuania to be introduced in the aftermath of the declaration of independence. So Lithuanian society reached independence without a clear vision for the system of law, including private law, of the future independent Lithuania. The consequence of such inactivity was the temporary retention of the Soviet legal system.[30]

Similarly, substantive changes were not made in the subject matter and teaching methods in the education system. This was not surprising considering that to a substantial extent 'the

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

[28] White (n 26) 333. The negative rule of law myth contrasts with the 'positive rule of law myth' predominating in Anglo-American and northern European societies, which is also self-reinforcing, in which everyone assumes that law is good, just, and represents the will of the people rather than that of the elite. ibid.

[29] ibid 335-36; Kurkchiyan (n 27) 32-33.

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

same persons continued in both judicial offices and academic positions'.[31] The academic institutions that provide legal education in Eastern Europe should have, but did not, reform their curricula and treatment of subject areas following the changes of the late 1980s. Topics such as contract law were not modified despite the profound differences moving from a state with a centralised economy to that of a free market economy.[32]

Despite the administrative changes in Lithuania's universities, education remains heavily influenced by the communist style of rote learning – a skill once appropriate for a judge applying the Soviet command theory of law (that is, from when law and the courts served the interests of the Communist Party).[33] Modern skills in critical thinking and legal methodologies that apply the law to a set of facts are simply not taught.[34] This affects the fundamental understanding and attitudes of attorneys, prosecutors and judges, because they all begin their professional preparation with a university degree in law at the bachelor level.[35] Professors and their teaching methods have remained essentially the same, still following the model of legal education in which lecturers provide the given rules in each subject area, with no discussion. As described by Professor Kęstutis Kaminskas:

> We can't change how professors think overnight. More than half studied during the Soviet era and today teach students who only know an independent Lithuania. Many schools which were built

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

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

[33] *Judiciary in Central and Eastern Europe* (n 31) xvi; Rauličkytė (n 25) 187.

[34] K Jaak Roosaare, 'Practical Aspects of Teaching Law in Newly Independent Central Europe (Experiences in Estonia and Lithuania)' (2007) 4 EJ Legal Educ 121, 125; *Judiciary in Central and Eastern Europe* (n 31) xvi.

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

> post-Soviet era look like factory buildings, because they were there to spread the ideology. We have to overcome this.[36]

Students expect to be lectured to, and because attendance is not mandatory, they only attend class if they want to, often not having read the assigned reading. Analytical skills are not encouraged in the classroom, so students are not familiar with answering questions about the material or discussing it.[37] Questions that require a general knowledge of the material – requiring answers that synthesise the information – are met with frustration because the answer is not set out in any one place.[38]

The schools in Eastern Europe, including Lithuania, were not reformed at the time the Soviet Union collapsed.[39] As a result, they generally see no reason to reform now. 'They do not know what it is they do not know. And they are proud.'[40] Instead, those persons teaching law stayed the same even though the environment changed.[41] The educational culture continued:

> Against expectations, the old, unqualified, and xenophobic professors did not die out. They reproduced themselves through inbreeding, selecting future teachers from among their students according to the criteria of loyalty and lack of intellectual challenge to the current incompetent professoriate.[42]

Even the Constitutional Court missed the need for adapting to transforming legal educational requirements in its review of qualifications for judicial office. It mandated certain topics be included,[43] but notably absent were legal writing and analysis, clinical experience, or

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[36] Marc Sarena, 'Soviet Mentality Brakes Lithuanian Educational Reform' (tr Nabeelah Shabbir) *Café Babel* (11 May 2007) <http://www.cafebabel.co.uk/article/22785/soviet-mentality-brakes-lithuanian-educational-ref.html> accessed 12 August 2013.
[37] Roosaare (n 34) 124-25.
[38] ibid.
[39] 'AALS Panel on Global Legal Education' (n 32) 322.
[40] ibid.
[41] ibid.
[42] Avieczer Tucker, 'Reproducing Incompetence: The Constitution of Czech Higher Education' (2000) 9 E Eur Const Rev 94-95.
[43] Constitutional Court, 20 February 2008 ruling on the Higher Education Qualifications Requirements for the

the study of professional ethics.[44]

There is a compelling need for education in ethics, and by extension, in professional ethics, given the culture of dishonesty reported in the academic environment in the form of cheating on exams and homework. Cheating is always an issue at any university, but in Eastern Europe it is described as 'pretty well off the scale'.[45] This is consistent with an attitude in Lithuania describing academic dishonesty as a 'victimless' crime not worthy of punishment. Academic dishonesty in Lithuania has received national attention in recent years, yet no action appears to have been taken.[46]

As with many systems in Lithuania, its universities underwent some structural change since independence, such as in making universities autonomous from state control allowing them to control their programmes of study and administrative methods. According to public accounts, the changes have not improved a low quality of research and educational outcomes.[47] A 'relatively high level of corruption' remains, including student gift-giving to professors at examinations and when performing academic requirements. Critics also note a widespread practice of filling high-ranking administrative positions with unqualified personnel and providing them with the power to make changes in policy even when they are destroying academic values, and fail to challenge students academically. Tolerance for this corruption and low level of

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Judiciary [title restated], *Official Gazette* 2008, No 23-852 (26 February 2008) with corrections 19 March 2011, *Official Gazette* 2011 (mandating subjects such as theory of law, constitutional and civil law, and some related fields such as the social sciences).

[44] ibid. According to the official website of the Lithuanian Bar Association, professional responsibility and ethics are potential topics for the bar examination. See <http://denver.infolex.lt/advoco_old/?item=tvarka> (*Egzamino programa*) accessed 12 August 2013.

[45] 'AALS Panel on Global Legal Education' (n 32) 324.

[46] Loreta Tauginienė, 'Corporate Social Responsibility in the Research Management: Corporate Social Responsibility at a University' (2010) Paper for Presentation at the 16th European Doctoral Programmes Association in Management and Business Administration (EDAMBA) Summer Academy in Sorèze, France, July 2010, 3 <http://www.edamba.eu/userfiles/file/Tauginiene%20Loreta.pdf> accessed 12 August 2013.

[47] 'R Mikalauskas: How Can the Quality of Research and Education Be Improved?' *Delfi News* (18 November 2011) (in Lithuanian) (*R Mikalauskas. Kaip Pagerinti Mokslo Ir Studijų Kokybę?*) <http://www.delfi.lt/news/ringas/lit/r-mikalauskas-kaip-pagerinti-mokslo-ir-studiju-kokybe.d?id=51550947> accessed 12 August 2013.

academic ability is seen as an illustration of a low priority for a high institutional reputation.[48]

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

These considerations, combined with the continuation of a pre-existing lack of public involvement – vital to a democracy – have impaired development of a robust legal culture consistent with a democratic state.

3. The Judiciary

Overall, the ability to have a fair trial appears significantly challenged due to the lack of a tradition of independent judges and lingering attitudes and behaviour that prevailed in the Soviet legal system. Although structurally independent, and perhaps with the exception of the Constitutional Court, it is not functionally independent. Without a judiciary that is independent in practice – cognizant of its role as independent of the prosecution, free from outside influence, and willing to avoid conflicts of interest and remain independent – the risk will remain high that trial proceedings will not be fair as understood in the jurisprudence of the European Court of Human Rights and internationally.

Root causes are found in the outmoded education and underdeveloped understanding of the concepts of accountability and conflict of interest. Also significant is the lack of constructive disagreement other than in those cases in which a lower court judge is bound by the opinion of a higher court.[49] This has been observed in judges in Lithuania's lower courts, for whom improvement from the earlier formalistic reasoning has been hindered in part by the absence of a

[48] ibid.
[49] Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 EPL 99, 108.

tradition of dissenting opinions.[50] Examples of dissenting and concurring opinions can be seen in the decisions of the European Court. The overall situation is one in which there is structural judicial independence, but no mentally independent judges.[51]

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

> Judges lacking knowledge and the ability to reason and explain can hardly be independent; they cannot rely on personal authority. The lack of authority is then replaced by force: the decisions is not correct because it is soundly and well reasoned, but because it is 'us' (the court) who made it.[52]

This *ipse dixit* attitude – or, 'it is true because I say it is true'– illustrates the difference between the authoritarian approach to legal discourse and the authoritative approach. The authoritarian model tends to decree universal truths from the centre, while authoritative decisions result from a dialogue that leads to a reasoned solution. The willingness to engage in the dialogue contemplated by an authoritative decision is, of course, determined by personal knowledge and ability of the individual judge.[53]

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

> This type of judicial 'independence' has not been included, for obvious reasons, in the mainstream debate so far: it is difficult to discern, hard to describe, and, contrary to the institutional changes, it is lengthy and painful.[54]

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[50] Vaidotas A Vaičaitis, 'Transitional Democracy and Judicial Review: Lithuanian Case', 2007 Conference Paper, VII World Congress of the International Association of Constitutional Law, Athens, Greece, 11-15 June 2007, 4 <http://www.enelsyn.gr/papers/w5/Paper%20by%20Prof%20Vaidotas%20A.%20Vaicaitis.pdf> accessed 12 August 2013.
[51] Bobek (n 49) 108.
[52] ibid 110.
[53] ibid.
[54] ibid 108.

Personal courage has been described as one dimension of individual judicial independence that has been a characteristic heavily lacking in the Central European judiciary. It was not a characteristic fostered by the Soviet government,[55] evident in the position held by the courts and judges as subordinate to Communist party leaders.[56] The post-Soviet governments do not endorse it either.[57] Critical thinking and critical morality that is different from, yet complementary to, what the majoritarian legislature does, is non-existent or very rare.[58] The continued effect of Soviet legal culture in the region and in Lithuania is noted in legal academic articles authored by Lithuanians.[59] This is not at all surprising considering that the judges sitting during Soviet occupation became judges of an independent Lithuania overnight. Nearly all of the judges, attorneys, law professors and lawyers in public administration in Lithuania retained their positions, irrespective of their ideological views under the communist regime.[60]

With other priorities to attend to, the newly independent leaders did not substitute other judges in their place, or give immediate attention to rule of law reform other than ensuring the basic framework of documents were in place for a functioning government.[61] Initially, the primary focus was on structure and format, such as whether laws had been passed or the judicial councils established were adequate. However, whether the judiciary is truly independent also

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[55] ibid.
[56] James H Anderson and Cheryl W Gray 'Transforming Judicial Systems in Europe and Central Asia' in François Bourguignon and Boris Pleskovic (eds), *Beyond Transition: Annual World Bank Conference on Economic Development* (World Bank 2007) 329.
[57] Bobek (n 49) 108.
[58] ibid.
[59] Open Society Institute, 'Judicial Independence in Lithuania' in *Monitoring the EU Accession Process: Judicial Independence* (Central European University Press, Budapest 2001) 276; *Judiciary in Central and Eastern Europe* (n 31) xvi; Rauličkytė (n 25); 'AALS Panel on Global Legal Education' (n 32) 322 (legal education in Eastern Europe changed very little since the fall of the Soviet Union); Tomas Berkmanas, 'On the Academic Understanding of Legal Interpretation in Lithuania' (2005) 2 Intl J Baltic L 60 (difficulties transforming from Soviet mode of dogmatic thinking in legal interpretation).
[60] Frank Emmert, 'Administrative and Court Reform in Central and Eastern Europe' (2003) 9 ELJ 288, 302-03.
[61] Daniel Ryan Koslosky, 'Toward an Interpretive Model of Judicial Independence: a Case Study of Eastern Europe' (2009) 31 U Pa J Intl L 203, 204.

depends upon 'the judicial mentality and self-image'.[62]

The predominant judicial culture and self-perception in Central European judiciaries remains one of a well-paid civil servant. This is said to result from the merging of a European bureaucratic tendencies with the rule of the working class, telephone justice,[63] and the Soviet Communist doctrine of unity of state power.[64] As a result, when the Soviet Union collapsed, the post-Soviet judges were the same subservient technocrats who still seek refuge in mechanical and formalistic interpretation of the law.[65]

Although the courts are reformed in structure, the individuals serving as judges were the same men and women who were judges in Soviet times, and personnel changes since then have been slow, again as a result of the Soviet legal culture, which continues its tacit control. Changes that might otherwise be expected from the passage of time or retirement are impeded by this control – to do well, new judges must adopt the old traditions.[66] As studies in organizational behaviour have identified, the phenomenon described here as 'adopting old traditions' is informal organizational knowledge that is learned by members of an organization in the performance of their duties.[67] This helps explain how, even after over two decades, the culture of the Soviet legal system can survive institutionally.

Even sixteen years after independence, the majority of sitting judges in Lithuania had

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[62] Bobek (n 49) 99.

[63] Rasma Karklins, *The System Made Me Do It: Corruption in Post-Communist Societies* (ME Sharpe, London 2005) 14 (describing when 'communist party leaders would pick up the telephone and call prosecutors and judges and tell them what outcome the party expected in specific cases'). Karklins further notes that even though the evidence that this practise continues is scattered, 'the exceptional political influence of the ruling elites on law enforcement persists'. ibid.

[64] Bobek (n 49) 107.

[65] ibid. This was the case in all post-communist countries with the exception of the former Eastern Germany, where '100% of all judges and law professors and a very high percentage of all public prosecutors and high level lawyers in the public administration lost their jobs and were replaced by Western-trained lawyers from the Federal Republic of Germany'. Emmert (n 60) 302.

[66] Bobek (n 49) 108.

[67] Haridimos Tsoukas and Efi Vladimirou, 'What is Organizational Knowledge?' (2001) 38 J Management Studies 973, 980.

been trained during the Soviet occupation, adding to the low level of public confidence in the judiciary, with exception of the Constitutional Court.[68] These judges are described as finding it difficult to adapt to the social and legal changes, continuing in their formalistic application of law according to prevailing Soviet concept of legal positivism, without taking into account the principles of the Constitution as a common practise adopted in the ordinary courts, especially the lower courts.[69] The judges in Lithuania are still viewed as functioning as bureaucrats. Reasons for this include that they are chosen at a young age, and are not chosen from the best and the brightest.[70] Once they enter the system, they remain there with little or no engagement with the public.[71]

Assertions of judicial independence have been used to excess in some circumstances in Central Europe, such as to explain the basis for disregarding the established case law of higher courts (thereby turning the judicial process into an unpredictable one); for not displaying the full name of deciding judges in published decisions of the court; why judges cannot be compelled to engage in continuous education after their appointment; or why only judges may keep their higher salaries when public savings measures are adopted for all public employees. As a result, the public can be apathetic to judicial calls for safeguarding 'judicial independence', even when the concerns are well-founded.[72]

The judiciary's emphasis on self-governing without any professional administrative support or other form has hidden judicial shortcomings. Not receiving adequate focus is the need for the judiciary to make the transition 'from a cast of well-paid subservient civil servants to

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[68] Vaičaitis (n 50) 4.
[69] ibid.
[70] 'The Lithuanian Rule of Law' (n 16).
[71] ibid.
[72] Bobek (n 49) 112-13.

personally independent and critical judges who are ready to make and publicly defend their opinions'. While understandable that the obvious changes were made, such as whether laws have been passed, the more difficult tasks have not been addressed, such as an assessment of judicial self-image, mentality and ideology, or fostering the development of more personally independent judges.[73]

When the countries in this region became newly independent, the organisation of the judiciary went from one extreme to the other – from being completely dependent to lacking in any exterior control whatsoever. There was an unreasonably optimistic belief that once the judiciary gained organisational independence, its quality and performance would improve. Unfortunately, the argument for judicial independence from those outside the judiciary was not matched with a similar commitment to ensuring the concomitant development of judicial expertise, competence, and quality. This phenomenon demonstrates the negative impact of failing to address structural and functional judicial independence together.

What many jurists confused was the relationship between independence and accountability. That is, once structurally independent, they were not excused from being professionally accountable:

> It is again for the judges themselves to realize that judicial independence is not a spell designed to lock oneself away into an ivory tower of irresponsibility. It is a limited privilege that must be repaid with performance, expertise, and willingness to assume individual responsibility.[74]

Independence and accountability normally evolve gradually together, but in Eastern Europe judicial accountability developing more slowly due to the disequilibrium resulting from the

[73] ibid 100, 112.
[74] ibid 111

implosion of the Soviet Union.[75]

Social scientists have measured judicial independence[76] by considering the level of independence that can be deduced from legal documents (*de jure*) and the level of independence that courts have in fact (*de facto*) to determine that judicial independence is also conducive to economic growth.[77] To understand *de jure* independence, they considered characteristics such as the establishment, organization, and operation of a country's highest courts as evident from legal documents, such as the country's constitution. They included the appointment process, salary and salary protection, and material support for court operations. To understand *de facto* independence, they considered how well eight of the *de jure* variables were implemented. From their results, they concluded that while *de jure* judicial independence does not have an impact on economic growth, *de facto* judicial independence does.[78] In other words, their research supports the common sense expectation that the existence of a legal structure with elements of judicial independence does not alone ensure that the judiciary functions independently.

4. Difficulties for Litigants

The right of individuals to have a fair trial begins with their ability to place their claims before a court.[79] As described in the work of Lithuania's NGOs,[80] among the specific problems

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[75] ibid 113.
[76] Lars P Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators' (2003) 19 EuropJPolEcon 497-527, 449.
[77] ibid 498.
[78] Lars P Feld and Stefan Voigt, 'Unbundling Judicial Independence' (2007) Intl Soc for New Inst Economics (20 June 2007) Washington University, Dept of Economics, St Louis, Missouri, USA <http://www.isnie.org/assets/files/papers2007/voigt.pdf> accessed 12 August 2013, 2 (results also indicate that the positive impact of *de facto* judicial independence on economic growth is stronger in systems with a high level of checks and balances; further, *de facto* judicial independence appears to be effective independent of the age of a constitution).
[79] *Golder v UK* (n 5).
[80] Such as by the Human Rights Monitoring Institute, Transparency International Lithuania, Lithuanian Centre for Human Rights, Center for Equality Advancement, and VILTIS: Lithuanian Welfare Society For Persons With Mental Disability.

that litigants have in the legal system, there are barriers to court access created by the length of proceedings, lack of a promptly available reliable court record, and lack of procedural protection for the most vulnerable – the physically disabled, the mentally ill, and children. Those persons who are adjudged mentally incapacitated have no standing before any court, and can be involuntarily committed to a psychiatric facility without being present in court and without legal representation. There are no protections in place against conflicts of interest for legal guardians, or any periodic review. Child custody determinations are made without legal representation for the children. There are also physical barriers to court access created by the incomplete implementation of alterations to public buildings required by law.

In criminal cases, there is a need for a more independent prosecution service and stronger system of advocacy for those accused of crime. There are long-standing complaints in Lithuania from many sources as to the poorly conducted criminal pretrial investigations, characterised by lack of professionalism, with no measure taken to improve their quality.[81] Pretrial investigations are often slow and poorly handled. Members of the media and public officials, including investigating authorities, are known to disregard the presumption of innocence by publicly suggesting guilt in criminal matters without effective response by those enforcing legal and ethical standards. The length of the investigations leaves potential witnesses who are victims vulnerable to their perpetrators and individuals vulnerable to repeated arrest and detention for investigative purposes without judicial review.

Access to a court using legal aid is also a problem. Consistent with a study on effective criminal defence in Europe,[82] in Lithuania, potential users of the programme are often without

[81] HRMI 2009 (n 22) 36-37; Henrikas Mickevičius and others (eds), *Human Rights in Lithuania, 2009-2010 Overview* (Human Rights Monitoring Institute, Vilnius 2011) (HRMI 2011) 42-43.
[82] Ed Cape and others, *Effective Criminal Defence in Europe* (Intersentia, Antwerp-Oxford 2010).

access to information about their eligibility, especially those with disabilities or who are in detention.[83]

The legal professionals who represent the parties to litigation, as with the judiciary, also shares cultural history that influences the functioning of its members. Representation by criminal defence attorneys is often formalistic, with little involvement beyond minimum requirements, particularly where the defence is provided by legal aid. Criminal proceedings are dominated by the prosecution. Public complaints that prosecutors do not function independently as they are constitutionally required thus appear supported, as do the other indicators established by social scientists.

4.1 Attorneys

A handful of individuals within the Soviet legal system attempted to realise the right to counsel and the presumption of innocence along with other ideals, and were occasionally successful. But overall, the Soviet system failed to embrace these standards in substance, rendering them 'hollow'.[84] The challenge in today's post-Soviet states is 'to infuse these long-dormant standards of justice with meaning and force ... contributing to the legitimization of the laws and courts'.[85] Also a challenge is addressing the need for improving the quality of academic performance and ethics in legal studies to contemporary standards addressed earlier, since the attorneys and prosecutors begin with the same initial educational training as the judiciary, profoundly affecting the judicial system.

Service as an *advokat* in the Soviet system was seldom professionally fulfilling. It was

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[83] United Nations Human Rights Council, 'Joint UPR [Universal Periodic Review] Submission of Human Rights Monitoring Institute, Center for Equality Advancement, Equal Rights and Social Development Centre, Lithuania – October 2011' <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/LT/JS1-JointSubmission1-eng.pdf> accessed 12 August 2013 (Joint UPR Submission October 2011) paras 43-44.

[84] Valerie Wattenberg, 'Making Way For Justice: Breaking with Tradition in the Former Soviet Bloc' in *Justice Initiatives* (Open Society Justice Initiative 2004) 9.

[85] ibid.

the role of lawyers to serve the state, not their clients. Rules, laws, and ethics were routinely disregarded. Significant decisions were not based on the law, but on dictates of party leaders who controlled the system, who advised the courts in telephone calls, meetings or secret instructions. *Advokats* faced the constant minimization of the law knowing that at any time the effect of the law could be reduced by some extralegal method.[86]

After the collapse of the Soviet Union, the private practice of law was essentially a new profession with little historical precedent. The most pervasive problem affecting post-Soviet *advokats* was in their lack of ethical behaviour and understanding what circumstances constitute a conflict of interest. This is due to several factors, the first of which was the continuation of the corruption that was typical at every level and in every sector of the legal profession. Many in the profession, particularly those who were older, had only been able to function playing by the rules of the Soviet regime. For them, shifting to more ethical behaviour had no advantage.[87]

4.2. The Prosecution Service

Concerns with the prosecutor service include the unregulated use of prosecutorial discretion and the lack of independence in practice, made more profound by the Soviet legacy in which prosecutors were part of the state apparatus and unquestionably the most influential members of the legal profession.[88]

The prosecutor remains the most decisive institution in criminal justice. Prosecutors, or police officers supervised by prosecutors, gather all the evidence, evaluate it and decide whether or not to send the case to the court. Several recent events have given the public perception that they have an incredible amount of discretion and visibly misuse it. Combined with a tradition in

[86] Meyer (n 18) 1042.
[87] ibid 1058-59.
[88] Meyer (n 18) 1035.

which the judiciary relies heavily on the pretrial investigation[89] and attorneys who do not aggressively defend their clients, the presumption of innocence and fairness to the defendant suffer.[90]

The lack of professional investigative methods has been criticised for years, including by the Chair of the Supreme Court of Lithuania.[91] This criticism was echoed by the Prosecutor General who publicly acknowledged before Seimas that the pretrial investigative officers lack education, motivation, and organization:

> a very desperate situation exists with the pre-trial investigation officers who are directly responsible for the conduct of investigations.[92]

Independent Lithuania established a framework for an independent prosecution service, establishing it constitutionally and mandating that it be independent and observe only the law.[93] In practice, however, there are several features of the prosecution service that impair the system. Officially, prosecutors must investigate all cases brought to their attention,[94] making Lithuania a jurisdiction of mandatory prosecution. Prosecutorial duties in a mandatory prosecution jurisdiction differ in a critical way from prosecutors in many countries because they do not have the official ability to exercise prosecutorial discretion. They are obliged to investigate all cases

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[89] HRMI 2007 (n 21) 21 (as observed in a court watching project).
[90] Inga Abramaviciute and Regina Valutyte, 'Lithuania' in Ed Cape and Zaza Namoradze (eds), *Effective Criminal Defence in Eastern Europe* (Soros Foundation 2012) 245-46.
[91] HRMI 2007 (n 21) 22.
[92] ibid 21-22.
[93] Constitution of Lithuania, ch IX (arts 109-114). 'According to the Constitution, the prosecutors are a component part of the judiciary, therefore, the principles defining the independence of courts are applicable to them, but only with due consideration of the approach specified by the Constitutional Court.' Constitutional Court, 6 December 1995 ruling on Government Resolutions on Remuneration of Officers of the Courts and Certain Officers of the Legal Profession [title restated], *Official Gazette* 1995, No 101-2264 (13 December 1995); Constitution of Lithuania, art 118 ('When performing his [or her] functions, the prosecutor shall be independent and shall obey only the law.') .
[94] Code of Criminal Procedure, 14 March 2002, No IX-785, amended 21 June 2012, No IX-785, *Official Gazette* 2012, No 78-4030 (4 July 2012) sec 3.

brought to their attention.[95] This is common in post-Soviet countries.[96] Internationally, there is a wide range of discretion granted to prosecutors to initiate investigations and to decide whether to prosecute, halt, or discontinue prosecutions, with standards that encourage clear rules and guidelines on the use of that discretion. The Council of Europe promotes the principle of prosecutorial discretion, proposing that where it is not already in use, that it be introduced.[97] The Council of Europe further recommends that a prosecutor's decision to waive or discontinue a prosecution be based on specific criteria, such as the seriousness of the offence or the effects of conviction on the alleged offender, and that a decision to waive prosecution should not act as a bar to a victim seeking civil damages from an alleged offender.[98]

The problem with the mandatory requirement to investigate and prosecute is that it allows for hidden abuses and disingenuous use of discretion, with preference given to 'more easily verifiable facts' and simple cases, and use of administrative penalties rather than more serious criminal sanctions:

> The existence of discretion in individual decisions regarding prosecution is likely to have an impact on the chances of public figures being prosecuted. The degree of discretion is influenced by the adoption of the mandatory principle, but also by 'hidden' components of discretion, such as the ability to drop a case due to insufficient evidence or not concentrating enough efforts to

[95] Laima Čekelienė and Vaida Urmonaitė, 'The Prosecution Service of Lithuania' (Country Report Lithuania, Eurojustice Network of European Prosecutors-General in the European Union, circa 2004) 560 <http://www.euro-justice.com/member_states/lithuania/country_report/country_report_lithuania> accessed 12 August 2013 (authored by the Chief Prosecutor, Dept. of Intl Relations and Legal Assistance, Prosecutor General's Office, and the Deputy Prosecutor General, respectively). ibid.

[96] Organisation for Economic Co-Operation and Development, 'Anti-Corruption Specialisation of Prosecutors in Selected European Countries' (Working Paper, September 2011) <www.oecd.org/countries/lithuania/49540917.pdf> accessed 12 August 2013 (OECD 2011) 9.

[97] The Committee of Ministers has recommended the introduction or application of the principle of discretionary prosecution 'wherever historical development and the constitution of member states allow' or otherwise devise '[m]easures having the same purpose as discretionary prosecution'. Committee of Ministers, 'Recommendation R (87) 18, Concerning the Simplification of Criminal Justice' (adopted 17 September 1987, 410th Meeting of Ministers' Deputies, Council of Europe) ss I(a)(I), 1(b); OECD 2011 (n 96) 9. There are similar standards recommended by the United Nations.

[98] OECD 2011 (n 96) 9.

conduct serious investigations.[99]

Addressing the opportunity for hidden decisions is important to re-balancing the significant power of the prosecution and police that developed under Soviet theory. Soviet procedural law gave the courts far less control while the police, militia and departments under the competence of the Ministry of Interior were given far greater control than their Western counterparts.[100] The Soviet system expected criminal convictions. This legacy is reflected in the fact that it has only been in the past few years that prosecutor performance evaluations in Lithuania no longer presume that an acquittal is a professional flaw.[101]

Among the quantitative studies on independence is a 2011 study on prosecution services in 78 countries, including Lithuania, by considering the appointment process and tenure in office of the head of the institution.[102] The lowest levels for independence were given to situations in which the selection process is dominated by legislators, with appointments by a group with a mixed participation of different agencies ranking somewhat better. Generally, and the point to be made in the case of Lithuania, independence levels increase significantly where the nomination process is conducted by judicial institutions without interference of politicians. The highest levels of independence, however, were found in those situations where the process is dominated by civil society, such as commissions that include academics and legal practitioners.[103] By these measures, the involvement of both the President of Lithuania in the

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[99] Anne van Aaken, Lars P Feld, Stefan Voigt, 'Power Over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator' (March 2008) CESifo Working Paper No 2245, 10 <http://ssrn.com/abstract=1097675> accessed 12 August 2013.

[100] Károly Bárd, 'Trial and Sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing Patterns, the Role of the Defence in the Countries in Transition' (1999) 7 EurJCrime CrLCrJ 433, 435.

[101] HRMI 2011 (n 81) 42.

[102] Ernani Carvalho and Natália Leitão, 'A Factor Analysis Model to Measure Procuracy Office's Independence' (Working Paper, 7 May 2011) 1, 12 <http://ssrn.com/ abstract=1881043> accessed 12 August 2013.

[103] ibid 2.

appointment of the Prosecutor General and Seimas in providing consent for that appointment, Lithuania falls in the category of 'mixed' appointments that ranks 'somewhat better', but still toward the lower end of the spectrum of independence.[104] Ultimately, and similar to studies as to the judiciary, Lithuania's prosecutors ranked above average in institutional independence, but below average for independence in fact.[105]

5. Measuring Compliance

Lithuania has complied with the vast majority of the adverse judgments against it in the European Court of Human Rights except for two highly-public and politically sensitive cases in which general measures remain open: *L v Lithuania* and *Paksas v Lithuania*.[106] Open for evaluation in the near future is the response to remedy the fair trial defects found in *DD v Lithuania*.[107]

Ensuring a fair trial in Lithuania as understood by the Convention is in need of improvement. This is evident in the Lithuania-specific areas reviewed in this research, and in the application of factors developed in comparative and quantitative research. The need for improvement is also suggested by an absence of political will to address system problems after they become known. Lithuania has not yet received increased scrutiny by the Committee of Ministers for its systemic problems, but that may change in light of the Committee of Ministers' increased attention on systemic issues in future judgments.

While it is true that Lithuania has complied with the payments ordered by the European Court, judgments alone do not provide the complete view. Judgments are only part of the equation. In addition, judgment data alone does not provide a true reflection of a country's

[104] ibid; Constitution of Lithuania, art 118.
[105] Carvalho and Natália Leitão (n 102) 12, figure 03.
[106] *Paksas v Lithuania* App no 34932/04 (ECtHR, 6 January 2011); *L v Lithuania* (2008) 46 EHRR 22.
[107] *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012).

Convention compliance. This is due to the extremely low chances that a case can reach the Court. The number of applications filed represents only a small fraction of potential claims due to the lengthy and expensive process that must be completed in the national courts that precedes an application to the Court. Then, having made an application, there is only about a 2 per cent chance that a complaint will be heard. Furthermore, a single adverse judgment provides no indication of its seriousness. It may represent a problem for a single individual or a systemic problem that affects many.[108]

There are other indicators for assessment that are found in the less tangible functioning of government. Various studies test theories for successful Convention compliance, the role of national officials in coordinating national law with the European Court, and factors that promote state compliance with adverse judgments of the European Court. By standards relevant to the informal mechanisms of knowledge and practice in Lithuania, implementation of the right to a fair trial in Lithuania requires further work.

Two recent comparative studies consider the reasons for favourable cooperation with international obligations, providing an analytical framework for understanding the intangible elements of knowledge and practice critical to promoting Convention implementation, areas in which Lithuania has demonstrated weakness.[109] It is important to note that Lithuania was not included in these two studies, but there are conclusions that may be drawn to conditions in Lithuania in the informal mechanisms of knowledge and practice. First, the less knowledgeable

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[108] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 72-73.

[109] Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) (a comparison in eighteen states of how various actors within national legal systems make decisions that either promote or hinder the status of the Convention) and Dia Anagnostou and Alina Mungiu-Pippidi, 'Why Do States Implement Differently the European Court of Human Rights Judgments? The Case Law on Civil Liberties and the Rights of Minorities' (JURISTRAS Project Comparative Report, funded by the European Commission Research Directorate, Contract FP6-028398, 2009) (a comparison of Convention provisions in nine countries to explain differences in how expeditiously national authorities execute adverse judgments).

national officials were of the Convention, the less likely they were to properly perform their duties.[110] Second, although teaching and scholarly research about the Court and its jurisprudence had steadily increased among the states studied, knowledge of the Court's case law and access to translations of decisions involving other States remains poor, especially among lawyers and lower court judges. This limited knowledge 'weakens the judiciary's overall capacity to guarantee the ECHR's effectiveness'.[111] Third, the networks of non-governmental organizations, expected to grow in tandem with the importance of the Convention at the domestic level, did not increase. Although some organizations were relevant in some states, in no state did they regularly exercise decisive influence on important outcomes.[112]

The second study considered the process of implementation of adverse judgments in the most general sense, in the reactions of domestic officials, legislators, administrators and judges. The related comparative report identifies the conditions that promote implementation, finding that in countries where the quality of public services is high and independent from political pressures, the likelihood is high that the Court's decisions will be implemented.[113]

A relationship was also found between rule of law – an indicator developed by the World Bank and employed in this study – and implementation of judgments.[114] The concept of the rule of law, mentioned earlier, reflects the extent to which citizens have confidence in and abide by the rules of society, and the degree to which they have confidence in the legal framework and the independence of the judiciary. It also refers to enforceability of contracts and property rights, perceptions of the police, the courts and crime. In this regard, solid institutions are consistent

[110] Alec Stone Sweet and Helen Keller, 'Assessing the Impact of the ECHR on National Legal Systems' in *A Europe of Rights* (n 109) 688.
[111] ibid 688-89.
[112] ibid (noting the prominent exception of the Warsaw Helsinki Foundation of Human Rights).
[113] Anagnostou and Mungiu-Pippidi (n 109) 6, 19.
[114] ibid 18. On the other hand, economic indicators alone, such as the level of gross domestic production, did not significantly inform the study results. ibid 19.

with the likelihood of enforcing the Court's decisions,[115] a finding that has not gone unnoticed by the Council of Europe.[116]

The authors conclude that parties with strong implementation records are regularly characterised by active involvement of parliamentary actors in the execution process.[117] In seven of the nine countries, the domestic structures for execution of judgments involved parliamentary actors only minimally, if at all.[118] In these countries, while parliamentarians may discuss and vote on legislation relating to judgments, they have no active role preparing the legislation, assessing their laws or policies, or in promoting the reform that an adverse decision may require. They found it rare for parliamentary bodies to discuss or debate Strasbourg case law.[119]

Looking at the variations between the implementation levels in the countries studied, domestic factors such as these tended to have more relevance than those that were case-specific.[120] In this regard, full domestic implementation of the Convention requires that a state has established 'preventive procedures to review compatibility of draft legislation with the Convention and relevant case law, including case law against third states', as well as concurrent development of related legal scholarship and raising of public awareness.[121]

Applying either approach used in the studies reported by Keller and Stone Sweet[122] and

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[115] Anagnostou and Mungiu-Pippidi (n 109) 18-19.
[116] Committee on Legal Affairs and Human Rights, 'Implementation of Judgments of the European Court of Human Rights, 2009 Progress Report' (AS/Jur (2009) 36, ajdoc36 2009, 31 August 2009, Council of Europe)7 para 24 (noting this report as finding 'state parties with strong implementation records are regularly characterised by active involvement of parliamentary actors in the execution process').
[117] Anagnostou and Mungiu-Pippidi (n 109) 23; Andrew Drzemczewski and James Gaughan, 'Implementing Strasbourg Court Judgments: the Parliamentary Dimension', in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2010* (European Academic Press 2010) 239.
[118] Anagnostou and Mungiu-Pippidi (n 109) 22.
[119] ibid 22-23.
[120] ibid 6.
[121] ibid; Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in *The Impact of the ECHR on National Legal Systems* (n 109) 25.
[122] *The Impact of the ECHR on National Legal Systems* (n 109).

Anagnostou and Mungiu-Pippidi[123] would add considerably to understanding where within the legal system better reception of the Convention can be made. What is known from public accounts, there are areas that need improvement.

Consider the quality of Lithuania's public services and level of the rule of law, for example. Domestic governance indicators were found to contribute significantly in predicting the likelihood of swift and effective implementation of judgments in the European Court. These indicators measure the quality of public services and civil service, the degree of independence from political pressures, quality of policy formulation and implementation, and credibility of the government's commitment to these policies.[124] In two critical public services meant to safeguard the right to a fair trial addressed in this research, Lithuania's judiciary (other than the Constitutional Court) and prosecution service both exhibit indications that they lack independence and lack of competence in Western human rights standards. If for no other reason, the status of the rule of law is frail simply considering the high level of distrust Lithuanians have in their institutions year after year.

One of the first areas investigated in a nine-country comparative study of implementation of the Convention is the manner in which human rights law is mobilised. This entails an examination of the resources and legal support offered to individuals who may wish to pursue a violation in the European Court.[125] Lithuania is weak in this area, especially for those who would qualify for legal aid, due in part to the disregard for international obligations during the

[123] Anagnostou and Mungiu-Pippidi (n 109).
[124] ibid 18.
[125] See Christoph Gusy and Sebastian Müller, 'Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: a Case Study of Germany' (JURISTRAS Case Study Report funded by the European Commission Research Directorate, Contract FP6-028398, June 2008) 6-7.

period of Soviet administration of justice.[126] Legal aid provisions suffer from inadequate implementation, particularly in that the quality of the services, with a substantial impact for those in contact with the criminal justice system. This is due primarily to the legal culture, low compensation for defence attorneys, lack of minimum standards for legal aid counsel, and lack of quality assessment or supervision of counsel by the Bar.[127]

Also important to understanding implementation of European Convention standards at the domestic level is knowing the actors and institutions involved in responding to the adverse rulings from the European Court.[128] In Lithuania, the office of the Agent bears the responsibility of coordinating the responses to the judgments, with no parliamentary body to review violations found or otherwise assess its judicial system against the requirements of the Convention. In this aspect, Lithuania's process for responding to adverse judgments places it among countries least likely to be compliant. As the research illustrates, nations with strong implementation records are those that have active involvement by parliament in the execution process.[129] In Lithuania, when an adverse judgment requires action by the Seimas, it is prepared and presented by the Minister of Justice working with the Agent, but the actions by Seimas in response to the judgments in *Paksas v Lithuania*[130] and *L v Lithuania*[131] have not been supportive.

Lithuania has demonstrated the reluctance to meet its positive obligations under Article 6 even when it is aware of significant deficiencies. Recent examples are documented in *DD v Lithuania*,[132] the factual circumstances of which were known to authorities for a considerable

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[126] Bárd (n 100) 439.
[127] Abramaviciute and Valutyte (n 90) 252.
[128] Gusy and Müller (n 125) 11-19.
[129] Anagnostou and Mungiu-Pippidi (n 109) 23.
[130] *Paksas v Lithuania* (n 106).
[131] *L v Lithuania* (n 106).
[132] *DD v Lithuania* (n 107).

period of time from the work of NGOs[133] and the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). As reflected in its reports, the CPT has attempted to work with Lithuanian authorities since 2004 on several matters, including recommendations on emergency involuntary civil psychiatric commitments.[134] Facts gathered by the delegation during its 2008 visit indicated its earlier recommendations had not been implemented.[135] In many of its responses, Lithuania claimed many of the conditions were 'being addressed' or were the subject of ongoing training.[136] Also raised in the CPT's 2004 visit, and still not clarified in Lithuania's responses, is whether its domestic courts are now seeking the opinion from a psychiatrist not affiliated with the hospital concerned during civil involuntary placement procedures.[137]

Having reliable information regarding Convention violations and not addressing them suggests a general lack of regard for Convention protections absent an adverse judgment in the European Court. At a minimum, Lithuania's failure to address these and other known Convention violations illustrates a fundamental lack of appreciation of the rights of 'others'.

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133 Such as the joint report of the Human Rights Monitoring Institute, Global Initiative on Psychiatry, Viltis: Lithuanian Welfare Society for Persons with Mental Disability, and the Vilnius Centre for Psychological and Social Rehabilitation, 'Human Rights Monitoring in Closed Mental Health Care Institutions: Project Report' (Vilnius 2005) < http://www.hrmi.lt/uploaded/PDF%20dokai/mental%20health%20care%20inst.en_1.pdf> accessed 12 August 2013.

134 'Report to the Lithuanian Government on the Visit to Lithuania Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2008' (CPT/Inf (2009) 22, 25 June 2009, Council of Europe) (CPT 2009 Report to Lithuania) para 133.

135 ibid para 121.

136 'Responses of the Lithuanian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its Visit to Lithuania from 21 to 30 April 2008' (CPT/Inf (2009) 24, 15 September 2009, Council of Europe) 8.

137 CPT 2009 Report to Lithuania (n 134) para 122.

6. Another Approach to Problem Solving

One difficulty in addressing the problems of the legal system is that in many ways the system is operating in isolation. Lithuania's closed institutional culture described in 2001[138] has not appeared to improve how judges are perceived. It is not unusual to see that judges are described in the media as operating as a 'clan'.

When social scientists consider how systems behave, an important characteristic is the insularity of the system, whether a national court system, a particular court within a system, or a profession. The product of an insular system is the inability to see a problem from within. Social scientists refer to this as having a self-referential character.

A system that is self-referential is one that is confined in its thinking to only those things that reinforce the understanding of its own system.[139] It is resistant to change, but change may occur if the system regularly receives information from its environment or generates information about its own functioning. The general concept is that by identifying the desired elements of a system, data can be collected and analysed to identify its dysfunctional aspects so that those who set policy can make improvements. These methods were initially used in management theory and have expanded to many other areas, including medicine and court systems. Several initiatives have been undertaken in Europe to improve the quality of courts using these methodologies.[140] Continuous Quality Improvement (CQI) is one such method for improving aspects of the legal system worth considering in Lithuania because it can also promote change in

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[138] Open Society Institute, 'Judicial Capacity in Lithuania' in *Monitoring the EU Accession Process: Judicial Capacity* (Open Society Institute, 2002) 146-47.

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

[140] Pim Albers, 'The Assessment of Court Quality: Hype or Global Trend?' (2009) 1 HJRL 53, 54.

an insular, self-referential system.[141] The first step in this process, data collection, is already in use by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ).[142] The next steps for Lithuania, should policy makers want to move forward, is to modify the data collection processes to suit the system in Lithuania using the expertise and under the supervision of the Council of Europe.

7. Recommendations Going Forward

There are three fundamental areas that could improve the right to a fair trial in Lithuania. First, increase public education and civic involvement in legal processes across the full spectrum of society. This should include a multi-tiered program of education – from children to all branches of government – that actively addresses all European Convention requirements, including the concepts that come from cases against other countries in the European Court. This should include meaningful civic participation in the selection of judicial candidates. To ensure that there is a cadre of well-informed civic representatives over a broad range of social issues, this participation should include knowledgeable members of NGOs and their experts. Meaningful civic involvement will also enhance the public trust that is lacking today.

Second, improve the quality of public services and civil service by addressing the deficits in legal education and training, including professional ethics. For the right to a fair trial, this means improving legal education and training in all legal professions, beginning with the content and ethics in academic studies and continuing into professional life. All legal professionals must be willing and able to hold themselves and each other accountable to ethical standards; members

[141] Tsoukas and Papoulias (n 139) 853, 855, 857 (data collection and analysis improve the dynamics of insular, self-referential social systems).
[142] Committee of Ministers, 'Resolution Res(2002)12 Establishing the European Commission for the Efficiency of Justice (CEPEJ)' (adopted 18 September 2002, 808th Meeting of Ministers' Deputies, Council of Europe). Detailed information is provided at the CEPEJ website <http://www.coe.int/cepej> accessed 12 August 2013.

of the judiciary must recognise that they are accountable to the public for their independence or impartiality. Legal professionals require the education and training that will enable them to identify and avoid unethical situations. Adequate procedures should be in place to independently and objectively address unethical conduct, for both professional licensing and redress for any affected parties. There should be no retaliation for raising arguable claims challenging professional conduct.

Implicit in strengthening ethical behaviour and accountability is the potential for reducing opportunities for corrupt behaviour, such as inappropriate pressure, financial gain, or personal favours. A strong system of ethics will strengthen the independence of the judiciary, the prosecution system, and the bar. It may also halt, and perhaps repair, the erosion of public trust in the system.

Enhancing public services includes protection of matters protected as confidential, including those who are the subject of criminal pretrial investigations and the communications between attorneys and their clients. Members of law enforcement and legal professionals who violate this confidentiality should be professionally accountable apart from any criminal or civil liability. In this regard, prosecutors should reconsider the practices of publicly announcing the undertaking of a criminal investigation, and openly discussing the findings or identity of the targets of any investigation underway.

Third, adopt an ongoing approach to problem solving that incorporates work already underway in Europe. This should include direct consultations with and supervision by Council of Europe experts. For improvements to the functioning and independence of its courts and prosecution service, Lithuania would benefit from instituting ongoing quality assurance evaluations, such as those developed by the Council of Europe founded in behavioural science

methods of total quality management. This approach can suggest ongoing improvements for its systems that will also reduce its insularity and, by relying upon data collection and analysis, focus on areas that need correction rather than assigning fault. These techniques can also apply to improve those systemic conditions negatively affecting fair trial rights when they are identified, whether found domestically in the work of NGOs and others, or identified by representative bodies of the Council of Europe or other international organizations to which Lithuania belongs.

In closing, unless the courts and government in Lithuania work in a transparent way to make improvements in the areas of meaningful civic involvement, professional legal education and ethics, and a new approach to problem solving, it is unlikely that the prospects for the rights to a fair trial can be improved, and more likely they will decline. This would result in continued jeopardy for all human rights enforcement in the country, do nothing to improve public trust in the courts and the government, and encourage continued high levels of emigration.