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THE ROLE OF THE JUDICIARY IN THE DEMOCRATIC TRANSITION: THE ESTONIAN EXPERIENCE

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(An Abstract)

The Constitutional Courts in Eastern and Central Europe are playing an active role in the protection of human rights and the democratisation procedure. The main focus of academic research on transitional judiciary has been concentrated on the relations between the judicial, executive and legislative branches of government. Few, if any legal scholars have considered the relationship between civil society and the judiciary. I argue that it is high time to shift the traditional angle of thought.

In Chapter I, I will discuss the traditional concepts and the meaning of the rule of law in periods of transition.

In Chapter II, I will examine the concepts of judicial activism and restraint and analyse the position and approach of post-communist constitutional courts.

In Chapter III, I will explore the requirements for exercising judicial power – the judicial independence and accountability.

In Chapter IV, I will analyse the role of judiciary in the democratic transition of Estonia.

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INTRODUCTION

What is the role of a judge? Undoubtedly the role of every judge in any society is to solve legal disputes. But that is definitely not all we can say about the proper role of judges. As the political regime of a country moulds the role of governmental branches, it must be true with respect to the judiciary as well. Consequently, the shift from illiberal rule to democracy should influence the judicial branch.

Human rights constitute the essence of democracy and thus, without respect to human rights no state can be considered democratic. Just as a war cannot be left solely to generals, the protection of human rights cannot be left only to the executive and the legislature. It is not accidental that after the Second World War the attention to the protection of human rights and the significance of the judiciary increased in parallel.

During the past decade we have witnessed the new wave of democratisation of former communist-bloc countries. One of the main reasons behind the "velvet" revolutions was certainly the rebellion against human rights abuses. Recent surveys identify that the Eastern and Central European constitutional courts are playing an active role in the establishment of the rule of law, the strengthening of democracy and the protection of human rights.

Still the main focus of academic research has been concentrated on the relations between the governmental branches. Some scholars argue that the activism of the post-communist constitutional courts is not plausible, because it could undermine the power of the executive and legislative branches. On the contrary, other scholars congratulate the activism of the courts and admit that the democratic transition should lie with the judiciary. However, all of these allegations should be assessed within the context of transitional period and the role of the courts in the process of democratisation.

Few, if any academics have considered the relationship between civil society and the judiciary. My aim in this work is to suggest, how this relationship might be considered - I argue that the public confidence in the judiciary is reciprocally useful.

Wide support of the courts will increase the prestige and strength of the judicial branch and accordingly, the strong and independent judiciary can be effective in the protection of human rights.

In Chapter I, I will explore the traditional concepts and the meaning of the rule of law in periods of intensive political change. In order to help understand the transitional rule of law, I will explain the general attitude towards law and the rule of law during the communist regime. I will also focus on specific problems of democratic transitions and mediating concepts of the transitional rule of law which could help to overcome these difficulties. During the transitional periods when the law is unstable, the implementation of the rule of law requires a more active role of the constitutional courts. This role is unique, because for the Third Wave of democratisation the constitutional courts were not important actors.

In Chapter II, I will analyse different methods and ways of how the judiciary can fulfil its role. I will elucidate the concepts of judicial activism and restraint. As judicial activism is allegedly on the rise throughout the world[1] and *inter alia* in Europe[2], I will also observe the reasons of that phenomenon. This context will provide insight into endeavours of post-communist countries that want to be recognised as equal members of the community of democratic states. I will also consider the judicial activism and restraint in the framework of transition and contradicting opinions about the appropriate stand of transformative judiciary. The more activist position of the post-communist constitutional courts does not mean that the democratic transition should lie primarily on the judicial branch.

In Chapter III, I will examine the preconditions and requirements for exercising judicial power. I will study the concepts of judicial independence and judicial accountability. Then I will focus on the conditions of the effective performance of the judicial role in transitional societies. At the time of the transition the emphasis should be focussed on gaining the public confidence in the judiciary.

In Chapter IV, I will explore the role of the judiciary in the democratic transition of Estonia. Whilst the example of Estonia was chosen because of my knowledge of the country, it is also interesting for theoretical reasons. Estonia is the only post-

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[1] J. Goldsworthy, *Preface,* in T. Campbell, J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism,* Aldershot, Ashgate, 2000, p. xiii.

[2] B. Bugaric, *Courts as Policy-Makers: Lessons from Transition,* in " Harvard International Law Journal", vol. 42, no. 1, Winter 2001, pp. 250-251.

communist country where constitutional review is exercised within the regular court system. I will describe the constitutional review procedure and the development of the rule of law and protection of human rights by the Constitutional Review Chamber. Finally, I will present my view about current problems of Estonia's judiciary and suggest some possible solutions.

I. THE RULE OF LAW

1. INTRODUCTION

There is a vast amount of comprehensive literature on the rule of law, which elucidates the concept from nearly every standpoint. Thus, the question remains – why is it important to discuss the subject again? There are some good reasons.

The meaning and scope of the conception of the rule of law has been altered over the course of time. There is no single universally agreed definition associated with the Western liberal tradition, let alone any Eastern models of the rule of law.[3] Moreover, adherence to the rule of law as a legal principle is determined by a particular legal culture and it could vary in different jurisdictions.[4]

Yet it is generally agreed among scholars that the concept of the rule of law as it stands in its classic version requires clear, stable and prospective law.[5] In other words, it means existence of well-known rules that curb what would otherwise be arbitrary governmental power. But those principles fit poorly with societies in transition. Such societies are at the crossroads from illiberal to the democratic regime. These are states where in political, legal, social and economical spheres reforms are going on simultaneously to meet the demands of democracy.

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[3] I will discuss later about the rule of law in communist regimes.

[4] J. Goldsworthy, *Legislative Sovereignty and the Rule of Law*, in T. Campbell, K. D. Ewing, A. Tomkins (eds.), *Sceptical Essays on Human Rights*, New York, Oxford University Press, 2001, p. 62. In same work (at pp.62-63) Goldsworthy admits that the rule of law as a political principle is universal, but it can also serve as a legal principle if and to the extent it is judicially enforceable.
R. G. Teitel, *Transitional Justice*, New York, Oxford University Press, 2000, p. 11.

[5] Ruti G. Teitel, ibid., p. 11.

Therefore, in respect of societies in transition, the changes are considered as essential values of their own. Consequently, it seems obvious that in the circumstances of substantial political flux the traditional meaning of the rule of law is not appropriate. However, what then does the rule of law mean? This is a problem that has arisen during the last decade and is not very well elaborated. Few scholars have assessed the rule of law in post-communist transition.[6]

I found that it would be helpful at the beginning to place the transitional conceptions into the general theoretical context and have in mind some classical conceptions about the rule of law. In addition, for the purpose of clarity I have to give some explanatory remarks.

First, in the following discourse the term "transition" is used to mark change towards a liberalising direction and the notion of "societies in transition" is meant to replace post-communist states. The latter term is used for the twenty-seven former soviet countries in Eastern and Central Europe, which emerged into the world arena with democratic endeavours after the "velvet" revolutions between 1989 (the fall of the Berlin wall) and 1991 (the break up of the USSR).

Secondly, the overview of the prevailing classical theories of the rule of law has a limited historical scope. It is coterminous with the 20th and early 21st century and does not reach back to the origins of liberal tradition of Western thought. My selection is based on the assumption that these theories represent the best of the preceding thoughts, but their advantage or surplus value lies in contemporaneity. They reflect more adequately the developments of the modern world.

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[6] See, i.e., M. Krygier, *Institutional Optimism, Cultural Pessimism, and the Rule of Law,* in M. Krygier, A. Czarnota (eds.), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe*, Aldershot, Ashgate, 1999, pp.77-108;
M. Krygier, A. Czarnota, *The Rule of Law After Communism: Introduction,* in M. Krygier, A.Czarnota, op. cit., pp. 1-18;
R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, in "Yale Law Journal", vol. 106, 1997, pp. 2009-2080;
R. Teitel, op. cit. note 4, pp. 11-26;
P. Selznick, *Legal Culture and the Rule of Law*, in M. Krygier, A. Czarnota (eds.) op.cit., pp. 21-38;
L. Morawski, *Positivist or Non-Positivist Rule of Law? Polish Experience of a Dilemma*, in M.Krygier, A. Czarnota (eds.) op. cit, pp. 39-54;
A. Ökérny and K. L. Scheppele, *Rules of Law: The Complexity of Legality in Hungary,* in M. Krygier, A. Czarnota (eds.), op. cit., pp. 55-76.

2. DEFINING THE RULE OF LAW

What is the rule of law?

The idea of "the rule of law and not of men" has been known since Aristotle.[7] From that time the conception, however, has been interpreted in many ways. Nevertheless, the notion itself remains relatively vague and indeterminate, and it is often misused as an all-encompassing term with ambiguous content.

The following discourse is far from being a comprehensive review of relevant ideas. My aim is to present two modern and generally recognised approaches to the issue, because the meaning of the rule of law for societies in transition cannot be examined without understanding its more traditional conceptions.

First of all it should be acknowledged that the rule of law is not simple, but rather a complex ideal of democracy.[8] It is a "practical ideal" that can utilise a guiding rule for decision-making and institutional architecture.[9]

As described by Jeffrey Goldsworthy:

" The rule of law requires more than the rule of the law: in other words, the law itself might not adequately protect the rule of law".[10] But everyone probably agrees that at a minimum there must be a rule and the rule must be in accordance with the law.[11]

The debates about the rule of law in most cases are focussed on the extent of its meaning, the matter of degree or (to borrow again J. Goldsworthy's expression) "how much more" than the law is required by the rule of law. [12]

From the variety of conceptions it is possible to deduce two major approaches. On the one hand, there are the conceptions which have in common the idea that under the rule of law certain moral principles must be observed. On the other hand, there are conceptions of law-and-order.[13] Thus, despite these different wordings there is generally a dichotomy of the main ideas. For an account of clarity, it is better to stick

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[7] M. Krygier, *Ethical Positivism and the Liberalism of Fear*, in T. Campbell, J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism*, Aldershot, Ashgate, 2000, p. 62.
[8] M.Krygier and A. Czarnota, op.cit. note 6, p. 4.
[9] P. Selznick, op. cit. note 6, p. 21.
[10] J. Goldsworthy, op. cit. note 4, p. 64.
[11] M. Neumann, *The Rule of Law: Politicizing Ethics*, Aldershot, Ashgate, 2002, Preface.
[12] J. Goldsworthy, op. cit. note 4, p. 64.
[13] M. Neuman, op. cit. note 11, p. 1.

to one version. I preferred Professor Paul Craig's discourse for its essential, but still simple manner.

Paul Craig, in his influential and frequently cited study,[14] identifies two main sets of distinctions of the predominant conceptions of the rule of law – formal and substantial conceptions.

Formal conceptions are the focus of institutional and procedural requirements for the law. Those doctrines accept that the prerequisites for the rule of law are granted if the formal conditions are met. For example, where the law is relatively stable, sufficiently clear, and adopted by a competent authority, it is known to the wide public (that is, to the subjects of the law) and enforceable by an independent court. [15]

Formal conceptions of the rule of law are unconcerned with the content of the law.[16] According to the most prominent supporter of the formal conception, Joseph Raz, the rule of law should not automatically be considered as a rule of good law.[17] He continues that the rule of law as a formal doctrine should stand separately from democracy, justice, equality or human rights:

"A non democratic legal system… may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies".[18]

The core of the rule of law, as Raz suggests, is in its negative value.[19] This negative conception focuses mainly upon the legal restraints, which are necessary to avoid the arbitrary use of power by the State. The negative notion in its wider sense is extended to everybody's actions. The negative concept corresponds to the legal culture of autonomous law. This model of the rule of law is associated with legal positivism. The rule-centred legal culture requires a clear differentiation between legal reasoning and lawmaking, and also the separation of law and polities.[20] The judicial review of legislation on these grounds is limited on controlling the formal requirements of the rule of law, for example, that the law is prospective, general,

[14] See further: P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in "Public Law", Autumn 1997, pp. 467- 487.
[15] P. Craig, ibid., p. 467.
[16] P. Craig, ibid., p. 467.
[17] J. Raz, *The Rule of Law and its Virtue*, in "The Law Quarterly Review", vol. 93, 1977, p. 211.
[18] J. Raz, ibid., p. 196.
[19] J. Raz, ibid., p. 211.
[20] P. Selznick, op. cit. note 6, pp. 24-26.

clear, relatively stable and published.[21] It follows also that under this conception, the principles, which are not expressed in the written laws, cannot be the sources of law. Consequently, rights and duties should only spring from legal texts.[22]

The alternative is the principle-centred substantive conception. This positive vision does not deny the importance of the rules, but emphasises that there must be an appropriate cause behind the law.[23]

Proponents of substantive conceptions thus go further - they care about the content of the law. They argue that the rule of law requires not just mere existence of the law, but also a certain standard for its content and exercise.[24]

The spirit of law could be seen in the substantive rights, which are based on or stem from the idea of rule of law. From the substantial point of view it is possible to distinguish between good and bad law, the latter is incompatible with aforesaid rights.[25]

Ronald Dworkin is probably the most notable exponent from among the contemporary substantive theorists. This substantive conception, which Ronald Dworkin prefers, rests on his theory of law and adjudication:

"It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights".[26]

Within the conception of the rule of law, R. Dworkin rejects any rigid distinction between the legal and political principles. Moreover, in accordance with his view, the rule of law does not have an independent value, but it is embedded in the theory of

[21] J. Raz, op. cit. note 17, pp. 197-199.
[22] L. Morawski, op. cit. note 6, p. 41.
[23] L. Morawski, ibid., pp. 39-41.
[24] P. Selznick, op. cit. note 6, pp. 23-24.
[25] P. Craig, op. cit. note 14, p. 467.
[26] R. Dworkin, *A Matter of Principle*, Oxford, Clarendon Press, 1992, pp. 11-12 (emphasis in original).

law and adjudication. According to R. Dworkin the rule of law is inseparable from the individual perception of the law and the adjudicative role of the judge.[27]

The preceding analysis reveals that the substantive and formal theories differ mainly by their perceptions of law and understandings regarding proper adjudication. It also follows from the previous discourse that the formal theories probably tend to favour a more passive approach and the substantive theories favour a more active role of the courts. Even if the content of the law might be unlike for the proponents of one or another theory, they agree on point that for the rule of law it is significant that the law is clear, stable and preferably prospective.

The dilemma, which is an appropriate meaning of the law and the correct way of adjudication, is inescapable during periods of political changes. But then the responses to the question have to be adequate to the distinctive context of transition.

3. COMMUNISM AND THE RULE OF LAW

The communist states had never been complete legal deserts.[28] They had both law and order, but did they have the rule of law? Only a very superficial observer could affirm that they had. As we all know now Gorbachev's attempt to establish "a socialist law-governed state" failured and led to the collapse of the totalitarian regime.[29] Because Gorbachev's aim was unfeasible – to compile was incompatible.

As previous discussions indicated, the meaning of the rule of law depends to a considerable extent on what is understood by the notion of law.[30] The idea of the transitional rule of law can only be perceived if one is conscious of the role and meaning of the law during the communist period.

It is well known that in communist sates law did not have a great importance. [31] As put by cynical words of a contemporary: "It was like a door in the middle of an open field. Of course, you could go through the door, but why bother?"[32] For this regime,

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[27] P. Craig, op. cit. note 14, pp. 478- 479.
[28] M. Krygier, A. Czarnota, op. cit. note 6, p. 1.
[29] S. White, G. Gill, D. Slider, *The Politics of Transition: Shaping a Post-Soviet Future*, Cambridge, Cambridge University Press, 1993, pp. 212-214
[30] P. Craig, op. cit. note 14, p. 487
[31] Rein Müllerson, *International law, rights and politics: developments in Eastern Europe and the CIS*, London, Routledge, 1994, pp. 178-180.
[32] M. Krygier, A. Czarnota, op. cit. note 6, p. 2.

more vital "things" were notable – the people with connections and influence and the other important people like your friends and your relatives.[33] Indeed, these ties can matter in every society. Nevertheless, some features were unique and peculiar only to the communist states.

The grip of the communist Party was immense.[34] Almost every aspect of life was politicised and the Party ruled above the laws. Needless to say that all significant members of the society were meanwhile members of the Party.[35]

The communist countries did not correspond to any classical forms of the rule of law state. As mentioned before, the positivist or formal conception of the rule of law presupposes the clear separation of law and polities. Under this principle not every institution is entitled to adopt binding rules, but legitimate lawmaking has to be subjected to certain authorities and procedures. The substantive conception of the rule of law stands for harmony between the laws and commonly accepted values. But for the communist reality, the hierarchy of legal norms (such as the superiority of the constitution and the statutes) existed solely in legal theory. In practice the regulation of main spheres of social and economical life by administrative acts was predominant. The statutes and the constitution, however, were reduced to solemn declarations of the communist ideology.[36]

Moreover, there was a public secret that the Communist Party also performed a legislative role by adopting political directives which were binding on the state organs, although officially the Party was not furnished with lawmaking power.[37] At the same time not a single court was competent to review the legislation and the actions of public authorities.

From the preceding deliberations we can deduce that during the communist era the rule of law was constitutionally declared, but not followed in the sense of the liberal traditions.

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[33] See further about patronage relations in Soviet Union: J. P. Willerton, *Patronage and Politics in the USSR*, Cambridge, Cambridge University Press, 1992.

[34] See further about the role of the Communist Party: R. J. Hill and P. Frank, *The Soviet Communist Party*, Boston, Unwin Hyman, 1988;
G. Gill, *The Collapse of a Single-Party System: The Disintegration of the CPSU*, Cambridge, Cambridge University Press, 1994;
J. C. Moses, *Regional Party Leadership and Policy-Making in the USSR*, New York, Praeger Publishers, 1974.

[35] M. Krygier, A. Czarnota, op. cit. note 6, pp.1-2.

[36] L. Morawski, op. cit. note 6, p. 44.

[37] L. Morawski, ibid., p. 44.

Furthermore, it is also widely known that the former communist states "never accepted the institutions of parliamentary democracy and the most fundamental political freedoms and rights. The communist states practically replaced market economy by central planning, effectively reducing the right to private ownership in many important aspects".[38]

4. THE RULE OF LAW IN PERIODS OF DEMOCRATIC TRANSITION

During the last decade the Eastern and Central European transitional countries have had variable success in respect of their democratisation processes, however, these states are associated with the same particular political regime with totalitarian practices in the past and similar endeavours for the future. At present we can experience on the historical foundations the truth that establishing the rule of law, democracy and welfare state is not an easy and short-term task to solve. Or as put by Chou En-lai's thoughtful words, when he was asked to evaluate the outcome of the French Revolution: "It is too soon to tell".[39] Of course, twelve years might be a scant period for a state's development. But on the grounds of empirical studies (relatively few of which exist) it is possible to identify some common features and problems of democratic transition for the region.

The "velvet" revolutions are also known as the "rule of law" revolutions. Debates about the role of law and the rule of law during periods of substantial political change are often concentrated on the appropriate approach to the question – whether it should be one or another of the ordinary classical conceptions or alternatively, whether such periods demand new mediating conceptions. Therefore, it seems unavoidable to elucidate both prevailing theories.

However, the representatives of opposing opinions about the nature of transitional rule of law share mutual acknowledgement that the path of the transition from party-state to democracy is edged with very specific problems.

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[38] L. Morawski, ibid., p. 43.

[39] As referred by M. Krygier, *Parables of Hope and Disappointment*, in "East European Constitutional Review", vol. 11, no. 3, Summer 2002, p. 2.

Most researchers have emphasised the inevitable necessity of deep and simultaneous socio-economic, political and legal reforms.[40] In the field of economy, the main goal is the creation of an economic society, not merely a market as one could erroneously consider. Undoubtedly, the transformation from state-planned economy into economic society implies an adequate legal and political environment and the rule of law. [41]

The changes have started with an application of a multi-party system and free elections, which are pre-requisites of parliamentary democracy. The adoption of completely new or amended pre-soviet constitutions was also among the common and most significant steps. The political system of those modern democracies rests on the principle of separation of powers. The legislative and executive powers are now equipoise with the independent judicial branch. Furthermore, the administrative and constitutional courts and as well the institution of the Ombudsman are newly introduced safeguards to prevent the misuse of the political power.[42]

Still, it must be confessed that these reforms were not always realised smoothly and without any obstacles. The transition has produced the novel problems of minority and group rights.[43]

It is not a mystery that one important motivation behind the "velvet" revolutions was a strong national aspiration.[44] Yet, the events in the former Soviet Union, Yugoslavia and Czech Republic and Slovak Republic and the determination of new borders were accompanied by a large number of illegal immigrants, people without citizenship or internally displaced persons. Within the former Soviet Union there are scattered about 25 million ethnic Russians. For example, the Russian or Slav

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[40] A. Stepan, J. J. Linz, *Post-Communist Europe: Comparative Reflections*, in T. Inoguchi, E. Neuman, J. Keane (eds.), *The Changing Nature of Democracy*, Tokyo, United Nations University Press, 1998, pp. 184-186.
B. Bugaric, op. cit. note 2, pp. 247-248.
[41] A. Stepan, J. J. Linz, ibid., p. 185.
[42] B. Bowring, *Human Rights in Eastern Europe*, in A. Hegarty, S. Leonard (eds.), *A Human Rights: An Agenda for the 21st Century*, London, Cavendish, 1999, pp. 339-340 and pp. 345-349;
L. Morawski, op. cit. note 6, pp.45-46.
[43] B. Bowring, ibid., p. 340.
[44] R. Müllerson, *Introduction*, in R. Müllerson, M. Fitzmaurice, M. Adenas (eds.), *Constitutional Reform and International Law in Central and Eastern Europe*, The Hague, Kluwer Law International, 1998, p. XVI.

population in Estonia form approximately 30 percent, and 39 percent in Latvia, nearly making them states with two main nationalities.[45]

Another debate that these contemporary challenges stimulate is a dispute on the hierarchy of individual and group rights, because giving preferences to one or other can "lead to significantly different political and social order".[46]

Additionally severe is the issue connected with the economical sphere regarding the question of legitimacy and fairness of the property reform and privatisation. Rehabilitation of the property rights and privatisation are regarded as the main tools for establishing the free-market economy. However, the stand toward the property reform and privatisation is based on the rather dubious presumption that democracy can by itself easily legitimate the privatisation and property rights, or vice versa that economic success can legitimate the new democracy.[47] In reality the majority of the citizens of Eastern and Central European countries are witnesses to the process by which the members of the "red bourgeoisie" have skilfully taken advantage of their privileged position and through privatisation became owners of the first property rights of a new regime. Thus, for the ordinary people, the power did not even change hands, but the former elite has transformed its political power into an economical one.[48]

The forth set of problems of transition concerns the meaning of the law and historical justice. According to the ordinary understanding of the rule of law, the law must be stable and known to the wider public. But such claims fail to explain the relationship between normative responses to past injustice and the prospects for liberal transformation.[49]

As observed by Ruti Teitel:

"During the periods of radical political change the law is both settled and unsettled. It is as well simultaneously backward- and forward-looking."[50] This is because

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[45] V. Pettai, *Ethnopolitics in Constitutional Courts: Estonia and Latvia compared,* in "East European Constitutional Review", vol. 11/12, no. 4/1, Winter 2002/Spring 2003.
[46] H. J. Steiner, P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Oxford, Oxford University Press, 2000, p. 364.
[47] A. Stepan , J. J. Linz, op. cit. note 40, pp. 187-188.
[48] A. Stepan, J.J. Linz, ibid., p. 187;
S. Holmes, *Back to the Drawing Board*, in "East European Constitutional Review", Winter 1993, p. 21.
[49] R. Teitel, op. cit. note 6, p. 2011.
[50] R. Teitel, ibid., p. 2015.

transitional law is like a product of political change.[51] There is an enormous amount of rapidly changing legislation, however, many statutes from previous soviet-times are still valid. The latter does not correspond either to the expectations of the people or to the development of society. The problem here lies even deeper than in the improper content and formulation of the "old" law. It is just hard to respect the norms, which have been devalued by former inhuman regimes. Therefore, the transformative role for the judiciary – to settle a new and appropriate perception of the rule of law – is extremely hard and delicate. That new scale of values has to be "in response to past political repression supported by the prior legal system". [52] Respectively, transitional legislature and judiciary stood before a serious dilemma over which interpretation of the rule of law had to choose.

Admittedly, in post-communist countries there is an inclination to give preference to the classical formal approach.[53] In one sense, this is comprehensible.

There are at least two possible reasons to justify this option. The first, external one, is following the traditions of Western civil law countries. This position is meant to counterbalance the communist ideology, which constantly criticised Western democracy and opposed its own legal culture to the Western countries legal culture. The second one is kind of internal and political reason. A great number of people with a Communist Party background (civil servants, judges etc.) did not lose their prominent positions and are currently very influential. Obviously they are supporting the legal order, which better serves their interests, guarantees their security and helps them to avoid responsibility.[54] As Lech Morawski observes: "… the positivistic… thesis of separation of law and morality… accepts dogmatically the priority of legal norms over moral rules…".[55] The practically similar idea of division of law and moral was also used during the communist times in the form of indisputable enforcement of the laws despite their questionable humanness.[56] This parallel alters, however, the formal conception unacceptable to the general public. One can easily find another difficulty that makes problematic the value of the formal conception for transitional societies. Application of formal positivistic theory presupposes the

[51] R. Teitel, ibid., pp. 2011-2012.
[52] R. Teitel, ibid., p. 2015.
[53] L. Morawski, op. cit. note 6, p. 46.
See also: B. Bugaric, op. cit. note 2, pp. 272-273.
[54] L. Morawski, ibid., p. 47.
[55] L. Morawski, ibid., p. 47.

existence of stable legal environment. Therefore, it possibly makes more sense to look for the modern transformative understandings of the rule of law.

The first mediating concept is based on the empirically proven assertion that the transitional rule of law is socially constructed. This conclusion stems from analysis of adjudication practices of the post-communist courts in Hungary and Germany. This conception is also a kind of substantive conception idea, albeit, slightly different from previous theories. It is a rule of recognition. The validity and legitimacy of the prior regime's law allegedly depends on its popular perception. But it is up to the courts to decide what the law consists of. Understood in this way, the law stands independent from political changes. Meanwhile, social understanding and practices can guarantee legal continuity.[57]

Another mediating concept of the transitional rule of law is founded on international law. In this connection the primacy of international law over national law and the direct applicability of international law in domestic legal systems are considered as an expanded version of the rule of law.[58] Therefore, in periods of transition, international law offers an alternative construction of law that, despite substantial and political change, provides continuity.[59]

One must bear in mind that for the post-communist countries democratisation also denotes "the road to Europe". It is a pursuit of recognition by the international community. Within that context the rule of law has been regarded as an important "external" standard that "old" consolidated democracies share. Such common democratic standards were opposed to the totalitarian rule and were embodied in international legal instruments. The significance of international law has been reflected in the novel constitutional principle introduced in almost every post-communist constitution that international law should prevail over national law.[60] Judicial review is a procedural method of enforcement for these superior norms.[61]

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[56] L. Morawski, ibid., p. 48.
[57] R. G. Teitel, op. cit. note 4, p. 19.
[58] D. Georgiev, *The Collapse of Totalitarian Regimes in Eastern Europe and the International Rule of Law*, in M. Krygier, A. Czarnota (eds.), *The Rule of Law After Communism: Problems and Prospects in East-Europe*, Aldershot, Ashgate, 1999, p. 332.
[59] D. Georgiev, ibid., p. 329.
R. G.Teitel, op. cit. note 4, p. 21.
[60] D. Georgiev, ibid., pp. 329-332.
[61] D. Georgiev, ibid., p. 334.

The last and most controversial conception is the idea of the transitional rule of law as antipolitics opposed to the former overpoliticised regime.[62] Nevertheless, it is hard to deny that lawmaking is itself a political process.[63] This theory seems to be a variation of the ordinary formal conception, which clearly divides law, politics and adjudication.

5. CONCLUSION

My aim has not been to undervalue the classical conceptions about the rule of law. It has been an attempt to draw attention to the fact that extraordinary circumstances demand creative approach, rather than merely fitting principles suitable for well-settled regular times. More precisely, liberal understandings of the rule of law are fundamentally challenged during periods of political transitions.[64]

As prior discussions underscore, the transitional rule of law is unusual and dynamic, because it evaluates legal changes. Whereas the whole "legal system cannot be reformed overnight",[65] the periods of intense political change impel us to seek beyond settled law. Therefore, the transformative conceptions, where the rule of law is formed by the use of social perception of law or international law, offer solutions on how to soothe tensions and meanwhile mediate the normative shift. These conceptions could also provide relevant guidelines for legislative and adjudicative practices. In my opinion the conception of the transitional rule of law as antipolitics is not a very successful idea. It is contradictory to the core of transitional concept that the lawmaking (and for that matter also the policy-making) by the courts is plausible. Moreover, the public perception of the law constitutes a non-political approach. Ruti Teitel also concedes that the last transitional theory is to a certain extent similar to the ordinary conceptions of the rule of law.[66]

I found that the common feature of transitional theories of the rule of law is the fundamental role of the courts, however, mainly the constitutional courts. When the

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[62] R. G. Teitel, op. cit. note 4, p. 21.
[63] B. Bowring, op. cit. note 42, p. 285.
[64] R. G. Teitel, op. cit. note 4, p. 25.
[65] D. Murgio, *Forging Constitutionalism After Communism: Constitution-Making and Constitutionalism in Poland's Third Republic*, in "The Journal of East European Law", vol. 6, no 1, 1999, p. 230.

law is unsettled, the establishment of the rule of law requires from the constitutional courts a more active role, especially in respect of the protection of the human rights. Professor Leonardo Morlino in his comparative study of Third Wave Southern European democracies and nascent Eastern and Central European democracies, admits that in Southern Europe the constitutional courts did not have a significant role in the implementation of the rule of law. He also argues that in the process of the post-communist democratisation, the constitutional courts played a pivotal part.[67] He explains that the post-communist constitutional courts are crucial actors in the democratic process for the following reasons: "the uncertainties of the rule of law, the lack of constitutional traditions, and the lack of strong political actors".[68]

How should the courts carry out their role? What is the essence of judicial activism and restraint? Does the active role of the post-communist courts mean that democratic transition should lie on judiciary? These are the questions I will try to answer in the next chapter.

II. ACTIVISM VERSUS RESTRAINT

1. INTRODUCTION

"To say that the rule of law is the rule of reason rather than will is to beg the question of whose reason should rule, and whose reason should be overridden or discounted on the ground that it is mere "will". Should law be based ultimately on the reason of an elected legislator, or the reason of judges?" [69] To put these words in another way: who has a right to say the last word about the content of the law – the judges or the

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[66] R. G. Teitel, op. cit. note 4, p. 22.
[67] Leonardo Morlino explains that in some Southern European countries (like Italy, for example) the consitutional court was created at the end of the consolidation phase of democracy. See further: L.Morlino,*Constitutional Design and Problems of Implementation in Southern and Eastern Europe*, in J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe, Volume I: Institutional Engineering*, New York, Oxford University Press, 2001, pp. 48-108.
[68] L. Morlino, ibid., p. 106.
[69] J. Goldsworthy, op. cit. note 4, p. 71.

legislator? In essence, this is the current debate about judicial activism and restraint in a nutshell.

From the judicial standpoint the final word about the law can be seen in the process of judicial review and by the constitutional courts. There are also different possibilities to exercise the judicial function. Therefore, the role of the judges cannot be properly examined without considering those alternatives. Generally speaking, there are two models of judicial review. One is a model in which judges merely control constitutionality of law and declare the law invalid if its *ultra vires* the powers of the legislature. The second model assumes that the court can keep the constitutional provisions up to date through dynamic interpretation. The court that gives a modern meaning to the norms so as to suit the changing socio-economic conditions or expands the rights of individuals is considered to be an activist court. Thus, judicial review could make the constitutional courts powerful democratic actors. Judicial activism is considerably greater where judicial review embraces likewise a legislative and an executive action.[70]

2. THE REASONS OF EXPANSION OF JUDICIAL ACTIVISM

Although judicial activism is now "on the rise throughout the world",[71] for a long time it was asserted that judges either found the law or interpreted it, but their duty is not to create law.[72]

According to the view of many ordinary citizens and as well legal scholars " the role of the judiciary or judicial work is essentially passive. Judges are generally viewed as persons who react to situations, that is, they react to cases presented to them, they react to adopted legislation that is brought to their attention for constitutional review; in some countries they may even react to legislation that is being proposed in the legislative branch and has been submitted to them to their views. Judges very rarely engage, in the public mind, in the kind of activism that characterises public officers in the executive branch… or… in the legislative

[70] P. N. Bhagwati, *Judicial Activism and Public Interest Litigation*, in "Columbia Journal of Transnational Law", no. 23, 1985, pp. 561-563.
[71] J. Goldsworthy, op. cit. note 1, p. xiii.
[72] J. A. G. Griffith, *The Politics of the Judiciary*, London, Fontana, 1997, p. 290.

branch".[73] Yet it is hardly questionable nowadays that the judiciary is totally neutral and far from politicisation. As J. Griffith explained:

"Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions".[74] The kernel of truth in this statement is that the original content of the doctrine of a separation of powers does not entirely apply to the modern states where the sharp borderlines between the legislative, executive and judicial branches have been gradually converged.[75]

Another commonly shared approach was contrasting the "passive and career-oriented" European judiciary with the "activist and politically influential" American judiciary.[76] But such a broadly spread opinion no longer corresponds to the reality of the contemporary world, because European judges have gained a stronger position of their lawmaking role. Professor Bugaric explains this development with two historical and political reasons: the expansion of judicial review and European integration.[77]

Prior to the Second World War the judiciaries in Europe were also independent branches of government. However, the courts in most European countries could not review the constitutionality of laws and executive actions. At the end of the 19th century, judicial review was only exercised in Norway, Greece and Romania.[78] The first constitutional courts in Europe were established in Austria and Czechoslovakia in 1920.[79] The overwhelming majority of European constitutional courts were established only just after the Second World War.[80] This change also marks a big step forward in political and legal thought in Europe which was considered before "judicial review … contradictory to the principle of legislative supremacy".[81] Probably the atrocities of war, the collapse of some European democracies, and the concurring human right abuses impelled politicians and scholars to change their

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[73] J. G. Apple, *The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights*, in E. Cotran, A.O. Sherif (eds.), *The Role of the Judiciary in the Protection of Human Rights*, The Hague, Kluwer Law International, 1997, p. 201.
[74] J.A.G. Griffith, op. cit. note 72, p. 292-293.
[75] J. Bell, *Policy Arguments in Judicial Decisions*, Oxford, Clarendon Press, 1985, p. 9-10.
[76] B. Bugaric, op. cit. note 2, p. 250.
[77] B. Bugaric, ibid., p. 251.
[78] G. Dietze, *Judicial Review in Europe*, in "Michigan Law Review", vol. 55, no. 4, February 1957, p. 548.
[79] A. R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge, Cambridge University Press, 1989, p. 195
[80] See further: I. Kavass (ed.), *Supranational and constitutional courts in Europe: functions and sources: papers presented at the 30th Anniversary Meeting of the International Association of Law Libraries, Bibliothèque Cujas, Paris, August 1989*, Buffalo, New York, W.S. Hein, 1992, p.

attitudes toward constitutional courts. Judicial review was accordingly conceived as a protective tool for democracy.[82]

The second reason for the growth of judicial power and activism is European integration. More precisely it is connected with the establishment of the new supra-national entity like European Union and its distinctive legal order. [83] This legal order has enhanced the power and prestige of national courts.[84] Through the preliminary rulings procedure, the national courts have direct access to the significant institution of European Union, namely, the European Court of Justice.[85] The national courts are now considered important policy-makers in the European Union. On the other hand, the membership status in the European Union has led to the decrease of national legislative and executive powers.[86]

3. DEFINING JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT

The notions "judicial activism" and "judicial restraint" are often exploited terms. But there is no unanimous understanding among law-practitioners and scholars concerning the precise content of the terms, not to speak of their clear definition.[87]

The two main confronting tendencies are both trying to find their response to the question of what is more appropriate to the judicial function – to stay neutral and only declare the law or to be more creative and keep their legal reasoning up with the times. The first concept limits judicial task to the mere logical decision-making, where the central issue is just to juxtapose the relevant statutes and the facts presented by parties.[88] The supporters of the second approach stressed that the judicial work is complicated and requires creative and up-to-date argumentation besides legal

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[81] B. Bugaric, op. cit. note 2, p. 253.
[82] B. Bugaric, ibid., p. 255.
[83] P. Craig, G. De BÚRCA, *EU Law:text, cases, and materials*, New York, Oxford University Press, 2003, pp.178-228.
[84] A. Arnull, *The European Union and its Court of Justice*, Oxford, Oxford University Press, 1999, pp. 559-561.
[85] A. Arnull, ibid., pp. 49-74.
[86] P. Craig, G. De BÚRCA, op.cit. note 83, pp.11-138 and 230-273.
[87] A. Barak, *The Supreme Court 2001 Term: Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, in "Harvard Law Review", vol. 116, no. 1, November 2002, p. 126.
[88] J. Bell, op. cit. note 75, p. 9-10.

erudition also, for example, some understanding of politics, economics, sociology, ethics and psychology.[89]

3.1. Judicial activism

In order to understand what is at stake in the debate about judicial activism and restraint it is necessary to explore different concepts of activism. But before that, I must draw a distinction between judicial interpretation, discretion and lawmaking. Evidently any sort of creative activity has an innate connection with interpretation. To put it in the words of Professor Mauro Cappelletti:

"To interpret means to penetrate the thoughts, the inspiration, and the language of others in order to understand them, and, in the case of the judge no less than in the case of, say, the musician, to reproduce, "enforce", or "execute" them in a new and different setting and time".[90] Whilst, the interpretation of the law obviously contains opinions of the judges regarding the competing values, adjudication does not mean merely to effectuate ones own ideas. Preferably, the judges consider, of course, according to their best knowledge and understanding, what is most profitable for the community within the given statutory framework.[91],[92]

However, there would seem to be no difficulty to separate judicial interpretation and lawmaking. The creativeness of one as well as the other is beyond doubt. Yet the real discussion among the scholars has concentrated on the level of such creativity, its limits, methods and admissibility.[93] Sometimes, according to the law itself, several equally lawful alternatives are available for the same situation. In these indeterminate cases the judges have power to exercise discretion.[94]

There have been serious indictments that judicial activism is solely a fitting sign to criticize and attack unpopular or unwelcome decisions.[95] Even further - sometimes the interchangeably used terms "judicial imperialism" or "judicial activism" have become

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[89] J. Bell, ibid., p.9-10.
[90] M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon Press, 1989, p. 5
[91] M. Capelletti, ibid., p. 8.
[92] J. Bell, op. cit. note 75, pp. 12-13 and 82-83.
[93] M. Cappelletti, op. cit. note 90, p.7.
[94] About judicial discretion see: D. Pannick, *Judicial Discretion*, in R. Dhavan, R. Sudarshan, S. Khurshid (eds.), London, Sweet & Maxwell, 1985, pp. 41-53.

[95] An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence, available at:

disparaged synonyms for the value-judgements, which allegedly represent more judges' personal symphaties, than implementation of law.[96] A yardstick to measure the limits of judicial lawmaking or distinguish the judicial activism from the interpretation of law is vague and blurred as well. Nevertheless, in most legal writings the notion of "judicial activism" is used to describe the judges as lawmakers.

In theory, the judge is acting in a similar way to the legislator in deciding to speak in hard cases.[97] This could happen when the courts have to resolve the cases, which include novel situations unforeseen and not provided by legislator, likewise, the guidelines laid down in the existing law are uncertain and ambiguous.[98] On the contrary, in the easy cases the ideas for legal reasoning were obtained directly from the text of the law.[99]

The following has to be considered as an attempt to examine the main models of thought about the role of judges as lawmakers. According to their approach to judicial lawmaking, Professor K. L. Bhatia distinguishes three schools of thought: (1) the Classical or Doctrinal Approach; (2) the Realistic Approach, and (3) the Socio-Economic or Social Justice (Judicial Activism) Approach.[100]

Classical Doctrinal Approach

The first and oldest theory suggests that the judge's duty is only to declare the law and to make decisions on how the law should be, is incompatible with the courts' role.[101] As Lord McCluskey vividly explained:

"The judge should know his limitations. The principal limitation, though it is also his strength, is the law itself. And when a judge begins to think that justice demands a "yes" but the law requires a "no", he has to stop and remember that judges have no general responsibility for considering the greatest good of the greatest number, or for advancing social or moral aims. Justice itself is not a legal concept. Insofar as he helps to build the just society, the judge's role is to be not an architect but a

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http://www.abanet.org/govaffairs/judiciary/r6b.html

[96] Ibid.

[97] J. Bell, op. cit. note 75, p.226

[98] J. Bell, ibid., p.92.

[99] Mac Cormick, N., *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978, p. 107.

[100] K. L. Bhatia, *Kaleidoscopic View of Jurisprudential Dimensions of Judicial Activism with Reference to Swadeshi Jurisprudence: Saint or Sinner*, in K. L. Bhatia (ed.), *Judicial Activism and Social Change*, New Dehli, Deep & Deep, 1990, p. 139.

[101] T. Bingham, *The Business of Judging: Selected Essays and Speeches*, New York, Oxford University Press, 2000, p. 25.

bricklayer".[102] This statement presupposes that the core meaning of the law remains constant and that the judges cannot change this content.

The strict proponents of particular view are arguing that only excuse not to uphold the law might be the absence of the relevant law itself.[103] On the other hand, some academics agree that judicial lawmaking is permissible when pre-existent rule is not sufficiently clear.[104]

Realistic Approach

The second model asserts that law is to a great extent made by judges.[105] As put by the strong proponent of the realistic approach Benjamin N. Cardozo: "[the] judge-made law is one of existing realities of life".[106] Cardozo argues that a dynamic judge will mould the law according to the needs of welfare of society.[107]

Judicial Activism Approach

The proponents of third school hold an opinion that judges are creating new law if they take into account social needs. This school is considering the fundamental activity for the judges to eliminate all obstacles from the path of justice, and lawmaking is one of the main means for doing so.[108] Roscoe Pound therefore describes the role of creative judges as "social engineering".[109]

But even the legal scholars and judges, who support judicial activism and regard it as an inevitable part of the judicial process in democratic societies, acknowledge that judicial lawmaking is certainly restricted mode of action.

First and foremost, the existing *law* limits the power of the courts. The judges have to follow the rules of the established legal system in their activities, as their legislative

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[102] J. H. McCluskey, *Law, Justice and Democracy*, London, Sweet & Maxwell, 1987, p. 3.
[103] S. J. Burton, *Judging in good faith*, New York, Cambridge University Press, 1992, p. 97.
[104] T. Campbell, *Democratic Aspects of Ethical Positivism*, in T. Campbell and J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism*, Aldershot, Ashgate, 2000, p. 14.
[105] K. L. Bhatia, op. cit. note 100, p. 144.
[106] B. N. Cardozo, *The Nature of Judicial Process*, New Haven and London, Yale University Press, 1965, p. 10.
[107] B. N. Cardozo, ibid., p. 66 and pp. 98-141.
[108] T. Bingham, op. cit. note 101, pp. 27-28.
[109] R. Pound, *An Introduction to the Philosophy of Law*, New Haven, Yale University Press, 1955, p. 47.
See also: R. Pound, *Jurisprudence: Volume IV: Part 6, Chapter 20, The Judicial Process in Action*, St.Paul, West Publishing, 1959, pp. 5-36.

role is supplemental and connected mainly with the developing and improving of the legal principles.[110]

Judicial law-creation is always initiated externally – the courts are able to operate only within the boundaries provided by the *parties of the dispute*.[111] Due to this very distinctive character of the judicial procedure the courts are somehow in the position of waiting for the possibility to make law, but meanwhile, they have also a duty to resolve every case. Therefore, likewise the legislators, they cannot postpone or escape from law-making action when the situation demands relatively immediate and effective performance.[112]

The judgements must be always motivated. In decisions the judges have to give the reasons and explanations to their conclusions.[113]

It is important to add that judges are dealing with the restricted domain of the facts that have happened in the past. Whereas they apply their newly created rules or novel standards *retrospectively*, it might even be argued that judicial lawmaking could be incompatible with the rule of law.[114]

The judicial law making power is also reduced by the event that the courts' decisions often do not have binding effect to the following judgements in the future.[115]

3. 2. Judicial restraint

Judicial restraint is presumably the less attentively treated notion. For most legal scholars it seems obvious and clear that an opposite of judicial activism should be a complete negation of judicial lawmaking. But this is too exaggerated and simplified idea. It is more accurate to say that restrained judges make their choices on the grounds of applying pre-existing rules and they try to avoid lawmaking as long as it is feasible. Consequently, judicial restraint is rather a matter of a degree of readiness or willingness to make law.[116]

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[110] J. Bell, op. cit. note 75, pp. 13 and 19.
[111] J. Bell, ibid., p. 79.
[112] J. Bell, ibid., pp.233 and 250.
[113] J. Bell, ibid., p. 79.
[114] J. Bell, ibid., 229 and 233.
[115] J. Bell, ibid., p. 229.

[116] John Daley, *Defining Judicial Restraint*, in T. Campbell, J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism*, pp. 279-280.

John Daley explains that restraint expresses a certain stand to judicial role. Thus, judicial restraint presupposes that the judgements should be based on previously adopted norms and the judges should eschew exercising other functions.[117] To justify such a role the judges can use in their decisions legal doctrines of restraint. Legal scholars have defined various doctrines of judicial restraint.[118] As Richard Posner observes, these doctrines can be characterised by three distinctive approaches, namely: deferential, prudential and reticent approaches.[119]

Deference

The deferential approach implies the requirement that judges must avoid making judgements which are in conflict with the decisions of other branches of government. Otherwise they risk undermining the authority of legislative and executive branches.[120] This approach embodies a narrow interpretation of individual fundamental rights. Broad interpretation of constitutional rights, on the other hand, is a symptom of judicial activism.[121]

Reticence

The reticent approach assumes that judges do not make moral, political, social or economical choices in the process of judicial reasoning.[122] In the course of practical reasoning of single cases the court is incapable of solving difficult and complex problems of universal significance.[123]

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[117] John Daley, ibid., p. 279.
[118] Probably the most extensive list of legal doctrines of judicial restraint is given by Henry Abraham. See further : H. J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts in the United States, England, and France*, New York, Oxford University Press, 1998.
[119] R. Posner, *The Federal Courts*, Cambridge, Harvard University Press, 1996, pp. 304-334.
[120] John Daley, op. cit. note 116, p. 286.
[121] M. Kirby, *Judicial Activism*, in " University of Western Australia Law Review", vol. 27, no. 1, July 1997, p. 12.
[122] R. Posner, op. cit. note 119, p. 314;
J. Daley, op. cit. note 116, pp. 288-289.
[123] J. Daley, ibid., p. 300.

Prudence

The prudential approach claims that judges should not make decisions which might limit their capacity in the future.[124] There are two facets of prudential restraint – political and functional.

Political prudential restraint may used in order to avoid political controversy. This is a measure for preventing political reprisals which would decrease judicial decision-making abilities.[125]

Functional prudential restraint requires that judges must avoid decisions which may increase the courts' workload and therefore, result in the decline of their efficiency.[126]

The arguments supporting judicial restraint as put by John Daley are briefly, the following:

"relative to other institutions, the judiciary will make worse factual decisions, make worse moral, coordinate less, fail to reflect legitimate preferences, fail to promote popular involvement in decision-making, cost more, inflict damage on other processes and is incapable of comprehensive reform".[127] However, Daley also concedes that justifications for restraint may vary with society and time. Thus, in a society with a long history of legal nihilism and a relatively short tradition of the rule of law, the judiciary is, in the lawmaking decisions, more confident and often likewise more competent. The role of judges in such societies implies an improvement of general public confidence towards the laws, as well towards the judiciary itself.[128]

4. JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT IN THE CONTEXT OF TRANSITION

As discussed before the establishment of the rule of law in the new Central and Eastern European countries is a joint attainment where the judiciary has an essential role to play. But how actively are the judiciaries are playing their part? Could judicial activism lead to the unbalanced distribution of powers? And if so, is it justified?

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[124] J. Daley, ibid., p. 286.
[125] J. Daley, ibid., pp. 289-290.
[126] J. Daley, ibid., pp. 289-291.
[127] J. Daley, ibid., p.303.

In an attempt to answer those questions, the existing literature on constitutional courts in transitional societies is divided between two competing and conflicting opinions. Some legal scholars contend that the period of transition requires activist and strong courts.[129] Other scholars, on the contrary, consider that the judicial restraint is the more appropriate approach in deciding complex transitional cases.[130] Outside of the mainstream, there are also intermediate theorists, who support in general one or another of the prevailing theories, but with certain exceptions.[131] However, the main debate revolves around the issue: "where, as an institutional matter, the transition should lie".[132]

Eastern and Western European constitutional courts have quite similar jurisdiction, however, their difference lies in the way in which one or other practices the judicial power.[133] According to the relevant literature there is a common understanding that the constitutional courts in post-communist states are usually robust, influential and activist.[134] Such a role is widely accepted by law professors and as well by the general public. Professor Sadurski explains this phenomenon as follows: on one hand, the high prestige of the new constitutional courts might be a response to the former discredited politics, but on the other hand, the reason might even be pragmatic. This carefully designed image of the constitutional courts is probably a result of mutual self-regarding of the constitutional judiciary and academics.[135]

Professor Teitel asserts that the courts' activist role is compatible with democratic transition. Moreover, the judiciary should be comparatively more responsible for transition than the legislature: " [in] these periods newly founded constitutional courts have borne the institutional burden of establishing new understandings of the rule of law. The burden of transformation to a rule-of-law system has to some devolved on the judiciary, chiefly the new constitutional courts".[136]

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[128] J. Daley, ibid., pp. 303-304.
[129] R. G. Teitel, op. cit. note 4, pp. 22-25.
[130] W. Sadurski, *Rights Based Constitutional Review in Central and Eastern Europe*, in T. Campbell, K. D. Ewing, A. Tomkins (eds.), *Sceptical Essays on Human Rights*, New York, Oxford University Press, 2001, pp. 315 and 327;
S. Holmes, op. cit. note 48, p. 23.
[131] B. Bugaric, op. cit. note 2, pp. 270-277.
[132] R. G. Teitel, op. cit. note 4, p. 22.
[133] B. Bugaric, op. cit. note 2, p. 260.
[134] W. Sadurski, op. cit. note 130, pp. 320-326.
B. Bugaric, op. cit. note 2, p. 270.
[135] W. Sadurski, op. cit. note 130, pp. 315-316.
[136] R. G. Teitel, op. cit. note 4, p. 22.

Teitel argues that in transitional periods the legislature lacks legitimacy, because it is not freely elected. There is also a vital necessity for new laws, but the lack of adequate experience and institutional capacity causes a great backlog in parliamentary work.[137] The judiciary could be more efficient in lawmaking, because the judiciary is competent in the legal questions and in transitional times the judicial procedure is faster than the legislative. In addition, the changes in judicial practices may in turn enhance the prestige of the judicial branch. On that account, as Teitel affirms, the transformative lawmaking by adjudication is justified.[138]

However, Professor Bojan Bugaric is quite sceptical about the law-making capacity of transitional judiciary. He admits that Eastern European judges are not sufficiently qualified to mould extensive socio-economic reforms. The problem is that the majority of judges completed their legal studies during the soviet times when western-type economic relations and democratic practices were unknown.[139]

Professor Sadurski goes further and makes even stronger statements. Accordingly, the activism of the courts can have dangerous and detrimental consequences for the legislature. As a discourse by Professor Sadurski establishes, the activism of the constitutional court could weaken the power of the elected branch. He argues that leaving the decisions about the fundamental rights solely to the constitutional courts gives the judiciary a power to say the final word on the scope and content of these rights. Meanwhile it throws doubt on the legislators' understanding of the constitutional rights.[140] Sadurski observes that "legislating in the shadow of constitutional review" can transmute the legislature in certain sense negligent. The existence of judicial review reduces the risks of political decision-making and consequently lowers the motivation and responsibility of the legislative branch.[141] Sadurski declares on aforesaid grounds that the benefits of judicial activism are rather questionable.[142]

Similarly, Stephen Holmes admits: "to overlegitimate the [constitutional] court is to diminish the [parliamentary] assembly in the public's eyes and to help discredit the

[137] R. G.Teitel, ibid., p. 24.
[138] R. G. Teitel, ibid., pp. 24-25.
[139] B. Bugaric, op. cit. note 2, p. 271.
[140] W. Sadurski, op. cit. 130, pp. 315 and 318.
[141] W. Sadurski, ibid., p. 327.
[142] W. Sadurski, ibid., p. 327.

nascent idea of representation through periodic elections".[143] He warns that overestimating the role of the constitutional courts may have adverse effects on democratisation. Whereas the courts are not representing the interests of the citizens and lacking accountability, the emphasis of democratic transition should lie on the parliament.[144] While the proper role of the post-communist constitutional courts as described by B. Bugaric is following:

"their jurisdiction should be narrowly circumscribed to the traditional task of the judiciary – the application of laws and the resolution of concrete legal disputes. In performing its duties, the judiciary should avoid ruling on large-scale structural reforms. The [constitutional] courts should only invoke judicial review to a set of clearly defined issues… and … should play only a secondary role in the process of transition to a market economy. The nascent democracies of Eastern Europe should not be court-centred but rather based on legislative authority".[145] For B. Bugaric, the only exception where courts activism might be recommendable is regarding the protection of human rights.[146] B. Bugaric argues also that the fulfilment of such a role requires from the judges a self-restraint attitude.[147] First, of course, the courts must develop better knowledge about relevant western doctrines,[148] because, as aptly noted by W. Sadurski, the new institution was "imported" without concurrent legal and philosophical theories.[149]

5. CONCLUSION

All transitional theories explored above contain many contradictions. It is hard to agree that constitutional review of Central and Eastern European constitutional courts and their activism are illegitimate or lacking legitimacy. These courts do not exercise a power arbitrarily, but on the grounds of relevant constitutional provisions. Almost all post-communist constitutions include the norms about constitutional courts.[150]

[143] S. Holmes, op. cit. note 48, p. 23.
[144] S. Holmes, ibid., pp. 23-24.
[145] B. Bugaric, op. cit. note 2, p. 273.
[146] B. Bugaric, ibid., p. 273.
[147] B. Bugaric, ibid., p. 275.
[148] For more about of doctrines of restraint see: J. Delay, op. cit., note pp. 280-286.
[149] W. Sadurski, op. cit. note 130, p. 316.
[150] W. Sadurski, ibid., p. 317.

Moreover, as a study by Professor W. Sadurski reveals, the transitional constitutional courts and their activist approach can enjoy general appreciation of both – wide public and scholars.[151]

It seems also obvious that during the transitional period the lack of democratic experiences is a common feature of all governmental branches. The members of the judiciary as well as the members of parliament had obtained their knowledge and education at the time of communist regime. But it appears that judges are generally better and more adequately prepared for lawmaking than transitional "amateur"[152] parliamentarians. I also agree with Ruti Teitel that the courts can work relatively faster than extremely overloaded transitional parliaments. However, there is a significant obstacle for truly efficient judicial lawmaking – it cannot be complex. The courts may deal with single problems and therefore, are not capable of implementing socio-economic or legal reforms,[153] whilst simultaneous structural reforms have vital importance, particularly for the perspective of strengthening of democracy.[154]

To sum up, there are the arguments for and against judicial activism, but do they support the idea that the transition must lie either on judiciary or on legislature? I could not find any convincing reasoning. I argue that for democracy, it is better to have balanced power – the equality of governmental branches. First, it is certainly difficult or even unfeasible to find contra-arguments that balanced power might be somehow dangerous or disadvantageous for the prosperity of democracy. Secondly, it is also comprehensible that to achieve the balance of powers is a difficult task. However, it is a goal, which should always be kept in mind as an ideal for political compromises.

Thirdly, the equipoise of governmental powers does not exclude judicial activism. Still the activist role of transitional constitutional courts should be restricted to the protection of human rights. On the other hand, as the judiciary is lacking capacity to make economic or social policy, in the socio-economic field the judicial intervention is not appropriate. Within the above-mentioned domain, the judiciary should exercise self-restraint.

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[151] W. Sadurski, ibid., pp. 315-316.
[152] S. Holmes, op. cit. note 48, p. 23.
[153] C. R. Sunstein, *Legal Reasoning and Political Conflict*, New York, Oxford University Press, 1996, p. 45.

III. JUDICIAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE

1. INTRODUCTION

In order to function effectively, the courts must have some pre-conditions. Judicial independence is certainly the most significant of them.

Judicial independence together with the rule of law constitutes "an absolute right that may suffer no exception".[155] Thus, mistrust of the political and legal system could easily impel the people to seek after the alternative solutions in order to protect their rights that may in turn lead to anarchy and arbitrariness.[156] Among the scholars and the wider public there is the general concord of the crucial significance of the independence of the judiciary, this concept has never been entirely defined[157] and the notion itself abides ambiguous.

2. JUDICIAL INDEPENDENCE

It is almost impossible to talk about judicial accountability without also explaining judicial independence. These notions are two sides of a same coin. It is commonly acknowledged that judges must be independent – it is an ideal and legal requirement of every democracy. Countries with different legal cultures and various systems of government share this general principle. But in the debates about judicial independence always arises a question – independent from what?

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[154] B. Bugaric, op. cit. note 2, pp. 261-262.
[155]The Human Rights Committee Communication No. 263/1987 (Consales del Rio v. Peru) CCPR/C/46/263/1987/, para. 5.
[156] D. C. Préfontaine, J. Lee., *The Rule of Law and the Independence of Judiciary*, p. 1, available at: http://www.icclr.law.ubc.ca/Publications/Reports/Ruleoflaw.pdf
[157] R. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office,* Oxford, Clarendon Press, 1993, p.3.

As judicial independence has become a very broad concept, which may differ with time and society, "[i]t may well turn out that judicial independence is easier to protect than to define".[158]

Professor Pamela Karlan offers an idea on how to conceptualise judicial independence. Her theory, based on Isaiah Berlin's two concepts on liberty, distinguishes negative and positive aspects of judicial independence. Correspondingly, judges must be free *from* pressure (negative aspect) *to* realise their duties (positive aspect).[159]

However, these two aspects of judicial independence are closely connected. At first glance the positive aspect does not create any problems. It seems that if undue influence is absent, then the judges can freely fulfil their task of adjudication. But there might be also situations (well-known to the nascent democracies), when the judiciary is not able to exercise their function despite missing pressure because of, for example, lacking material and human resources. Therefore, separation of negative and positive aspects is quite artificial. It makes more sense to identify different components and levels of independence.

Judicial independence is an essential part of the right to a fair trial.[160] In this context impartiality and independence of the judges has been very often collated. Independence has usually been interpreted as a freedom from subordination to the executive power and impartiality as an absence of bias or personal concern on the merits of the case.[161] The distinction between these two issues as stated by Justice Le Dain of the Canadian Supreme Court is the following: "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case," but independence is "a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees."[162]

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[158] S. Lubet, *Judicial Discipline and Judicial Independence,* in "Law and Contemporary Problems", vol. 61, no. 3, Summer 1998, p. 74.

[159] P. S. Karlan, *Two Concepts of Judicial Independence*, available at: www.usc.edu/dept/law/symposia/judicial/pdf/karlan.pdf

[160] See further: D. S. Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,* The Hague, Martinus Nijhoff Publishers, 2001.

[161] S.A. Beliaev, *The Fundamental Right to an Independent and Impartial Judge*, available at: http://www.venice.coe.int/docs/1998/CDL-JU(1998)047-e.html

[162] Valente v. The Queen (1985) quoted by W.F.B. Kelly, *An Independent Judiciary: The Core of the Rule of Law*, p. 6, available at: http://www.icclr.law.ubc.ca/Publications/Reports/An_Independent_Judiciary.pdf

As held by the United Nations Human Rights Committee, the judge must not to "harbour any preconceptions about the matter put before him, and, not to act in ways that promote the interests of one of the parties".[163] In addition it should be emphasised that even the judge's behaviour and appearance must be seen to be impartial.[164]

The principle of judicial independence serves the interests of the rule of law and individuals who are seeking justice. Therefore, it also seems to be a guarantee for impartiality. It obviously derives that the aim of an elaboration of such a principle was not to create any particular privilege of the judicial branch.[165] The judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community.[166] Judicial independence is above all the obligation of a State.[167]

Although an independent judiciary is one of the main features of the modern democratic society and a fair legal system, the exact scope of this principle may be difficult to find.[168] In the very centre of the concept of the independence of the judiciary lies a traditional idea that judges should form their decisions freely without any external pressure, especially from executive authority.[169] The meaning of the concept of judicial independence has gradually extended and it now has several other aspects.[170] There have been two basic intertwined facets distinguished. The first could be called the individual[171] or personal[172] independence of the judge. It is as well a decisional independence. The second is that of institutional[173] or collective[174]

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[163] The Human Rights Committee, Communication No. 387/1989 (Karttunen v. Finland).
[164] L. Lehtimaja, M. Pellonpää, *Article 10,* in A. Eide, G. Alfredsson, G. Melander, L.A. Rehof, A.Rosas (eds.), *The Universal Declaration of Human Rights: A Commentary,* Oslo, Scandinavian University Press, 1992, p. 164.
[165] The Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE), referred later as CCJE op. 1, P. 10.
[166] S. Kenny, *Maintaining Public Confidence in the Judiciary*, in "Monash University Law Review", vol. 25, no. 2, 1999, p. 209.
[167] S. A.Beliaev, op. cit. 161.
[168] W.F. B. Kelly, op. cit. 162, p.1.
[169] H.-G. Heinrich, *Guarantees of independence of constitutional justice and interference of the constitutional courts on public practice,* p. 2, available at:
http://www.venice.coe.int/docs/2001/CDL-JU(2001)039-e.html.
M. E.Bari, *Independent judiciary in a democratic state,* p. 2, available at:
http://www.independent-bangladesh.com/news/jan/01/01012003pd.htm
[170] M. E. Bari, ibid. p.2.
[171] A. H.Butler, *Supporting an Independent Judiciary and Bar,* p. 4, available at:
http://www.humanrightstoday.ky/papers/butler.pdf
[172] M. E. Bari, op. cit. note 170, p. 2.
[173] A. H. Butler, op. cit. note 171, p.4.
[174] M. E. Bari, op. cit. note 170, p. 2.

independence of the judiciary as an institution. To more thoroughly examine the content of these notions we should look for the (minimum) standards which are to be fulfilled by every democratic state, no matter how its judicial system is arranged.

The issue of judicial independence[175] has been intensively elucidated by various intergovernmental and non-governmental organisations.[176] As a result a remarkable number of standard-setting documents have been adopted with the intent to unify the level that different countries must observe and the representatives of a legal profession and general public can account for. Indeed, the wording and placement of the right to a fair trial can vary across different human rights instruments.[177]

The Universal Declaration of Human Rights[178] (Article 10) proclaims that everyone should be entitled to a fair and public hearing by an independent and impartial tribunal. This is an absolute minimum standard required under international law. In the beginning the Universal Declaration of Human Rights was a non-binding document, however, its provisions are now recognised as a part of customary international law.[179] Since the adoption of the Universal Declaration of Human Rights, the international community has consistently accentuated the relevance of independent judiciary in more specific and detailed documents.

The United Nations has endorsed the essential importance of an independent judiciary. In 1985, the United Nations adopted the Basic Principles [180], which outline the fundamental elements of an independent judiciary. These include a requirement that the independence of the judiciary should be guaranteed by the state and enshrined in the Constitution or some other legislative instrument. The Basic Principles also emphasise the importance of selecting and training judges appropriately, and making provision for their discipline, suspension or removal with a suitable complaints mechanisms. However, the Basic Principles have an advisory legal nature.

A treaty adopted in 1966, the International Covenant on Civil and Political Rights has developed the rights enshrined in the Universal Declaration of Human Rights. In the Covenant on Civil and Political Rights, the right to fair trial is dealt with in the extensive scope of Article 14, paragraph 1. The right to a fair trial is also affirmed by

[175] Mainly within the framework or as an ingredient of a right to a fair trial.
[176] L. Lehtimaja, M. Pellonpää, op. cit. note 164, p. 163.
[177] L. Lehtimaja, M. Pellonpää, ibid. p.161-162.
[178] Adopted and proclaimed by the UN General Assembly resolution 217 A(III) of 10 December 1948.
[179] H. J. Steiner, P. Alston, op. cit. note 46, p. 124.

some specialised conventions.[181] In addition, all major regional human rights instruments acknowledge the right to a fair trial: The European Convention on Human Rights (1950), Article 6 (1); The American Convention on Human Rights (1969) Article 8 (1) and the African Charter on Human and Peoples' Rights (1981) Article 7 (1). It should be mentioned here that there are plenty of other internationally accepted standards.[182]

2.1.The constituent elements of judicial independence

The concept of judicial independence has many elements. It is almost impossible to give a full list of them due to the huge volume of relevant legal documents developed by both formal and less formal institutions. But generally they fall under the subdivisions of appointment, promotion, tenure, payment and individual and institutional freedom from interference.

Subsequently I will review these elements with particular emphasis on UN Basic Principles on the Independence of Judiciary [UNBP]; Recommendation No, R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges [Rec(94)]; The European Charter on the Statute for Judges [EC] and the Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges [CCJE Op.1]. The substance and the status of these documents have influenced my choice.

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[180] Adopted on the Seventh UN Congress on the Prevention of Crime and the Treatment Offenders in Milan, Italy, 26 August to 6 September 1985. UN Doc. A/CONF.121/22/ Rev.1

[181] For example: The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) Articles 12-15 and The Convention on the Rights of the Child (1989) Articles 37 and 40.

[182] For example: Draft Syracuse Principles on independence of the Judiciary formulated by a Committee of Jurists and the International Commission of Jurists at Syracuse, Sicily on 25th-29th May, 1981; The International Bar Association adopted at its 19th Biennial Conference held in New Dehli, October, 1982 the Minimum Standards of Judicial Independence – known as "Dehli Approved Standards";The Universal Declaration on the Independence of Justice, adopted in the World Conference of the Justices, Montréal on 5-20 June, 1983.

General principles:[183]

Freedom from undue external influence

There is no doubt that individual judges and the judiciary as an institution must maintain their independence regardless of pressure from any quarter. The importance of freedom form undue external influence has been stated in all of the selected instruments. According to CCJE it is difficult to clarify what constitutes undue influence in particular, regarding case or country.[184] That leads to the problem of balancing different rights and interests that might occur in connection with judicial proceedings. It is easy to imagine, for example, that the public interest to know, the right to privacy, and the judicial obligation to decide impartially can compete simultaneously.

Independence within the Judiciary

Judges must also maintain their independence vis-à-vis their colleagues or superiors. They must decide the cases only in conformity with their conscience and their understanding of the facts and laws. In the judging business they do not have any supervisors or superiors. That means, in other words, that they are not answerable even to chairpersons of the court or any other judges about their reasoning or interpretation.

Appointment and promotion[185]

To have a superior judiciary, it is obvious that great care must be taken at the initial stage, the selection or appointment process.

National legal systems represent very different models of appointment of judges (by parliaments, by the government with consent of the parliaments, election by the population, by the head of State etc.). The CCJE recommends that every state should create and adopt its own appropriate criteria for the appointment and promotion of the judiciary. Despite the particular type or procedure of judicial appointments, the selection of judges should be based on objective criteria as regards to their qualification, ability and efficiency. The significance of such criteria such as age and

[183] UNBP 2 ; Rec (94) P I.2, P I (2) (d); CCJE Op. 1, P 63. I will use here P for principle.
[184] CCJE Op.1, P 63.
[185] UNBP 10 and 13; CCJE Op. 1, P25; P 29; P56; P 73(2); EC P 4.1

duration of career are largely disputable. The recent developments of relevant standards endorse that seniority should not be the governing principle determining promotion. Adequate professional experience is however, relevant, and pre-conditions related to years of experience may assist to support independence.

There have also been recommendations that the appointment of judges should have representative character, bearing in mind the ethnical, racial, sexual, social origin or age of the judges and the relevant composition of the population. Otherwise it can lead to accusations by representatives of these groups that the court system itself is arbitrary and unfair.

Remuneration [186]

Remuneration security means that the salary of all judges should be adequate, fixed and secure and not subject to arbitrary change by any branch of government. The objectives, of course, are to ensure judges are not subject to temptation, are not worried or distracted by their present and future financial state, and that judicial remuneration is sufficient to attract the most competent and qualified persons into the judicial ranks.

Judges' remuneration should be commensurate with their role and responsibilities and should provide appropriately for sickness pay and retirement pay. It should be guaranteed by specific legal provisions against reduction and there should be provision for increases in line with the cost of living.

Tenure and removal[187]

One of the most important guarantees of judicial independence is fixed tenure. UNBP provides that judges "shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office". Tenure secures independence for judges as it will leave them free from worrying about political reactions to their decisions.

The transfer of judges from the office or removal implies a possibility of influence to a decision and questions the independence of a judge. Removal of judges from

[186] UNBP 11, Rec(94) PI(2)(a) (ii); PIII (1)(6); EC P 6.
[187] UNBP 11;12;17;18; CCJE Op. 1, P 46; P53; P 57; P 60; EC P 3.3; Rec(94) PI (2) (a) (iii) and (3) PVI (1) and (2).

office or the involuntarily transfer is often a punitive measure used to affect the independence of the judiciary. To protest against this, UNBP 18 provides that judges "shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties". On the contrary, removal of a judge at the will and expediency of the executive violates the principle of non-interference in the functions of the judiciary.

The timing terms of appointment are another aspect of this problem. As concerns international practice, judges do not necessarily hold positions for life for the sake of independence and impartiality.

3. JUDICIAL ACCOUNTABILITY

When talking about accountability we always bear in mind two questions: accountable to whom and for what?[188] As the concept of accountability has in general expanded during the last decades, these questions have now neither short nor clear answers. First, modern accountability practices involve the increasing number of participants. Secondly, this term is used not only in the sense of ordinary subordination relationships, but for example, to justify media scrutiny.[189]

Since judges are exercising a power, they must also be responsible for their conduct. Accountability is one face of judicial responsibility.[190] Most academics and law practitioners tend to share this view. However, there are some who consider that judicial independence is incompatible with accountability and judicial power does not have to be subject to accountability.[191] But these thoughts are rare exceptions. The contemporary debate is mainly concentrated on different models and types of judicial accountability. The forms of judicial accountability can be divided into a number of categories.

Professor Mauro Cappelletti distinguishes between three models of judicial accountability: the repressive or dependency model, the corporative-autonomous or

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[188] A. C. Spigelman, *Judicial Accountability and Performance Indicators,* in "Civil Justice Quarterly", vol. 21, January 2002, p. 18.
[189] A. Le Sueur, *Developing Mechanism for Routine Judicial Accountability in the UK,* a paper prepared for a lecture in the BIICL conference on Accountability and Independence of the Judiciary, 14 June 2003, p. 2.
[190] M. Cappelletti, op. cit. note 90, p. 60.

separateness model and the consumer-oriented or responsive model.[192] The differentiation here is made on the grounds of to whom the judiciary is accountable.

The *repressive or dependency model* leaves the judiciary accountable predominately to the legislative and executive branches.[193] On the contrary, in the *corporative-autonomous or separateness model*, the control proceeds within the judiciary.[194] The *responsive or consumer-oriented model* represents the best balance of various forms of accountability, where neither political nor judicial accountability is prevailing.[195] The last model, as Professor Cappelletti affirms, corresponds to the democratic ideal of "checks and balances". He writes: [judicial accountability] shall be seen as a function of the 'consumers', that is citizenry…".[196]

For a better understanding of exactly what is meant by judicial accountability we should also look at different practices of accountability within the judicial framework. I found a recent study of Professor Le Sueur a very helpful source of information due to its comparative approach. In his discourse Professor Le Sueur also argues that courts of different stages have distinctive roles and that they need therefore, different methods of accountability. I also hope that relevant practices of consolidated democracies could give guidelines for the post-communist states.

His first distinction between individual and institutional accountability is widely known.[197] Secondly, he identifies formal and informal (or non-State or civil society) accountability.[198] Le Sueur argues that different types of accountability may influences each other and their joint effect is stronger.[199] For instance an adequate media scrutiny could provoke interest in parliamentary debates on judicial function or published annual reports of the courts.

Whereas with the first two selection made by Le Sueur, we can put under the titles "who" and "to whom", the last set of accountability practices is about "for what". This distinction involves content, process, performance and probity accountability.[200]

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[191] A. Le Sueur, op. cit. note 189, p. 3.
[192] M. Cappelletti, op. cit. note 90, 1989, p. 105.
[193] M. Cappellatti, ibid., p. 105-111.
[194] M. Cappelletti, ibid., pp. 111-112.
[195] M. Cappelletti, ibid., pp. 112-113.
[196] M. Cappelletti, ibid., p. 113.
[197] A. Le Sueur, op. cit. note 189, pp. 6-7.
[198] A. Le Sueur, ibid., pp. 7-9.
[199] A. Le Sueur, ibid., p. 8.
[200] A. Le Sueur, ibid., pp. 9-15.

The components of the last set are less elaborated in scholarly opinions and they probably need more explanation.

Probity accountability means that for the courts with own budgets, there is a requirement of financial audit. As to the judges it is disclosure of their pecuniary or other personal interests like for instance their membership in some organizations or institutions.[201]

Performance accountability is the accountability for effectiveness of case management. This form of accountability conceals feasible sources of tensions related to the institution who establishes goals upon the courts – whether it is a court itself or any other governmental branch.[202]

Process accountability is about the courts' internal working practices. This may imply the methods of distribution of the cases between the judges or selection of the judges panels.[203]

Content accountability is usually practices in the form of legal reasoning of judgements in which the judges explain their understanding of law and values at stake. But it may as well occur in the form of public lectures or academic writings of the judges.[204]

4. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN THE TRANSITIONAL SOCIETIES

There is quite a large volume of legal writing about Central and Eastern European constitutional courts[205], but only few, if any scholars have been interested in studies about the transitional judiciary as whole. Judicial independence and accountability is exactly the topic, which implies every single judge and entire judiciary as an institution. Theoretically, of course, it is possible to talk about different methods of accountability suitable for one or another level in the judicial hierarchy of the courts or divide judicial independence between individual and institutional facets. In practice I do not believe that a judge can be more or less independent than a judicial branch or

[201] A. Le Sueur, ibid., pp.9-10.
[202] A. Le Sueur, ibid., pp. 10-13.
[203] A. Le Sueur, ibid., pp. 13-14.
[204] A. Le Sueur, ibid., pp. 14-15.
[205] See for example: W. Sadurski, op. cit. note 130; R.G. Teitel, op.cit. note 4.

vice versa. However, my statement does not exclude contradictory opinions - it all depends on arguments. In recent survey on judicial independence of post-communist countries[206] which had applied for accession to the European Union (some of which were successful), mention was made, among the other problematic issues, regarding the insufficient institutional independence of the judiciary and the undue executive interference with the administration of the judiciary.[207] This study clearly characterises the link between institutional and individual aspects of judicial independence.

It is hard to deny that the independence of the judiciary and judicial accountability are both important matters for the Central and Eastern European countries. But their main common problem, the hot issue, lies elsewhere. There is more than a proper balance of independence and accountability at stake. The vital question is, I believe, how to build confidence in the judiciary of the whole of the community. To over accentuate only judicial independence is a very harmful approach as it exposes the absence of a social nerve, because explaining high salaries or life tenure of judges "merely" with the necessity of their independence is not a sufficiently convincing argument for the audience, which is also relatively poor and insecure about its own future.

Although Professor Sadurski suggests that Central and Eastern European constitutional courts are widely appreciated, it remains true solely in a few cases. In several countries the constitutional courts have been involved in political conflicts and a power struggle with the executive and legislative organs. [208] As an analysis of early post-communist experiences assure: "it is the majority that needs protection from manipulation by elites, rather other way around. In other words, the possibility of 'minority tyranny' proved to be a greater danger than the alleged 'tyranny' of … majorities".[209]

It is also quite naïve to expect that citizenry can accept a changed status of the judiciary just because it is said to be for the prosperity of democracy. Post-communist

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[206] Bulgaria, Chech, Estonia, Hungary, Latvia, Lithuania, Poland, Rumenia, Slovak and Slovenia.
[207] Monitoring the EU Accession Process: Judicial Independence (EUMAP 2001), p.21, available at: http://www.eumap.org/reports
[208] R. R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, in "Georgia Journal of International and Comparative Law", vol. 29, no. 1, 2000, p. 25.
[209] R. Elgie and J. Zielonka, *Constitutions and Constitution-Building: A Comparative Perspective,* in J.Zielonka (ed.), *Democratic Consolidation in Eastern Europe: Volume I: Institutional Engineering,* New York, Oxford University Press, 2001, p. 23.

countries have no tradition of judicial independence[210] and public memory is not as short as one might believe.

During the communist period the judges were considered to be ordinary officials who executed state (read: party) policy.[211] Some critical observers have noted that "in the communist countries, the judiciary which may have been independent from law, was strictly subordinated to the rule of the communist party, especially in matters of human rights and fundamental freedoms.".[212] All Central and Eastern European states were ruled by communist dictatorships for about forty-five years, or in some member states of the former USSR, even longer. The following example can illustrate that this party guidance was far from being innocent or formal.

Sydney Bloch and Peter Reddaway presented a terrifying insight of the soviet regime. They described how a lot of "dissidents" have been isolated from society by enforced placements to psychiatric hospitals. The role of the courts of these activities was portrayed as following:

" The dissenter is hospitalised by way of either a criminal or a civil commitment… . Dissenters who undergo a psychiatric evaluation are usually declared mentally ill and not responsible for their alleged offence. The court almost always adopts the psychiatrists' recommendations. Their involvement ushers in a number of procedural changes: the dissenter is usually excluded from the trial on the grounds of his ill-health; his family and friends are normally kept out of court by extra-legal means; and the number of witnesses is substantially reduced. The trial, as a result, is often transformed into a mere formality.

Civil commitment is the dissenter's other potential route into the psychiatric hospital… . Soviet psychiatrists, as is the case universally, have the legal authority to place a person in hospital without his consent if he is regarded mentally ill and as a result dangerous to himself or to others… .

The detainee has no right of appeal at any point during his commitment and no access to legal counsel."[213]

Consequently socialism undermines confidence in the judiciary and these historical experiences still have influence on the public opinion.[214] If we add the current (and

[210] R. Elgie and J. Zielonka, ibid., p. 28.
[211] EUMAP 2001, op. cit. note 207, p. 22.
[212] R. Müllerson, op. cit. note 44, p. XIV.

not always groundless) suspicions in corruption, the entire picture of the post-communist judiciaries is not very promising. But is there any hope for improvement? This question is easier to ask than answer.

5. CONCLUSION

The debate about judicial independence and accountability in transitional countries has been mainly concentrated on the relationships between the governmental branches. I argue that it is time to shift the focus of the discussion from the relations of governmental powers to that of civil society and the judiciary. But how to build the public confidence in the court? One solution might be to augment transparency of judicial work. I believe that the enhancement of relationships between the judiciary and civil society could facilitate democratic changes. This is a domain where judicial initiative is probably fostered. At the individual level it may be expressed in the form of lectures or articles addressed not solely to the narrow circle of legal community, but to the community as whole.

In addition it may involve the development of certain techniques of legal reasoning. Among the judiciary, as we all know, are spread two strategies for the motivation of judgements. Either the judge bears in minds that it should be comprehensible to the higher courts or to the parties of the dispute. If the judges really want to enhance the trust of the wider public, the latter must also have a clear understanding that the judiciary is protecting everyone's rights.

The judiciary as an institution should be more open as well. This can be achieved for instance by explaining the priorities of the budget or the reasons of the backlog of the cases.

Therefore, it is important and inescapable to strengthen the mutual relations and confidence between the judiciary and the media. For a start, the easiest way seems to be the introduction of a post of spokespersons in every court.

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[213] S. Bloch and P. Reddaway, *Soviet Psychiatric Abuse: The Shadow Over World Psychiatry*, London, Gollancz, 1984, pp. 22-25.

IV. THE ROLE OF JUDICIARY IN DEMOCRATIC TRANSITION OF ESTONIA

1. INTRODUCTION

The history of independent courts in Estonia is relatively short, approximately as long as independent statehood. Before World War I, Estonia was a part of Russian Empire. Between 1918 and 1940 Estonia was an independent republic and in 1940, was forcibly integrated into the Soviet Union.[215] The independence of the Republic of Estonia was restored on 20 August 1991 and 16 September 1991.[216] After ten months of transition, Estonia's new Constitution was adopted on 28 June 1992 by referendum. Legal basis for a court system was introduced even earlier in 1991.

2. COURT SYSTEM

The court system in Estonia is quite simple. It consists of county and city, and administrative courts (the first instance); circuit courts (the courts of appeal) and the Supreme Court.

At the present time Estonia has fourteen county and two city courts[217], four administrative courts[218] and three circuit courts of appeal.[219] The Supreme Court is a cassation court[220] and also a constitutional court.[221] This new three-level court system has been in operation from 15 September 1993, when circuit courts of appeal began

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[214] EUMAP 2001, op.cit. 207, p. 22.
[215] V. Pettai, *Estonia: Positive and Negative Institutional Engineering*, in J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe,* New York, Oxford University Press, 2001, p. 115.
[216] A. Neljas, *Incorporation and Implementation of Human Rights in Estonia,* in M. Scheinin (ed.), *International Human Rights Norms in the Nordic and Baltic Countries*, The Hague, Martinus Nijhoff Publishers, 1996, p. 27.
[217] Courts Act § 9 (2).
[218] Courts Act § 18(2).
[219] Courts Act § 22 (2).
[220] Courts Act § 26(1).
[221] Courts Act § 26 (3).

their work.[222] Before the court reform there was 83 judges in Estonia[223] and this number has been increased up to 254 in 2003.[224] Approximately two thirds of judges started their career during the democratic transition.[225] There have not been any screening procedures[226] introduced against the judges who hold an office in Soviet Estonia. Albeit (as it was in May 1994) the President did not nominate 14 candidates for the first and second instances and three candidates for the Supreme Court were rejected by the Riigikogu (the Parliament).[227] Whereas there is no obligation to give explanations about judicial appointment or non-appointments, we can only speculate what is behind these decisions. Nevertheless, recently (3 February 2003) the Minister of Internal Affairs, Mr. Ain Seppik, was forced to resign for the reason that in 1985 he, as a member of the criminal panel of the Supreme Court of Estonian Soviet Socialist Republic, convicted five young men on allegedly unfounded political accusations.[228]

3. JUDICIAL INDEPENDENCE

According to the Constitution Estonia is an independent and sovereign parliamentary republic, where activities of the Riigikogu (the Parliament), the President of the Republic, the Government and the courts are organised on the principle of the separation and balance of powers.[229]

It is stipulated that solely independent courts shall administer justice.[230] The Constitution also provides some precise guarantees for judicial independence – a life

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[222] R. Maruste, *Kohtureform – kas lõpu alguses või alguse lõpus?*, in "Juridica", no. 5, 1994, p. 103.
[223] R. Maruste, ibid. p. 103.
[224] Regulation of Minister of Justice of 12 November 2002 no. 73, available at: https://www.riigiteataja.ee

[225] R. Maruste, *Supreme Jurisdiction: Basis, Organisation and Role*, in *Judicial Systems in a period of transition*, Council of Europe Publishing, 1997, p. 51
[226] W. Sadurski explains that such kind of lustration or screening procedures are practised towards the officials " who are suspected of improprieties under the auspices of the *ancien regime"*. See: W.Sadurski, *Postcommunist Constitutional Courts in Search of Political Legitimacy: EUI Working Papers*, Florence, European University Institute, 2001, p. 2.
[227] R. Maruste, op. cit. note 222, p. 103.
[228] K. Kalamees, K. Karpa, *Taandunud Ain Seppik hoidis ära valitsuskriisi,* in "Eesti Päevaleht" 4 February 2003, available at: http://www.epl.ee/artikkel_226858.html
[229] The Consitution of the Republic of Estonia, § 4.
[230] The Constitution, § 146.

tenure and protection against arbitrary removal from office.[231] As to the Constitution, it appears that judicial independence is guaranteed on both levels – an individual and as well an institutional. However, why the monitoring report on judicial independence notes almost ten years after transition began that in Estonia "the problem of insufficient institutional independence is especially acute"?[232] The report offers an explanation for the situation – an undue executive influence and interference by the Ministry of Justice.[233] The real reason, however, is hidden deeper. The Parliament (the Riigikogu) has been overloaded with a great number of functions incompatible with legislative power.[234] Presumably the drafters of the Constitution were contemplated in line – more tasks to the Parliament, more parliamentarian Republic. Consequently, due to the lack of experience and truly huge workload, the Parliament started to adopt so-called framework laws. Meanwhile a part of the legislature was delegated to the executive under the title of implementation acts. The executive in turn has good justification to increase its apparatus and establish new subdivisions.[235] As one Estonian scholar describes: "the executive has founded its subsidiary offices even in county and city courts".[236] These "branch offices" are actually the land registry departments[237], the registration departments[238] and the probation supervision departments[239], which are attached to every county and city court. However, such departments have nothing to do with the administration of justice, they are exercising administrative functions and are subordinate to the Ministry of Justice. Therefore, on the one hand the courts are loaded with improper functions, whilst on the other hand, the Ministry of Justice is controlling the courts administration. The only exception is the autonomous Supreme Court. Thus, Estonia has its courts and judges, but I can not affirm that there exists an integral judicial branch. For integrity, I suppose, there must be an independent constitutional authority representing the judiciary in relations with the legislature and executive.

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[231] The Constitution, § 147.
[232] EUMAP 2001, op. cit. note p. 23.
[233] EUMAP 2001, ibid., p. 24-25.
[234] See :The Constitution § 65.
[235] H. Schneider, *Kohus lahusvõimude süsteemis*, in "Juridica", no. 9, 1999, p. 419.
[236] H. Schneider, ibid., p. 420.
[237] Courts Act, § 15 (1).
[238] Courts Act, § 16 (1).
[239] Courts Act, § 17 (1).

The new Courts Act, which entered into force on 29 July 2002 allegedly "represents a major step forward in strengthening the judicial system if its provisions are effectively implemented, especially those on the new Council for Court Administration".[240] I have my doubts about that. According to the Courts Act, the Council for Administration of Courts has no power to give binding decisions. On the other hand, the Government of the Republic Act provides that the area of government of Ministry of Justice shall include *inter alia* the management of the professional activities of the courts of first and second instances.[241] As same act stipulates, the ministry is the superior body within its area of government.[242] These provisions were not amended or abrogated with adoption of the Courts Act and are still valid.

Therefore, it seems that the Council for Administration of Courts remains a rather advisory institution, than real counter-power to the executive. The Minister of Justice has already given its opinion about judicial independence in the explanatory letter accompanying the Draft Courts Act in a statement that "the independence of the Courts shall be guaranteed at the level of individual judges".[243]

4. CONSTITUTIONAL REVIEW PROCEDURE

Professor W. Sadurski characterises a typical model of constitutional review in post-communist countries as abstract, ex-post, final and centralised. Judicial review in Central and Eastern European states (except Estonia) is exercised solely by special bodies outside the ordinary court system, where the judges are appointed by political branches for limited tenure.[244]

The system of constitutional review in Estonia is unique and quite different from the model described above. Estonian judicial review is a mixture of the European and American models of constitutional control.[245]

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[240] Monitoring the EU Accession Process: Judicial Capacitiy (EUMAP 2002), p. 24, available: http://www.eumap.org/reports/2002/content/70/233/2002_j_05_estonia.pdf
[241] Government of the Republic Act, § 59.
[242] Government of the Republic Act, § 46.
[243] Monitoring the EU Accession Process: Judicial Independence in Estonia, p. 156 available at: http://www.eumap.org/reports/content/20/233/judicial_estonia.pdf
[244] W. Sadurski, op. cit. note 130, p.317.
[245] P. Roosma, *Constitutional review in Estonia: Procedural Questions and Their Practical Implementations,* available at: http://www.venice.coe.int/docs/2002/CDL-JU(2002)032-e.html

In Estonia, like elsewhere in continental Europe, the judicial review involves *in abstracto* and *ex-ante* review and there has been introduced, a special constitutional review court procedure. Estonia's constitutional review is also concentrated and final, but practised inside regular court system either by the Supreme Court *en banc* (consists of all the justices of the Supreme Court) or by a specialised structural unit of the Supreme Court – the Chamber of Constitutional Review.[246] The Parliament (the Riigikogu) appoints the justices of the Supreme Court for a lifetime. The Chief Justice of the Supreme Court is an *ex officio* chairman of the Constitutional Review Chamber. The Constitutional Review Chamber consists of nine justices of the Supreme Court appointed by the Supreme Court *en banc* [247]for the term of five years.[248]

The subjects who have a right to initiate constitutional review procedure are the President of the Republic (*ex ante* abstract review)[249], the Legal Chancellor (*ex post* abstract review)[250] and the courts (*ex post* concrete review).[251] The local government councils, the Government of the Republic, the members of the Parliament, the Board of the Parliament, the factions of the Parliament and individuals only have a limited right to initiate constitutional review procedure.[252] A more detailed description of the functions and procedure of the Constitutional Review Chamber can be found in the Courts Act and the Act of the Procedure of Constitutional Review.[253]

5. CONSTITUTIONAL REVIEW PRACTICE

Adviser to the Constitutional Review Chamber, Peeter Roosma, admits that the Constitutional Review Chamber has managed to avoid almost completely the accusations of judicial activism.[254] However, this statement does not throw light on

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[246] Constitutional Review Court Procedure Act (CRCPA) § 3 (1).
[247] Courts Act, § 29 (2).
[248] Rules of the Supreme Court, Rule 16 (3).
[249] CRCPA § 4 (2) and § 5.
[250] CRCPA § 4 (2) and § 6.
[251] CRCPA § 4 (1) and § 9.
[252] See for example CRCPA §§ 7; 16; 17; 18; 37.
[253] Available at:
https://www.riigiteataja.ee/ert.jsp?link=print&id=264891
http://www.legaltext.ee/text/en/X30065.htm (in English)

[254] P.Roosma, op. cit. note 244.

the question: is Estonia's Constitutional Review Chamber activist or not? Professor Sadurski proposes to use two-sided working test for evaluation of judicial activism: the importance of the laws invalidated and the nature of the reasoning leading to the invalidation decision. He adds that the significance of a norm at stake depends naturally on subjective perception.[255]

The Constitutional Review Chamber held the first decision on 22 June 1993 and thereupon during the last ten years had 79 possibilities to weight constitutional issues.[256] The laws invalidated or partly invalidated by the Chamber of Constitutional Review involved: the Property Law Enforcement Act; the Law Invalidating the Transactions Involving Land, Buildings and Structures on the Territory of the Republic of Estonia Which Had Been in the Possession or Use of the Former Soviet Union Armed Forces; the Language Act; the Aliens Act; the Legislation Related to Ownership Reform Amendment Act; the Procedure for Privatisation of Land by Auction; the Local Government Council Election Act if mention some of them. This list of examples, (albeit not complete), is quite striking and characterises well the problems of transitional societies. Nevertheless, I do not think that presenting a list of overturned laws can give us severe insight to the constitutional review practices – the estimation test should rather rest on the analysis of the content of relevant decisions.

On several occasions the Constitutional Review Chamber has used the general principles of law as a mediating concept when the Constitution itself has been insufficient to support the judicial reasoning.

The Estonian Constitution Provides that the administration of justice must be based on the grounds of the Constitution and the laws.[257] At first glance it seems that the recognised sources of the law are limited merely to the laws and the Constitution. Nevertheless, the Estonian Constitution approves the general principles and rules of international law as an inseparable part of the Estonian legal System.[258]There is no doubt that the State as a party of international treaties has to obey the norms stemming from these treaties. Meanwhile, the Constitution does not mention precisely the principles of international law, which are supposed to be part of Estonia's legal system. To solve the dilemma, the Constitutional Review Chamber has skilfully

[255] W. Sadurski, op. cit. note 130, p. 320.
[256] As it was on 22 June 2003.
[257] The Constitution, § 146.
[258] The Constitution., § 3 (1).

applied, the so-called "development clause" of the Constitution which stipulates that the basic rights catalogue of the Constitution does not "preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law".[259] Prominent legal scholars have appreciated this clause of the Constitutional "spirit" for particularly successful wording.[260] This clause goes beyond of pure textualism and suggests that the interpretation of the Constitution is more than applying the plain meaning of a legal text.[261]

Professor Robert Alexy deduces from the Estonian Constitution seven general principles[262]: human dignity,[263] freedom,[264] equality,[265] the rule of law,[266] democracy,[267] social state,[268] and Estonia's identity.[269] The adjudication practice of the Constitutional Review Chamber has added the principles of legitimate expectations, legal certainty, equal treatment, proportionality and legality.

The first pivotal decision concerning the general principles of law was on 30 September 1994, when the Constitutional Review Chamber stated:

"In democratic states the law and general principles of law developed in the course of history are observed in law-making as well as in law application, including the administration of justice. In creating the general principles of law for Estonia the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered. These principles have their origin in the general principles of law of the highly developed legal systems of the member states".[270]

The Chief Justice of the Supreme Court, Uno Lõhmus, has stressed the noteworthiness of referred decision from many aspects. Firstly, the Constitutional Review Chamber affirmed that the general principles of law developed by the

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[259] The Constitution., § 10.
[260] R. Alexy, *Põhiõigused Eesti Põhiseaduses*, in "Juridica", 2001 (special edition), pp. 87-88.
[261] R. Alexy, ibid., pp. 88-89.
[262] R. Alexy, ibid., p. 89.
[263] The Constitution., § 10.
[264] The Constitution., § 19 (1).
[265] The Constitution., § 12 (1).
[266] The Constitution, § 10.
[267] The Constitution., § 1(1).
[268] The Constitution., § 10.
[269] The Constitution., § 1(2).

authorities of the Council of Europe and the European Union are the sources of Estonian law. Secondly, the Constitutional Review Chamber recognised that the general principles of law shall be taken into consideration by the legislature in law-making procedures and as well by the courts in adjudication procedures. Thirdly, the Constitutional Review Chamber noted that the principle of legitimate expectation is a general principle of Estonian law and thus, in accordance with the spirit of the Constitution.[271]

The principle of legitimate expectation as described by the Constitutional Review Chamber is as following: " According to that principle everyone has a right to conduct his or her activities in the reasonable expectation that a statute being applied will be in effect. Everyone must be ensured that he or she can enjoy the rights and liberties granted by the law. Modifications to the law must not be perfidious to those subject to the law".[272]

The principle of legal certainty was mentioned in constitutional decisions many times.[273] For example, in the decision on 5 February 1998, the Constitutional Review Chamber has only admitted that "ambiguous authority undermines general legal certainty and creates a danger of effecting the state-building principles and every person's rights and freedoms established by the Constitution". [274] More explicitly it was explained in the decision of 17 March 1999, when the Constitutional Review Chamber was asked to assess the validity of some provisions of amendments to legislation related to Ownership Reform Amendment Act and the court found that the principles of legal certainty, lawful expectation and equal treatment had been violated. The Chamber held that the principles of legal certainty and lawful expectation "give rise to everyone's lawful expectation that what has been promised by a law shall be applied towards persons who have started to realise their rights. An Act which violates the right is in conflict with the Constitution".[275]

The principle of proportionality has been used for the estimation as to whether legislative means are essential for gaining the legislative aim. A relevant decision of

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[270] Decision of 30 September 1994, no. III-4/A-5/94, available at: http://www.nc.ee/english
[271] Uno Lõhmus, *Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana*, in "Juridica", no. 9, 1999, p. 428.
[272] Decision of 30 September 1994, No III-4/A-5/94, available in http://www.nc.ee/english
[273] For example, the decisions of 5 February 1998 No 3-4-1-1-98; 23 March 1998 No 3-4-1-2-98; 17 June 1998 no. 3-4-1-5-98. See: http://www.nc.ee/english
[274] Decision no. 3-4-1-1-98, available at: http://www.nc.ee/english
[275] Decision no. 3-4-1-2-99, available at: http://www.nc.ee/english

30 September 1998 also concerned amendments of the legislation related to Ownership Reform Act. Subsection 13 (1) of the aforesaid Act established that if unlawfully expropriated property as an object of the ownership reform is destroyed, the State shall compensate the value of the property. This provision was amended in the manner that the State has generally no obligations to compensate the destroyed property. The right for compensation was guaranteed only if a city or rural municipality government has approved the determination of the value of the property *before* the amendment act entered into force. The Constitutional Review Chamber found that this amendment act violated the principles of legal certainty, lawful expectation and equal treatment. However, the Court did not explained very clearly the violation of these three principles, but instead based the decision on the principle of proportionality:

"Pursuant to the principle of proportionality, valid in a state based on rule of law, the measures taken must be proportionate to the objectives to be achieved. The representative of the Minister of Justice found at the court session that by partial termination of compensating for unlawfully expropriated property which is destroyed, the legislator wanted to avoid causing injustice towards other members of society who have to meet the expenses of compensation. The Constitutional Review Chamber finds that the partial termination of compensating for destroyed property does not serve the purpose referred to by the representative of the Minister of Justice. …. [T]he fact that in the course of compensating for unlawfully expropriated property the position of some entitled subjects was somewhat improved at the cost of considerable deterioration of the position of other entitled subjects does conform to the principle of proportionality".[276] In the same decision, the Constitutional Review Chamber has admitted that after the amendment act entered into force the entitled subjects of the ownership reform were not treated equally.[277] The Constitutional Review Chamber has used the principle of equal treatment in earlier decisions, also in conformity with the constitutional meaning,[278] as equality before the law.[279]

As to the principle of legality, the Constitutional Review Chamber has stated:

[276] Decision no. 3-4-1-6-98, available at: http://www.nc.ee/english
[277] Decision no. 3-4-1-6-98, available at: http://www.nc.ee/english
[278] The Constitution, § 12.
[279] Decision of 27 May 1998, no. 3-4-1-4-98, available at: http://www.nc.ee/english

"[T]he principle that public power should be exercised observing the principle of legality, which is recognised in democratic rule-of-law states, is also valid for Estonia. For the exercise of power the content of a legal act, as well as the procedure and form of exercising power must be legal".[280]

The norms of international law and the case law of the European Human Rights Court and the European Court of Justice have been used by the Constitutional Review Chamber mainly as a tool for interpretation.[281] In the Estonian legal system the Constitution has the superior place, but the international treaties ratified by the Riigikogu (the Parliament) have primacy over the national legislation.[282] However, it is interesting to note that despite of the aforesaid hierarchy of norms the Constitutional Review Chamber in some occasions considered it necessary to declare that the disputable act, or part of it, is unconstitutional and also in conflict with the international treaty.[283] Yet the power to estimate the accordance of the national law with the norms of international treaties within the procedure of judicial review is questionable. I also find that equipping the legal system with new general principles is a kind of lawmaking and definitely typical for the "activist" courts. As adjudication practice of the Constitutional Review Chamber indicates, these principles have a crucial role in assessing the constitutionality of the laws.

The example of value judgement is provided by the Constitutional Review Chamber decision of 3 May 2001, which declared the provision of the Surnames Act unconstitutional. It appears from the facts of the case that an Estonian Marika Arendi wished to restore the surname of her family – Elita von Wolsky and the Minister of Internal Affairs refused to approve her request on the grounds of the Surname Act. As section 11 of the Surname Act establishes the non-Estonian name may not be a new surname if the person requesting the name is of Estonian origin or has an Estonian surname. The Riigikogu (the Parliament) held an opinion that the Surnames Act is in

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[280] Decision of 6 October 1997, no. 3-4-1-3-97, available at: http://www.nc.ee/english
[281] Decision of 3 May 2001, no. 3-4-1-6-01, available at: http://www.nc.ee/english
See also: R. Maruste, *The Implementation of the European Convention on Human Rights and Basic Freedoms in Member States of the Council of Europe*, available at: http://www.venice.coe.int/docs/CDL-JU(1998)034-e.html
H. Vallikivi, *Euroopa Inimõiguste konventsiooni kasutamine Riigikohtu Praktikas,* in "Juridica", no.VI, 2001, p. 404.
[282] The Constitution, § 123 (2).
M. Ernits, Põhiõiguste mõiste ja tähtsus õigussüsteemis, in "Juridica", no. 9, 1996, p. 469.
[283] Decision of 10 May 1996, no. 3-4-1-1-96; Decision of 27 May 1998, no. 3-4-1-4-98.

accordance with the Constitution, because its preamble emphasis that the State must guarantee the preservation of the Estonian nation and culture. In its decision, the Constitutional Review Chamber was weighing the need to protect national identity and the individual right to change one's name. The Constitutional Review Chamber recognised that when the Constitution was drafted the national identity had greater importance, but now the protection of national identity should not exclude the change of names.[284]

Making value judgements of this kind is quite analogical to the action of the legislator when formulating new statutes.[285] To quote John Bell:
"In this modest way, the judge is thereby determining the direction which society is to take".[286] Nevertheless, he concedes that "such issues may be controversial"[287] and could lead to bias.

Probably the most expressive illustration of solving clearly political question is provided in the Constitutional Review Chambers decision of 15 July 2002, which declared partially unconstitutional the Local Government Council Act, which entered into force on 6 May 2002. This Act established that in the election of local government councils on 20 October 2002 one can stand as a candidate either in the list of political party or as an independent candidate.

The Legal Chancellor found that this Act disproportionately restricted the exercise of free elections and general and uniform suffrage. He proposed the Riigikogu (the parliament) to bring the Act into conformity with the Constitution. Whereas the Riigikogu (the Parliament) disagreed with the proposal, the Legal Chancellor challenged the Act in the Constitutional Review Chamber.

According to the petition of the Legal Chancellor, subsections 31 (1); 32 (2) and clause 33 (2.1) of the Local Government Council Act are in conflict with the Articles 11, 12 and 156 (1) of the Constitution "to the extent that they do not enable persons with the right to run as a candidates to participate in the elections of local government councils in the lists of citizens' election coalitions."[288]

There was factually nothing wrong or unconstitutional in the new Local Government Council Election Act. But the Legal Chancellor still argued that the

[284] Op. cit. note 280.
[285] J. Bell, op. cit. note 75, pp.18 and 237.
[286] J. Bell, ibid., p. 83.
[287] J. Bell, ibid., p. 182.

possibility to become elected as an independent candidate is smaller in comparison with participating in elections in the coalition list. The latter possibility was also permitted by the previous Local Government Council Election Act of 1996.

The Constitutional Review Chamber found that the aim of the Riigikogu (the Parliament), to increase the political responsibility of persons elected to local government councils, was legitimate. The Court also considered that the means employed, the discarding of election coalitions, can be legitimate. However, the Court hold an opinion that in the present legal and social context, the prohibition of citizens' election coalitions is not constitutional and constituted a disproportionate restriction of the right to vote. To justify this statement, the Constitutional Review Chamber checked "whether the application of the new regulation is capable of prejudicing the representative quality of local government councils".[289] In their assessment the Chamber has taken "into consideration the competitiveness of individual candidates as compared to lists of candidates, previous preferences of electors and the time when the Local Government Council Election Act should enter into force and when the local elections are to be held".[290]

It is quite clear from the reasoning of the Constitutional Review Chamber that the judgement has been made on the grounds of "costs and benefits" calculation. Such a decision is usually ascribed to the political branches.

6. CONCLUSION

My slightly sceptical discourse of Estonian judiciary is far from a negative assessment. It is impossible not to notice the progress that has been achieved during the last decade. But it is also too early to become complacent.

As my observations reveal, the new Courts Act is a bitter compromise and does not completely guarantee the independence of the judiciary and the balance of powers. Consequently, this situation is poorly serving the interests of the consolidation of democracy. Of course, it is not enough only to complain about the irrational treatment of the judiciary. Hitherto the essential debate about the role of the judiciary has been

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[288] Decision of 15 July 2002, no. 3-4-1-7-02, available at: http://www.nc.ee/english
[289] Ibid.

usually held among the inner circle of legal professionals. I believe that it is high time to widen this circle. The solution (or at least part of it) is in the hands of the judiciary. Here I must repeat some suggestions made before.

First, more transparency and openness. Awareness is an inevitable condition for gaining public confidence. As we all know, information is a robust tool and today it is inescapable to avoid the scrutiny of the "fourth branch" of power – the media. And if something is already unavoidable, it makes sense to make the best of it.

Secondly, there is a pressing need for a competent, objective and critical analysis of adjudication practices. While preparing my thesis I noticed in Estonia the same phenomenon described by Professor Sadurski – the symbiosis of constitutional scholars and justices. Almost 11 justice's clerks of the Supreme Court (out of total number 19) are closely connected with Estonia's most prominent university, being either members of the teaching staff or post-graduate students of Tartu University. In addition, six Justices of the Supreme Court are teaching at same university.

Thirdly, the judicial capacity depends to a great extent on the knowledge of the judges. However, the mere training of the judges might be useless if they do not have the opportunity to put their knowledge into practice. Here I mean that the main, if not only, task of the judiciary is the administration of justice. But there is a shortage of clerks and the judges are overloaded.

In conclusion, for the effective administration of justice (and this is the aim, no doubt) it is necessary to have highly capable judges and structural, administrative, academic and public support for their work.

CONCLUDING REMARKS

One of the most impressive characteristics of the transition to democracy in Eastern and Central Europe has been the continuous increase in the importance of judicial role, and especially the prominent and active role of the constitutional courts. The thesis of present paper is that the role of the judiciary in post-communist democratic

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[290] Ibid.

transition, is extraordinary crucial. This distinctive feature also differentiates the current period of intense political change from the Third Wave of democratisation.

However, the significance of the judicial role does not mean that the transition should primary lie as an institutional matter on judiciary. I argue that for a consolidation of democracy is better that no power is dominant within governmental branches. The activism of the courts should be favoured in the furnishing of fundamental rights catalogue and in protection of human rights.

The efficiency of the courts depends on both the administration and the support of general public. But the years of the communist rule have strongly undermined the public trust in judiciary. This is a serious problem that should not be underestimated. If the debates about the appropriate role of judiciary stay solely within the framework of power-balance, the judicial branch might be alienated from the civil society even more. For gaining confidence of the wider public, judicial work must be more open and transparent. For that purpose, the judiciary has to exercise relevant accountability practices. The public hearing of court cases and the proper reasoning of the decisions are still important tools of accountability, although, not sufficient. Therefore, the courts should introduce a new field of "judicial activism" like, for example, frequent lectures and articles addressed to the society as whole.

Estonia as an example of transitional judiciary is on one hand very typical of the region of post-communist states for shared past and in a great amount of same problem of transition. On the other hand, with a quite unique procedure of judicial review, Estonia has chosen a somehow different path of democratisation and the judicial role for it.

However, the limited length of the current dissertation could allow the exhaustion of neither the examined issue, nor the matters that could be scrutinised on the role of judiciary in democratic transition. But I hope that I succeeded (at least) in shifting the traditional angle of thought.

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