

# Konrad Hesse's *praktische Konkordanz* as a Method of Balancing Constitutional Rights in the Lithuanian and Latvian Legal Systems

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## Konrad Hesse's *praktische Konkordanz* as a Method of Balancing Constitutional Rights in the Lithuanian and Latvian Legal Systems

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This article addresses the question of whether Konrad Hesse's method for resolving collisions of constitutional rights, named *practical concordance*, can be applicable in the Lithuanian and Latvian legal systems. The first part of the article introduces and compares two constitutional right conflict-resolving methods – the principle of practical concordance and the *ad hoc* balancing method. Further, the article analyses whether the principle of practical concordance is recognised and applied in the Lithuanian and Latvian legal systems. The article concludes with the thesis that the principle of practical concordance can be applied in the Lithuanian and Latvian legal systems, and that both legal systems have a similar and comparable understanding of the application of the principle of practical concordance.

**Keywords:** Konrad Hesse, principle of practical concordance, *ad hoc* balancing method, conflicting constitutional rights.

## Konrado Hesės *praktische Konkordanz* kaip metodas konstitucinių teisių pusiausvyrai užtikrinti Lietuvos ir Latvijos teisinėse sistemose

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Šiame straipsnyje nagrinėjama, ar Konrado Hesės (Konrad Hesse) konstitucinių teisių kolizijų sprendimo metodas, vadinamas praktine konkordancija (vok. *praktische Konkordanz*), gali būti naudojamas Lietuvos ir Latvijos teisinėse sistemose. Pirmoje straipsnio dalyje pristatomi ir lyginami du metodai, galintys padėti spręsti konstitucinių teisių konfliktus – praktinės konkordancijos principas ir *ad hoc* pusiausvyros metodas. Kitoje dalyje analizuojama, ar praktinės konkordancijos principas pripažįstamas ir juo remiamasi Lietuvos ir Latvijos teisinėse sistemose. Straipsnis baigiamas teze, kad praktinės konkordancijos principas gali būti taikomas abiejų šalių teisinėse sistemose, be to, pats jo taikymas suprantamas panašiai. **Pagrindiniai žodžiai:** Konradas Hesė, praktinės konkordancijos principas, *ad hoc* pusiausvyros metodas, konfliktuojančios konstitucinės teisės.

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## Introduction

In Europe, there is an observed correlation between legal pluralism and value pluralism since national legal systems most often express the values of their society (Taekema, 2021, p. 405–423). Values in a democratic state are protected by constitutional rights. In certain situations, these values may clash, and thus constitutional law has to deal with conflicts of constitutional rights and their resolution (Flynn, 2018, p. 136).

In the legal doctrine, a question is often asked whether it is possible to develop a model that would help legislators and judges to deal with conflicting rights. Professor Eva Brems believes that Konrad Hesse's principle of *praktische Konkordanz* (further – *practical concordance*), which has been developed in the German legal system, can be a favourable approach because it avoids giving priority to one conflicting right over the other. However, in her view, there is need for further research to determine whether any other legal systems have developed similar methods of constitutional right conflict resolution (Brems, 2008, p. 4–5).

The above-mentioned point describes the aim of this article. Namely, we wonder whether Konrad Hesse's principle of practical concordance can be applicable in the Lithuanian and Latvian legal systems. Because of the similarities and a shared tradition between the Lithuanian and Latvian Constitutional Courts (and both legal systems in general), the case law of both constitutional courts and the legal doctrine allows for a comparison in our pursuit to find solutions to common questions in both legal systems (Pleps, 2012, p. 14; Pleps, 2014, p. 6–7). Therefore, the task of this research, firstly, is to have a brief insight into the principle of practical concordance and distinguish it from the different yet frequently used collision-resolving method – the *ad hoc* balancing method. Further follows the analysis of the principle of practical concordance in the Lithuanian and Latvian legal systems with the objective to see how the principle of practical concordance is reflected in the Latvian and Lithuanian legal doctrines and whether the Constitutional Courts of Latvia and Lithuania have incorporated the principle of practical concordance in their judgments.

To fulfil the task of this research, comparative and analytical scientific methods will be used to analyse the content of Konrad Hesse's practical concordance and to compare it, firstly, with the *ad hoc* balancing method and, secondly, with the findings of Lithuanian and Latvian legal theory and rulings of the Lithuanian and Latvian Constitutional Courts. The systematic scientific method, however, will be used to see if there are similarities between the Lithuanian and Latvian legal systems in relation to the principle of practical concordance.

## 1. Konrad Hesse's Concept of Practical Concordance and the *ad hoc* Balancing Method

Despite the fact that the legal theory tends to distinguish several different terms for methods of balancing rights (Gerards, 2023, p. 350), there can be distinguished two main methods of balancing constitutional rights. This distinction is based on nothing more than answering the question of whether several or only one of the conflicting constitutional rights need to be applied in the given case. The former method is Konrad Hesse's principle of practical concordance; however, the latter is called the *ad hoc* balancing method. Both methods will be explained below.

Many consider Konrad Hesse as the 'founding father' of the concept of practical concordance (Marauhn and Ruppel, 2008, p. 273–274). However, this concept can be dated back to the Swiss constitutional law scholar Richard Bäumlin (Fischer-Lescano, 2008, p. 169–171; Schladebach, 2014,

p. 267–268). It was Richard Bäuml who first pointed out that individual constitutional values are not mutually consistent, and therefore, continuous concretisation of the constitution is necessary, which ultimately leads to the practical concordance of these constitutional values (Fischer-Lescano, 2008, p. 170; Schladebach, 2014, p. 267–268). Nevertheless, Konrad Hesse can be considered as the founder of the principle of practical concordance within the German legal theory. Notably, it is the German legal theory that has further influenced and shaped the modern European legal thought. For example, the German legal theory has paved the way for a number of European constitutional courts, as well as the European Court of Justice and the European Court of Human rights through developing a German-style proportionality approach on balancing conflicting rights (Stone Sweet and Mathews, 2008, p. 147; Barak, 2012, p. 183–184).

Konrad Hesse defined the principle of practical concordance as follows: “Rights and interests guaranteed by the Constitution must be related to one another in such a way that each of them can be put into effect. In the case of conflicting rights, none of them must be implemented at the expense of the other, neither by hastily balancing the underlying values nor on the basis of abstract considerations”<sup>1</sup> (Marauhn and Ruppel, 2008, p. 279–280; Hesse, 1999, p. 28).

This means that, in accordance with the provided definition, practical concordance is a legal method of balancing constitutional provisions (Marauhn and Ruppel, 2008, p. 281). In the case of conflicting competing rights, according to practical concordance, none of the conflicting provisions shall be preferred, but rather, all conflicting interests are to be given equal protection and its maximum effect (Robertson, 2010, p. 331).

We get a clearer view on understanding the principle of practical concordance if we contrast it with another collision-resolving method that is called the *ad hoc* balancing method, also known as the weighing and balancing method. The *ad hoc* balancing method supposes a case-by-case weighing of the competing interests, in the end determining which interest deserves to prevail in a given case (Deutsch, 2006, p. 485). When determining which constitutional right has more weight, i.e., which prevails in each case, specific social, economic, political and other relevant conditions must be considered (Rezevska, 2015, p. 112).

This presents a crucial difference from the principle of practical concordance since, with the *ad hoc* balancing method, in the process of balancing the constitutional rights, preference will be given to the right that carries more weight in the context of the circumstances of the case at hand (De Schutter and Tulkens, 2008, p. 203–204). The principle of the practical concordance, on the other hand, excludes such situations, because one constitutional value may not be realized at the expense of a competing constitutional value (Kommers, 2012, p. 68).

It is possible to look critically at both approaches. For example, the *ad hoc* balancing method could be seen as uncertain, since its application makes the outcome of a case unpredictable and even dependent on the judge’s choice. In a legal system in which the two conflicting constitutional rights are equal, it is unpredictable which of the conflicting rights the judge will prefer. Moreover, if both constitutional rights are equal, it would be arbitrary to say which of the conflicting constitutional rights in given case will achieve justice, and which must be dismissed (Lock, 2019, p. 2253; Kelsen, 2016, p. 14–15).

On the other hand, the principle of practical concordance is also open to criticism. The phrase in a court decision that the balancing exercise should take into account as far as possible all rights in conflict, and that none of them must be implemented at the expense of the other, could be seen as

<sup>1</sup> For the purposes of this article, the author quotes the English translation of Konrad Hesse’s definition of the principle of practical concordance, translated from German into English by Thilo Marauhn and Nadine Ruppel.

illusory and declaratory (Schladebach, 2014, p. 274). Critics of the principle of practical concordance might argue that the judge must make a choice and take a result-oriented decision on the case at hand. It could, therefore, be argued that it would be inevitable that a choice will be made in favour for one of the conflicting constitutional rights in the given case.

It can be said that the achievement of the one balancing method is the inability of the other, and *vice versa*. Hence, when looking at the two mentioned methods, it is not a question of whether one collision-resolving method is better than the other. It is also not a question of which collision-resolving method is more valuable. Rather, it is a question of which collision-resolving method characterises and represents the legal system as a whole.<sup>2</sup> As described by Aharon Barak, “<...> [B]alancing is a way of thinking; it is a conceptual mentality; it is a process that leads to decision” (Barak, 2006, p. 173). Therefore, by looking merely at the ‘way of thinking’ of a given legal system, i.e., its normative order, practice and legal doctrine, it is possible to ascertain which balancing method fits more organically into the legal system. Consequently, the question of whether the principle of practical concordance fits and can be applied in the Lithuanian and Latvian legal systems must be examined.

## 2. Practical Concordance in the Lithuanian and Latvian Legal Systems

### 2.1. Practical concordance in the Lithuanian legal system

The author puts forward the thesis that, in the Lithuanian legal system, the existence of the principle of practical concordance derives primarily from the Constitution of the Republic of Lithuania, namely, from its Article 28 and Article 6.

Article 28 of the Constitution of the Republic of Lithuania states that, while implementing their rights and exercising their freedoms, everyone must observe the Constitution and laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people (Constitution of the Republic of Lithuania, 1992). As stated in the Lithuanian legal doctrine regarding Article 28 of the Constitution of the Republic of Lithuania, a legitimate human rights restriction is possible in a case when it is necessary to protect the rights of another person, i.e., exercising one’s rights without restricting the rights of another person (Vaišvila, 2009, p. 182). Therefore, Article 28 of the Constitution of the Republic of Lithuania clearly reflects the principle of practical concordance – not to give automatic priority to one constitutional right, while bearing in mind that these basic guarantees will also need to be reconciled with other constitutional rights.

Additionally, the principle of practical concordance derives not only from Article 28 of the Constitution of the Republic of Lithuania, but also from the first sentence of Article 6 of the Constitution of the Republic of Lithuania, which states that the Constitution shall be an integral and a directly applicable act (Constitution of the Republic of Lithuania, 1992). Article 6 of the Constitution of the Republic of Lithuania is related to the need to apply the systematic method of interpretation of the Constitution. In the Lithuanian legal system, it is the systematic method of interpretation which helps to reveal conflicts (and contradictions) of legal norms (Vaišvila, 2009, p. 376–377).

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<sup>2</sup> There is also a possibility that the two collision-resolving methods are not mutually exclusive, but rather coherent. For example, it is possible to propose a comprehensive and universal balancing formula that is also consistent with the principle of practical concordance and with the *ad hoc* balancing method (Alexy, 2002, p. 50–107). In addition, it is also possible to apply both collision-resolving methods sequentially, i.e., recognise that both collision-resolving methods exist in the given legal system, however, the application of one or the other collision-resolving method depends on the facts of the particular case and the nature of the conflicting constitutional rights in question (Šuspāns, 2024, p. 63–66).

Gediminas Mesonis, in describing the systematic method of interpretation, has recognised that the legal norms in the Constitution of the Republic of Lithuania are equal. They formulate an interpretative task – not to deny any of the values protected by them. He states that the integrity of the Constitution obliges the interpreter not to violate equally valuable legal norms when revealing the content of the specific legal norm. Thus, it is necessary to establish a balance of values that would not distort the content of any value protected by any legal norm (Mesonis, 2010, p. 50–51).

It is of importance to mention that a reference to Professor Donald P. Kommers, who explains Konrad Hesse's principle of practical concordance in the German legal system, has played a notable role in the early days of introducing the concept of practical concordance to the Lithuanian legal system. As it will be examined later, the same applies to the Latvian legal system. Mesonis, directly referring to Professor Donald P. Kommers, makes a link to the systematic method of interpretation of the Constitution of the Republic of Lithuania and the need to apply the principle of practical concordance. Referring to this, Mesonis points out that the Constitutional Court has a constitutional duty, when interpreting a single legal norm, to reveal its content in such a way that other provisions are not harmed, because they are just as significant as any other legal norm (Mesonis, 2010, p. 54).

The clear application of the principle of practical concordance is reflected not only in the Lithuanian legal doctrine, but also in Judgment No. 7/04-8/04 of the Constitutional Court of the Republic of Lithuania, which assessed the prohibition of access to information classified as a State secret.

The Constitutional Court of the Republic of Lithuania stated that, on the one hand, the necessity to protect information constituting a State secret (or other classified information) is a public interest but, on the other hand, it is necessary to ensure the right of a person to judicial protection. The Court stated that it is necessary to establish a legal regulation that would maintain a balance between two constitutional values and to establish such a legal regulation whereby a court could administer justice without denying any of these values (Ruling of the Constitutional Court of the Republic of Lithuania of 15 May 2007. Case No. 7/04-8/04, para. 3.11).

In this case, the Constitutional Court of the Republic of Lithuania recognised that, contrary to the *ad hoc* balancing method, whereby the judge has to give priority to one of the constitutional rights, competing constitutional rights must respect the inherent element of the principle of practical concordance.

This also implies a second important aspect in the application of the principle of practical concordance. The Constitutional Court of the Republic of Lithuania pointed out an obligation to the legislature to reconcile different interests and to ensure the balance of constitutional rights. Similar findings have been reflected in the legal doctrine stating, for instance, that the legislator has a realistic opportunity to develop a complete legal framework, within which, all legal interests are genuinely afforded their maximum protection (Brems, 2008, p. 3). Therefore, not only the judiciary, but also the legislator has to comply with the principle of practical concordance. For this reason, the task of the Constitutional Court, in fact, is not to state exactly how the principle of practical concordance should be achieved in a given case, but, in reality, to determine whether the legislator has fulfilled its obligation to respect the principle of practical concordance.

In conclusion, the principle of practical concordance is integrated into the Lithuanian legal system. It is derived from Article 28 and Article 6 of the Constitution of the Republic of Lithuania. However, the applicability of the principle of practical concordance is also recognised in the case law of the Constitutional Court of the Republic of Lithuania.

## 2.2. Practical concordance in Latvian legal system

What concerns the place of the principle of practical concordance in the Latvian legal system, only recent legal studies have put forward the thesis that the principle of practical concordance in the Latvian legal system must be applied as a legal method, dealing with conflicts of general principles of law (Šuspāns, 2024, p. 51–66). Narrowly speaking, the principle of practical concordance in the Latvian legal system can be applied to resolve conflicts between constitutional rights.

It was Jānis Pleps who pioneered the understanding of the principle of practical concordance in the Latvian legal system. Similarly to Mesonis, Pleps also refers to Professor Donald P. Kommers, by stating that the principle of practical concordance is applied in cases where the implementation of two constitutionally protected values is to be decided. He notes that this principle requires optimisation of the conflicting values. Therefore, the judge in each case must harmonise them in order to give the necessary effect. By this, Pleps believes that the judge cannot choose only one constitutionally protected value in a conflict (Pleps, 2012, p. 224).

However, unlike the Lithuanian legal system, the existence of the principle of practical concordance in the Latvian legal system is not linked to a specific article of the Constitution of the Republic of Latvia (Constitution of the Republic of Latvia, 1922). On the contrary, the principle of practical concordance in the Latvian legal system is an existing legal method and a general principle of law (Šuspāns, 2024, p. 63–66). In addition, in the Latvian legal system, it is possible to see a direct adoption of Konrad Hesse's developed doctrine, linking the principle of practical concordance with the principle of unity of the Constitution (Hesse, 1999, p. 27–28). In the Latvian legal system, it is the principle of unity of the Constitution that requires a judge to analyse constitutional norms as elements of a unified system, while the principle of practical concordance requires that constitutional values must be mutually reconciled in the event of conflicts (Pleps, 2012, p. 223).

That said, it is necessary to look at the principle of practical concordance in the decisions of the Constitutional Court of the Republic of Latvia. Albeit indirectly, the Constitutional Court of the Republic of Latvia applies the principle of practical concordance in its rulings.

In the case 2015-19-01, a person convicted of a crime tried to submit an application to the prosecution based on newly discovered circumstances in the criminal procedure. However, the application was examined by the same prosecutors who had carried out the investigation and prosecution in the previous criminal proceedings, leading to his conviction. The person convicted submitted an application to the Constitutional Court of the Republic of Latvia, and, in their application, they indicated that such a procedure does not ensure that the application on the newly discovered circumstances will be examined independently and impartially, since such an application is examined by the same prosecutors who also carried out the investigation as well as the prosecution, and who upheld the State prosecution in the previous criminal proceedings. Therefore, the Constitutional Court of the Republic of Latvia addressed the conflict between two elements of the right to a fair trial – the principle of *res judicata*, on the one hand, and the principle of ensuring a fair judgment, on the other.

The Constitutional Court of the Republic of Latvia examined whether the contested procedure was aimed at achieving a fair balance between the principle of *res judicata* and the principle of ensuring a fair judgment. Taking into account that, in some cases, the contested procedure and legal norms regulating this procedure raised doubts as to the prosecutor's neutrality and impartiality, the Constitutional Court of the Republic of Latvia concluded that the balance between the principle of *res judicata* and a principle of ensuring fair judgment had not been achieved. This conclusion resulted in the procedure established in the contested legal norms as being incompatible with the first sentence of Article 92 of

the Constitution of the Republic of Latvia, which comprises both previously mentioned elements of the right to fair trial (Ruling of the Constitutional Court of the Republic of Latvia of 29 April 2016. Case No. 2015-19-01, para. 16.3).

The above example shows that the Constitutional Court of the Republic of Latvia cannot choose which of the elements of the right to a fair trial has a priority or a greater weight. The previously mentioned example clearly shows how the Constitutional Court of the Republic of Latvia does not choose between the priority of the principle of *res judicata* or the priority principle of ensuring fair judgment, but rather determines whether the legislator has achieved a reasonable and fair balance between the two elements of the right to a fair trial. Hence, the priority of one constitutional right is not ensured, but it is ascertained whether the two constitutional rights are mutually consistent in accordance with the principle of practical concordance (Šuspāns, 2024, p. 55). Similar to the Constitutional Court of the Republic of Lithuania, also, the Constitutional Court of the Republic of Latvia cannot state exactly how to reconcile both conflicting constitutional rights. That would be a task for a legislator. Nevertheless, the Constitutional Court of the Republic of Latvia will determine whether the legislator in the given case has reconciled both conflicting constitutional rights in accordance with the principle of practical concordance.

In summary, the principle of practical concordance fits into the Latvian legal system as a general principle of law and as a legal method. Its application is not only recognised in the legal doctrine, but also in the case law of the Constitutional Court of the Republic of Latvia.

## Conclusions

1. Konrad Hesse's principle of practical concordance as a method of balancing constitutional rights organically fits into legal systems in which there is no hierarchical relationship between constitutional rights. In such legal systems, the starting point for the application of the principle of practical concordance obligates to see conflicting constitutional rights as equally valuable and equally protectable.
2. The Lithuanian and Latvian legal systems have a similar and comparable understanding of the application of the principle of practical concordance. In the legal doctrine, the principle of practical concordance is indirectly adopted by reference to Konrad Hesse. Meanwhile, a reference to Professor Donald P. Kommers, who explains the principle of practical concordance in the German legal system, has played an important role in the early days of introducing the concept of practical concordance to the Lithuanian and Latvian legal systems.
3. In the Lithuanian legal system, the principle of practical concordance is implied in Article 28 and Article 6 of the Constitution of the Republic of Lithuania. However, in the Latvian legal system, the principle of practical concordance is a directly applicable method of resolving a conflict between constitutional rights.
4. Although the Constitutional Court of the Republic of Lithuania and the Constitutional Court of the Republic of Latvia cannot state exactly how the principle of practical concordance should be achieved in a given case, they can determine whether the legislator has fulfilled its obligation to respect the principle of practical concordance. In this way, the Lithuanian and Latvian Constitutional courts examine whether a balance has been struck between the two rights at stake, without giving priority to either of them.



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