The "dialogue of judges" and the mutual influence of constitutional concepts in Europe: How the interpretation of national fundamental rights is influenced by the fundamental rights of the ECHR and the EC general principles as well as by a horizontal exchange of ideas of national constitutional courts.

Latvia

The “dialogue of judges” and the mutual influence of constitutional concepts in Europe: How the interpretation of national fundamental rights is influenced by the fundamental rights of the ECHR and the EC general principles as well as by a horizontal exchange of ideas of national constitutional courts. Perspectives from Latvia

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Perspectives from Latvia

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Introduction

Every State has its own specific legal system. There are large differences in the elements of States’ legal systems. Namely, every legal system contains its own legal norms, sources of law, understandings of law, etc. As a result of this, legal systems are categorized.

The Latvian legal system is considered to be a continental European legal system. Therefore, the sources of law that are used by legal scientists, judges and, after all, everyone who is applying the law are the same as everywhere in continental Europe.
Namely, this refers to law, general principles, customary law, jurisprudence and legal doctrine. Although jurisprudence is a secondary source of law, it does not mean that arguments based on it are less important than others.

European integration is developing and it has affected the judicial practice of the Constitutional Court of the Republic of Latvia (Satversmes tiesa). Since it is hard for the Court to use the jurisprudence developed by ordinary courts, the Court cites heavily to precedents from other countries, both European and non-European alike. While judicial practice from other countries is not binding, it is an unwritten albeit accepted rule that other States’ jurisprudence should be cited. For example, the Court cites heavily to the Constitutional Court of the Republic of Lithuania (Lietuvos Respublikos Konstitucinis Teismas), the Constitutional Council of the French Republic (Le Conseil constitutionnel de la République Française), the Italian Constitutional Court (La Corte costituzionale della Repubblica italiana) and the Federal Constitutional Court of Germany (das Bundesverfassungsgericht). The Constitutional Court of Latvia, as other European courts, does not cite precedent from certain former Soviet countries that are viewed as having largely undemocratic forms of government; this sends an internationally poignant message about the countries’ undemocratic dictatorial conditions. Citation, in this sense, is internationally significant not only as precedent but also as signaling – of approval or disapproval.

The Republic of Latvia has signed on to all of most important agreements about fundamental rights. As the most important regional human rights document must be mentioned, the European Convention on Human Rights. European Court of Human Rights (ECHR) is the court that interprets and controls the implementation of fundamental rights that are established in the Convention. Since the Treaty of Lisbon is not yet in force, the European Court of Justice does not have the possibility of giving its own interpretation to fundamental rights that are established in the Charter of Fundamental Rights.

The Article of the Constitution that implicitly obliges all Latvian State institutions and the Constitutional Court to take into account the decisions adopted by
the ECHR and ECJ is Article 89 of the Latvian Constitution (Satversme)\(^1\). Since most of the fundamental rights that are established in the Constitution of Latvia can also be found in the Convention, the Constitutional Court uses much of the jurisprudence made by ECHR.

When speaking about the “dialogue of judges”, the jurisprudence of the Constitutional Court of Latvia is based on the following two conclusions. Firstly, from Article 89 of the Constitution, it follows that the aim of the legislator is not to oppose the human rights norms that are incorporated into the Constitution against international human rights norms. Quite the contrary – the objective of the legislator has been to achieve mutual harmony between national and international norms. In cases when there is some doubt about the contents of the human rights included in the Constitution, the rights should be interpreted in compliance with the practice of international human rights norms. Secondly, to establish the contents of human rights norms that are incorporated in the Constitution, they should be interpreted in compliance with the norms applied in the practice of international human rights law. The practice of the European Court of Human Rights is mandatory with regard to the interpretation of the November 4, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and this practice should be used for interpreting the relevant norms of the Constitution.\(^2\)

Since in nearly every judgment a reference to a judgment of other constitutional courts and the ECHR or foreign legal doctrine is made, I will only refer to some judgments where it can be seen how often the Constitutional Court of Latvia uses the jurisprudence of other constitutional courts and of the ECHR.

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2 See case no. 2000-03-01
Judgments

1. Case no. 09-02(98)³

This was the first time that the Constitutional Court ruled for the compatibility of a national legal act with the provisions of the Convention. This is one of the competences of the Constitutional Court which is explicitly written in the Constitutional Court Law⁴.

In this judgment, the Constitutional Court used many ECHR judgments in making its conclusions. Since the judgment was about the conformity of the challenged norm with Article 1, First Protocol of the Convention⁵, the Court used the jurisprudence of the ECHR regarding property rights. The Court also cited books written by law professors about the Convention and its implementation.

For example, the Court came to the conclusion that: “although the amount of compensation is to be reasonably related to the value of the property to be expropriated, still – as has repeatedly been proved in the practice of the European Court of Human Rights – Article 1 Protocol 1 of the Convention does not envisage full compensation for

³ See full text of this and other judgments at: http://www.satv.tiesa.gov.lv/?lang=2&mid=19
⁴ Article 16 Cases to be reviewed by the Constitutional Court
The Constitutional Court shall review cases regarding:
1) compliance of laws with the Constitution;
2) compliance with the Constitution of international agreements signed or entered into by Latvia (even before the Saeima [the Parliament of the Republic of Latvia] has confirmed the agreement);
3) compliance of other normative acts or their parts with the legal norms (acts) of higher legal force;
4) compliance of other acts (with an exception of administrative acts) by the Saeima, the Cabinet of Ministers, the President, the Chairperson of the Saeima and the Prime Minister with the law;
5) compliance of Regulations by which the minister, authorized by the Cabinet of Ministers, has rescinded binding regulations issued by the Dome (Council) of a municipality with the law;
6) compliance of the national legal norms of Latvia with the international agreements entered into by Latvia, which are not contrary to the Constitution.

⁵ Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
the expropriated property, especially if the expropriation of property takes place in really important public interests. A fair balance between public interests, mentioned in Article 1, Protocol 1 of the Convention and the necessity to protect the interests of the owner, guaranteed by the above article, is unequivocally considered by the European Court of Human Rights to be the basic criterion for determining compensation for property to be expropriated. When specifying the notion of fair balance, the European Court of Human Rights has come to the conclusion that the legitimate objective of the public interest, pursued in measures of economic reform or designed to achieve greater social justice, for instance, may call for less reimbursement than the full market value of the property (see James and Others Judgement of 21 February, 1986, Paragraph 54 and Case of Lithgow and Others Judgement of July 8, 1986, Paragraph 121). Thus, the principle of fair balance not only establishes a certain boundary between an admissible and inadmissible expropriation of property, but also endows the government with extensive rights when evaluating the property to be expropriated and determining the amount of compensation (see D.J.Harris, M.O’Boyle, C.Warbrick. Law of the European Convention on Human Rights. London, Dublin, Edinburgh, 1995, pages 532 – 534).”

The Court also stated that: «the general principle on peaceful enjoyment of possessions is always to be considered in connection with the right of the state to limit the use of the property and in accordance with conditions envisaged by Article 1 Protocol 1 of the Convention» (see D.GOMIEN, D.HARRIS, L.ZWAAK. Law and Practice of the European Convention on Human Rights and the European Social Charter. Council of Europe, 1996, page 312).

In its judgment, the Court also used the interpretation on discrimination given by the ECHR: «Article 14 of the Convention does not forbid difference in treatment, in the exercise of the rights and freedoms recognised by Article 1, Protocol 1 of the Convention» (see Paragraph 10 of the Judgement by the European Court of Human Rights of July 23, 1968 in Belgian Linguistics case). As has been repeatedly stressed in the practice of the European Court of Human Rights, Article 14 of the Convention
protects persons – in analogous and comparable circumstances – from discriminatory and different treatment.

Differences in treatment – according to Article 14 of the Convention – shall be considered discriminatory if they have no objective and reasonable justification – in a word, if they do not pursue a legitimate aim or there is no reasonable relationship of proportionality between the means employed and the legal aim sought to be realised. Besides, the state, to a certain extent, enjoys a certain margin of appreciation in assessing whether and to what extent the differences in otherwise similar situations justify a different treatment under the law; the scope of this margin will vary according to the circumstances and the subject–matter and its background (see Paragraphs 35, 38, and 40 of the Judgement of November 28, 1984 in Rasmussen Case by European Court of Human Rights and the Judgement by the same above Court in Case of Abdulaziz, Cabales and Balkandali of May, 28, 1985, Paragraph 72).

2. Case no 2000-03-01

In this case, the Court had to decide about the legitimacy of the infringement of Article 101 of the Constitution. Since the relevant question was already discussed in many legal instruments, such as foreign legal doctrine and jurisprudence, the Court based its conclusions on them.

For example, the Court stated that: «the ideas of the Universal Declaration of Human Rights are specified in the Covenant. And the norms incorporated in Article 25 of it determine that every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 of the Covenant and without unreasonable restrictions to vote and be elected at genuine, periodic elections. In compliance with the practice of interpretation of the Covenant, the norms of Article 25 confer the right not

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6 Every citizen of Latvia has the right, as provided for by law, to participate in the work of the State and of local government, and to hold a position in the civil service. Local governments shall be elected by Latvian citizens and citizens of the European Union who permanently reside in Latvia. Every citizen of the European Union who permanently resides in Latvia has the right, as provided by law, to participate in the work of local governments. The working language of local governments is the Latvian language.
only in the choice of legislature but also in local Dome (Council) elections» (see The Universal Declaration of Human Rights: A Commentary. – Oslo: Scandinavian University press, 1992, p.307).

The Court also used the judicial practice of the ECHR and the literature about it. For example, it stated that: «the implementation of commitments envisaged in Article 3 of the First Protocol of the Convention is an essentially important provision for any democratic state system, based on human rights. The Article guarantees the basis of democratic community – existence of a representative legislator, elected for a certain period» (see The Greek case, Comm. Report 05.11.69, para. 416, Yearbook 12, p.179-180) as in compliance with the Preamble of the Convention it is best of all to maintain fundamental human rights and freedoms in the state with valid political democracy.

This Article includes provisions on elections of the legislator, but does not contain provisions on local authority elections (see Frede Castberg, The European Convention on Human Rights. A.W.Sithoff-Leiden Oceana publications inc. – N.Y.: Dobbs Ferry, 1974, p. 181). Thus, Article 3 of the First Protocol of the Convention does not refer to the Local Authority Election Law. As the European Court of Human Rights has declared in the case Mathieu-Mohin and Clerfayt, even though the states have «a wide margin of appreciation in this sphere”, any means or claim, restricting the norms expressed in Article 3 of the First Protocol of the Convention shall comply with the following preconditions: it must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised; rights may be restricted “only in an extent which does not deprive the right of its essence and does not diminish its efficiency”; the “principle of equality of treatment” shall be respected and arbitrary restrictions must not be used» (see The Human Rights Act 1998: Enforcing The European Convencion In The Domestic Courts, p.390).

The Court also made a reference to a judgment made by the Federal Constitutional Court of Germany. Namely, the Court concluded that: the essence and efficiency of rights lies also in ethics. To demand loyalty to democracy from its political representatives is in the legitimate interests of a democratic society. When determining
restrictions, respect and honour of the candidates legally protected by law is not questioned. It is just doubted if the respective persons deserve to represent the people in the Parliament or the respective local authority. The restrictions concern persons, who have been the staff employees of the repression apparatus of the occupation regime or after January 13, 1991 have been active in the organizations, mentioned in the disputable norms, who fought against the renewed the Constitution and the state of Latvia. A similar viewpoint was expressed also by the Federal Constitutional Court of the GFR: «He, who has spied on and oppressed his own people, who has deceived, betrayed and cheated or who is responsible for it all, shall have no place in Bundestag even if one cannot deprive him of his mandate» (see May 21, 1996 Decision in case 2 BvE 1/95).

3. Case no. 2001-08-01

This case concerned the rights to a fair court established in Article 92 of the Constitution\(^7\). In this judgment, a German Federal Constitution legal doctrine, as well as jurisprudence from the ECHR was cited.

While it is obligatory for Latvia and other signatories to the European Convention on Human Rights to adhere to ECHR precedent, it is not officially obligatory to reference other countries’ case-law; constitutional courts such as Latvia’s make their judgments more legitimate and acceptable in the European community by doing so.

The Constitutional Court cited a provision of the German Federal Constitution\(^8\) which supported abiding by the European Convention for the Protection of Human

\(^7\) Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.

\(^8\) Quoting from the decision: “the German Federal Constitution has pointed out that ‘when interpreting the Fundamental Law, one should consider the contents and state of the European Convention for the Protection of Human Rights and Fundamental Freedoms as far as it does not decrease or limit
Rights and Fundamental Freedoms. The Latvian constitutional court, like The Federal Constitutional Court of Germany (*Das Bundesverfassungsgericht*), abides by international conventions to the extent that they do not limit the fundamental human rights expressed or implied in the national constitution. In this case, rulings from the ECHR and provisions in the German Federal Constitution were used in the reasoning that the idea that “everyone can protect his or her rights and legal interests in a fair court”, as expressed in Article 92 of the Constitution, does not always guarantee a right to appeal a court decision in civil (as opposed to criminal) matters, concerning insolvency in this case.

4. Case no. 2003-04-01

This case is one of many where it can be seen what a large influence the legal practice of the ECHR has on the jurisprudence of the Constitutional Court of Latvia.

When proving legitimacy of an infringement of fundamental rights, the Court uses the proving mechanism that is used by the ECHR. Also in this judgment it was the case. Namely, the Court stated that: «when interpreting Article 92 of the Constitution as read together with Article 86, one may conclude that the right to defend the rights at a fair court may be restricted by law if the restriction (as the ECHR has resolved with regard to the rights, anticipated in the first part of Article 6 of the Convention) has been conferred by law, has a legitimate aim and the restriction is proportionate to that aim» (*see ECHR Judgment in case Fayed v. the United Kingdom*).

5. Case no. 2004-14-01

In this judgment, the Constitutional Court used German Administrative Law to support its holding that a claimant’s immigration status may be appealed. In the case, fundamental rights included in the Fundamental Law. Thus, the judgments of the European Court of Human Rights serve as basic means of interpreting the contents and limits of the fundamental rights determined by the Fundamental Law. One may not presume that the legislator, if he has not stated it clearly, would have wanted to deviate from the international liabilities binding on the German Federative Republic or allowed the possibility of infringing the above liabilities (*see BverfGE 74, 358*)”.

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the claimant sought appeal of her denial of permanent residence status by the State Secretary of the Ministry of the Interior. The court regarded the Secretary’s action of denial as an administrative act and, therefore, according to Latvian Administrative Procedural Law, the denial could be appealed. The court looked to the General Administrative Law of Germany for examples of administrative acts (verwaltungsakt).

The court also utilized a Canadian legal norm to support the notion that, although great deference is accorded to state security officials like the State Secretary of the Ministry of the Interior, security concerns cannot be manipulated so as to mitigate fundamental human rights and individual freedoms. The court cited the Canadian Immigration and Refugee Protection Act of 2001 to bolster the idea that due process and procedural justice are fulfilled when an individual is accorded the right to appeal an administrative decision even though the decision concerns national security.\(^9\)

\(^9\) Quoting from the case: «in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice». 