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GRADUATE  
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LAW

MĀRTIŅŠ MITS

# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND DEMOCRATISATION OF LATVIA

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## **Abstract**

This paper explores what impact the European Convention on Human Rights has made in the post-Socialist environment in Latvia. It looks at various levels: the judiciary, the legislature and the executive, with the aim of identifying areas where the rulings of the European Court of Human Rights have made an impact on the democratisation of the country. It also attempts to explore whether this young democracy may offer fresh input in return for the Convention system. Particular attention is paid to the domestic application of the European Convention on Human Rights by the Latvian Constitutional Court and the Latvian Supreme Court.

This is the extended article written for the book *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* edited by Iulia Motoc and Ineta Ziemele, published by Cambridge University Press in 2016. It reflects the state of affairs as on 1 January 2014.

**Key words:** European Convention on Human Rights, European Court of Human Rights, domestic application, rule of law, democratisation, post-socialist.

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# 1. Introduction

Latvia ratified the European Convention on Human Rights (ECHR) and its Protocols No. 1, 2, 4, 7 and 11 on 4 June 1997. It took almost two and a half years for Latvia to accede to the ECHR, instead of one year, as was expected after joining the Council of Europe in 1995. Compatibility review of domestic legislation with the ECHR prior to its ratification was a lengthy process and, as it later turned out, did not adequately address the country's severest problems in the area of criminal procedure.

Ratification of the ECHR coincided with drafting the national catalogue of human rights – Chapter 8 of the Constitution. The Latvian legal system was in the process of discovering international law. Re-introduction of the *Satversme* (Constitution) of 1922, the need to facilitate smooth transition from Socialist law to that of modern Continental Europe and lack of corresponding human rights traditions all set the ground for a potentially deep influence of the ECHR. It was even suggested in scholarly writings that the ECHR had to become a guideline for determining fundamental values of society.

There are areas where a profound influence can be identified. Through the judgments of the European Court of Human Rights (ECtHR) involving Latvia the ECHR made a deep impact on such matters as due process guarantees in criminal procedure, balancing freedom of expression with protection of private life and contributed to searching for a delicate balance in lustration proceedings. Besides, the ECHR has served as the last bastion for domestic courts in socially sensitive questions of freedom of assembly in the absence of rulings against Latvia by the ECtHR. Similarly, the ECHR has served as a pillar for domestic courts in raising domestic standards over poor prison conditions.

Latvian judges have accepted the ECHR. Moreover ECtHR case law is followed irrespective of the country concerned. The newly established courts – the Constitutional Court and Administrative Cases Department of the Supreme Court – use the ECHR as a tool for interpretation of standards and methodology of domestic legal provisions to the extent that its role is becoming similar to a textbook. The downside of this overall acceptance, though, is the application of the ECHR on a level of its literal reading or as an argument for blocking judicial law-making. There are different dynamics of application of the ECHR within the Supreme Court and this captures the fact that the Latvian legal system today is a mixture of elements inherited from the legal positivism of Socialist law and from a comparatively flexible system of Civil law penetrating the Latvian legal system, inter alia, through the ECHR.

The pragmatically open use of the ECHR as a daily working tool by a part of the judiciary is something that Latvia may offer in return to the ECHR system. Besides, such cases as *Kononov v. Latvia* and *Ždanoka v. Latvia* remind us about the importance of application of the ECHR in a broader framework of international law and with due regard to historical details that influence today's conduct.

Overall, the ECHR has made a positive contribution to consolidating democratic changes in Latvia on various levels - legislation, the judiciary, civic

activism and through shaping the values of society. This paper attempts to explore these impacts, as well as to see whether there is room for further expansion.

## 2. Historical aspects of accession to the ECHR

### 2.1. Overview of the constitutional order

Latvia is a parliamentary democracy and its Constitution was adopted on 15 February 1922. The Republic of Latvia was proclaimed on 18 November 1918, but its *de facto* existence was interrupted by incorporation into the Union of Soviet Socialist Republics (USSR) from 17 June 1940. Latvia followed the doctrine of state continuity and viewed its Constitution and other legal acts as *de jure* in force during the occupation by the USSR (and by Nazi Germany from 1941-1944).<sup>1</sup> The *de facto* force of the Constitution was fully restored on 6 July 1993 on the day of the first session of the *Saeima* (the Parliament) elected in free elections after the restoration of independence.

The principles and structures laid down in the Constitution were considered so up-to-date and efficient that the majority of lawyers and politicians did not see an immediate need to change them. Thus, unlike in the neighbouring Baltic states, a new constitution was not adopted following restoration of independence at the beginning of the nineties. This and the fact that the Constitution was supplemented with Chapter 8 "Fundamental Human Rights" – a national catalogue of human rights – only in 1998, was one of the factors that made the Latvian legal system open to international law and direct application of international human rights treaties.

Power is shared among the Parliament, consisting of 100 members elected for four years based on proportional representation, the Cabinet of Ministers (the government) consisting of the prime minister and 13 ministers, as well as the judiciary. The prime minister is nominated by the president, who is head of state. The president is elected by the Parliament for a period of four years and, apart from representative functions, possesses important tools of the qualified right to veto laws and initiate dismissal of the Parliament. The latter right was exercised recently, and, as a reaction to deep distrust of politicians and public institutions in general, the people of Latvia for the first time dismissed the Parliament through a public referendum in July 2011.

The judiciary comprises the Constitutional Court and courts of general jurisdiction. The Constitutional Court has seven judges and was established in 1996.<sup>2</sup> It exercises abstract judicial review over compliance of legal norms with higher legal norms. Review may be initiated by a wide range of subjects. Notably, since 2000 individuals may submit constitutional complaints about alleged violations of their fundamental rights set out in the Constitution.

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<sup>1</sup> On Latvia's claim to state continuity see Ineta Ziemele *State Continuity and Nationality: the Baltic States and Russia*, Martinus Nijhoff Publishers: Leiden, 2005, in particular, pp. 31-36.

<sup>2</sup> Satversmes tiesas likums [Law on the Constitutional Court], adopted on 5 June 1996, published in *Latvijas Vēstnesis [Official Gazette]*, No. 103, 14 June 1996.

The court system is three-tiered, with 35 district/city courts, six regional courts and the Supreme Court hearing civil, criminal and administrative cases.<sup>3</sup> Administrative courts were introduced in 2004 with the entry into force of an entirely new Administrative Procedure Law. Therefore administrative courts have a distinctive structure with one district court and five regional branches and one regional court dealing exclusively with administrative cases while the rest of the district/city and regional courts deal with both civil and criminal cases. The Supreme Court has a Senate with three departments (civil, criminal and administrative) acting as a court of cassation and two chambers for civil and criminal cases acting as a court of appeal in certain cases. Both chambers are to be gradually abolished so that starting from 2017 the Supreme Court will have only three departments acting as a court of cassation.<sup>4</sup>

## 2.2. Status of the ECHR in the domestic order

### 2.2.1. Relationship between domestic and international Law

The relationship between domestic and international law in Latvia is best characterised by two phrases: openness and lack of clear regulation. Openness was largely determined by the need to have legal standards in place that would help transform the legal system in the early nineties as fast as possible. Lack of clear regulation, in its turn, was largely influenced by the fact that Latvia chose to restore its Constitution of 1922 where this question was not *expressis verbis* regulated.

The starting point is Article 1 of the Declaration on the Renewal of Independence of the Republic of Latvia (the Independence Declaration) in which the Parliament (then - the *Supreme Soviet of the Latvian Soviet Socialist Republic*) undertook:

To recognize the supremacy of the fundamental principles of international law over national law. (...)<sup>5</sup>

As later explained by one of the drafters of the Independence Declaration, by the "fundamental principles of international law" the drafters meant *ius cogens* norms, international customary rules and general principles of law recognised by civilised nations.<sup>6</sup> Since the Independence Declaration itself had constitutional status, there is a strong basis for arguing that the said sources of international law are directly applicable and their legal force is at least equal to that of the Constitution.

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<sup>3</sup> Likums "Par tiesu varu" [Law on Judicial Power], adopted on 15 December 1992, published in *Ziņotājs* [Official Reporter], No. 1, 14 January 1993.

<sup>4</sup> Grozījumi likumā par tiesu varu [Amendments to the Law on Judicial Power], *Latvijas Vēstnesis* [Official Gazette], No. 128, 4 July 2013, Article 32 (paragraph 57 in transitional provisions).

<sup>5</sup> Deklarācija Par Latvijas Republikas neatkarības atjaunošanu [Declaration On the Renewal of Independence of the Republic of Latvia], *Ziņotājs* [Official Reporter], No. 20, 17 May 1990.

<sup>6</sup> Egils Levits, "Cilvēktiesību normas un to juridiskais rangs Latvijas tiesību sistēmā" [Human Rights Norms and their Legal Rank in the Latvian Legal System], *Juristu Žurnāls, Nr.5 / Cilvēktiesību Žurnāls, Nr.6* [Law Journal No.5 / Human Rights Quarterly No.6], 1997, pp. 49-50.

Among all sources of international law, of the highest practical significance is the question of the place of international treaties in the hierarchy of domestic legal norms. The Constitution, unlike with other sources of international law, does address the question of international treaties, but only from the point of view of the procedure. Article 68(1) of the Constitution states:

The ratification of the *Saeima* [the Parliament] shall be indispensable to all international agreements dealing with matters to be settled by legislation.<sup>7</sup>

This means that all international treaties dealing with questions normally falling within the competence of the Parliament, including protection of human rights, must be reviewed and ratified by the Parliament. Ratification takes the form of passing a law that contains a brief statement that the treaty has been approved, with the text of the treaty attached in the original and Latvian languages. This suggests that international treaties after ratification have equal status to laws passed by the Parliament. It seems that such reading of Article 68(1) was followed by the Parliament when it adopted the Law on International treaties of the Republic of Latvia in 1994, affording priority to provisions of ratified international treaties over domestic laws in case of conflict.<sup>8</sup> The Law on International treaties of the Republic of Latvia acknowledged the direct applicability of international treaties on the domestic level.

However, this is only one of the possible models of the relationship between binding international treaties and laws passed by the Parliament. The work of the Constitutional Court and development of legal doctrine in the area of human rights law indicate two other possible models.

The competence of the Constitutional Court was defined, *inter alia*, as follows: compliance of laws passed by the Parliament has to be reviewed against the Constitution, compliance of domestic legal norms (including laws passed by the Parliament) has to be reviewed against those international agreements that are in compliance with the Constitution, while compliance of signed or binding international treaties has to be reviewed against the Constitution.<sup>9</sup> The logic of the set competence implies hierarchical relationships where the Constitution is on top, international treaties between the Constitution and individual laws, and, finally, laws passed by the parliament below international treaties and the Constitution. This

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<sup>7</sup> Latvijas Republikas Satversme [Constitution of the Republic of Latvia], *Latvijas Vēstnesis [Official Gazette]*, No. 43, 1 July 1993.

<sup>8</sup> Article 13 of the Law of the Republic of Latvia on International Treaties reads:

"If an international treaty approved by the Saeima [the Parliament] provides for other provisions than those in the Republic of Latvia legislative acts, the provisions of the international treaty shall be applied." Likums "Par Latvijas Republikas starptautiskajiem līgumiem" [Law of the Republic of Latvia on International Treaties], *Latvijas Vēstnesis [Official Gazette]*, No. 11, 26 January 1994.

<sup>9</sup> Article 16 of the Law on the Constitutional Court reads:

"The Constitutional Court shall review cases regarding:

- 1) compliance of laws with the Constitution;
- 2) compliance of international treaties signed or concluded by Latvia (including treaties that have not yet been accepted by the Parliament) with the Constitution; (...)
- 6) compliance of the national legal norms of Latvia with international treaties concluded by Latvia which are not contrary to the Constitution."

reading of the Law on the Constitutional Court means that binding international treaties have priority over laws passed by the Parliament by virtue of their higher legal rank and not because of the rule of collision affording priority to norms in the international treaty in the case of conflict as discussed above.

It is important to note that Judge Juris Jelāgins in a separate opinion specifically addressed this question in 2004.<sup>10</sup> His reading of the Law on the Constitutional Court was based on the first model discussed above: since international treaties after ratification acquire the same legal rank as a law passed by the Parliament then the Constitutional Court does not have competence to examine submissions concerning compliance of laws passed by the Parliament against binding international treaties. This is because such conflict would be between legal norms of the same legal rank but the Constitutional Court is mandated to examine disputes only between norms with a different legal force.<sup>11</sup> Notably, the majority of judges did not follow this line of reasoning but found the submission admissible and decided that provisions of the Code of Administrative Violations (a law passed by the Parliament) were contrary to the provisions of the Convention on Facilitation of International Maritime Traffic (an international treaty ratified by the Parliament).<sup>12</sup> This gives strength to the argument that the majority of the judges of the Constitutional Court viewed the legal rank of international treaties as being above the laws passed by the Parliament, but below the Constitution.

Both models approach the question of the place of international treaties from the procedural point of view on how international treaties enter the Latvian legal system. Another approach developed in the area of human rights looks upon the place of international treaties from the point of view of the subject matter regulated.

Since the Constitution did not contain a national catalogue of human rights, such a catalogue was adopted in the form of a Constitutional Law on the Rights and Obligations of a Citizen and a Person on 10 December 1991 (the Constitutional Law).<sup>13</sup> Despite its title, the constitutionality of the Constitutional Law could be challenged. The Constitution did not provide for such a category as “constitutional laws” and it was adopted by the Parliament by a simple majority vote, depriving this law of a “strong legitimacy” argument. In order to provide safe ground for protection of human rights, a noteworthy doctrine was developed relying on the concept of “democracy”.

The essence of this doctrine can be summarized as follows: protection of human rights is an inalienable feature of any democratic state governed by the rule of law; this means that human rights have to take precedence over ordinary laws, otherwise protection of human rights would be in constant danger; the core of

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<sup>10</sup> Dissenting Thoughts of Judge Juris Jelāgins on Constitutional Court Judgment No. 2004-01-06, 7 July 2004, paras 4 and 6.

<sup>11</sup> In another separate opinion Judge Jelāgins confirmed the previously expressed view that the Constitutional Court only has the competence to examine cases involving legal norms of a different legal force. Dissenting Thoughts of Judge Juris Jelāgins on Constitutional Court Judgment No. 2008-35-01 (Lisbon Treaty Case), 21 April 2009.

<sup>12</sup> Constitutional Court Judgment No. 2004-01-06, 7 July 2004.

<sup>13</sup> Konstitucionālais likums “Cilvēka un pilsoņa tiesības un pienākumi” [Constitutional Law on the Rights and Obligations of a Citizen and a Person], *Ziņotājs [Official Reporter]*, No. 4, 30 January 1992.

human rights has to be recognized by any democratic state, but national catalogues may go further than the core; the Constitutional Law makes it clear which rights are considered fundamental rights in Latvia and the concept of "democracy" laid down in Article 1 of the Constitution<sup>14</sup> affords constitutional rank to the Constitutional Law.<sup>15</sup> In a nutshell, this means that human rights laid down in the Constitutional Law enjoy constitutional status and priority over laws passed by the Parliament because protection of human rights is a fundamental principle of a modern democratic state governed by the rule of law and because it is rooted in the concept of "democracy" in Article 1 of the Constitution.

This doctrine was also applied to binding international human rights treaties, affording them constitutional rank alongside the Constitutional Law because of their subject matter – protection of human rights.<sup>16</sup> Moreover, it was applied beyond the scope of human rights, arguing that any binding international treaty that regulated matters covered by selected articles in the Constitution because of its object and purpose would have priority over laws passed by the Parliament.<sup>17</sup>

This approach advocated by legal scholars in the area of human rights was shared by the Parliament. When the Constitution was finally supplemented with a chapter on human rights in 1998, Article 89 referred to binding international treaties alongside the Constitution and domestic laws:

"The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international treaties binding upon Latvia."<sup>18</sup>

As a minimum, this article lays down a constitutional obligation to ensure protection of human rights on the level of binding international standards, but it does not preclude domestic standards from going further. It also implies an obligation to interpret domestic (constitutional) and international norms in harmony to avoid conflicts between them – the Constitutional Court soon developed the so called principle of "harmonious interpretation" and extensively relied on it. Article 89 also implied that binding international treaties could be directly applied on a domestic

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<sup>14</sup> Article 1 of the Constitution reads:

"Latvia is an independent democratic republic".

<sup>15</sup> Egils Levits, "Interpretation of Legal Norms and the Notion of "Democracy" in Article 1 of the *Satversme*". *Latvian Human Rights Quarterly*, No. 1, 1997, pp. 67-70.

<sup>16</sup> Egils Levits, "Eiropas Cilvēktiesību konvencijas piemērošana Latvijas iestādēs un tiesās" [Application of the European Convention of Human Rights in the Latvian courts and administrative authorities], in Ineta Ziemele (ed.), *Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process [Implementation of Human Rights in Latvia: Judicial and Administrative Procedure]*, Latvian Human Rights Institute: Riga, 1998, p. 58; Ineta Ziemele, "Rasu diskriminācijas aizliegums Latvijas tiesību sistēmā un praksē" [Prohibition of Racial Discrimination in the Latvian Legal System and in Practice], *Likums un Tiesības [Law and Justice]*, No. 11, 2004, p. 331.

<sup>17</sup> Ineta Ziemele, "Starptautiskās tiesības Latvijas tiesību sistēmā un tiesu un administratīvajā praksē" [International Law in the Latvian Legal System and Its Application by the Courts and Administration], in Ineta Ziemele (ed.), *Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process [Implementation of Human Rights in Latvia: Judicial and Administrative Procedure]*, Latvian Human Rights Institute: Riga, 1998, p. 43.

<sup>18</sup> Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia], *Latvijas Vēstnesis [Official Gazette]*, No. 308, 23 October 1998.

level – courts of general jurisdiction had gradually started to apply international treaties since the mid-nineties.

To summarise, the Latvian legal system has developed in a way that acknowledged direct applicability of international law and priority of international law over domestic law (except the Constitution). Three possible models show how the relationship between laws passed by the Parliament and binding international treaties can be seen: treaties have the same force as laws, treaties are placed between laws and the Constitution, the place of treaties depends on the subject matter regulated. The latter approach was developed by legal scholars in the area of human rights and is supported by the text of Article 89 of the Constitution.<sup>19</sup> Thus, it can be argued that binding human rights treaties have constitutional status in Latvia.

### 2.2.2. Status of the ECHR in the national legal order

The ECHR and its Protocols No. 1, 2, 4, 7 and 11 were ratified by the Parliament on 4 June 1997.<sup>20</sup> When ratifying the ECHR and its protocols, Latvia made a reservation exempting application of Article 1 of Protocol No.1 (property rights) to matters of property reform.<sup>21</sup> The Parliament also recognised the competence of the Commission and the ECtHR to deal with individual applications involving Latvia, but this question was surrounded by controversy and it captures the general tone of discussing important questions of international treaty law at the time of active transition from the Socialist legal system to that of continental Europe in the mid-nineties.

When the Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols No.1, 2, 4, 7 and 11 (the Ratification Law) was discussed during the second and the final reading in the Parliament, Antons Seiksts, Chairman of the Committee of Human Rights and public Affairs of the Parliament, who was in charge of the Ratification Law, made the following statement during debates:

(...) Jurisdiction of the Council of Europe enters into force in Latvia in three years. This is the term during which we still can set everything in order. (...) We have already exceeded the time limit and at the moment none of the articles take effect in a way that binds Latvia socially or politically."<sup>22</sup> (Author's translation)

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<sup>19</sup> As the latest authority see Ineta Ziemele and Daiga Rezevska, "15.pants [Article 15]", in Jautrīte Briede (ed.), *Administratīvā procesa likuma komentāri: A un B daļas [Commentary on the Administrative Procedure Law: Parts A and B]*, Tiesu namu aģentūra: Rīga, 2013, pp. 232-233. The authors argue that, in order to determine the place of international treaties, not only is the ratification procedure relevant but also the subject-matter and that binding human rights treaties have constitutional status.

<sup>20</sup> Likums "Par 1950.gada 4.novembra Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvenciju un tās 1., 2., 4., 7. un 11.protokolu" [Law on the European Convention on Human Rights and Fundamental Freedoms and Its Protocols No.1, 2, 4, 7 and 11], *Latvijas Vēstnesis [Official Gazette]*, No. 143/144, 13 June 1997.

<sup>21</sup> Reservation contained in the *Note Verbale* from the Minister of Foreign Affairs of Latvia is available at: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&NT=009&VL=1>.

<sup>22</sup> "Eiropas padomes jurisdikcija Latvijā stājas spēkā trīs gados. Šis termiņš ir laiks, kurā mēs vēl varam visu sakārtot. (...) Mēs esam jau pārtērējuši laika limitu, un šobrīd neviens no

The Chairman of the responsible committee was of the opinion that three more years remained during which Latvia could harmonise its laws with the ECHR, but the European Commission of Human Rights (Commission) and the European Court of Human Rights (ECtHR) seemingly would not have competence to deal with individual applications. This matter was not discussed further and the Ratification Law was adopted.

This statement could be explained if the relevant articles of the Ratification Law, whose object and purpose was to recognise the competence of the Commission and the ECtHR to receive complaints against Latvia, were read as not recognising competence **for** a period of three years, but only **after** three years from ratification of the ECHR.<sup>23</sup> However, it is clear that, following recommendations from the Parliamentary Assembly and prior to entry into force of Protocol No.11, the intention was to recognise immediately the competence of the Commission and the ECtHR to deal with individual applications under Articles 25 and 46 of the ECHR. This is clearly reflected in the text of declarations contained in a *Note Verbale* from the Latvian Minister for Foreign Affairs and deposited together with the instrument of ratification.<sup>24</sup> Likewise, the ECtHR did not hesitate to deal with applications from Latvia within a three year period following ratification of the ECHR.<sup>25</sup>

It could be argued that this is an accurate illustration, on the one hand, of the primary interest of the political elite (and the public at large) in being part of modern Europe and, on the other hand, the secondary interest attached to the scope of legal obligations that this entails. Ratification of the ECHR by the Parliament was surrounded by ambiguity as to when Latvia had to comply with its obligations.

Irrespective of this ambiguity, the ECHR after ratification was directly applicable and had constitutional status. While the ECHR was one of many human rights treaties and was not spelt out among other treaties on the level of legislation, it did have special standing among other treaties when it came to its application in the courts.

This is particularly evident in the work of the Constitutional Court, as illustrated by a study examining application of international human rights treaties by the Constitutional Court during the first nine years of its work (from 1997 until 1 April 2006).<sup>26</sup> Altogether the Constitutional Court referred to international human rights

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pantiem nestājas spēkā tādā veidā, kas Latviju saistītu sociālā vai politiskā ziņā.” (Original text in Latvian). Latvijas Republikas 6. Saeimas pavasara sesijas četrpadsmitās sēdes stenogramma [Transcript of the 14<sup>th</sup> Meeting of the Spring Session of the Sixth Saeima of the Republic of Latvia], 4 June 1997, *Latvijas Vēstnesis [Official Reporter]*, No. 139/140, 10 June 1997.

<sup>23</sup> See the text of Article 4 of the Ratification Law recognising the competence of the ECtHR in note 71 below.

<sup>24</sup> The declaration contained in the *Note Verbale* from the Latvian Minister of Foreign Affairs is available at:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=LAT&NT=005&MA=999&CV=0&NA=Ex-25&CN=999&VL=1&CM=5&CL=ENG>.

<sup>25</sup> The earliest admissibility decision involving Latvia considered by the Court was the case of *Pancenko v. Latvia* - Application No. 40772/98 introduced on 16 December 1997, registered on 15 April 1998, and decided on 28 October 1999.

<sup>26</sup> Martins Mits, *European Convention on Human Rights in Latvia: Impact on Legal Doctrine and Application of Legal Norms*, Media Tryck: Lund, 2010, p. 150.

treaties in 74 judgments. The ECHR was referred to in 49 cases (11 upon the initiative of applicants). By comparison, the International Covenant on Civil and Political Rights (ICCPR) was referred to in 30 cases (four upon the initiative of applicants). While the difference between the two treaties is not striking, however, it grows in favour of the ECHR when a more detailed analysis is undertaken. Thus, the contents of ECHR standards were clarified with a reference to scholarly writings or case law of the ECtHR (or the Commission) in 38 cases. Contents of ICCPR standards were clarified on the basis of scholarly writings or documents produced by the Human Rights Committee in 11 cases. References to ECtHR case law more than twice in one judgment were made in 24 cases while no references were made more than twice to scholarly writings or documents under the ICCPR at all.<sup>27</sup>

References to case law and scholarly writings indicate a pragmatic interest in clarifying the contents or methodology of application of legal provisions. The above study showed that the ECHR was the international human rights treaty most extensively applied by the Constitutional Court, while it was also the treaty most often invoked by applicants.<sup>28</sup>

A more recent study of application of the ECHR by the Supreme Court (from 1 January 2011 to 17 August 2012) reveals a diverse picture with respect to its application by the three departments. In the Criminal Law Department the contents of ECHR standards were clarified with reference to ECtHR case law in 6 out of 56 cases where the ECHR was referred to (3 upon the initiative of the applicants), in the Civil Law Department – in 25 out of 60 cases (11 upon the initiative of the applicants); in the Administrative Law Department – in 40 out of 54 cases (7 upon the initiative of the applicants).<sup>29</sup>

In a very high number of cases in the Administrative Law Department the contents of the ECHR were clarified by reference to ECtHR case law and usually this was done on the initiative of judges themselves. A similar situation existed in the Constitutional Court, as discussed above. Such extensive use of the ECHR suggests that it fulfilled the role of a “textbook”. References to ECtHR case law were mostly used to clarify the contents of standards in the ECHR (more seldom – methodology for application of ECHR standards) in order to achieve uniform interpretation of the contents (methodology for application) of human rights provisions contained in the Constitution or in laws passed by the Parliament.

This also shows that the ECHR was *de facto* equally important to the Constitution, supporting the argument about the constitutional status of human rights treaties. The Constitutional Court, however, has clearly indicated, with a

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<sup>27</sup> *Ibid.*

<sup>28</sup> By way of comparison, the International Covenant on Economic, Social and Cultural Rights was invoked by applicants in 1 case and referred to by the Constitutional Court in 12 cases; the Universal Declaration of human rights was not invoked by applicants but referred to in 17 cases; the European Social Charter – not invoked, but referred to in 8 cases; and the European Union Charter of Fundamental Rights – not invoked, but referred to in 4 cases.

<sup>29</sup> Martins Mits, *Eiropas Cilvēktiesību tiesas judikatūra Latvijas Republikas Augstākās tiesas nolēmumos [Case Law of the European Court of Human Rights in Decisions of the Supreme Court of the Republic of Latvia]*, Supreme Court of the Republic of Latvia, December 2012, paras 1 and 7 of the Conclusions, available at: <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/citi/>.

reference to the German Federal Constitutional Court, that the ECHR should be used for interpretation of the provisions of the Constitution only “as far as possible”, leaving to the Constitution the role of the supreme law.<sup>30</sup> At the same time, the Constitutional Court has always followed the principle of harmonious interpretation of domestic legal provisions (including the Constitution) with the ECHR and has avoided conflicts.

To summarise, ratification of the ECHR in the Parliament was surrounded by ambiguity as to when Latvia had to start complying with its obligations. Regardless, the ECHR, like other binding human rights treaties, was directly applicable and had constitutional status. The ECHR stood out among other human rights treaties in terms of its application – in the work of the Constitutional Court and the Administrative Cases Department of the Supreme Court the ECHR had an influence that exceeded the traditional function of an international treaty – it fulfilled the role of a “textbook.” The ECHR was *de facto* equal in importance to the Constitution and it has had a strong influence on the interpretation and application of human rights provisions contained in the Constitution.

## 2.3. Mechanisms of implementation and coordination

### 2.3.1. Legislative level

The Rules of Parliamentary Procedure in Article 85(5) set a requirement that an annotation accompanying any draft law submitted by eligible entities (the president, parliamentary committee, five members of the Parliament) must, *inter alia*, provide an answer to the question: “How does the law conform to the international obligations assumed by Latvia?”<sup>31</sup> Although the ECHR is not specifically spelled out, it is covered by that question. The government is also entitled to submit draft laws and it is required to provide more detailed information concerning compliance with the ECHR.<sup>32</sup>

An obligation to prepare an annotation rests with the relevant subject submitting a draft law. Nobody is required to check how diligently or whether this requirement has been complied with at all. Apart from this obligation, the Parliamentary Legal Office is independently required to carry out general monitoring whether a draft law complies with the Constitution, binding international agreements and the legal system in general – this follows from Article 89 of the Constitution and is also spelled out in the internal rules of procedure of the Parliamentary Legal Office.<sup>33</sup>

Only one entity – the people – may submit draft laws for approval by the Parliament without annotation. According to Article 78 of the Constitution, one tenth of eligible voters are entitled to submit a draft law. However, also in this case the

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<sup>30</sup> Constitutional Court Judgment No. 2001-08-01, 17 January 2002, para.3.

<sup>31</sup> Saeimas kārtības rullis [Rules of Parliamentary Procedure]. *Latvijas Vēstnesis [Official Gazette]*, No. 96, 18 August 1994.

<sup>32</sup> See section 2.3.2 below.

<sup>33</sup> Interview with Gunārs Kusiņš, former Head of the Parliamentary Legal Office, 7 October 2013.

Parliamentary Legal Office is required to provide its opinion on compliance of the draft law with, *inter alia*, binding international treaties.

To summarise, there is a double check mechanism on compliance of draft laws with binding international treaties (except draft laws submitted by the people). Parliamentary subjects entitled to submit draft laws have a general obligation to reflect on the impact of a draft law on Latvia's international obligations. The Parliamentary Legal Office independently carries out such impact assessment. There is no obligation to single out the ECHR among other binding international treaties or to pay particular attention to ECtHR case law.

### 2.3.2. Executive level

Draft laws that are initially prepared on the level of ministries must also contain annotation. According to Article 3 of the Rules of Government Procedure all draft laws submitted for review by the government must include annotation.<sup>34</sup> An instruction is issued by the government providing detailed regulation of what an annotation must contain.<sup>35</sup> Chapter V in the annotation entitled "Conformity of a draft legal act with the international obligations of the Republic of Latvia" contains three entries: obligations towards the EU, other international obligations, and other information. It is within the second entry "other international obligations" where obligations under the ECHR primarily fit. Article 57.3 of the instruction specifically points out that conformity with the case law of, *inter alia*, the EC/tHR has to be addressed. However, this obligation to assess conformity with "other international obligations" can be read as very limited in scope. Article 57.1 of the instruction requires an indication of those international instruments or documents "whose obligations are implemented or undertaken by [...] Latvia".

The above formulation suggests that it would apply only to cases when a draft law is specifically intended to implement international obligations, for example, directly following from the ECHR or from a ruling of the EC/tHR. According to Laila Medin, Deputy State Secretary of the Ministry of Justice, this is exactly the idea of the provision. However, the Ministry of Justice applies a broader interpretation and carries out an assessment, reflecting it in the annotation, also when a draft law might have a negative impact on obligations under the ECHR.<sup>36</sup>

Despite the broad interpretation applied, several factors, including the narrow wording of the obligation, may preclude broader assessment of the possible negative impact of a draft law on obligations under the ECHR. The Extradition Treaty between the United States and Latvia (the Extradition Treaty) concluded in 2006 serves as a good illustration. The need for concluding a new Extradition Treaty arose from Latvia's membership in the European Union. Despite the fact that the Extradition Treaty was related to several fundamental rights and freedoms regulated under the

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<sup>34</sup> Ministru kabineta kārtības rullis [Rules of Government Procedure], *Latvijas Vēstnesis [Official Gazette]*, No. 58, 16 April 2009.

<sup>35</sup> Tiesību akta projekta sākotnējās ietekmes izvērtēšanas kārtība [Procedure for Initial Impact Assessment of a Draft Legal Act], *Latvijas Vēstnesis [Official Gazette]*, No. 205, 30 December 2009.

<sup>36</sup> Interview with Laila Medin, Deputy State Secretary of the Ministry of Justice, 8 October 2013.

ECHR, including prohibition of the death penalty, the annotation accompanying the draft law on the Extradition Treaty stated that the draft law does not deal with obligations towards international organisations. The old bilateral treaties between Latvia and the USA were indicated as the only source among all bilateral or multilateral treaties that contain international obligations relevant for the present case.<sup>37</sup>

Apart from that, there is no regular monitoring mechanism to assess the need for legislative amendments following judgments delivered against Latvia or other member states. However, an informal joint working group with a representative of the Latvian Government before International Human Rights Institutions (Representative of the Latvian Government) and the Ministry of Justice meets several times a year and discusses topical questions in that regard.<sup>38</sup> As a rule, any initiative concerning legislative amendments following rulings of the ECtHR comes from the Representative of the Latvian Government before the ECtHR.<sup>39</sup>

To summarise, the obligation to assess the impact of draft law on obligations under the ECHR, including ECtHR case law, has been reflected in much more detail on the executive than on the legislative level. Despite its narrow wording, it has been interpreted broadly to cover potential violations of the ECHR, and there seems to be no uniform practice in this regard. No formal mechanisms are established to assess the need for legislative changes following rulings of the ECtHR in cases against Latvia or other countries. Such initiatives usually come from the Representative of the Latvian Government and joint consultations have been established between the two ministries involved.

### 2.3.3. Judiciary

All procedural laws explicitly allow domestic courts to apply binding international treaties, including the ECHR. However, there is no uniform approach as regards express acknowledgment of the obligation to take into consideration ECtHR case law. All three procedural laws emphasize the need to take into account case law of the Court of Justice of the European Union (CJEU) when implementing EU law.<sup>40</sup> Only Article 5(1) and (6) of the Civil Procedure Law is formulated in a way that lays down an obligation to consider ECtHR case law equally to that of the CJEU.<sup>41</sup> Express acknowledgment of the need to consider ECtHR (and other international courts')

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<sup>37</sup> Likumprojekta „Par Latvijas Republikas valdības un Amerikas Savienoto Valstu valdības līgumu par izdošanu” anotācija, [Annotation of Draft Law “On the Extradition Treaty Between the Government of the Republic of Latvia and the Government of the United States of America”], available from the Parliamentary legislative database at: <http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/>.

<sup>38</sup> Interview with Laila Medin, Deputy State Secretary of the Ministry of Justice, 8 October 2013.

<sup>39</sup> *Ibid.*

<sup>40</sup> Article 2(2) of the Criminal Procedure Law, Article 5(1) and (6) of the Civil Procedure Law and Article 15(4) of the Administrative Procedure Law.

<sup>41</sup> Article 5 of the Civil Procedure Law reads:

“(1) Courts shall adjudge civil matters in accordance with laws and other regulatory enactments, international agreements binding upon the Republic of Latvia and the legal norms of the European Union.(...)

(6) In applying legal norms, the court shall take into account case law.”

case law in the two other procedural laws would be advisable. This might make a positive contribution towards increased use of ECtHR case law, in particular in criminal cases, where its application is rare.<sup>42</sup>

All three procedural laws contain provisions that allow re-opening of a case following a ruling from the ECtHR.<sup>43</sup> The right to ask for reopening rests with the affected person (the prosecutor acts as a filter in criminal cases and can initiate re-opening himself). Regulation in the Administrative Procedure Law is more detailed. Besides providing for the right for the affected person to initiate re-start of administrative proceedings in a public institution (Article 87(1(3))) or in an administrative court (Article 353(6)), an obligation is also imposed on a public institution to re-start administrative proceedings if necessary for implementation of an ECtHR judgment (Article 88(2)). Thus, in principle the Latvian courts have tools for re-opening a case if the ECtHR has specifically indicated this special measure in its judgment or if it follows from the reasoning.

Another important aspect has to be mentioned in the context of implementation. The Supreme Court on its home page maintains a database of translations of all the judgments and decisions of the ECtHR that have been translated into Latvian.<sup>44</sup> This is done in cooperation with the Office of the Representative of the Latvian Government – the Ministry of Foreign Affairs supplies the translations. Importantly, the database includes all the judgments and selected decisions that the ECtHR has delivered against Latvia. It also includes a limited amount of case law against other countries that has been translated into Latvian. This is a very important tool for judges who write their decisions in Latvian, not to mention its utmost importance for those judges who do not know English and (or) French.

#### 2.3.4. Informal mechanisms

It is not an easy task to take stock of informal channels that contribute towards ensuring compliance with the ECHR. No particular single mechanism stands out among the various contributors. Therefore, each of the three actors will be briefly addressed: academia, NGOs and the media.

Apart from teaching and scholarship, discussed in sections 6.1 and 6.2 below, a human rights discussion that has become an established tradition and has been organised for over eight years is worthy of note. This event brings together the Latvian judge at the ECtHR, the Representative of the Latvian Government, academicians and representatives of public institutions – each year with a different focus (*e.g.* the Constitutional Court, Ombudsperson) and an audience of legal practitioners – prosecutors, judges, advocates, representatives from ministries, the Parliament, NGOs, academicians and students as well. A key component of this half-day event is a discussion of ECtHR rulings delivered over the past year against Latvia as well as other developments in the ECtHR of interest for Latvia. The event has been established upon the initiative of a former ECtHR judge, Ineta Ziemele, and is

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<sup>42</sup> See section 4.2 below.

<sup>43</sup> Article 655(5) of the Criminal Procedure Law, Article 479(6) of the Civil Procedure Law and Articles 87(1(3)), 88(2) and 353(6) of the Administrative Procedure Law.

<sup>44</sup> <http://at.gov.lv/lv/judikatura/ect-nolemumi/>.

organised by the Riga Graduate School of Law. It attracts attention not only from legal practitioners but also from the media and it helps to disseminate information efficiently about the causes of established violations of the ECHR and to pose questions about measures required to prevent future violations.

As regards NGOs, apart from strategic litigation, briefly discussed in section 6.4 below, NGOs have been instrumental in using the ECHR and ECtHR case law in their advisory or lobbying work. Important judgments (*e.g.*, *Opuz v. Turkey*, *D.H. v. Czech Republic*) have been selected, translated and disseminated by NGOs, seminars and training programmes conducted, the standards of the ECHR being constantly referred to by NGOs in formal working groups established by the public authorities where they have been invited to participate. As noted by Anhelita Kamenska, Director of the Latvian Centre for Human Rights, there are growing dynamics as regards readiness to accept arguments presented by NGOs on the basis of the ECHR in formal working groups; if an argument is based on specific ECtHR case law, the stronger is its impact.<sup>45</sup>

The media regularly report on judgments delivered against Latvia. Undisputedly, this is an important positive contribution towards raising public awareness about the problems identified and, ideally, to the responses envisaged by the responsible authorities. The media may, however, also give a negative twist when reporting on ECtHR rulings, depending on the way it is done. By way of example, the media response following such judgments as *Lavents v. Latvia* and *Bazjaks v. Latvia* have to be mentioned. Media attention did not focus on the essence of the violations established, but rather contributed towards overall public dissatisfaction with the fact that persons who had done "bad things" at home were acknowledged as victims in Strasbourg.

In the case of *Lavents v. Latvia* the applicant was convicted of leading the largest private bank to bankruptcy, leaving thousands of angry Latvian residents without their savings.<sup>46</sup> This was only the second judgment where a violation against Latvia was established and it brought considerable public frustration towards the ECtHR without a clear understanding of the exact competence and tasks of the ECtHR. In *Bazjaks v. Latvia*<sup>47</sup> the applicant was convicted in Latvia of raping a 15 year old girl. The ECtHR found a violation of Article 3 (and Article 13) of the ECHR on account of poor prison conditions and awarded compensation of 11 700 EUR for non-pecuniary damages. Again, the outcome of the case raised loud dissatisfaction among a large part of the public without any focus on the real cause of violation established.

On the one hand, these cases illustrated the important role that the media must play in explaining reasons for proven violations and their responsibility for failing to do so. On the other hand, these cases pointed out that a large segment of the population refused to accept that the human dignity of all persons has to be respected irrespective of what they have done. Notably, such views were shared by many legal practitioners as well. It can be argued that such disrespect towards

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<sup>45</sup> Interview with Anhelita Kamenska, Director of the Latvian Centre for Human Rights, 25 September 2013.

<sup>46</sup> See section 3.2.2 below.

<sup>47</sup> *Bazjaks v. Latvia*, Application No. 71572/01, ECtHR Judgment, 19 October 2010.

human dignity today might have been influenced by the denial of individuality under the Socialist era.

## 3. European Court case law in relation to the state

### 3.1. Overview

By 1 November 2013 the ECtHR had delivered 78 judgments against Latvia. Excluding those judgments where violations were not found, or which were referred to the Grand Chamber or where a decision on the merits was not taken, then 58 judgments remain where at least one violation by Latvia has been proven.

Since a judgment may contain conclusions about the existence or non-existence of several violations, for the purposes of this research, the ECtHR has established 110 violations in total, while at least on 32 occasions a violation has not been found. As can be seen from Table 1, the highest number of violations is related to Article 5 (right to liberty and security of the person), Article 3 (prohibition of torture), Article 6 (right to fair trial) and Article 8 (right to private and family life).

**Table 1.** Violations established by the ECtHR in relation to Latvia

ECHR Article	2	3	5	6	8	9	10	13	14	34	P1-1	P1-3	P7-2	In Total
Violations	2	20	35	20	14	2	3	2	1	6	1	2	1	110

If the violations are viewed from the perspective of their character, i.e., to which sphere of law they are primarily attributable, then the absolute majority of violations – 90 – can be attributed to criminal law provisions under the ECHR. It must be noted, however, that “criminal law” is used here as a broad term covering not only those violations that were directly committed in the course of domestic criminal proceedings, but also such violations that under domestic law would fall within the scope of administrative procedure law, while being associated with criminal law. Such examples include improper conditions in places of detention under Article 3, disproportionate restrictions on the rights to visits and correspondence of detained or imprisoned persons under Articles 8 and 34 of the ECHR, and the like.

For the sake of clarity, all violations will be presented by arranging them into four large groups with examination of one case characterising each group.

### 3.2. Selected examples

#### 3.2.1. Life and torture

Two violations have been established under Article 2 (procedural and substantive aspects) and 20 violations under Article 3. Article 3 violations can be divided into problems related to efficient investigation (7) and to inhuman and degrading

treatment and punishment (13). All latter violations, except in one case, are related to conditions in places of detention, including the regime of punishment, diet or lack of adequate medical treatment. Only on one occasion was ill-treatment by the police established. However, the above mentioned seven violations concerning lack of efficient investigation signal that the problem of ill-treatment is much more serious, but it was not possible to establish whether it had happened.

The case of *Jasinskis v. Latvia*<sup>48</sup> stands out among others since it is the only case concerning right to life and because of the serious nature of the problems revealed. A young deaf and mute person, having used alcohol and after a quarrel, fell down the stairs outside a place where a party was in progress. For the purposes of sobering him up, the police brought this person to a police station without, however, waiting for the ambulance to arrive and check his state of health. Having spent more than 14 hours in the police station and not being conscious, the person was brought to the hospital where he soon died due to head injuries suffered from the fall. Investigations against the police officers on duty were discontinued three times until they were passed for outside investigation by the Bureau of Internal Security of the State Police. However, this investigation was also discontinued due to lack of a crime.

The ECtHR found both substantive and procedural violations of Article 2. The police had failed to safeguard the life of the person by not providing adequate medical treatment, including denial of a means of communication to a deaf and mute person. The investigation carried out by the same police entity lacked the minimum guarantees of independence, nor was it expedient, since three times it was referred back by the prosecutor's office due to being inadequate. Likewise the investigation carried out by the external Bureau of Internal Security of the State Police was not prompt and it did not extend to assessment of all important aspects of the case. In sum, the investigation was neither efficient nor prompt and it pointed out significant shortcomings in the work of all institutions involved. The ECtHR awarded EUR 50 000 as moral compensation.

Thus, apart from lack of respect towards the health and life of a (deaf and mute) person, this case illustrates serious shortcomings in the investigation mechanisms that did not allow proof of responsibility of the law enforcement personnel involved.

### 3.2.2. Liberty and fair trial

Altogether 35 violations of Article 5 have been established: Article 5(1) – 12 violations, 5(3) – 12, 5(4) – 11. Most of the violations under Article 5(1) were related to criminal proceedings and on 7 occasions there was one and the same problem of a lack of legal basis for continued detention while the person in detention on remand became acquainted with the case files. Problems under Article 5(3) and 5(4) were related to lack of proper reasoning, the need and the length of pre-trial detention to the extent that the ECtHR made a statement in *Estrikh v. Latvia* that this “disclose[s]

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<sup>48</sup> *Jasinskis v. Latvia*, Application No. 45744/08, ECtHR Judgment, 21 December 2010.

a systemic problem in relation to the apparently indiscriminate application of detention as a preventive measure in Latvia".<sup>49</sup>

It has to be noted that on three occasions violation of Article 5(1) was established in the context of a legally incapacitated person's internment in special institutions. Problems included lack of procedures providing sufficient guarantees against possible arbitrary continued hospitalisation and lack of appeal procedures. In *Mihailovs v. Latvia*,<sup>50</sup> apart from finding a violation of Article 5(1) on account of lack of medical opinion justifying detention and its regular re-assessment, a violation of Article 5(4) was found because the law did not provide for automatic judicial review of the lawfulness of placing and keeping a person in a social care institution. This and another two cases point out serious problems in relation to safeguards from the public sphere against arbitrary isolation of individuals.

Article 6 was found violated on 20 occasions: Article 6(1) – 18 violations, Article 6(2) – 2. Of these 20 violations 14 were related to criminal procedure, 5 to civil procedure and 1 to administrative procedure. In the field of criminal law most of the violations (8) concerned length of proceedings. In the field of civil law the problems were related to access to courts (2), proceedings held *in absentia* (2) and length of proceedings (1). Proceedings *in absentia* were also the cause of a violation in the only administrative proceedings case (conducted by civil and not administrative courts). A violation of Article 2 of Protocol No.7 has to be mentioned as well. This related to inability to appeal against the decision of a court of first and final instance imposing sanctions under the Administrative Violations Code – minor violations that fall short of criminal responsibility and are classified as administrative violations in the Latvian legal system, but are considered as "criminal" within the meaning of the ECHR.

An absolute majority of violations under Articles 5 and 6 occurred in the context of criminal proceedings and were related to the Criminal Procedure Code inherited from the Soviet legal system. The case of *Lavents v. Latvia*<sup>51</sup> serves as a good illustration. The applicant was the head of the largest bank in Latvia in the mid-nineties. In 1997 the court of first instance started consideration of the case and in 2001 the applicant was sentenced to 9 years in prison for five crimes mostly connected to banking and economic activities, as a result of which thousands of Latvian residents lost their investments amounting to 227 000 000 EUR. The ECtHR established violations of Articles 5, 6 and 8 on seven accounts and awarded 15 000 EUR for costs and expenses, but did not award compensation for non-pecuniary damages.

Article 5(3) was violated because of lack of due diligence on the part of the judicial authorities (4 years and 6 months) and insufficient reasons for continuous detention on remand. Article 5(4) was violated because the court lacked the required elements of independence and impartiality. Article 6(1) entailed three separate violations. First, due to unprecedented resignation by one of the two lay judges, the court could not continue examination of the case in the same setting – this was found to be contrary to domestic law and therefore the court panel could not be

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<sup>49</sup> *Estrikh v. Latvia*, Application No. 73819/01, ECtHR Judgment, 18 January 2007, para. 127.

<sup>50</sup> *Mihailovs v. Latvia*, Application No. 35939/10, ECtHR Judgment, 22 January 2013.

<sup>51</sup> *Lavents v. Latvia*, Application No. 58442/00, ECtHR Judgment, 28 November 2002.

considered as “established in accordance with law”. Second, in interviews with two newspapers the presiding judge had admitted that the applicant would be either fully or partially found guilty and advised the defence to prove his innocence. This was found to be incompatible with the requirement of impartiality of the court. Third, the trial did not take place within a reasonable time. Irrespective of the complexity of the case that in principle could justify the overall duration of 4 years and 6 months, the violation was caused in particular by 11 months of inactivity following the resignation of the court panel. The statements made by the presiding judge concerning the guilt of the accused person amounted to violation of the presumption of innocence under Article 6(2). Finally, domestic legal provisions lacked the required precision for control of correspondence to be “in accordance with the law” and the stringent restrictions on visits by family members during detention on remand set in the by-laws without a possibility of their flexible application were both not “necessary in a democratic society” under Article 8(2) of the ECHR.

This was the first case dealing with criminal law provisions that was decided in respect of Latvia. It clearly showed that the letter and spirit of the criminal procedure legislation adopted back in 1961, although amended numerous times, could not live up to the demands of ECHR standards ten years after restoration of the country’s independence. Apart from the fundamental problems of continuous detention and lack of sufficient motivation, the complicated procedural rules contributing towards the overall length of proceedings, prevention of arbitrariness concerning control of correspondence and disallowing proportionality considerations in relation to visits by family members, this case also highlights a broader problem of proper understanding of impartiality and independence and, henceforth, the role of the judiciary in a democratic state.

This was the first widely known case when a judge expressed her opinion on the guilt of the accused person. Moreover, the court panel resigned following a joint statement made by the Prime Minister and the Minister of Justice published in the *Official Gazette* where they declared that the decision of a judge to replace detention on remand with house arrest was contrary to the public interest and expressed the need for review of the existing disciplinary punishments for judges.<sup>52</sup> Arguably, such a public statement could be explained by the relatively short experience of an independent judiciary.

Without any doubt, the case of *Lavents v. Latvia* and other similar judgments had a strong influence on the new Criminal Procedure Law that replaced the old law. Similarly, they shaped an understanding of the fundamental principles underlying criminal procedure from a human rights perspective.

### 3.2.3. Privacy, religion and expression

Fourteen violations of Article 8 have been established by the ECtHR. An absolute majority of these violations (10) were related to the penitentiary system: unjustified control of correspondence on 7 occasions and disproportionate ban on visits on 3 occasions that pointed out deficiencies in legal regulation as already seen in the case of *Lavents v. Latvia*. Two of the remaining “civil rights” cases dealt with expulsion

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<sup>52</sup> *Ibid*, para. 20.

from the country and one each with the right to private life in the context of publication of one's image and with a transborder "child abduction" dispute. In the latter case *X v. Latvia* a violation was found on account of reliance on the Hague Convention to determine the place where a child should stay without sufficient weight given to the best interests of the child.<sup>53</sup>

Article 9 was violated on two occasions – unjustified interference by a public authority in a dispute within a religious organisation and denial of entry into the country to a minister without an appropriate legal basis for doing so. Article 10 was violated on 3 occasions and these three cases are further examined in the context of a broader impact of ECHR on civil rights.<sup>54</sup>

Several judgments under Article 8 have pointed to the importance of the broader framework of international law and the relevance of historical aspects when deciding on violations of the ECHR. These cases concern expulsion of persons who had lost their rights to reside in the country in the context of restoration of Latvia's independence. Altogether there were 4 such judgments: three cases resulted in not finding a violation by the Grand Chamber, but in one case the Grand Chamber found a violation.

A violation of Article 8 was established in the case of *Slivenko v. Latvia*<sup>55</sup> and 10 000 EUR was awarded for non-pecuniary damage. Mrs. Slivenko was married to a military officer of the Soviet army and their daughter was born in Latvia. After restoration of Latvian independence, Mrs. Slivenko and her daughter were registered as ex-Soviet citizens, but they were requested to leave Latvia as family members of a military officer in accordance with the bilateral agreement concluded between Latvia and Russia. The majority in the Grand Chamber (11 to 6) noted that the interests of national security carried less weight with respect to retired military officers and their family members than in the case of active officers. The applicants were found sufficiently integrated into Latvian society since they had spent their lives there and had developed personal, social and economic ties in Latvia. Therefore, the Latvian authorities had exceeded their margin of appreciation in striking a balance between the legitimate aim of protecting national security and the applicants' rights to private life and home under Article 8.

The dissenting judges emphasised the specific historical context and the purpose of the bilateral treaty – elimination of the consequences of Soviet rule in Latvia. Since the bilateral agreement pursued a legitimate aim – repatriation of the totality of a foreign army – the dissenting judges could not agree that more importance should be attached to the interests of family members of recently retired officers than those of serving officers.<sup>56</sup> Apart from that, this case raises a question of the special character of multilateral human rights treaties within a general

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<sup>53</sup> *X v. Latvia*, Application No. 27853/09, ECtHR Judgment, 13 December 2011. On 26 November 2013 the Grand Chamber upheld the ruling, finding a violation of Article 8 (9 votes to 8).

<sup>54</sup> See section 7.4 below.

<sup>55</sup> *Slivenko v. Latvia*, Application No. 48321/99, ECtHR Judgment, 9 October 2003.

<sup>56</sup> Joint Dissenting Opinion of Judges Wildhaber, Ress, Sir Nicolas Bratza, Cabral Barreto, Greve and Maruste, paras 4 and 7.

framework of international law and it has been discussed by the International Commission of Jurists in a study on the fragmentation of international law.<sup>57</sup>

Interestingly, in all three other related cases a violation of Article 8 was initially established by a Chamber, but these cases ended without finding a violation by the Grand Chamber. The Latvian Government proposed to regularise the residence status of the applicants to the extent they would not be deported, thus removing the cause for concern. For example, in the case of *Sisojeva and Others v. Latvia*<sup>58</sup> concerning family members of a retired military officer who was not subject to the Latvian-Russian bilateral treaty, the Grand Chamber noted that the ECHR does not guarantee a right to a specific type of residence permit. Since Mrs. Sisojeva could obtain the status of a stateless person and the daughter and her husband could obtain residence permits independently of the first applicant, but they failed to take any action, the Latvian authorities had provided an adequate remedy, therefore the case was considered "resolved" and it was struck out of the list. In the case of *Kolosovskiy v. Latvia*<sup>59</sup> the ECtHR declared inadmissible a complaint about refusal to regularise his stay in Latvia from a demobilised officer of the Soviet army, emphasising the strong links that the applicant had with the army.

By way of summary, the case of *Slivenko v. Latvia* stands out alone where a violation of Article 8 was established in the context of expulsion of persons with military links. This and the other cases discussed illustrates the complexity of the situation for persons who had entered Latvia in the Soviet era and did not qualify for a status that would grant them permanent residence in Latvia and the complexity of questions that required detailed exploration by the ECtHR. In view of the outcomes in these cases, it could be argued that the more importance the ECtHR attributed to the historical context that has led to present-day situations, as well as to broader international law framework, the wider margin of appreciation was attributed to the government to deal with them.

#### 3.2.4. Property and elections

Protocol No. 1 to ECHR has generated very few violations in Latvian cases; however, all these cases present interesting aspects. One violation has been established under Article 1 to Protocol No. 1 (and one violation of Article 14 in conjunction with Article 1 of Protocol No. 1, discussed in section 7.2. below). In the case of *Vistiņš and Perepjolkins v. Latvia*<sup>60</sup> the problem was in the amount of compensation received for an expropriated property that on one occasion was even 350 times lower than the market value of the property.

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<sup>57</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, paras 246-248, available from the International Law Commission database at: [http://legal.un.org/ilc/guide/1\\_9.htm](http://legal.un.org/ilc/guide/1_9.htm).

<sup>58</sup> *Sisojeva and Others v. Latvia*, Application No. 60654/00, ECtHR Judgment, 15 January 2007.

<sup>59</sup> *Kolosovskiy v. Latvia*, Application No. 50183/99, ECtHR Decision, 29 January 2004.

<sup>60</sup> *Vistiņš and Perepjolkins v. Latvia*, Application No. 71243/01, ECtHR Judgment, 25 October 2012.

Two violations were established under Article 3 of Protocol 1 concerning the right to stand as a candidate in Parliamentary elections. These cases merit particular attention and one of them is discussed in the context of lustration measures (as well as another case - *Ždanoka v. Latvia* – where a violation was not found).<sup>61</sup> The case of *Podkolzina v. Latvia*<sup>62</sup> concerned language restrictions for persons who wished to run for parliamentary elections and will be discussed in detail.

Mrs. Podkolzina, as a member of the Russian speaking community, was required by law to produce a certificate confirming her knowledge of the state language – Latvian. Despite the fact that the applicant produced a duly obtained certificate, the language inspectorate, entitled to supervise compliance with the rules on the state language, requested her to undertake a repeated language examination. Since the applicant refused, she was struck off the list of candidates for elections.

The ECtHR established a violation of Article 3 of Protocol No. 1 and awarded 7500 EUR as compensation for non-pecuniary damages. The ECtHR noted that the requirement itself to have sufficient knowledge of the state language, in view of each country's historical and political considerations, pursued a legitimate aim of ensuring that a state's institutional system functioned properly. However, the procedure to which the applicant was subjected did not comply with the requirements of fairness and legal certainty. There was no legal regulation of the procedure of repeated examinations and, as carried out, it depended on the approach of the respective language inspector, whereas the initial language examination was carried out by a panel of examiners and was subject to legal regulation. The domestic court that dealt with the complaint afterwards did not consider other relevant aspects, including the fact of the initial examination. Therefore, the decision to remove the applicant from the list of candidates to parliamentary elections was not proportionate to the above legitimate aim.

This case leads to several conclusions. First, it underlined the need for proper regulation of the administrative procedure on the level of the Parliament. At the time of the events it was regulated on the level of by-laws issued by the government and the whole sphere of relationships between the individual and the state was *terra incognita* for the public administration if looked at from a perspective of democracy where the executive power is subject to the rule of law. Post-Socialist societies started to learn this and other fundamental principles relatively recently.

Second, the *Podkolzina* case also showed that the domestic courts were not equipped to deal with administrative procedure cases. Such cases were reviewed by civil judges who were not sufficiently trained in public law matters. Administrative courts with specially trained judges were introduced with the entry into force of the Administrative Procedure Law.

Third, the Administrative Procedure Law entered into force on 1 February 2004. Adoption of this law was one of the recommendations by the Ministry of Justice as part of a compatibility review carried out prior to ratification of the ECHR.<sup>63</sup> Thus, the need for such a law was obvious and this recommendation was finally

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<sup>61</sup> See section 7.1 below.

<sup>62</sup> *Podkolzina v. Latvia*, Application No. 46726/99, ECtHR Judgment, 9 April 2002.

<sup>63</sup> Letter from the Minister of Justice to the Parliamentary Committee on Human Rights and Public Affairs No. 4-3, 7 May 1997, unpublished.

implemented, but it took place almost 7 years after the ECHR became binding on Latvia.

## 4. European Court case law: effects on national law

### 4.1. Legislative level

According to Gunārs Kusiņš, former Head of the Parliamentary Legal Office, it is the Ministry of Justice whose primary responsibility it is to assess the need for legislative amendments as a follow up to rulings of the ECtHR.<sup>64</sup> This means that such legislative initiative would come before the Parliament in the form of a draft law initiated by the Ministry of Justice. However, it could also be submitted by members of the Parliament as a proposal for an amendment to a draft law that has already been submitted to the Parliament and considered at the first or the second reading.

It is not frequently when judgments delivered by the ECtHR are the sole reason for amendments to laws. At the same time, it is difficult to measure the overall impact of ECtHR case law on legislation since it may occur, for example, even at the stage of a permanent or *ad hoc* working group established for drafting a specific law, or later during discussions in the Parliamentary Legal Committee.

Apart from the area of criminal procedure, an example of a direct influence is amendments to the Parliamentary Elections Law following the judgment in the case *Ādamsons v. Latvia*. In this case the ECtHR established a violation of passive voting rights under Article 3 of Protocol No.1 for a former KGB officer, pointing out, *inter alia*, that the concept of "KGB officer" in the law was very broad.<sup>65</sup> This concept was narrowed down in the law to exclude from restrictions those persons who were involved only in planning, finance and maintenance structures of the KGB.

It is also possible to identify amendments to laws that were triggered by ECtHR case law involving other member states than Latvia. One example is the judgment in the case of *Shtukurov v. Russia* where the ECtHR found a violation of Article 8 of the ECHR because the law distinguished only between full capacity or full incapacity of mentally ill persons without allowing for borderline situations.<sup>66</sup> The Latvian Constitutional Court primarily relied on this judgment when it declared the relevant provisions of the Civil Law in violation of Article 96 of the Constitution.<sup>67</sup> Afterwards Article 8 of the ECHR and the judgment in *Shtukurov v. Russia* were indicated in the annotation among the main reasons for amendments to the Civil Law.<sup>68</sup>

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<sup>64</sup> Interview with Gunārs Kusiņš, Head of the Parliamentary Legal Office, 7 October 2013.

<sup>65</sup> See discussion of *Ādamsons v. Latvia* in section 7.1 below.

<sup>66</sup> *Shtukurov v. Russia*, Application No. 44009/05, ECtHR Judgment, 27 March 2008.

<sup>67</sup> Constitutional Court Judgment No. 2010-38-01, 27 December 2010, para. 12.

<sup>68</sup> Likumprojekta „Grozījumi Civillikumā” sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Report of the Initial Impact Assessment (Annotation) to Draft Law “Amendments to Civil Law”], part I, point 2, available from the Government database at: <http://www.mk.gov.lv>.

To summarise, no studies have been carried out to assess the impact of ECtHR case law on Latvian legislation. Examples can be identified of amendments as a direct result of ECtHR rulings in cases against Latvia and against other countries. However, it is not possible to assess the overall extent of the impact.

## 4.2. Judiciary

Latvian courts have accepted that they are bound by ECtHR case law and not only in cases involving Latvia. The Latvian Constitutional Court has made a crucial contribution towards this recognition despite the fact that it did not present the most convincing reasons. In a landmark decision in 2000 the Latvian Constitutional Court made the following pronouncement:

The case law of the European Court of Human Rights, which in accordance with obligations that Latvia has undertaken (Article 4 of the *Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols No.1, 2, 4, 7 and 11*) is mandatory with respect to interpretation of the norms of the Convention. This case law has to be used also when interpreting the respective norms of the Constitution.<sup>69</sup>

As already noted, the object and purpose of declarations made in the Ratification Law was to recognise the competence of the ECtHR (and the Commission) to receive complaints against Latvia for a period of three years.<sup>70</sup> Its intention was not to recognise judgments delivered against other countries as legally binding.<sup>71</sup> However, the general character of the pronouncement, the fact the Latvian Constitutional Court in this judgment referred to a number of judgments delivered by the ECtHR against other countries and the further practice of the Latvian Constitutional Court indicated that it treated Article 4 as imposing a legal obligation to follow interpretations of the ECHR provided by the ECtHR in cases against any country. This statement was echoed by other courts and it essentially removed any discussion in Latvia on the binding character of ECtHR case law.

The Latvian courts have accepted the ECHR as a working instrument in their daily work. All three departments of the Supreme Court have explicitly indicated that the ECHR has to be applied by the courts. There are cases from all three-tier courts demonstrating that the ECHR is applied in both ways: as a source of law and as a tool for interpretation of domestic legal provisions, including the Constitution. In a number of cases the ECHR has decisively influenced the outcome of a case.

A recent study on the ECHR in the Supreme Court showed that there is no uniform methodology as to how the ECHR is approached. However, it demonstrated certain tendencies: when the ECHR is invoked mostly at the initiative of the parties,

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<sup>69</sup> Constitutional Court Judgment No. 2000-03-01, 30 August 2000, para. 5.

<sup>70</sup> See section 2.2.2 above.

<sup>71</sup> Article 4 of the Ratification Law reads:

"In accordance with Article 46 of the Convention the Republic of Latvia three years after depositing of the instrument of ratification and on the basis of mutual agreement among the High Contracting Parties recognises as compulsory *ipso facto* without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning interpretation and application of this Convention and its protocols (including Articles 1-4 of Protocol No.4 and Articles 1-5 of Protocol No.7)."

treated as a source of law and applied without reference to ECtHR case law, there is a risk of application of the ECHR on the level of its literal reading and, hence, of its violation. Such a situation has been predominant in criminal cases. To the contrary, when the ECHR is invoked mostly by judges themselves, used to interpret provisions of domestic law with regular references to ECtHR case law, the ECHR fulfils the role of a "textbook". This has been prevalent in administrative cases. In civil cases the situation has been mixed.<sup>72</sup>

The situation described in relation to criminal cases seems to be characteristic of countries of Central and Eastern Europe in general. Another recent study claims that references to the ECHR and ECtHR case law in particular in courts of the said countries are rare (the higher the court, the rarer the references) and knowledge among lawyers of the ECHR system is typically limited to the text of the ECHR and perhaps to a few of the most widely discussed cases against their own country.<sup>73</sup> This is understandable in view of the lack of initial education on the ECHR and the language barrier. There is a high risk of violating the ECHR if the Supreme Court, being fully aware that it has to apply the ECHR, does so on the level of a literal reading assuming that its contents are identical to domestic legal provisions. At least, in the case of Latvia there is a strong correlation between the least number of references to case-law by domestic judges and the highest number of violations established by the ECtHR in the area of criminal law.

Use of the ECHR as a "textbook" is an exception from the overall picture. Use of the ECHR with the aim of establishing the contents of and methodology for application of domestic legal provisions can be widely observed not only in the Administrative Cases Department of the Supreme Court (and administrative courts in general), but first of all in the Latvian Constitutional Court. These courts were established after the restoration of independence and the newly appointed judges had to apply domestic human rights provisions in an area that lacked practice and doctrine. Here the ECHR with its elaborated case law provided valuable guidance. From this perspective, it can be argued that the role and impact of the ECHR in these courts significantly exceeded what could have been expected from one of the binding international treaties.

This proves the existence of completely different dynamics in the judiciary towards application of the ECHR. The differences are illustrated also by diametrically opposite philosophies regarding the role of the judiciary in law-making with the ECHR as a point of reference. The Administrative Cases Department of the Supreme Court has resorted to the doctrine of the ECHR as a "living instrument" developed by the ECtHR and claimed that the same doctrine is applicable to the Constitution – with the aim of interpreting the provisions of the Constitution in accordance with present day

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<sup>72</sup> Martins Mits, *Eiropas Cilvēktiesību tiesas judikatūra Latvijas Republikas Augstākās tiesas nolēmumos* [Case Law of the European Court of Human Rights in Decisions of the Supreme Court of the Republic of Latvia], Supreme Court of the Republic of Latvia, December 2012, paras 1–7 of the Conclusions, available at: <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/citi/>.

<sup>73</sup> Frank Emmert, "Conclusions" in Leonard Hammer, Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, Eleven International Publisher: the Netherlands, 2012, p. 600.

needs (in relation to spelling a personal name).<sup>74</sup> The Civil Cases Department of the Supreme Court, in its turn, observed that the ECHR does not impose specific obligations, that the Constitution must be interpreted in accordance with the provisions of the Civil Law and concluded, with a reference to scholarly writings from 1937, that the courts do not have competence to interpret broadly the relevant concept without express authorisation by the Parliament (in relation to equal treatment of unregistered relationships and registered marriage).<sup>75</sup>

The above philosophies co-exist within one court and they can be assessed at various levels. It could be said that this demonstrates the different degrees of openness of judges towards application of the ECHR – in one case the ECHR serves as an argument for dynamic application of domestic law while in the other case the fact that the ECHR does not require something serves as an argument for restrictive application of domestic law. It could be said that they represent different schools of thought (or generations) based on different understandings of the fundamental principles of separation of powers, parliamentary sovereignty and judicial law-making. It could also be argued that they accurately reflect the fact that the current legal system in Latvia contains a mixture of elements from legal positivism as it developed within Socialist law and from Civil law with its comparatively flexible system of general principles of law and emphasis on interpretation of law according to its object and purpose. The latter started penetrating the Latvian legal system through the ECHR, legal doctrines of other European countries, primarily Germany, and EU law. The link has been established and it continuously “upgrades” the domestic legal system.

## 5. Remedies

Three violations of Article 13 have been established concerning Latvia. Two violations were related to conditions in the place of detention.<sup>76</sup> In both cases the government was unable to demonstrate that the existing remedies at the time – complaint to the police carrying out detention, to the prosecutor supervising detention in general, civil complaint to a court based directly on the Constitution – or any other possible legal avenue, would be an effective remedy. The third violation of Article 13 was established in conjunction with Article 8 in the context of restrictions placed on visits by family members of convicted persons.<sup>77</sup> No remedies were available in this situation.

All three cases related to a period before entry into force of the Administrative Procedure Law in February 2004. From then on, complaints about conditions in places of detention and restrictions on visits would fall within the competence of the administrative courts. The situation concerning conditions in

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<sup>74</sup> Supreme Court Judgment No. SKA-184/2012, 27 April 2012, para. 10.

<sup>75</sup> Supreme Court Judgment No. SKC-4/2012, 1 February 2012, paras 10-12.2.

<sup>76</sup> *Kadikis v. Latvia (No. 2)*, Application No. 62393/00, ECtHR Judgment, 4 May 2006 and *Bazjaks v. Latvia*, Application No. 71572/01, ECtHR Judgment, 19 October 2010.

<sup>77</sup> *Moisejevs v. Latvia*, Application No. 64846/01, ECtHR Judgment, 15 June 2006.

places of detention requires more detailed exploration since the law sets a high threshold for its applicability.

According to Article 89 of the Administrative Procedure Law, situations like poor prison conditions fall within the concept of “factual action” and hence are subject to the jurisdiction of the administrative courts.<sup>78</sup> It is important that the administrative courts interpret reasonable claims about poor prison conditions which indicate that the “minimum level of severity” in the language of Article 3 of the ECHR might be reached as a “substantial infringement of the rights of the private person” in the language of the Administrative Procedure Law. Otherwise such claims would be left without a remedy. It is beyond any doubt that violation of Article 3 is a “substantial infringement” of an individual’s rights and freedoms. The same reasoning should apply to a reasonable claim about violation of any article of the ECHR; however, it should not be limited exclusively to the ECHR.

Since their establishment the administrative courts have demonstrated that they apply a reasonably broad interpretation of the “substantial infringement” clause and the ECHR has played a very important role in this process. Moreover, it is this area where the Administrative Cases Department of the Supreme Court has raised the domestic standard.

In case *No.SKA-120/2012* the applicant complained about prison conditions and claimed compensation for non-pecuniary damages. The Prison Administration did not dispute that the conditions were “inhuman and degrading”, but denied the right to compensation. The Supreme Court noted that, irrespective of the economic situation in Latvia, compensation may not be substantially lower than that awarded by the ECtHR, otherwise the person would continue to be a “victim” in the context of Article 34 of the ECHR. The Supreme Court made the following statement:

(...) Irrespective of the constant case-law of the [ECtHR] regarding what conditions are considered as violating Article 3 of the [ECHR] (...), the constant case-law of the administrative courts as well as the conclusions of the Committee on Prevention of Torture (...), the state refrains from providing a comprehensive solution to repeatedly established problems. This observation was supported also in this case, when it transpired from statements by the representative of [the Prison Administration] that the general practice is to reject complaints about conditions in places of detention submitted by imprisoned persons. Therefore, the [Administrative Cases Department] takes the view that, in order that the state may prevent recurrence of similar situations as soon as possible, the preventive function acquires greater weight in determining the amount of compensation in Latvia.<sup>79</sup> (Author’s translation)

This case calls for several conclusions. First, the Supreme Court implicitly recognized the existence of a structural problem concerning conditions of detention and increased the amount of compensation to influence state policy on this matter. Second, this is one of the cases which illustrates the deep influence that the ECHR has had on establishing violations and provision of remedies in cases of poor prison

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<sup>78</sup> Article 89(1) of the Administrative Procedure Law reads:

“(...) An actual action is also action that, irrespective of the intent of an institution, creates such actual consequences which results or may result in substantial infringement of the rights of the private person.(...)”.

<sup>79</sup> Supreme Court Judgment No. SKA-120/2012, 11 May 2012, para. 13.

conditions. Third, this certainly is a positive development from the perspective of the ECHR system, since the domestic Supreme Court on its own initiative puts pressure on the government to solve a (structural) problem domestically.

Availability of effective remedies is one of the key elements for successful operation of the ECHR system. In the post-Socialist context this question acquires particular importance since the reality in the past was completely different from what was pronounced in laws – human rights were treated as declaratory pronouncements without providing enforcement mechanisms. Against this background it comes as a surprise that only three violations have been established under Article 13 involving Latvia. This can partially be explained by the working methods adopted by the ECtHR.

To support the above statement, problems related to effective investigation can be referred to. The case of *Jasinskis v. Latvia* under Article 2 and the seven violations under Article 3 illustrated the scale of the problem – lack of efficient investigation concerning actions of the police and prison officers.<sup>80</sup> These problems were brought to attention because the ECtHR has developed an obligation to carry out efficient investigation as a part of procedural obligations under Articles 2 and 3 and does not consider them within the framework of Article 13. Attention to the existence of efficient remedies is important from the point of view of the whole ECHR system.

## 6. Dissemination

### 6.1. Teaching

On the level of higher education the ECHR is certainly addressed. A review of the publicly available study programmes, however, shows that it is done as a part of the broader human rights context either of United Nations standards or EU law. For example, there is a bachelor's level course at the University of Latvia entitled "Basic Human Rights Law" where a quarter of the classes are devoted specifically to the ECHR. Besides, students at the Law Faculty regularly take part in international moot court competitions on the ECHR. A master's level course at the Riga Graduate School of Law that is fully devoted to the ECHR includes a moot court as a part of the course with regular participation of current or former judges (domestic or from the ECtHR) and is taught in English.

On the level of judicial training, a very important contribution is made by the Latvian Judicial Training Centre. It offers courses on a regular basis aiming to provide a wide range of training programmes – basic training, regular updates on ECtHR case law and specialised training on specific topics. The ECHR is approached in both ways: as an integrated element of the relevant topic of domestic law and as a separate topic. The training is done by the Representative of the Latvian Government, domestic judges, and academics. Importantly, many courses are open to external participants, including sworn advocates and prosecutors. There are also specialised courses offered only for particular target groups, *e.g.*, employees of the

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<sup>80</sup> See section 3.2.1 above.

land registry or orphans courts, notaries, sworn advocates, etc. which include topics on the ECHR. On the negative side, training is optional for judges and there is no law-based system that would provide additional motivation for judges to undergo training apart from the professional interest.

Special training seminars for particular target groups such as the Prison Administration and the Citizenship and Migration Department are carried out by the Representative of the Latvian Government. Training in the form of special courses or seminars organised by NGOs is another channel of dissemination of information that needs to be mentioned. The ECHR plays an important role in these activities.

## 6.2. Scholarship

Legal scholars have made a significant contribution to the overall openness of the Latvian legal system to international law and to the comparatively active use of the ECHR by legal practitioners. The foundations were laid at the time of ratification of the ECHR in 1997. Discussions on applicability and the place of international human rights treaties, drafting the national catalogue of human rights – Chapter 8 “Fundamental Human Rights” of the Constitution – and ratification of the ECHR took place at the same time. In a landmark article Egils Levits argued that the ECHR should not only serve as a source of claims by individuals against the public authorities and be used as a tool for clarifying the contents of domestic legal provisions, but, notably, also serve as a guideline for determining fundamental values of society.<sup>81</sup> The latter is a particularly interesting observation in a post-Socialist environment and, as will be seen, it is possible to identify such impact.

In the second half of the nineties intense academic activities were carried out in particular by the newly established Institute of Human Rights of the University of Latvia, Faculty of Law that involved organising seminars and conferences on the ECHR with Council of Europe experts, publishing the *Latvian Human Rights Quarterly*, including summaries of important judgments of the ECtHR in Latvian, and other publications.

Therefore, at the time when the ECHR was published, scholars were prepared to take the added value that the ECHR with its elaborated case law could offer in the post-Socialist context for the development of domestic legal doctrine. It can be said that scholarship in principle has accepted this and nowadays the ECHR and ECtHR case law have become a regular and natural point of reference in scholarly articles on legal issues where the ECHR serves as a tool for crystallising the contents as well as the methodology for application of domestic legal provisions. It is a strong authoritative argument.

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<sup>81</sup> Egils Levits, “Eiropas Cilvēktiesību konvencijas piemērošana Latvijas iestādēs un tiesās” [The Application of the European Convention of Human Rights by public authorities and courts in Latvia], in Ineta Ziemele (ed.), *Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process [Implementation of Human Rights in Latvia: Judicial and Administrative Procedure]*, Latvian Human Rights Institute: Riga, 1998, pp. 60-67.

### 6.3. Judiciary

No special summaries of judgments either in cases against Latvia or other member states are prepared for judges. A partial exception is the Supreme Court whose judges receive daily summaries of press reviews, including press releases about judgments of the ECtHR concerning Latvia, prepared by the Communication Department of the Supreme Court.

As discussed in section 2.3.3 above, the Supreme Court manages a database of judgments and selected decisions of the ECtHR involving Latvia as well as a limited number of rulings against other countries that are translated into Latvian by the Ministry of Foreign Affairs. This is an extremely valuable resource not only for judges, but for every stakeholder since this database is publicly accessible.

Regular meetings between the Latvian judge at the ECtHR and judges of the Constitutional Court and judges of the Supreme Court must be mentioned as well. Importantly, such meetings take place not only in Riga, but also in Strasbourg.

Growing interest about the ECHR can be observed from the part of the judiciary and, in particular, the Supreme Court over the few last years. The Supreme Court organised a conference on the role of the ECHR in the work of the supreme courts in Latvia, Lithuania Estonia and Poland, held lectures exclusively for judges of the Supreme Court, and commissioned the above mentioned study on the application of the ECHR by all three departments of the Supreme Court. In the annual conference of all Latvian judges convened by the Judicial Council in 2012, a separate panel was organized on the ECHR. Overall, it can be said that the judiciary and the Supreme Court in particular signalled an interest in entering into dialogue with various stakeholders: the ECtHR, the Representative of the Latvian Government, the media – which are traditionally critical towards domestic judges – and with academia.

### 6.4. Lawyering

In view of the fact that the NGO sector is still in the process of development, as indeed are all mechanisms of democracy, an efficient way of bringing changes in a particular policy area is still through outside channels, *e.g.*, through the ECtHR. Some important cases have been brought before the ECtHR by NGOs.

The Latvian Human Rights Centre specialising in asylum rights and non-discrimination brought the case of *Longa Yonkeu v. Latvia*<sup>82</sup> where violations on two separate accounts of Article 5(1) were established in the context of asylum proceedings. Deficiencies of legal regulation were identified with respect to detention of a person after the end of asylum proceedings in the court and concerning detention of a person with a view to deportation. A working group within the Ministry of Interior has been established to work on legislative amendments.

The Latvian Human Rights Committee specialising in minority rights has brought such cases as *Podkolzina v. Latvia* – violation of Article 3 of Protocol No. 1 concerning striking the applicant off the list of candidates for Parliamentary elections in a deficient procedure, *Andrejeva v. Latvia* – a violation of Article 1 of Protocol No. 1 concerning social benefits on the basis of nationality, *Ždanoka v. Latvia* – no

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<sup>82</sup> *Longa Yonkeu v. Latvia*, Application No. 57229/09, ECtHR Judgment, 15 November 2011.

violation of Article 3 of Protocol No. 1 concerning denial to stand as a candidate for Parliamentary elections on account of being a member of the Communist Party.<sup>83</sup>

As to sworn advocates, a large number of law firms in Latvia advertise, as part of their specialisation, submission of complaints to the ECtHR. Representation of applicants before the ECtHR is a mixture of sworn advocates, lawyers, NGO representatives and applicants themselves with the proportion of sworn advocates increasing.

## 7. The influence of case law and the democratisation process

### 7.1. Political pluralism

There are three cases where legislation aimed at safeguarding the foundations of recently restored democracy was put to the test. All three cases dealt with restrictions on passive voting rights under Article 3 of Protocol 1 to the ECHR. Apart from knowledge of the state language discussed in *Podkolzina v. Latvia*,<sup>84</sup> two other cases explored the validity of a prohibition to stand as a candidate in Parliamentary elections for former members of organisations whose object and purpose was not compatible with the idea of an independent Latvia.

In *Ždanoka v. Latvia*<sup>85</sup> a member of the Latvian Communist Party was disqualified for elections. The law excluded a category of persons – those who were actively involved in the Latvian Communist Party after 13 January 1991 – from standing as candidates for elections. The ECtHR found that the restriction was compatible with the principle of the rule of law and general objectives of the ECHR since it pursued the legitimate aims of protecting state independence, democratic order and national security. The law was sufficiently detailed and flexible allowing domestic courts to determine whether the criteria were met. While such a prohibition could scarcely be acceptable in a well-established political system, it was considered acceptable in the specific socio-political context of Latvia where it was needed to protect the new democratic order from the resurgence of the former authoritarian regime. The ECtHR also attached particular importance to the fact that the Latvian Parliament had periodically reviewed the prohibition and that the Latvian Constitutional Court had accepted the validity of the prohibition in 2000. The ECtHR established that the law and procedures available to the affected individuals could not be considered as arbitrary and it did not find a violation of Article 3 of Protocol No.1. This ruling of the Grand Chamber (13 votes to 4) overruled the Chamber decision that had found a violation.<sup>86</sup>

In *Ādamsons v. Latvia*<sup>87</sup> a person was not eligible for Parliamentary elections because before restoration of Latvian independence he had been an officer of the

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<sup>83</sup> On all three cases see section 7.1 below.

<sup>84</sup> See discussion of the case *Podkolzina v. Latvia* in section 3.2.4 above.

<sup>85</sup> *Ždanoka v. Latvia*, Application No. 58278/00, ECtHR Judgment, 16 March 2006.

<sup>86</sup> *Ždanoka v. Latvia*, Application No. 58278/00, ECtHR Judgment, 17 June 2004.

<sup>87</sup> *Ādamsons v. Latvia*, Application No. 3669/03, ECtHR Judgment, 24 June 2008.

Soviet border guard forces under KGB supervision. Electoral legislation disqualified from election officers of institutions related to public security or intelligence of the USSR. In view of Latvia's experience under Soviet rule, the ECtHR agreed that the prohibition to run for elections pursued a legitimate aim of protecting independence, democratic order, the institutional system and national security. However, the concept of "officer" in the law was found as very broad. For this reason, unlike in *Ždanoka v. Latvia*, it would have been necessary to take a case-by-case approach allowing an assessment of conduct by a particular person. Nothing in the conduct of the applicant suggested that he had opposed restoration of Latvian independence. To the contrary – he had taken high public posts, including membership of Parliament before the restriction was introduced. The legal basis for electoral disqualification was initially introduced for a period of 10 years and then prolonged in 2004 for another 10 years without providing reasons. The ECtHR concluded that the prohibition to stand as a candidate for Parliamentary elections in the applicant's case was arbitrary and amounted to a violation of Article 3 of Protocol No.1.

Both cases allow two conclusions. First, domestic law and procedures before courts must allow a sufficient degree of individualisation in each case in order for the proportionality of the restriction to be assessed with respect to each affected individual. The more broadly the affected category of persons is defined in the law, the more detailed individualisation must be possible before the courts. Second, there is a general obligation to periodically review the need for restrictions imposed with the aim of protecting the new democratic order.

A distinction must be made between both cases as well. While there has not been a general review carried out on the level of the Parliament concerning the continued need for restrictions for former members of the Latvian Communist Party, steps have been taken towards assessing the validity of restrictions concerning former KGB officers. Restrictions on former KGB officers taking various posts and enjoying certain rights have been laid down in almost 20 laws. The procedure for establishing cooperation with the KGB is determined in the Law on Maintenance, Use of Documents of the Former State Security Committee and on Establishing the Fact of Cooperation with the KGB (KGB Law) adopted in 1994. Apart from the procedure, Article 17 of the KGB Law provides that cooperation with the KGB may be established and used to the detriment of the rights of a person only for a period of 20 years. It was exactly this article that was amended in 2004 extending the period from the 10 years initially set to 20 years without, however, reviewing the need to maintain each restriction contained in various laws. The Latvian Constitutional Court confirmed the validity of the extension in 2005. The period was extended to 50 years in 2014.

The concept of KGB officers in electoral legislation has been narrowed down. Amendments were made to Article 5(5) of the Parliamentary Elections Law specifying that restrictions on standing as a candidate for elections do not apply to persons who have been employed in the planning, finance and maintenance structures of the KGB.<sup>88</sup> The procedure for establishing cooperation with the KGB, though, has remained intact and it does not require further individualisation in each particular

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<sup>88</sup> Grozījumi Saeimas vēlēšanu likumā [Amendments to the Parliamentary Elections Law], *Latvijas Vēstnesis [Official Gazette]*, No. 43, 18 March 2009.

case. This would anyway be hampered by the fact that only a very limited part of the KGB archives is at the disposal of the Latvian Government.

The lustration process and passive voting rights of persons who have been members of organisations whose aims are not reconcilable with an independent and democratic state are socially and politically sensitive matters. Without any doubt, the cases of *Ždanoka v. Latvia* through not establishing a violation and *Ādamsons v. Latvia* through narrowing down the range of affected persons, have influenced the categories of persons who by law are not eligible to stand for elections. The same holds true for the *Podkolzina* case – it has expressly acknowledged the legitimacy of state language requirements for candidates and these requirements were recently reintroduced. Of course, the above rulings have also made a significant contribution to internal public debates on the question of lustration.

## 7.2. Equality before the law

Only one case has involved Latvia where a violation of Article 14 (in conjunction with Article 1 of Protocol No.1) was established, but it concerned an important question of Latvian citizenship after restoration of state independence. The problem raised in *Andrejeva v. Latvia*<sup>89</sup> was that employment in the times of the USSR carried out in Latvia but in enterprises subject to non-Latvian jurisdiction (Moscow and Kiev), was not calculated towards retirement pension for persons who were not Latvian nationals. Ms. Andrejeva had a Latvian “non-citizen” passport – a special category of persons who were former citizens of the USSR, were permanently residing in Latvia as of 1 January 1991 and did not have citizenship of any other state. The ECtHR established that the applicant would qualify for a full pension except for the criterion of nationality, that there were no qualifying requirements for calculating pensions during the Soviet era and that it was Latvia that objectively could assume responsibility over the social security of Ms. Andrejeva since she had stable legal ties only with this country. Therefore, the ECtHR did not see a “reasonable relationship of proportionality” in not counting the relevant periods of employment for the applicant as would be in the case of a Latvian national and found a violation of Article 14 in conjunction with Article 1 of Protocol No.1 (and of Article 6 in relation to court proceedings before the Supreme Court in the absence of the applicant).

It has to be noted that Latvian judge Ineta Ziemele delivered a partly dissenting opinion,<sup>90</sup> pointing out a broader international law framework that the majority had allegedly failed to take into account. Namely, since Latvia was occupied and its territory was controlled by the USSR, in contravention of the rules of international law, then Latvia should not be held responsible for the amounts of pensions that were earned on behalf of the wrongdoing state and which stayed with that state, particularly in view of the fact that Latvia guaranteed a minimum pension to all persons. The ECtHR thus allegedly missed an opportunity to clarify application of the ECHR in the context of state continuity following illegal annexation.

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<sup>89</sup> *Andrejeva v. Latvia*, Application No. 55707/00, Judgment of the ECtHR, 18 February 2009.

<sup>90</sup> *Action Report of the Government of the Republic of Latvia on the execution of the judgment of the European Court of Human Rights in the case of Andrejeva v. Latvia*, Secretariat of the Committee of Ministers, DH-DD(2013)746, 2 July 2013, available at: <https://wcd.coe.int/ViewDoc.jsp?id=2083611>.

A bilateral agreement between the Latvia and the Russian Federation entered into force in 2011. According to this agreement, persons could request and obtain recalculation of their pensions in the country of their residence for periods of employment in the other country during the Soviet era and 8900 Latvian non-citizens had submitted such requests to the Latvian authorities.<sup>91</sup> This solution was in line with the state continuity doctrine strictly followed by the Latvian Government.

### 7.3. Due process

It can be said that the ECHR has made a strong impact on due process regulation in the area of criminal procedure law, though to a lesser extent in civil procedure law, and has pointed out the inadequacy of former administrative procedures before the entry into force of the Administrative Procedure Law in 2004.

The 65 violations established under Articles 5 and 6 of the ECHR<sup>92</sup> clearly demonstrate the inability of the criminal procedure legislation inherited from the Soviet era to provide sufficient due process guarantees. It took more than eight years from the moment of ratification of the ECHR until a new Criminal Procedure Law entered into force in 2005. The new law provides much more detailed regulation concerning issues revealed in the judgments against Latvia by the ECtHR – this has been, for example, confirmed by the ECtHR in the admissibility decision in *Dergacovs v. Latvia* where the complaint was dismissed due to non-exhaustion of the new remedies concerning extension of detention.<sup>93</sup> Thus, ECHR standards were extensively considered when the Criminal Procedure Law was drafted and the position of investigative judge introduced with the aim of securing observance of human rights standards during criminal procedure.

There was a need to introduce new procedures in all areas of law; thus a new Civil Procedure Law entered into force on 1 March 1999 and an Administrative Procedure Law on 1 February 2004. The Criminal Procedure Law entered into force as the last – on 1 November 2005. As in the area of administrative procedure, adoption of new criminal procedure legislation was recommended by the Ministry of Justice in the context of a compatibility review carried out prior to ratification of the ECHR.<sup>94</sup> Interestingly, not one recommendation was made concerning the substance of criminal procedures during the compatibility review. While this can be explained by the fact that the work on drafting the new Criminal Procedure Law had already started at the time of the compatibility review, for a long period adequate Criminal Procedure Law was neither in place nor were issues of concern even identified during the compatibility review. This points to a problem of due diligence on the part of the state to ensure compliance with its obligations under the ECHR.

With regard to the Administrative Procedure Law, it is interesting to observe that the ECHR made an impact there in the form of a methodological approach that has been developed by the ECtHR and transposed into domestic law. Article 66 of

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<sup>91</sup> *Ibid*, para. 21.

<sup>92</sup> See section 3.2.2 below.

<sup>93</sup> *Dergacovs v. Latvia*, Application No. 417/06, ECtHR Decision, 12 April 2011.

<sup>94</sup> Letter from the Minister of Justice to the Parliamentary Committee on Human Rights and Public Affairs No. 4-3, 7 May 1997, unpublished.

the Administrative Procedure Law deals with proportionality considerations.<sup>95</sup> The three elements described in Paragraphs 2-4 are very similar to the “traditional” three elements of the proportionality principle – suitability, necessity, proportionality *sensu stricto* – as developed, for example, in German legal doctrine.<sup>96</sup> The remaining element in Paragraph 1, however, has been explained with a reference to the ECHR. Egils Levits, one of the drafters of the Administrative Procedure Law and a former judge of the ECtHR, has pointed out that this element is called “social necessity”, which forms part of the assessment of “necessity in a democratic society” of restrictions on human rights and that it corresponds to the concept of “pressing social need” developed by the ECtHR.<sup>97</sup> This means that in the context of domestic administrative procedure, restrictions on human rights must be assessed in the light of detailed proportionality considerations and the concept of pressing social need. From the point of view of the ECHR system this is a positive development, since it mainstreams methodological approaches applied by domestic courts and the ECtHR and potentially may lower the risk of different outcomes on the domestic and international levels.

It is also interesting to note that the right to fair trial in domestic judicial proceedings is the most often alleged violation before the Supreme Court. A recent study showed that Article 6 of the ECHR is by far the most often article invoked before all three departments of the Supreme Court taken together – it was invoked in 74 decisions out of 170 examined (86% in the Criminal Cases Department), Article 3 – in 19 decisions, Article 13 and Article 34 (the right to complain to the ECtHR) – in 18 decisions.<sup>98</sup> These statistics link with a high number of violations of Article 6 established by the EC/tHR – 43.99% of all violations ever established against all member states (Article 13 – 8.11%).<sup>99</sup> This shows that, apart from “structural” problems such as length of proceedings, there is a persistent need to pay particular attention to fair trial aspects in the work of domestic judges, including in training

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<sup>95</sup> Article 66(1) of the Administrative Procedure Law reads:

“In considering the usefulness of the issue of, or the content of an administrative act (...), an institution shall take a decision regarding:

- 1) the necessity of the administrative act for the attaining of a legal (legitimate) aim;
- 2) the suitability of the administrative act for the attaining of the relevant aim;
- 3) the need for the administrative act, that is, whether it is possible to attain such aim by means which are less restrictive of the rights and legal interests of participants in the administrative proceeding; and
- 4) the conformity of the administrative act, comparing the infringement of the rights of a private person and the benefits for the public interest, as well as taking into account that substantial restriction of the rights of a private person may only be justified by a significant benefit to the public. (...)”

<sup>96</sup> See, e.g., Nicholas Emiliou, *The Principle of Proportionality in European Law*, Kluwer Law International: London, 1996, 26-37.

<sup>97</sup> Egils Levits, “Samērīguma princips publiskajās tiesībās” [The Principle of Proportionality in Public Law], *Likums un Tiesības [Law and Justice]*, No. 9, 2000, p. 268.

<sup>98</sup> Martins Mits, *Eiropas Cilvēktiesību tiesas judikatūra Latvijas Republikas Augstākās tiesas nolēmumos [Case Law of the European Court of Human Rights in Decisions of the Supreme Court of the Republic of Latvia]*, Supreme Court of the Republic of Latvia, December 2012, para. 11 of the Conclusions, available at: <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/citi/>.

<sup>99</sup> [http://www.echr.coe.int/Documents/Overview\\_19592012\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf), 5.

programmes. A “human rights friendly” interpretation of domestic procedural law could help to avoid, for example, such violations as denial of access to domestic courts as were established by the ECtHR in two civil cases.

#### 7.4. Civil rights

The influence of the ECHR on protection of civil rights can be characterised as indirect – finding its way mostly through domestic courts. On the one hand, judgments delivered against Latvia under Articles 10 and 8 showed deviations in favour of state power when the public interest had to be balanced against the particular interests of the individual. On the other hand, the ECHR filled in gaps in domestic legislation providing working tools for domestic judges in the area of freedom of expression and it gave firm guidance for judges in deciding on sensitive questions for the public at large in the area of freedom of association.

The three judgements delivered against Latvia under Article 10 are good examples of attaching disproportionately great weight to the interests of state power. The cases of *Vides Aizsardzības Klubs v. Latvia*<sup>100</sup> and *A/S Diena and Ozoliņš v. Latvia*<sup>101</sup> both dealt with balancing freedom of expression with protection of reputation of politicians. In the former case the domestic courts established that an environmental NGO had damaged the reputation of the chairperson of a municipality by not being able to produce sufficient evidence of its allegations of unlawful actions. In the latter case a newspaper was ordered to pay compensation to the Minister of Economics for unjustified accusations of abuse of power in the interests of a private company. The third case of *Nagla v. Latvia*<sup>102</sup> dealt with searches of a journalist’s home to secure evidence in a criminal investigation involving another person without relevant and sufficient reasons, so it concerned balancing the journalist’s freedom of expression (including protection of sources) against the interests of criminal investigation.

All three cases demonstrate that the domestic courts attributed greater weight to protecting the interests of politicians and investigation and did not properly consider the role and the weight of the press in a democratic state. It can be argued that the shift towards protecting the interests of the public sector (politicians and investigation) resembles the historical influence of over-protection of state power in the Soviet era and of the role of the individual as being subordinated to the regime.

The same holds true of those nine violations of Article 8 (correspondence and visits) concerning imprisoned persons, although from a different angle. These violations demonstrate that, once an individual is convicted or even just suspected of committing a crime, state power may impose restrictions without the need to enter into detailed analysis of their necessity. The more so, once the rules regulating conduct of imprisoned persons are violated; this may entail harsh consequences. For example, in the case of *Kornakovs v. Latvia*<sup>103</sup> the prison authority refused to send the applicant’s letter to the ECtHR and, when he did so with the help of another

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<sup>100</sup> *Vides Aizsardzības Klubs v. Latvia*, Application No. 57829/00, ECtHR Judgment, 27 May 2004.

<sup>101</sup> *Diena and Ozoliņš v. Latvia*, Application No. 16657/03, ECtHR Judgment, 12 July 2007.

<sup>102</sup> *Nagla v. Latvia*, Application No. 73469/10, ECtHR Judgment, 16 July 2013.

<sup>103</sup> *Kornakovs v. Latvia*, Application No. 61005/00, ECtHR Judgment, 15 June 2006.

person, he received a disciplinary sanction – a reprimand. Altogether six violations of Article 34 were established by the ECtHR entailing hindrance by the prison authorities of the right of individual petition.

The rulings of the ECtHR have brought the principle of proportionality into the sphere of restrictions imposed on imprisoned persons. In particular, this applies to legal rules on visits at the pre-trial stage and after conviction. The rules regulating checks on correspondence have been changed as well.

The ECHR has not changed legal rules dealing with protection of reputation; however, it has had and continues to have a strong influence on their interpretation and application. The Civil Law regulating protection of reputation, with few amendments, was re-introduced from 1937. It does not provide much guidance on the fundamental principles that have to be considered in order to strike a proper balance between protection of reputation and freedom of expression. This has forced judges to draw the relevant principles directly from ECtHR case law, although they usually base their decisions on the relevant provision of the domestic law. Interestingly, it was in the above mentioned dispute between Minister of Economics Strujēvičs and journalist Ozoliņš and the newspaper *Diena* where the Civil Cases Department of the Supreme Court made a precedent - setting pronouncement:

When examining the case anew, the court [of appeal] has to take into account that there is a significant difference between the terms “news” and “opinions”. It must be examined whether publication of the opinion in the press about issues of interest to the public could infringe upon the dignity and reputation of Laimonis Strujēvičs as a Minister of Economics (...) by exceeding the limits of the press, and whether it happened in compliance with the standards laid down in Article 10 of the Convention and with the interpretation and application of the said standards by the European Court of Human Rights.<sup>104</sup>

Thus, the lower courts were instructed to apply directly the principles as developed by the ECtHR under Article 10 of the ECHR. Despite the fact that in this particular dispute the domestic courts did not manage to balance the opposing interests properly, the domestic courts widely apply the ECHR and the principles developed by the ECtHR in the area of freedom of expression.

Another area where the ECHR has had a strong influence through domestic courts, even in the absence of a judgment finding a violation by Latvia, is freedom of assembly. In a landmark judgment in 2006 the Latvian Constitutional Court substantially revised domestic legislation on convening of events, declaring more than 10 provisions of the domestic law unconstitutional with most of them also contravening the ECHR (and ICCPR).<sup>105</sup> Since then, ECHR standards have played an important role in domestic courts. Traditionally, these would be cases where a municipality disallowed an event that is not favourably received by the majority, for example, a “pride parade” organised by the LGBT community<sup>106</sup> or to commemorate the “de-occupation” of Latvia from the Soviet army on a date coinciding with the

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<sup>104</sup> Supreme Court Judgment No. SKC-102, 13 February 2003.

<sup>105</sup> Constitutional Court Judgment No. 2006-03-0106, 23 November 2006.

<sup>106</sup> See, for example, Administrative District Court Judgment No. A3498-05/19, 22 July 2005.

“occupation” of Latvia by the Nazi army.<sup>107</sup> Despite having to act under strong public and sometimes political pressure, the courts have repealed bans on processions due to lack of relevant and sufficient reasons and the ECHR standards either expressly or impliedly have provided firm guidance in taking their decisions.

It could be argued that strong opposition to events organised by the LGBT community by various civic groups, individual religious leaders and politicians as well as the public at large is a manifestation of the majority’s unwillingness to accept the right of a particular minority to manifest its diversity – however disturbed the majority would feel. Apparently, acceptance of such fundamental rights requires longer experience of democracy. This is exactly in such situations where the value-forming role of the ECHR becomes evident.

A related question, but much more complicated to explore, is the potential influence of the ECHR on formation of values that strengthen the rule of law in the context of corrupt practices. According to a Transparency International survey, perceptions of the corruption level in Latvia by its residents ranked Latvia as No. 54 in the world in 2012, behind Latvia’s Baltic neighbours (Lithuania – No. 48 and Estonia – No. 32).<sup>108</sup> There have been developments indicating that this perception is not entirely without reason. For example, in 2007 alleged transcripts of tapped telephone conversations were published between a publicly known advocate and his colleagues, judges and other public figures that happened between 1998-2000. The authenticity of the transcripts was never proved, but they pointed to possible discussion by judges of ongoing cases outside the court, including with advocates, as well as the influence of politicians and businessmen on the judiciary.<sup>109</sup> In 2007 a prime minister had to resign following an unconvincing battle and dismissal of the head of the anti-corruption office. In 2011 the people of Latvia voted to dissolve the Parliament – the vote was initiated by the state president following refusal by the Parliament to allow searches in the home of a publicly known businessman and member of the Parliament.

No judgments have been delivered by the ECtHR against Latvia that would specifically point to corrupt practices. Nevertheless, the ECHR, as far as it applies, requires the existence of and adherence to strict procedural rules on the domestic level that prevents arbitrariness. Besides, judgments of the ECtHR crystallise fundamental principles, for example, what practices are not reconcilable with the impartiality and independence of a court that contribute to formation of fundamental values. Thus, the ECHR certainly contributes towards prevention of corrupt practices although its impact there is impossible to measure.

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<sup>107</sup> See, for example, Administrative District Court Judgment No. A06727-10/17, 29 June 2010.

<sup>108</sup> Transparency International, Corruption perception index 2102, available at: <http://www.transparency.org/cpi2012/results>.

<sup>109</sup> US Department of State, *2008 Human Rights Report: Latvia*, available at: <http://www.state.gov/j/drl/rls/hrrpt/2008/eur/119087.htm>.

## 8. The influence in return on the Court's case law

Several cases of importance for the whole ECHR system have been generated by Latvia. Two cases stand out among the others: *Kononovs v. Latvia* and the case of *Ždanoka v. Latvia*, discussed above.

In the case of *Kononovs v. Latvia* the applicant was convicted in 2004 by the Latvian Supreme Court of war crimes that he committed in 1944. He led a unit of Soviet partisans that executed 6 villagers and burned alive 3 other persons, including a pregnant woman, in their houses as a punishment measure. The applicant claimed violation of Article 7(1) of the ECHR arguing that his acts at the time of commission did not constitute an offence either under domestic or international law. The Chamber found a violation of Article 7, but the Grand Chamber, after the case was referred to it by the Latvian government, concluded that there had not been a violation (14 votes to 3).

Since the relevant provision of Latvian criminal law made a reference to international law, the analysis had to be carried out on the basis of international law. The ECtHR established, first, that there was a sufficiently clear legal basis in international law in 1944 for the war crimes of which the applicant was convicted. Even if the villagers were regarded as unarmed combatants, they were protected from wounding or killing under customary humanitarian law. Second, although domestic criminal law provisions were not applicable, the ECtHR did not find evidence that prosecution for war crimes would have become statute barred under international law. Third, the ECtHR established that the laws and customs of war were regulated in sufficient detail and that the applicant as a commander could have been expected to assess the risks of the relevant actions of the partisan unit and his individual and criminal responsibility. The court also noted that it was legitimate for a state after a change of regime to bring criminal proceedings against persons who had committed crimes during the former regime subject to the principle of the rule of law and other core principles on which the ECHR system is founded. In sum, the applicant's conviction was based on international law in force in 1944 and the crimes were defined with sufficient precision and foreseeability by humanitarian law.

In its ruling the ECtHR, first, clarified what actions constituted crimes under international law during WWII and that they were not statute barred. This case builds on the principle of progressive development of criminal law through judicial law-making in the context of Article 7 as confirmed by the cases *Korbely v. Hungary*<sup>110</sup> and *Streletz, Kessler and Krenz v. Germany*.<sup>111</sup>

Second, this judgment further confirmed the principle developed in the case *Streletz, Kessler and Krenz v. Germany* that it is legitimate for a successor state to bring criminal charges against persons who had committed crimes under a former regime, but only in the light of the principles of the rule of law and those core

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<sup>110</sup> *Korbely v. Hungary*, Application No. 9174/02, ECtHR Judgment, 19 September 2009.

<sup>111</sup> *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97, 44801/98, ECtHR Judgment, 22 March 2001.

principles on which the ECHR system is built. It was also clarified that the situation in Latvia allowed for application of this principle.

Third, this judgment underlined that criminal responsibility extended to acts that constitute war crimes under international law irrespective of which side the person fought on. This principle has not been accepted with ease, in particular when crimes have been committed in the broader context of the fight against such a global evil as the Nazi regime.<sup>112</sup> Overall, this case is of high relevance for countries whose judiciaries are dealing with similar crimes committed a long time ago.

As discussed above, the case of *Ždanoka v. Latvia* concerned restrictions on passive voting rights for members of the Communist Party – an organisation that acted against restoration of Latvia’s independence.<sup>113</sup> The Grand Chamber did not find a violation of Article 3 of Protocol No.1. First, this case is highly relevant from the point of view of the wide margin of expression that the government enjoyed in setting restrictions on passive voting rights against the background of the country’s “political evolution”. Second, since the restriction was aimed at protecting the independence of the state, this case contributes to shaping the concept of a “democracy capable of defending itself” introduced in the case of *Vogt v. Germany*.<sup>114</sup> Third, notwithstanding the considerably wide margin of appreciation, an obligation on the part of the government was pointed out to keep the restriction under periodic review. Once again, these principles were of high relevance for other countries with a similar level of maturity of their democracy.

There are other cases to mention – *Podkolzina v. Latvia* in relation to the wide margin of appreciation to impose language restrictions on candidates for Parliamentary elections on the one hand, and provision of appropriate procedures against arbitrary application of those restrictions on the other hand; *Sisojeva v. Latvia* – concerning loss of victim status if the risk of deportation has ceased to exist without, however, a right to any specific legal status under domestic law; *X v. Latvia* – with regard to the need to consider the best interests of the child in the context of transborder “child abduction”; *J.L. v. Latvia*<sup>115</sup> – in relation to particular obligations to protect prisoners who have co-operated with the police and are exposed to violence in prisons. It is interesting to note that all these cases, except the last two, concern Latvia’s historical aspects. As noted by Inga Reine, former Representative of the Latvian Government: “Practically every case that goes to the Court for adjudication features either historical issues, or political issues, or the issue of state continuity. These cases are complex for the Court; it cannot copy and paste from its previous judgments.”<sup>116</sup>

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<sup>112</sup> See Concurring Opinion of Judge Myjer to the Chamber judgment in *Kononovs v. Latvia*.

<sup>113</sup> See section 7.1 above.

<sup>114</sup> *Vogt v. Germany*, Application No. 17851/91, ECtHR Judgment, 26 September 1995.

<sup>115</sup> *J.L. v. Latvia*, Application No. 23893/06, ECtHR Judgment, 17 April 2012.

<sup>116</sup> Interview with Inga Reine by Nils Muižnieks on 2 August 2009, cited from Nils Muižnieks, “Latvian-Russian Memory Battles at the European Court of Human Rights”, in Nils Muižnieks (ed.), *The Geopolitics of History in Latvian-Russian Relations*, Academic Press of the University of Latvia, 2011, p. 238.

## 9. Conclusions

A number of factors existed at the time of ratification of the ECHR in 1997 that created a legal environment for the potentially strong influence of the ECHR in Latvia. They included, but were not limited to, re-introduction of the Constitution of 1922, ambiguity of the constitutional character of the temporary human rights catalogue adopted in 1991, non-existence of proper domestic constitutional doctrines, and active involvement of legal scholars advocating direct application of international human rights treaties. As a result, the ECHR has developed into a highly authoritative and respected argument in terms of its effects at the level of legislation or in the work of the judiciary. Besides, the fundamental principles it embodies are enlightening for all stakeholders, including those who draft laws and apply them, as well as the beneficiary – the public at large.

The influence of the ECHR on the legislative level can be objectively identified – the examples discussed included the Criminal Procedure Law, the concept of “pressing social need” in the Administrative Procedure Law, amendments to the Parliamentary Elections Law following *Ādamsons v. Latvia* and amendments to the Civil Law as a reaction to a judgment against another member state – *Shtukaturov v. Russia*. In principle, tools are available both on the levels of the Parliament and the government to monitor compliance of draft laws with the ECHR. However, there is also a risk of their narrow application and of not addressing questions that merit closer analysis. Apart from informal consultations established between the ministries involved, it could be advisable to introduce a mechanism on the governmental level with the aim of regular impact assessment of rulings of the ECtHR against Latvia and other countries.

The influence on the level of judiciary is strong, but also mixed at the same time. The Constitutional Court has extensively used the ECHR to clarify the contents and methodology for application of human rights provisions and the domestic provisions were then applied in the same way. The ECHR stood out by far from the ICCPR and other international treaties. It can be argued that the Constitutional Court treated the ECHR as equally important to the Constitution.

The ECHR has been extensively used as a tool for interpretation by the Administrative Cases Department of the Supreme Court. Both courts (the Constitutional Court and administrative courts) were introduced after the restoration of independence. It can be said that they saw and took advantage of the added value that the ECHR and its elaborated case law could offer in the post-Socialist context. Hence, the ECHR played the role of a “textbook”. This was a specific and certainly positive development that allowed very fast learning. Moreover, all courts accepted that they could rely on interpretation of the ECHR as provided by the ECtHR in cases against any member state, not only Latvia. Once again, this contributed to swift development of domestic legal doctrine and must be positively viewed from the ECHR system since it minimises the risk of domestic and ECtHR case law separating into different directions. The experience of a positively open approach by domestic judges to developing domestic legal doctrine in line with ECtHR case law is something that Latvia can offer to Western member states.

As a negative consequence of the overall acceptance of the obligation to apply the ECHR, its application on the level of literal reading must be mentioned. For example, the Criminal Law Department of the Supreme Court applied the ECHR almost exclusively as a source of law. On the one hand, it demonstrated that judges felt obliged to address allegations about violation of the ECHR, as a rule, made by applicants. On the other hand, the lack of references to case law and treatment of the ECHR provisions together with domestic legal provisions suggests that judges may have assumed that the contents of the ECHR provisions are identical to domestic legal provisions. Unless verified, such an assumption increases the risk of a violation of the ECHR by the Supreme Court despite its express pronouncement to the contrary.

The ECHR has been used as an argument either to foster or hamper judicial law making by different departments of the Supreme Court. This is a symbolic manifestation of the mixture of legal traditions that are present in Latvia – dominance of the letter of law characteristic of legal positivism as was prevalent under Socialist Law and emphasis on the spirit of the law in accordance with the traditions of modern Civil Law countries. The latter started entering Latvian legal space through international human rights and ECtHR case law in particular. The law of the European Union came later in time.

The question of the ECHR as a value guideline can be approached from several angles. If judgments delivered by the ECtHR against Latvia are examined from the point of view of what serious deviations from the fundamental values of the ECHR system they attest to, the following problems have to be pointed out: degrading and inhuman conditions in places of detention (Article 3), a general lack of efficient investigation (Articles 2 and 3), due procedures to prevent arbitrary placing and keeping persons of unsound mind in special institutions (Article 5(1) and (4)), massive violations of due process guarantees in criminal matters (Articles 5 and 6), disproportionate restrictions on correspondence, in particular punishments for correspondence with the ECtHR (Articles 8 and 34), misbalanced protection of politicians and disregard of the public watchdog role (Article 10). All these problems except in relation to persons of unsound mind and politicians are related to the criminal law sphere and can be explained by the attitudes prevailing in the Soviet era that persons who have committed crimes do not deserve equal protection. Similarly, indiscriminate placing of persons in special care institutions and over-protection of representatives of state power may be explained as consequences of the need to protect the regime in the Socialist era.

A different approach to the question of the value guideline would be to explore which judgments have caused massive dissatisfaction among the public. Certainly the judgment in the case of *Lavents v. Latvia* where thousands of residents had lost their savings in a bank that was led to bankruptcy – unwillingness to accept a “victory” by such an applicant in the ECtHR could be at least partially explained by the above reasons. The case of *Bazjaks v. Latvia* where public outcry was caused by compensation awarded to a person whose detention amounted to inhuman and degrading treatment and who was imprisoned because he had raped a 15 year old girl raises a fundamental question of disrespect towards human dignity. It is precisely this concept on which protection against ill-treatment is based. What is alarming is

that the general public sentiment is shared by many legal practitioners. Another example is strong opposition to holding peaceful “pride parades” by LGBT organisations. This primarily demonstrates that the majority is not ready to let minorities manifest their difference. Although no judgments involve Latvia on this point, it is exactly the ECHR that not only provides guidance as to the fundamental principles applicable in such situations, but also serves as a bastion for domestic judges on whose authority their decisions are based in favour of freedom of assembly. The same holds true for domestic judges awarding compensation to persons detained in prison conditions falling below the standards of Article 3.

If looking at the overall influence of judgments delivered against Latvia, the ECHR has certainly contributed to democratisation of the country in areas of due process in criminal matters, acknowledging the role of the media in a democracy and partially regarding the lustration process. Violations only under Articles 5 and 6 account for half of the total number of violations against Latvia (65 out of 110) and as a result a new Criminal Procedure Law adequately addressing the established problems of detention on remand (the need, the reasoning, the length and control), length of proceedings, control of correspondence has been adopted and investigative judges introduced with a mandate of supervising compliance with human rights guarantees. In the area of balancing protection of private life with freedom of expression the influence of the ECHR has manifested itself through massive application of the principles developed by the ECtHR by domestic judges to fill in gaps in the Civil Law. In the lustration context the influence is twofold: the legitimacy of restrictions in the context of passive voting rights has been confirmed (*Ždanoka v. Latvia*) and this has helped to strengthen institutions of high importance for democracy. On the other hand, a message has been sent that the restrictions must be proportionate to a sufficient degree (*Ādamsons v. Latvia*) and may lose legitimacy after lapse of time.

The ECHR is limited in scope and there are important questions related to democratisation that are not directly covered by it, for example, corruption and maturity of public administration. There are also questions that are directly covered, for example, favourable treatment of particular individuals by judges that falls within the scope of independence and impartiality of the court under Article 6, but have never resulted in legal proceedings either before the domestic courts or the ECtHR. It must be observed that Latvia is no exception in the overall fallback of Eastern and Central European countries in the mid-2000s evidencing a decline of trust in public institutions, fair politicians and the benefits of democracy as opposed to a firm belief in liberal values that dominated during the transition from Socialism to democracy.<sup>117</sup> Although it is impossible to measure to what extent the ECHR has contributed to overcoming corrupt practices and the crisis of trust, it is possible to think of the potential influence in two ways: as imposing an obligation to strictly follow procedural rules under domestic law to prevent arbitrariness and through manifesting the values on which the ECHR is built. In the latter case the effects could

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<sup>117</sup> Ivan Krastev, “The Strange Death of Liberal Consensus”, *Journal of Democracy*, October 2007, Vol. 18, pp. 56-57.

be reasonably expected over the longer term, which further links to the question of education.

The Latvian cases have made the ECtHR pay particular attention to historical aspects and consider them in the broader context of international law. The case of *Ždanoka v. Latvia* has set a standard of a very wide margin of appreciation on passive voting rights against the background of a country's political evolution and the need to preserve democracy. The case of *Kononovs v. Latvia* has raised a question of justice and responsibility for international crimes committed during WWII by the victors. These are not easy questions for the ECtHR and as has been pointed out with respect to the Latvian cases by Nils Muižnieks, the current Commissioner for Human Rights of the Council of Europe: "the Court has demonstrated a certain inconsistency in the degree to which it has judged itself or the Government as being better placed to evaluate restrictions imposed in the name of national security based on lingering threats from former Communists, military personnel or KGB officials."<sup>118</sup>

Overall, the influence of the ECHR in Latvia exceeds far beyond the immediate effects of judgments delivered against the country. The ECHR has made a positive contribution towards the democratisation of Latvia in various different forms, such as being a checklist in the process of legislative drafting, a text-book of applicable law by judges, an advocacy tool by NGOs. There is room for further expansion. Apart from the suggested monitoring mechanism on the level of the government, legal summaries about relevant rulings of the ECtHR for different groups of legal practitioners could help in the area of dissemination. Elaborating the system of motivation in the context of judicial training could be another path worth exploring. Increased focus on the availability of remedies both on the domestic level and from the side of the ECtHR could also contribute to enhanced compliance with the ECHR on a domestic level.

Apart from that, perhaps the most important contribution that the ECHR has made towards democratisation is through shaping the values of society. In order to understand the outcome of a ruling from the ECtHR, it is necessary to understand the principles on which the ruling is based. It is this aspect that is sometimes neglected, but it has to be properly addressed on all levels of ECHR application and particularly through education.

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<sup>118</sup> Nils Muižnieks, "Latvian-Russian Memory Battles at the European Court of Human Rights", in Nils Muižnieks (ed.), *The Geopolitics of History in Latvian-Russian Relations*, Academic Press of the University of Latvia, 2011, pp. 237-238.