Constitutional justice in Latvia. A young Court, a strong institution

di Francesco Duranti

Abstract: Constitutional justice is a relatively recent acquisition in the constitutional system of the Republic of Latvia. After the collapse of the Soviet Union, when democracy was restored in Latvia, the necessity to establish a Constitutional Court was intensively debated: Latvia chose the European, centralized, model of constitutional review, based on ad hoc Constitutional Court, separated by the ordinary judiciary, and specialized in constitutional adjudication. The Latvian Constitutional Court has frequently referred to comparative law in his judgments and today this practice is still in use, confirming the general trend according to which it is an important tool to reinforce the legitimization of a new Constitutional Court.

Keywords: Comparative constitutional law; Comparative constitutional justice; Latvian Constitution; Constitutional Court of Latvia; Judicial recourse to comparative law.

1. The starting point of constitutional justice in Latvia

Constitutional justice – a key component of checks and balances in a constitutional democracy – is a relatively recent acquisition in the constitutional system of the Republic of Latvia.

After the Act on Proclamation of the State in 1918, the original text of the Constitution of 1922 (*Satversme*) does not contain any provision on constitutional review of legislation: the prevailing opinion in the Constitutional Assembly was that – paying obedience to the fundamental principle of parliamentary supremacy – no institutions could stand above the Parliament, the foremost representative of the people.

After the collapse of the Soviet Union, when democracy was restored in Latvia, the necessity to establish the Constitutional Court was intensively debated.

The Declaration of 4 May 1990 "*On the Renewal of the Independence of the Republic of Latvia*" consider the possibility – during the transitional period – «to implement those constitutional and other legislative acts of the Latvian SSR, which are in effect in Latvia at the moment of adopting this decision, insofar as they do not contradict Articles 1, 2, 3 and 6 of the Republic of Latvia *Satversme*. Conflicts in the implementation of legislative acts shall be resolved by the Constitutional Court of the Republic of Latvia» (section 6, second sentence).

In December of 1992 the Law "*On the Judicial Power*", passed by the Supreme Council of the Republic of Latvia – the transitional Parliament during

DPCE online
ISSN: 2037-6677

the period 1990/1993 – envisaged creation of the Constitutional Supervision Chamber at the Supreme Court: however, this norm was never implemented.

During summer 1993, the 5th *Saeima* (Parliament) and Government starts discussions about the instalment of a new Constitutional Court and in 1994 the Ministry of Justice submitted to the *Saeima* a draft Law on Constitutional Court.

In spring 1996 the 6th *Saeima* adopted an amendment to article 85 of *Satversme* providing that «in Latvia there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the *Saeima* for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the *Saeima*»[1].

At the same time, in June 1996, the *Saeima* definitively adopted the Law on the Constitutional Court.

The Constitutional Court as "the youngest constitutional institution"[2] commenced its activities on 11 December 1996 and passed its first judgment on 7 May 1997 (Judgment of the CC in case No. 04-01(97)): thus, the establishment of the Constitutional Court "has been the greatest innovation in the democratic constitutional order of Latvia"[3].

As it is well known, since World War II, Constitutional Courts were typically established in Europe during the transition to democracy: first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe[4].

The purpose of these Courts was to overcome the legacy of the previous regimes and to protect human rights violated by these regimes.

Instead of the principle of the unity of power, which excluded any control over Parliament, the system of the separation of powers was introduced: replacing the supreme role of Parliament, the new system was based on the principle of checks and balances between different State organs.

Consequently, even Parliament must respect the supremacy of the

[1] Until now, article 85 of the Latvian Constitution has been amended only once (in October 2013), replacing secret ballot on the appointment of Constitutional Judges with an open vote in Parliament.

[2] A. Rodiņa, *Constitutional Court as a guardian of the Latvian legal system*, in *Strani pravni život*, vol. LXV, nr. 4/2021, 580.

[3] I. Ziemele, A. Spale, L. Jurcēna, *The Constitutional Court of the Republic of Latvia*, in *The Max Planck Handbooks in European Public law*, Volume III, *Constitutional Adjudication: Institutions*, A. von Bogdandy, P.M. Huber, C. Grabenwarter (eds.), Oxford, OUP, 2020, 514.

[4] See H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago/London, The University of Chicago Press, 2000; A.S. Sweet, *Constitutional Courts*, in M. Rosenfeld, A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, OUP, 2012, 816-830.

Constitution and it can be controlled by other organs, especially by the Constitutional Court.

Latvia chose the European, centralized, model of constitutional review, based on *ad hoc* Constitutional Court, separated by the ordinary judiciary, and specialized in constitutional adjudication[5].

Therefore, the establishment of a Constitutional Court is a catalyst in a society in transition to democracy, the protection of human rights and the rule of law: in addition to protecting the individual rights set out in the Constitution, the Court ensures that the State powers remain within the limits of the Constitution and settles conflicts between them.

In this vein, the Venice Commission frequently recall "the importance of the role of constitutional courts in putting into practice democracy: the state constitutional courts are the institutions which can, by interpreting the wording of the constitution, prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time"[6].

2. Composition and competence of the Constitutional Court

The Constitutional Court consists of seven justices approved by the Parliament, with an absolute majority of 51 votes[7], for a term of ten years[8].

Three justices of the Constitutional Court are approved upon the proposal of not less than ten members of the *Saeima*, two upon the proposal of the Cabinet of Ministers, and two justices of the Constitutional Court upon the proposal of the Supreme Court (who may select candidates for the office of a justice of the Constitutional Court only among judges of the Republic of Latvia).

The justices of the Constitutional Court must meet the following requirements laid down by the law: 1) citizenship of the Republic of Latvia; 2) impeccable reputation; 3) 40 years of age; 4) higher professional or academic education in legal science and also a master's degree or a doctorate; and, 5) at least 10 years of service in a legal speciality or in a judicial speciality in scientific educational work at a scientific or higher educational establishment after acquiring a higher professional or academic education in legal science[9].

[5] M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, Oxford/Portland, Hart Publishing, 2014.

[6] Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2020)004, Strasbourg, 14 April 2020.

[7] After constitutional amendment of 2013, there is an open ballot – replacing previous secret vote – in the *Saeima* to confirm constitutional judges: the purpose of the amendment is to promote transparency and openness in the decision-making process, thereby also increasing public trust in the Parliament.

[8] The President and Vice-President of the Constitutional Court are elected by secret ballot for a period of three years from among the members of the Constitutional Court by an absolute majority vote of all of the justices.

[9] In order to evaluate the professional requirements of constitutional judges of Latvia, the Venice Commission considers that "these criteria fit to international standards and have not been increased unreasonably far, keeping in mind both the limited pool of candidates

DPCE online
ISSN: 2037-6677

The *Satversme* and Law on Constitutional Court provides effective guarantees of independence for the members of the Court.

The justices of the Court act independently in fulfilling their duties and are bound only by law: direct or indirect interference with the actions of the Constitutional Court in relation to the activity of the justice is not permissible.

There are restrictions on work and political activities of the justices of the Constitutional Court: members of the Court may not fill another office or have other paid employment except in a teaching, scientific and creative capacity. A justice must not be a Member of Parliament or a local government council. The office of a justice of the Constitutional Court is incompatible with membership in a political organisation (party) or association.

The Constitutional Court judges are inviolable: a justice of the Constitutional Court may not be arrested or prosecuted on criminal charges without the consent of the Constitutional Court, and he/she may be detained and subjected to a search only with the consent of the Constitutional Court.

A justice of the Constitutional Court may be released from office only by the decision of the Constitutional Court because of reasons of health or if he/she is convicted of a crime and the judgment has come into legal effect.

To ensure the functionality of the Court, the judicial mandate of ten years is extended if the Parliament has not yet appointed a successor to the justice whose tenure has expired: in that case, the mandate is extended until such time as the Parliament has appointed another justice and that person has taken the judicial oath[10].

The competence of the Constitutional Court is included in the *Satversme* (Article 85), as well as in the Law on Constitutional Court (Section 16).

The Constitutional Court reviews cases concerning:

1) compliance of laws with the Constitution;

2) compliance of international agreements signed or entered into by Latvia (even before the *Saeima* has confirmed the agreement) with the Constitution;

3) compliance of other normative acts or parts thereof 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 Speaker of the *Saeima* and the Prime Minister with the law;

5) compliance with the law of Regulations by which a minister,

in a smaller country like Latvia and the necessarily high exigencies they have to be confronted with. Finally, they will not necessarily lead to a Constitutional Court consisting of career judges and prosecutors only, but will leave space for other legal professionals (e.g. lawyers or law professors) as well and hence allow for a composition of judges different from the ordinary judiciary, which would comply with the logic of a specialised Constitutional Court" (Venice Commission, *Opinion no. 537/2009 on Draft Amendment to the Law on the Constitutional Court of Latvia*, CDL-AD(2009)042, par. 12).

[10] The important purpose of this norm is "to point out to the person involved in the appointment procedure that they have an obligation in creating the composition of the Court": I. Ziemele, A. Spale, L. Jurcēna, *The Constitutional Court of the Republic of Latvia*, cit., 522.

authorized by the Cabinet of Ministers, has suspended binding regulations issued by a local government council;

6) compliance of the national legal norms with the international agreements entered into by Latvia, which are not in conflict with the Constitution.

The jurisdiction of the Constitutional Court can be divided between abstract and concrete review of legal norms.

The right to submit an application of abstract constitutional review has been granted to:

1) the President of Latvia;

2) the *Saeima*;

3) twenty deputies of the *Saeima*;

4) the Cabinet;

5) the Prosecutor General;

6) the Council of the State Audit Office;

7) the Ombudsman;

8) the Council for the Judiciary[11].

Concrete constitutional review is understood – like in the European model of constitutional justice – as the right of an application by a court of general jurisdiction (civil, criminal, or administrative) to the Constitutional Court.

In Latvia all courts – first instance courts, appellate courts and also the Supreme Court – can submit an application to challenge a legal norm that has to be applied in a concrete case under scrutiny.

The court of general jurisdiction have the primary obligation to ensure the protection of human rights: thus, they have an obligation, in adjudicating, to verify the constitutionality of the applicable norm.

As the judgment by the Constitutional Court and also the interpretation of the legal norm provided in the decision has *erga omnes* effect[12], the court will have to resolve a case by taking into consideration the ruling by the Constitutional Court.

Latvia's constitutional justice system also allows for the individual constitutional complaint.

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[11] Members of Parliament are the most active submitters of applications regarding abstract review. Since the establishment of the Constitutional Court (in 1996) until the mid of 2021, in total they have submitted 86 applications to the Constitutional Court, whereas the Cabinet has submitted two, the President one application, the Prosecutor General five applications, the Council of the State Audit Office has submitted four applications and the Ombudsman has submitted 38 applications: see A. Rodiņa, *Constitutional Court as a guardian of the Latvian legal system*, cit., 584.

[12] As noted by the Venice Commission, an amendment of 2009 to the Law on Constitutional Court provides that "not only the operational part of a judgement of the Constitutional Court but also the interpretation of legal provisions given will be binding. The interpretation of legal provisions is necessarily part of a judgment. Constitutional courts in new democracies sometimes encounter a 'literal' implementation of their judgements by the ordinary courts (or the executive), which respect the operative part but not the spirit of the judgement. The draft Amendments seem to be a response to such problems and are welcomed" (Venice Commission, *Opinion no. 537/2009 on Draft Amendment to the Law on the Constitutional Court of Latvia*, cit., par. 17).

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ISSN: 2037-6677

The legal definition of the constitutional complaint is contained in the Law on Constitutional Court, where Article 19 states: "constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution are infringed upon by legal norms that do not comply with the norms of a higher legal force".

Like in other countries where constitutional complaint exists, this is a strong remedy which can be used to effectively protect fundamental rights set in the constitution[13].

The constitutional complaint is tied to specific procedural limitations, thus access to the Constitutional court in the case of a constitutional complaint is not absolute but is subject to several limitations.

Firstly, there should be an infringement on the fundamental rights of the claimant: if a person cannot prove that his/her fundamental rights are violated, then he/she has no standing to file a complaint to the Constitutional Court.

Secondly, the constitutional complaint is a subsidiary legal measure, which means that an individual must exhaust other legal measures before filing a constitutional complaint to the Court[14].

Thirdly, a constitutional complaint shall be filed within a set time period: a) if other legal remedies can be used and the person has used them, then a constitutional complaint may be filed within six months after the ruling of the final institution has come into force; b) if the fundamental rights established in the Constitution cannot be defended by general legal remedies, then a constitutional complaint may be filed to the Constitutional Court within six months from the period when the breach of fundamental rights took place.

Latvian type of the constitutional complaint is the normative one (i.e., not full constitutional complaint), therefore a claimant cannot challenge an individual act or a court decision: this provision marks the difference between the Latvian type of constitutional complaint and that of Germany and other countries[15].

[13] As wisely noted, the right of individuals to submit a constitutional complaint, introduced in 2001, "should be considered a cornerstone in the development of constitutionalism in Latvia. This is because the constitutional complaint, as a remedy against the public power, emphasizes the importance of the person in the state and also allows rights to be developed based on constitutionalism": A. Rodiņa, J. Pleps, *Constitutionalism in Latvia: Reality and Developments*, New Millennium Constitutionalism: Paradigms of Reality, NJHAR, Yerevan, 2013, 208.

[14] If the review of the constitutional claim is of general significance or if legal protection of the rights with general legal means cannot avert material injury to the applicant of the claim, the Constitutional Court may decide to review the claim (application) before all the other legal means have been exhausted.

[15] Normative constitutional complaints exist in several Eastern European countries. "In systems that provide for a normative constitutional complaint, the individual act applying the normative act cannot be attacked as such before the constitutional court. The control by the constitutional court does not concern the implementation of the normative act. As a consequence, a normative constitutional complaint is not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself" (Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, cit., par. 5.2.2).

The decision on the admissibility of a claim is adopted by a Court Panel of three justices, who examines the application and takes the decision to initiate a case or refuse to initiate it.

Four Panels operate at the Constitutional Court: thus, "deciding an admitted case is then the sole responsibility of the full Court"[16].

3. Types and effects of rulings

The Constitutional Court may adopt two types of rulings: decisions and judgments.

A judgment is a final ruling on the merit of the case or controversy.

All other rulings adopted during proceedings are decisions.

The Law on Constitutional Court permits the publication of separate – dissenting or concurring – opinions.

As recalled by the Venice Commission, "dissenting opinions do not weaken a Constitutional Court, but they have numerous advantages: they enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the review of the case"[17].

The judgment has *erga omnes* effect and it is final, mandatory to all individuals and institutions.

A legal norm, declared invalid by the Constitutional Court, shall be regarded as not being in effect from the day of the publication of the judgment (*ex nunc*).

The Constitutional Court has a broad discretion – granted by the law – to determine the moment when a legal norm, which is not compatible with the Constitution, becomes invalid.

The Court can rule that the unconstitutional legal norm becomes invalid from the day it was adopted (*ex tunc*), or the date may be set in the future (*pro futuro*)[18].

When it has to decide on the date when the legal norm loses its legal force, the Constitutional Court "considers several principles: the principle of

[16] I. Ziemele, A. Spale, L. Jurcēna, *The Constitutional Court of the Republic of Latvia*, cit., 543. Whereas a decision of admissibility is adopted by the majority vote of the justices on the Panel, the inadmissibility decision must be a unanimous one.

[17] Consequently, "the intention of the (2009) amendments to publish dissenting opinions earlier thus has to be welcomed. However, the amendments still allow for a publication of the dissent after the main part of the judgement. These parts form a whole, however, and should be published together" (Venice Commission, *Opinion no. 537/2009 on Draft Amendment to the Law on the Constitutional Court of Latvia*, cit., par. 20-21).

[18] "Both *ex tunc* and *ex nunc* decisions are sometimes found to need attenuation. One possibility is to enable the constitutional court to decide when its decision enters into force (either in the past, as a middle course between nullity and derogation, or at some moment in the future, or both). The other possibility is to resort to techniques of (authoritative) interpretation that combine adequate protection of the constitution and coherence of the legal order in that not all provisions are removed immediately from the legal order" (Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, cit., par. 8.2).

DPCE online
ISSN: 2037-6677

justice, the principle of legality, the principle of separation of power, legal expectations and legal certainty"[19].

It is important to stress that retroactive decisions are of specific relevance in cases which have been based on constitutional complaints.

That can be explained by the fact that the *ex tunc* effect might be the only possibility to protect individual's fundamental rights, not only of the claimant, but also of the others in similar conditions[20].

Thus, in recognizing an unconstitutional legal norm as being invalid retroactively, the Court highlights the "main purpose of the constitutional complaint – to provide not only theoretical but also practical protection of the fundamental rights of a person who has suffered an infringement, as the Constitutional Court has the duty, within its mandate, to ensure effective protection and restoration of fundamental rights of the affected individuals"[21].

The *pro futuro* holding of unconstitutionality implies a sort of institutional dialogue between Constitutional Court and Parliament.

Like other constitutional courts, the Latvian Court may decide that the invalidation of these unconstitutional provisions will only take place in the future: this means that during this period the unconstitutional provision will continue to be applied, even though its unconstitutionality has already been established.

The application of a legal provision that is known to be unconstitutional may be justified by the need to maintain legal certainty, to provide for equality and to avoid a legal gap without any applicable provision.

This period gives time to the *Saeima* to discretionally adopt a new provision that comply with the Constitution and that replaces the one that was found unconstitutional.

The unconstitutional provision loses its effect by virtue of the decision of the Constitutional Court and the legal gap really opens only if the legislator remains inactive during this period.

4. Constitutional justice and comparative law in Latvia

The establishment of Constitutional Court "should be regarded as the most significant event in the development of constitutional law in Latvia after the country regained independence. It marked a qualitatively new beginning in the development of legal thought and culture", and in performing its task, the Court "has expedited the transformation of the Latvian legal system from Soviet law to a law that is appropriate for a democratic State governed by the rule of law"[22].

[19] A. Rodiņa, *Constitutional Court as a guardian of the Latvian legal system*, cit., 589.
[20] See Judgment of the CC in case No. 2020-21-01, para. 16; Judgment of the CC in case No. 2020-31-01, para. 23.2.
[21] A. Rodiņa, *Constitutional Court as a guardian of the Latvian legal system*, cit., 590, recalling Judgment of the CC in case No. 2009-43-01, para. 35.3.
[22] I. Ziemele, A. Spale, L. Jurcēna, *The Constitutional Court of the Republic of Latvia*, cit., 557-558.

Thus, the Court interpreted the Latvian Constitution taking into specific consideration the European Convention on Human Rights and EU law, "as well as taking into account the common constitutional heritage of the European States"[23].

After the fall of Berlin Wall in 1989, European constitutional scholarship and case law rapidly spread to Central and Eastern Europe, principally through the opinions of the Venice Commission, recalling the consolidated European and international standards on protecting human rights.

This open up considerable space for the use of comparative method and comparative public law, constitutional courts lying at the heart of this dialectical and interpretive process: "the application of the comparative approach to constitutional case law allows judges to avoid voluntarist subjectivism (…) it ensures that they maintain an elevated critical capacity with regard to the evolution of the legal system in question (…) this ends up favoring the dialectic of pluralism"[24].

When employed by the constitutional court, "the purpose of comparison is to facilitate a better understanding of the national law that is applicable to the individual case by conducting a critical comparison with other laws"[25].

The Latvian Constitutional Court has frequently referred to comparative law in his judgments.

The favour shown by the Constitutional Court to the comparative method "can be explained also by the need to develop or to return the Latvian legal system to the circle of the Western law, at the same time taking over the best practice of other countries (…) therefore comparative method was applied due to practical needs to learn and to follow the Western legal theory and thinking"[26].

The Constitutional Court has repeatedly considered that a comparative analysis must always deserves a reasonable approach, taking into appropriate consideration the different legal, social, political, historical, and systemic context[27], stressing that references "to the law, case law, or national legal doctrine of other states is only permissible after an extensive comparison of legal terminology"[28].

As regards of judgments of foreign constitutional courts quoted by the Latvian Court, the German Federal Constitutional Court "clearly dominates"[29].

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[23] Judgment of the CC in case No. 2009-45-01, para. 9.

[24] G.F. Ferrari, *Introduction: Judicial Constitutional Comparison and Its Varieties*, in G.F. Ferrari (ed.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Brill/Nijhoff, Leiden/Boston, 2019, 4.

[25] G. de Vergottini, *Constitutional Law and the Comparative Method*, in J. Cremades, C. Hermida, *Encyclopedia of Contemporary Constitutionalism*, Berlin, Springer, 2022, 26.

[26] A. Rodiņa, *Foreign Materials in the Judgments of the Constitutional Court of the Republic of Latvia*, in G.F. Ferrari (ed.), *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, cit., 497.

[27] Judgment of the CC in case No. 2008-43-0106; Judgment of the CC in case No. 2010—51-01, para 17.

[28] I. Ziemele, A. Spale, L. Jurcēna, *The Constitutional Court of the Republic of Latvia*, cit., 558.

[29] A. Rodiņa, *Foreign Materials in the Judgments of the Constitutional Court of the Republic of Latvia*, cit., 489.

DPCE online
ISSN: 2037-6677

There are many reasons for this prevailing practice: 1) in drafting the *Satversme* of 1922, the Weimar Constitution was taken into consideration; 2) in establishing the Constitutional Court, the German model was intensively debated; 3) the constitutional protection of human rights is largely modelled on the German *Grundgesetz*.

Thus, "the case law of the German Federal Constitutional Court has served as the basis for creating methodology for assessing restrictions upon fundamental human rights"[30].

The second most frequently quoted court is the Lithuanian Constitutional Court, probably because the legal systems of the two Baltic countries are very similar in their constitutional fundamentals[31].

Especially in the period of transformation of the legal system, after the reinstatement of *Satversme*, "it was also important to draw inspiration from courts that had dealt with the same problem (…) in specific cases that involved typical post-soviet issues references can be found to the court practice of Eastern European Constitutional Court: comparative method was used as an experienced friend"[32].

Judicial recourse to comparative law and judgments of other constitutional court was particular intense during the very first period (1996-2001) of activities of the Latvian Constitutional Court, confirming the general trend according to which it is an important tool to reinforce the legitimization of a new constitutional court[33].

Today, "the comparative method is still used and, if needed, can be used in drafting a reasoned and well-considered judgment by the Court, at the same time outlining the development of Latvian law in the common European space"[34].

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[30] A. Rodiņa, *Foreign Materials in the Judgments of the Constitutional Court of the Republic of Latvia*, cit., 489, recalling numerous judgments of the Latvian Court explicitly quoting rulings of the German Federal Constitutional Court.

[31] A. Endziņš, V. Sinkevičius, *Constitutional Review in Latvia and Lithuania: A Comparative Analysis*, in *International Comparative Jurisprudence*, 2017, 3(2), 161-178.

[32] A. Rodiņa, *Foreign Materials in the Judgments of the Constitutional Court of the Republic of Latvia*, cit., 497.

[33] G.F. Ferrari, *Introduction: Judicial Constitutional Comparison and Its Varieties*, cit., 20; G. de Vergottini, *Constitutional Law and the Comparative Method*, cit., 29.

[34] A. Rodiņa, *Foreign Materials in the Judgments of the Constitutional Court of the Republic of Latvia*, cit., 500.