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Rebuilding the Court System of Estonia after the Communist Regime[*1]

1. Introduction

The dismantling of the Estonian Soviet Socialist Republic (ESSR) judiciary and recreating a judiciary that would be able to implement the new but rapidly changing democratic legal system was a challenge that Estonia faced between 1987 and 1993. Following the breakdown of the Soviet Union, ending the occupation and regaining independence, Estonia modernised its laws and institutions through a comparatively democratic process without sudden disruption of the legal system or of the work of the judiciary. This process had two aspects – dismantling the interconnected legal systems of the Union of Soviet Socialist Republics (USSR) and ESSR and, secondly, building a new legal system and institutions that would lead to the re-establishment of the independent Estonian state.[*2] With this article we are able to discuss only a fraction of the events and developments of the time, and we focus on the problems related to the dissolution of the ESSR judiciary and creation of the new democratic judiciary.

The transition of the Estonian judiciary was comparatively uncomplicated for two main reasons: First, the ESSR judiciary was relatively small and compact. In 1987, the judiciary consisted of 79 People's Court (*rahvakohus*) judges and 20 ESSR Supreme Court (*ENSV Ülemkohus*) judges.[*3] In 2022, there are approximately 250 positions of judges in Estonia's three-level court system.[*4] Second, within the judicial system of the ESSR, the judges did not have independence or security of tenure. As in the rest of the Soviet Union, judges were periodically elected and subjected to scrutiny by the communist political system. Most of the judges elected in 1987 finished their term in 1992. Together these conditions made the selection of the new judges less controversial.

1 The research leading to this article was supported by the Estonian Academy of Sciences (SSVOI21349).

2 For more comprehensive accounts of the transition process of Estonia, see, for example, Rein Taagepera. *Estonia: Return to Independence* (1st edn). Routledge 2018. – DOI: https://doi.org/10.4324/9780429500725; Graham Smith. *The Baltic States: The National Self-Determination of Estonia, Latvia, and Lithuania*. St Martin's Press 1994; Walter R. Iwaskiw (ed.). *Estonia, Latvia and Lithuania: Country Studies* (Area Handbook Series 550–113, Library of Congress 1996).

3 'Eesti Ülemnõukogu otsus Eesti Nõukogude Sotsialistliku Vabariigi Ülemkohtu valimise kohta', *ENSV ÜVT* 735, 10, 176, 29.3.1985.

4 The number of district, administrative, and circuit court judges is determined by resolution of the Minister of Justice. 'Maa-, haldus- ja ringkonnakohtu kohtunike arv ja jagunemine kohtumajade vahel', RT I, 1.4.2022, 10. Subsection 25 (3) of the Courts Act establishes the number of Supreme Court justices as 19; see the Courts Act [*Kohtute seadus*], RT I 2002, 64, 390; RT I, 20.6.2022, 6.

At the same time, the task ahead of Estonia was very complex; it had to rebuild its whole legal and institutional system and separate itself legally and practically from the USSR. The communist legacy and the influence of the Estonian Communist Party (ECP) on the legal system were incompatible with the values of democracy and human rights that newly independent Estonia embraced. Notwithstanding seemingly smooth progress in reforming the judiciary and the absence of significant eruptions, stability and continuity in the enforcement of laws and maintaining the regular workings of the judiciary were key challenges of the transition both before and after the adoption of the 1992 Constitution (*Põhiseadus*).[*5]

The article analyses central factors and turning points of the transition of the Estonian judiciary and maps the theoretical and practical difficulties of the transition. For understanding of the context of the transition, the article starts with a short overview of the judicial system of the Estonian SSR. From then on, it follows chronological organisation.

2. The starting point – the legal system of the ESSR

Until 1990, the Estonian legal system was tightly intertwined with the legal system of the USSR. The central values of the legal system of the ESSR were fundamentally different from a democratic legal system's. Although power was formally vested in people, it was *de facto* held by the Communist Party and its members.[*6]

The ESSR Constitution required the separation of powers and stressed that the judiciary is independent and its work based on the rule of law.[*7] However, separation of powers was not fully realised, as the Soviet court system was dependent on the Ministry of Justice of the USSR and of the ESSR.[*8] The judiciary was governed in practice by the administrative division of the ECP, which decided on all the important issues, including the selection of personnel.[*9]

Courts were not the only institutions in the Soviet legal system that resolved legal disputes, as it was possible to resolve them also in political bodies – in the party institutions, 'comrade courts',[*10] juvenile-justice committees, and administrative commissions.[*11] Thus, the dispute resolution system was highly politicised and intertwined with the functioning of the Communist Party. Furthermore, most administrative matters and some political offences were decided upon by administrative Communist-Party-affiliated committees or communist 'comrades' that were neither courts of law nor bound by the obligation to abide by the law.[*12] At the same time, the scope of civil law and administrative law was very limited.

The ESSR national court system was two-tiered – People's Courts (essentially district courts) decided on most matters as a first-level court, and the ESSR Supreme Court was both a court of cassation and a first-level court for a number of first-degree criminal offences.[*13] The USSR Supreme Court and the Military Tribunals formed a supranational element of the legal system supervising national courts; the national legislator and national courts were bound by their decisions and general directions.[*14]

The judges of the People's Court were elected for five years by the people on the basis of 'universal, uniform and direct secret ballot'.[*15] In practice, this process was under the control of the Communist Party

5 Constitution of the Republic of Estonia [*Eesti Vabariigi põhiseadus*], RT 1992, 26, 349.

6 Section 2 of the 1977 Constitution of the USSR and §§ 2–4 and 6 of the Constitution of the ESSR. The ESSR Constitution was proclaimed on 13.4.1978. 'ENSV konstitutsiooni vastuvõtmine ja väljakuulutamine' ['Adoption and promulgation of the Constitution of the ESSR'], *ENSV ÜVT* 1978, 13, 147; E.-J. Truuväli. *Põhiseaduse teel*. Iloprint 2008, pp. 303–336.

7 Section 154. As an example, the plenum of the USSR Supreme Court adopted on 5.12.1986 a resolution aimed at improving legality and the rule of law in the decision-making of the judiciary and stressed the need to guarantee that judgments do not depend on the status or the position of the persons involved (para. 1), uniform application of *nulla poena sine lege* (para. 2), and the importance of judicial independence (para. 3). 'Seaduslikkuse edasisest tugevdamisest õigusemõistmisel' ['Further strengthening the rule of law in the judiciary'], *Nõukogude Õigus* 121/1 (January–February 1987), pp. 64–67.

8 Section 18 of the Court Organisation Act (COA) [*Seadus ENSV kohtukorralduse kohta*]. See *ENSV ÜVT* 1981, 38, 583.

9 Email from Rait Maruste (20.1.2020).

10 '"Seltsimehelike kohtute põhimääruse" ja "Seltsimehelike kohtute ühiskondlike nõukogude põhimääruse" kinnitamise kohta', *ENSV ÜVT* 1978, 8, 95.

11 Ülemnõukogu, or Supreme Soviet, on 26.9.1991, item 2.

12 Kalle Nigola. *Kohtukorraldus NSV Liidus*. Tartu Riiklik Ülikool 1989, p. 36. See also §161 of the ESSR Constitution.

13 Section 150 of the ESSR Constitution.

14 Sections 1–2 COA.

15 Section 152 USSR Constitution; §151 ESSR Constitution.

and every region had the same number of candidates as there were places for justices.[*16] The ESSR Supreme Soviet (*Ülemnõukogu*) elected justices to the ESSR Supreme Court for a renewable term of five years.[*17] The Supreme Soviet also decided the number of judges for each period. Public assessors for all national courts (lay judges) were elected for two and a half years in open voting in the area of their work or residence.

The last election of People's Court judges was held in conjunction with the elections to the local soviet councils on 21 June 1987.[*18] The participation rate in the election of the judges was 98.5%, and each of the candidates received 99% of the votes.[*19] In total, 79 People's Court judges[*20] (for 24 courts) and 5,685 public assessors were elected.

The election of the judiciary meant that the process was, in essence, a political process, where the party had the central role in putting forward the candidates.[*21] In practice, all judges had to be members of the Communist Party, as the nomination of candidates was done by the Communist Party.[*22] Hearings for the election of judges during the transition revealed that there were suspicions of several judges having co-operated with the KGB during the Soviet era and having followed party guidance in a highly politicised case.[*23] During the hearings, when asked whether the justices of the ESSR Supreme Court had told the truth when stating that they had not been influenced by 'telephone justice', one justice replied that truth was unlikely.[*24] However, there is a lack of documented evidence on which of the judges collaborated with the KGB. Even though special tribunals or special boards handled most of the political cases, the ESSR Supreme Court was an institution of Soviet repression that also handled political ones.[*25]

3. Transformation of the court system

3.1. The role of the former elite

The pre-constitutional transformation of the court system was characterised by the wish of the judicial elite (including the ESSR Supreme Court) to keep the existing structures and improve them as necessary. The ESSR Supreme Court members actively participated in the development of the Courts Act.[*26] At the same time, they were not included in the drafting of the Constitution and the court reform was criticised as reflecting Soviet values.[*27] In one example, the last appointed Chief Justice of the ESSR Supreme Court was put forward as a candidate to be the first Chief Justice of the new Supreme Court. Said nomination did not, however, gain the support of the Supreme Soviet.[*28] It is unclear whether they sincerely wished to go along with the renewal of the legal and court system or whether they wanted to influence the system so as to keep their power. The ESSR Supreme Court made several attempts to adapt to the situation before the establishment of the new Supreme Court. All such attempts were, still, peaceful and civilised.[*29]

16 A permanent executive body of the ESSR Supreme Soviet that acted on behalf of the legislator when it was not in session. See §§ 106–111 ESSR Constitution.

17 Section 152(2) ESSR Constitution; Section 29 COA.

18 'NSV kohalike rahvasaadikute nõukogude ning rajoonide (linnade) rahvakohtute valimiste tulemuste kohta', decision of the ESSR Plenum, 25.6.1987, ERA R.3.7.1656. The statistics also were published together with the list of elected judges in the legal journal of the Ministry of Justice: 'Rahvas valis rahvakohtunikud', *Nõukogude Õigus* 124/4 (July–August 1987), pp. 253–254.

19 'Rahvas valis rahvakohtunikud' (ibid.).

20 Out of the 79 judges, 24 were elected for their first term; 71 of the judges were members of the Communist Party, and the other 8 were candidates of the party.

21 Section 35 of the LEPC.

22 Riigikogu, 25.2.1993, item 12.

23 Riigikogu, 25.2.1993, item 9.

24 Informal influence or pressure excerted on the judiciary by the Communist Party. Ülemnõukogu, 8.5.1990, item 3.

25 International Commission for the Investigation of Crimes Against Humanity. 'Conclusion of the Commission. Phase III: The Soviet Occupation of Estonia from 1944' (2008), p. 10.

26 Explanations to the Courts Act [*Eesti Vabariigi kohtute seadus*] of 23.10.1991, ERA R-3.3.15918, p. 81.

27 Constitutional Assembly, 1.11.1991.

28 Supreme Soviet, 11.5.1992, item 1.

29 Maruste (see Note 9).

3.2. Depoliticising the judiciary

One of the first reforms focused on the party affiliation of the judges (especially filiation to the Communist Party). Already in 1990, candidate for Chief Justice of the ESSR Supreme Court J. Kirikal[*30] stressed that judges should not belong to any political party or movement, since their independence is possible only when they are subject to the law alone. Hence, it was deemed important that members of the judiciary and law-protection agencies in general, not be members of such parties and that they suspend their membership of these for the duration of holding the position of public trust.[*31] The practical obstacle at the time was that all the members of the judiciary belonged to the Communist Party. To resolve the matter, the Presidium of the Supreme Soviet adopted a decree depoliticising the law-enforcement bodies and prohibiting political unions in them,[*32] thus paving the way for the later requirement that judges not be members of political parties.[*33]

3.3. Foundations of the court reform

On 16 May 1990, the Supreme Soviet adopted general principles of transitional governance.[*34] The principles stated that all the laws in force in the Estonian SSR remained in force until they were nullified or changed (per Section 4). The law separated the Estonian courts from the courts of the USSR and declared that the courts of Estonia should follow only the laws in force in Estonia (Section 5). This legislation thus brought an end to the supervisory powers of the Supreme Court of the USSR, and the administration of justice and all adjudication in Estonian territory was separated from the judiciary of the USSR and conferred solely on the Estonian courts.[*35]

When the Chief Justice of the ESSR Supreme Court presented candidates for positions of justice to the interim ESSR Supreme Court in 1990, he also introduced the central requirements for the transitional court system:[*36]

(1) substantive protection of fundamental rights;[*37]
(2) the Supreme Court as a court of appeal and cassation only;[*38]
(3) a second-level court at least for criminal-law matters;
(4) redress for the legal injustice of the Soviet period.

The drafting of the Courts Act of 1991 followed these recommendations. Until then, the re-regulation of the court system was limited and demand-driven. As a first step in de-Sovietisation, the court system was consolidated and the names of the courts were changed to reflect their jurisdictional areas, to rebuild trust in and adherence to Estonian laws and policies.[*39]

30 Jaak Kirikal was appointed Chief Justice of the ESSR Supreme Court in 1988. From then onward, he actively supported the democratisation process both in his oral statements and in his writings. During his nomination process in 1990, he suspended his membership in the Communist Party for the term of his office. Ülemnõukogu, 3.4.1990, item 1.

31 Ibid.

32 'Eesti NSV õiguskaitseorganite osalisest depolitiseerimisest', *ENSV ÜVT* 1990, 16, 253.

33 Status of Judges Act [*Kohtuniku staatuse seadus*], RT 1991, 38, 473, §4(2)2.

34 'Eesti valitsemise ajutise korra alustest', *ENSV ÜVT* 1990, 15, 247.

35 'Eesti Vabariigi Ülemnõukogu tegevusprogramm üleminekuperioodil Eesti Vabariigi iseseisvuse taastamiseni ja valitsemise ajutisest korrast', *ENSV ÜVT* 1990, 15, 248 (Chapter III).

36 Ülemnõukogu, 8.5.1990, item 3.

37 The legal system of the ESSR did not include concrete legal mechanisms to help to enforce individuals' rights and freedoms, including protection against arbitrary state action. The Estonian legal system at the time lacked administrative courts.

38 The Supreme Court of the ESSR was a first-instance court (and the only instance) for some legal disputes.

39 'Rahvakohtute ümbernimetamise kohta' ['On the renaming of the People's Courts'], *ENSV ÜVT* 1990, 17, 270.

3.4. Election of judges

In 1988–1993, before the full reform of the judiciary, several judges were appointed both to People's Courts and to the ESSR Supreme Court. On 2 April 1990, the Supreme Soviet adopted the Rules of Procedure and Internal Rules Act,[*40] which regulated, among other issues, the nomination and appointment of judges to the ESSR Supreme Court.[*41]

The Chief Justice recommended that the transitionary ESSR Supreme Court consist of 19 judges; the majority of whom should have previous work experience in the judiciary.[*42] During the discussions, it was pointed out that the Court needed stability both as an institution and for the individual judges. Questions to the candidates ranged from their views on the independence of the judiciary to their views on the future of the Estonian legal system and the court system. For example, they had to answer questions on the use of 'telephone justice' in the Soviet era as well as on their loyalty to the Estonian state.[*43] The doubts about their honesty and their position as the ESSR legal elite remained an issue, and it was brought up again during the establishment of the Supreme Court and the election of its justices.[*44] The 1990 overview of the ESSR Supreme Court pointed out that it had been difficult to find persons outside the ESSR judiciary willing to be candidates for positions with the interim ESSR Supreme Court. A number of possible candidates had refrained from competing as the pay was low, these positions were seen as temporary, and there was political instability.[*45]

Until the adoption of the Constitution in 1992, the Supreme Soviet also appointed justices to the district courts (former People's Courts), basing the appointments on nomination by the Minister of Justice. For example, in 1990, the Supreme Soviet appointed four justices to district courts, and four justices were released from their positions.[*46] From 1991 onward, the nomination of justices required an evaluation by the judges' qualification commission wherein their professional and personal qualifications were assessed.[*47] From November 1991, all nominations were made jointly by the Minister of Justice and the Chief Justice of the ESSR Supreme Court. All the nominations to the ESSR Supreme Court were made by the Chief Justice or the Deputy Chief Justices. In 1991, the nature of the questions asked of the candidates focused on the current problems in the work of the judiciary and on the abolishment of the death penalty.[*48]

3.5. Practical problems faced by the court system

In 1990, the Chief Justice emphasised practical issues facing the judiciary that needed legislative and administrative attention.[*49] Firstly, there was a need to find and appoint new judges with high moral, personal, and professional standards as several judges of the People's Courts had left the court system for the private sector. The salary of judges was not commensurate with the private sector, and this resulted in small numbers of applicants for open positions; working for the courts was not a popular career option. Secondly, there was a need to improve the practical arrangements for the courts – from buildings and courtrooms, through the use of new technology, to court support personnel. These practical problems were addressed in 1991, with the Status of Judges Act, and the salaries of judges were linked with salaries of other state officials; e.g., the pay of the Chief Justice of the Supreme Court was made equal to that of the Prime Minister.[*50]

In its annual overview of 1990, the ESSR Supreme Court pointed out that Estonian courts had been given sufficient powers to act as independent enforcers of law.[*51] It saw as a possible violation of separation

40 'ENSV Ülemnõukogu ajutise töö- ja kodukorra kinnitamise kohta' ['Temporary rules of procedure and rules of procedure of the ESSR Supreme Soviet'], *ENSV ÜVT* 1990, 12, 181.

41 The alternative proposal to extend the term of office of the existing ESSR Supreme Court was not supported.

42 The Chief Justice, 11 members of the Criminal Law Chamber, and 7 members of the Civil Law Chamber. Ülemnõukogu, 8.5.1990, item 3; see also the proceedings of 29.5.1990, item 2.

43 Ibid.

44 Riigikogu, 8.12.1992, item 3, and 25.2.1992, items 2–16.

45 Ülemkohus, 'Eesti Vabariigi Ülemkohus 1990. aastal', *Eesti Jurist* 1991/2, p. 89.

46 The reasons for this are not available.

47 Ülemnõukogu, 31.1.1991, item 1.

48 E.g., Ülemnõukogu, 20.11.1991, item 2. The last death penalty decreed in Estonia was carried out in 1992.

49 Ülemnõukogu, 8.5.1990, item 3.

50 Section 29 of the Courts Act.

51 Ülemkohus (Note 45).

of powers the fact that the Ministry of Justice had nominated several judges as members of government committees. The overview also pointed out that problems related to training of the judges were not resolved.

Finally, the overview emphasised that the rapid legislative process meant that new laws were of poor quality, that several vital laws had not been adopted yet; and that the delays in publishing laws in the official gazette *Riigi Teataja* made law enforcement difficult as judges could not implement laws published in newspapers. Moreover, the overview noted, laws often set out only general principles and did not include implementation norms or further clarity that would secure their uniform application by the People's Courts.[*52]

4. Legislative reforms of the court system

4.1. Development of the Courts Act

When opening the Constitutional Assembly, the Minister of Justice set forth the following aim for reforming the court system: to create a constitution based on the separation of powers that could be applied in the courts with a focus on the protection of basic rights.[*53] His views were echoed by the chairman of the assembly,[*54] who stated that the Constitution had to be concrete enough to enable it to be enforced by the courts and, hence, there was a need to adopt clear principles that the courts could apply when they are faced with lacunae as would be inevitable in the transitional society.[*55] The regulation of the court system in the Constitution mirrored the development of the Courts Act and the ongoing reform. The central elements of the renewal were related to the constitutional review function of the Supreme Court.[*56]

The development of the draft Courts Act (CA)[*57] and the Status of Judges Act (SJA)[*58] started already in 1990, and it was finished before completion of the drafting of the Constitution. This process was led by the Ministry of Justice in collaboration with the ESSR Supreme Court. Because of these processes, run in parallel, the discussions over the structure of the Court system and the status of the judiciary in the assembly and the Supreme Soviet were similar and can be viewed together.[*59] The Constitutional Assembly left the practicalities of the court system to the legislator, and its discussions focused on the role of the court system in constitutional review alongside the independence of the judges and the judiciary.[*60]

The new court system had to be suitable for the social needs of this state in transition to democracy. Therefore, the court reform had to take into account the existing realities and the personnel available, as well as the surrounding institutional systems, and could not be modelled after any other state. Instead, the draft CA followed the Courts Act of 1938[*61] and intentionally excluded any rules of procedure, which were established in separate legal acts.[*62] The Courts Act was adopted in October 1991 together with the SJA and the Implementation Act.[*63]

52 Ibid., paras 102–104.

53 Constitutional Assembly, 13.9.1991.

54 Later a justice of the Administrative Chamber of the Supreme Court.

55 Constitutional Assembly, 20.9.1991.

56 See, for example, the discussion by Rait Maruste. 'Sissejuhatus. Kohtusüsteemi ülesehitamine iseseisvuse taastanud Eestis' in Priit Pikamäe and others (eds), *Kohtute seadus: kommenteeritud väljaanne*. Juura: Riigikohus 2018, pp. 17–18. See also Constitutional Assembly, 22.11.1991.

57 Courts Act [*Kohtute seadus*], RT 1991, 38, 472.

58 Status of Judges Act, RT 1991, 38, 473.

59 The Supreme Soviet discussed the co-operation with the Constitutional Assembly during the second reading of the draft Courts Act, and found that there already existed co-operation between these institutions as two persons were simultaneously members of the respective committees of the Supreme Soviet and the Constitutional Assembly. Ülemnõukogu, 23.10.1991, item 1.

60 About the work of the assembly, see Viljar Peep (ed.). *Põhiseadus ja Põhiseaduse Assamblee: koguteos*. Tallinn: Juura 1997.

61 Courts Act [*Kohtute seadustik*], RT 1938, 36, 321. Pre-war Estonia had a three-level court system. See further material on the election of the judiciary before WW II from Hannes Vallikivi. 'Kohtunike valiku kriteeriumid Eesti Vabariigis 1934–1940', *Ajalooline Ajakiri* 2017, p. 363. – DOI: https://doi.org/10.12697/aa.2017.2-3.07.

62 Ülemnõukogu, 26.9.1991, item 2.

63 The decision on the implementation of the Courts Act and the Status of Judges Act [*Otsus 'Eesti Vabariigi kohtute seaduse' ja 'Eesti Vabariigi kohtuniku staatuse seaduse' rakendamise kohta*], RT 1991, 38, 47.

4.2. A three-tier court system

The need to create administrative courts, define their tasks, and dissolve the arbitration court was discussed before the adoption of the CA.[*64] The CA created a three-tiered court system – district courts and administrative courts or judges on the first level, circuit courts as appellate courts, and the Supreme Court at the last level.[*65] The existing People's Courts were reorganised into district courts, and they continued their work at the same courthouses. Circuit courts were initially situated in conjunction with the district courts; they started to function only in 1993. Most of the court administrative personnel were retained. Both circuit and administrative courts required adoption of procedural legislation, and their tasks needed further clarification.[*66]

Responsibility for the management of the first-level courts, an issue that arose at the heart of the debates during the drafting of the Courts Act of 2002, was given to the Minister of Justice.[*67] This included the right to determine the number of judges for each courthouse, a right to regulate the administration of the courts, and an obligation for the courts to report on their work to the Ministry of Justice. The Supreme Court was the only self-governing court, working in chambers or as a court *en banc*, and it was given dual status as the court of cassation and of constitutional review.[*68]

The Minister of Justice initially had the right to be consulted on legislative matters and also to participate in the meetings of the Supreme Court *en banc* with speaking rights. Such rights were gradually abolished.[*69] In this format, the court mainly dealt with administration tasks. The jurisdiction of the Supreme Court *en banc* was wide-ranging, from the right to review the practice of its chambers to the right to initiate legislative drafting or offer opinions on draft legislation. It also made recommendations for the appointment of judges and regulated its internal work.

Whether the courts had the right to interpret law when there were lacunae, laws were unclear, or laws were in mutual conflict was highly debated.[*70] The draft Courts Act originally foresaw that when a court was faced with a difficult question of interpretation, the question would be transferred to the ESSR Supreme Court, which, as necessary, would consult the Supreme Soviet on the interpretation of the law. This position was vehemently opposed by the ESSR Supreme Court, which saw the right to interpret laws as a right inherently vested in courts.[*71] The requirement that the Supreme Soviet be consulted was still included in the CA[*72] since during the Soviet era the ESSR Supreme Court often substantively changed the meaning of the legal norms with its interpretation. This requirement remained a transitional regulation, but it was not enforced, and it was nullified already in 1993 since it was not compatible with the Constitution, which instrument gave all the courts the power to initiate constitutional review proceedings in such cases and the Supreme Court the power of constitutional review.[*73]

4.3. Nominating judges and supervision of the judiciary

There was no consensus on the method for formal nomination of the judges in the draft constitutions. The Courts Act gave the power to nominate judges to the Supreme Soviet. The Constitutional Assembly saw the right of Parliament to elect judges as a possible violation of the independence of the judiciary

64 Jaano Odar. 'Kohtu pädevuse probleemid', *Eesti Jurist* 1991/2, p. 107.

65 The Supreme Soviet had several discussion on whether the law should continue to call the third-level court an ESSR Supreme Court (*Ülemkohus*) or the Supreme Court (*Riigikohus*). The name 'Riigikohus' was decided on at the second reading of the Courts Act. Ülemnõukogu, 23.10.1991, item 1.

66 Riigikogu, 12.5.1994, item 1.

67 Maruste (Note 56), p. 16.

68 The Constitutional Review Court Procedure Act [*Põhiseaduslikkuse järelevalve kohtumenetluse seadus*] was adopted in 1993. RT 1993, 25, 435. In 1993, the Constitutional Review Chamber decided 4 cases.

69 See, for example, the Courts Act and Status of Judges Act Amendment and Supplementation Act [*'Kohtute seaduse' ja 'Kohtuniku staatuse seaduse' muutmise ja täiendamise seadus*], RT 1993, 1, 2. §14; Courts Act and Status of Judges Act amendment and supplementation per RT 1993, 24, 429. §9.

70 Ülemnõukogu, 26.9.1991, item 2.

71 Ibid.

72 Section 29 of the CA.

73 Courts Act and Status of Judges Act amendment and supplementation act, RT 1993, 1, 2. §15.

and the separation of powers.[*74] Nevertheless, the Constitution stipulates that Supreme Court justices are appointed by the parliament; other judges are appointed by the President on the recommendation of the Supreme Court. There was no security vetting of judges, so the President maintained control over the nominations and accepted only nomination made by two-thirds of the former justices.[*75] Judges must be Estonian citizens and be fluent in Estonian language; this requirement, in effect, excluded several acting judges from applying after 1993.

The SJA regulated the education requirements and age limits for judges. Judges are required to have a higher education in law acquired at a national university or an equivalent qualification, and all candidates are obliged to pass a judge's exam. The SJA further set age and professional-experience requirements for judges, including their age limits These practical professional requirements were not regulated in the Constitution and were left to be regulated by ordinary law. The discussions in the Constitutional Assembly focused on the length of the term of the judges and on whether the Constitution should set a specific retirement age for judges.[*76] It was, nevertheless, acknowledged that all reforms have to consider the social context.[*77] Finally, it was decided that judges are to be appointed for life. The Constitution further imposed employment restrictions on judges: they cannot hold any additional elected or other positions except in education, belong to a political party, or be a founder or member of the board of a company.

In December 1992, Rait Maruste was elected as Chief Justice of the newly established Supreme Court.[*78] His tasks were twofold – on one hand, he had to dissolve the ESSR judiciary and the ESSR Supreme Court; on the other, he had to build the new judiciary, including the new Supreme Court.

The first justices for the new Supreme Court were elected through an open call, and all the applications were received and analysed by a select committee of Parliament,[*79] which nominated 11 candidates for the Supreme Court.[*80] Then, Parliament heard the candidates and voted on their appointment. As the Chief Justice recalled, one of the aims for the elections was to expand the competencies of the judiciary and escape from old routines and practices by selecting persons with different backgrounds. On 25 February 1993, the parliament decided to appoint 10 of these 11 candidates as Supreme Court justices. The hearing of the candidate who was rejected focused on politically motivated cases he had previously decided upon in the course of his judge's practice. The Supreme Court, consisting of the Chief Justice and 10 other justices, held its first session on 27 May 1993.[*81]

4.4. De-Sovietisation and the oath of judges

During the presentation of the draft Courts Act, the Minister of Justice expressed his concern that while, on one hand, 80% of the judges would complete their term of office in summer 1992 and it was questionable whether they would be ethically and legally suitable for the reformed court system, at the same time it was vital for the system to retain those who had previous work experience in the courts.[*82] International experts recommended a full lustration process for higher civil servants, including the judiciary.[*83] This approach was not welcomed in Estonia. Instead, all elected state officials, along with candidates for such offices, including members of the judiciary,[*84] were required to swear an oath of conscience.[*85] The Constitution Implementation Act (CIA) required that, until 31 December 2000, all candidates for a judicial position must

74 E.g., the Constitutional Assembly on 31.10.1991.

75 Toomas Anepaio. 'Eesti kohtunikud' in *Akadeemiline õigusharidus ja juristide täienduskoolitus*. Tartu: Tartu Ülikool 1996, p. 135.

76 E.g., the Constitutional Assembly, 10.4.1992.

77 The Constitutional Assembly on 11.10.1991 and 8.11.1991.

78 Riigikogu, 8.12.1992, item 3.

79 The committee included 4 members of Parliament, the Chief Justice, the Minister of Justice, 2 judges, and an attorney at law.

80 'Riigikogu poolt Riigikohtusse kandideerimisavalduste läbivaatamiseks moodustatud komisjoni protokoll', *Eesti Jurist* 1993/3–4, p. 40.

81 *Eesti Jurist* 1993/5–6, p. 65.

82 Ülemnõukogu, 26.9.1991, item 2.

83 Maruste (Note 56), p. 17.

84 The same requirement applied to the members of Parliament and higher civil servants.

85 Maruste (Note 56), p. 17.

take a written oath of conscience in addition to the oath of office.[*86] This was a transitional measure, and 10 years was considered to be a sufficiently long time, after which such persons should not pose an immediate risk to the state.[*87] In essence, they had to affirm that they had not worked for or collaborated with the repressive security services of the USSR or ESSR or participated in the persecution or repression of citizens.

As the Constitution did not automatically end the terms of office of public servants, those who wanted to remain in office after the adoption of the Constitution had to give their oath within 30 days after the first meeting of the newly elected parliament in order to remain in office.[*88] However, in December 1992, the legal commission of Parliament pointed out that almost no written oaths of conscience had been submitted by judges.[*89] This situation was resolved with the new nominations and appointment process, wherein the written oath was one of the documents required for the application. Additionally, judges have an obligation to take an oath of office when taking up the post.[*90] As the term of office of most of the judges ended in 1993 and the positions were filled through a new competition, the lack of oaths in 1992 was not a practical problem for the judiciary.

The SJA did not propose any procedure for assessing the suitability of individual candidates. Neither did it grant the Internal Security Service a right to investigate the candidate for security clearance. It was presumed that the unlimited tenure and social guarantees for judges listed in the SJA – stable pay, security of office, accommodation, and judge's pension – would ensure the sustainability and independence of the court system.[*91] In addition, it was thought that the oath taken by judges provides a sufficient guarantee of their loyalty.[*92]

5. Conclusion

In hindsight, Estonia was successful in transforming an ideological judiciary. From administering 'telephone justice' and following the directions of the Communist Party, the judiciary transformed relatively rapidly into one that adheres to the values of human rights and the rule of law. The relative compactness of the judiciary, together with the lack of resistance from the former judges, was a key to the successful legal transition.[*93]

At the beginning of the transition, the role of the former judiciary and the ESSR Supreme Court was at the centre of the legislative process and reforms. It can even be claimed that they attempted to reform the existing system such that they would remain in power, and the first changes to the Courts Act and the fast pace of the reforms supported this aim. These attempts were not, however, fully successful, as the members of the last Supreme Soviet were more critical of the Soviet judicial elite and their role in the Soviet state. Similarly, although the Constitutional Assembly was critical of the court reforms, they recognised that the reforms of the judiciary had to take into account the realities. Therefore, their work focused on the position of the courts as institutions and on constitutional review. Furthermore, the Constitutional Assembly did not involve the ESSR Supreme Court in the drafting process, rather, it considered the opinions of the academic experts. Even though they recognised the problems related to appointing judges for life, they saw it as a necessary guarantee for the separation of powers.

The creation of the Supreme Court and the appointment of judges in 1993 both created an opportunity for the former judicial elite to apply and opened the doors for new applicants. While citizenship and language requirements limited the application process to some extent, the actual filter was the judicial committee of the Supreme Court and the President. In parallel with the appointment of the judges, the focus was still on the full functioning of the three-tier court system and the development of the necessary procedural legislation.

The transition of the Estonian judiciary did not bring significant disruption or setbacks to the system. While the creation of the new court levels and the election of all judges did present practical difficulties nevertheless, the process itself was straightforward.

86 The Constitution of the Republic of Estonia Implementation Act [*Eesti Vabariigi põhiseaduse rakendamise seadus*], RT 1992, 26, 350, §7.

87 Constitutional Assembly, 28.2.1992.

88 CIA, §7.

89 Riigikogu, 9.12.1992, item 2.

90 SJA, §8.

91 Ülemnõukogu, 26.9.1991, item 2.

92 Maruste (Note 56), p. 17.

93 See also Maruste (Note 56).