

THE CONTINUITY OF THE CONSTITUTIONS: THE EXAMPLES OF THE BALTIC STATES AND GEORGIA

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INTRODUCTION

Post-socialist countries of Central Europe and former USSR republics, which gained independence, drafted and adopted new constitutions. This extent of constitutional creative activity led to the conclusion that a new wave in the development of constitutionalism has arrived.¹ Some authors have maintained that the contribution of constitutional drafting in Central Europe to the global constitutionalism is shamefully insignificant.² Nevertheless, this assessment might be rather hasty. The mechanisms of the separation of powers and human rights catalogues embedded in the constitutions of Central Europe, practical implementation thereof, and, first of all, the significant contributions of constitutional courts to the development of constitutionalism prove that this wave of development of constitutionalism has been essential not merely for the region but also for the European legal space and global constitutionalism.³

Within the context of restoring constitutionalism, not only the adoption and practical implementation of new constitutions, but also the exploration and restoration of constitutional traditions of states have been of

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¹ Юрий Юдин, Вениамин Чиркин, 'Современные модели конституции' in Вениамин Чиркин (ред.), *Сравнительное конституционное право* (Международные отношения 2002) [Yuri Yudin, Veniamin Chirkin, 'Modern models of the constitution' in Veniamin Chirkin (ed) *Comparative constitutional law* (International relations 2002)] 49 – 50.

² Талия Хабриева, Вениамин Чиркин, *Теория современной конституции* (Норма, 2005) [Taliya Habrijeva, Veniamin Chirkin, *Theory of the modern constitution* (Norma 2005)] 27.

³ András Sajó, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press 1999) xiii – xv; Egidijus Jarašiūnas, 'Nuo pirmosios iki naujausių konstitucijų: keletas minčių apie konstitucinio reguliavimo raidą' in *Šiuolaikinė konstitucija: studijos apie užsienio šalių konstitucinį reguliavimą* (Mykolo Romerio Universitetas 2005) [Egidijus Jarašiūnas, 'From the first to the new constitutions: some thoughts on the development of constitutional regulation' in *Modern constitution: studies on the constitutional regulation of the foreign states* (Mykolo Romerio Universitetas 2005)] 28 – 29.

importance in the post-socialist space. Bearing in mind the age-old and significant traditions of constitutionalism in Central Europe and their important role in the development after WWI, the examination of these historical roots ensured a more successful practical implementation of ideas of constitutionalism.⁴

After regaining national independence, some countries decided to restore the functioning of their previous constitutions. While the decisions of the legislators of Georgia, Lithuania, and Estonia to restore the constitution were of a rather symbolic and political nature, the constitutional legislator of Latvia refused to draft a new constitution — the Constitution of 15 February 1922⁵ was considered fully relevant to the modern constitutional reality.

Within this article, I will offer a comparative analysis of the restoration of constitutions in some Central and Eastern Europe countries following the collapse of the socialist system. This constitutional solution has not been widely considered up to now, however it should be regarded as a rather original and interesting experiment, the analysis of which might prove useful in a broader regional context.

I. THEORETICAL CONSIDERATIONS OF RESTORING A CONSTITUTION

A constitution is the bedrock of a state and its legal system. The constitution is not merely a set of procedural regulations, neutral in their contents, which allows for any political power implementing state administration or even permits the change of the political system or constitution. The constitution contains a range of political concepts, principles, and programmatic guidelines, determining the nature of the constitutional system, by limiting the freedom of action of the state power.⁶ The constitution describes the identity of the respective state, by covering not merely the legal, but also the historic, political, national, cultural, and other extra-legal factors, which characterise the specific country.⁷ Due to these reasons, the constitution is traditionally described as both a legal and a political document. Additionally, the constitution bears a symbolic importance — it is the sign of the identity and culture of the specific

⁴ Agnes Headlam-Morley, *The New Democratic Constitutions of Europe. A Comparative Study of Post-War European Constitutions with Special References to Germany, Czechoslovakia, Poland, Finland, the Kingdom of the Serbs, Croats & Slovenes and the Baltic States* (Oxford University Press 1928).

⁵ 'The Constitution of the Republic of Latvia' <<http://saeima.lv/en/legislation/constitution>> accessed 25 January 2016

⁶ Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer tr., Duke University Press 2004) 39 – 58.

⁷ Valsts prezidenta Konstitucionālo tiesību komisija, 'Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu' in *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu: Konstitucionālo tiesību komisijas viedoklis un materiāli* (Latvijas Vēstnesis 2012) [the Constitutional Law Commission to the State President of Latvia, 'On the Constitutional Basis of the State of Latvia and the Core of the Constitution' in *On the Constitutional Basis of the State of Latvia and the Core of the Constitution: Opinion and Materials of the Constitutional Law Commission* (Latvijas Vēstnesis 2012) 56 – 60.

country.⁸

Constitutions are usually drafted with the conviction that they will determine the constitutional system for an indefinite time period. Likewise, the constitutional legislator usually strives to ensure the stability and authority of the constitution.⁹

Even though officially such provisions are included in constitutions which provide for amending the constitution, most often it is done with the purpose of achieving the protection of the existing text of the constitution rather than to encourage the subsequent legislator to introduce a fundamental constitutional reform. A procedure for amending the constitution included in a constitution does not suggest an entitlement to adopt a new constitution or to fundamentally review the core principles of the constitution, because the identity of the constitution must be preserved also while amending the constitution.¹⁰ Thus, for instance, the Constitution of the Czechoslovak Republic of 1920¹¹ did not include any restrictions on amending the constitution. However, its commentators remarked that the authors of the constitution had no hesitation as to the constancy of the political and economic system embedded in the constitution.¹²

The adoption of a new constitution usually suggests a radical turn in the life and beliefs of a state and society. Constitutional review is performed in case the state system is changed in a crisis, when, within the framework of the existing systems, it is impossible to resolve the current political issues, when a *coup-d'état* has occurred and the regime rising to power is constituted, the constitutional standards are reviewed in line with the spirit of the moment, or if the old constitution with many amendments is revised.¹³

States can be justifiably proud with old and stable constitutions, which are capable of permanent and effective regulation of the implementation of state power and of ensuring the stability of the constitutional system.¹⁴ The permanency of a constitution promotes its authority and symbolic role, as well as consolidating constitutionalism.

Usually, the drafting of a new constitution means the rejection of the previous constitution. Society, when deciding in favour of a need for a new

⁸ Ringolds Balodis, 'Priekšvārds' in *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības* (Latvijas Vēstnesis, 2011) [Ringolds Balodis, 'Foreword' in *The Commentaries of the Constitution of the Republic of Latvia. Chapter VIII. Fundamental Human Rights* (Latvijas Vēstnesis 2011) 3.

⁹ Jānis Vālbergs, 'Konstitūcijas jēdziena attīstība vēsturiskā apgaismojumā' (1936) (3) *Tieslietu Ministrijas Vēstnesis* [Jānis Vālbergs, 'Development of the definition of the constitution in the historical perspective' (1936) (3) *Journal of Ministry of Justice*] 784.

¹⁰ Carl Schmitt (n 6) 150 – 154.

¹¹ *The Constitution of the Czechoslovak Republic* (Société l'effort de la Tschécoslovaquie 1920).

¹² Кароль Лацо, *Конституция домюнхенской Чехословацкой Республики* (Прогресс 1972) [Karol Laco, *The Constitution of the Czechoslovak Republic before the Munich* (Progress 1972)] 214 – 216.

¹³ Jānis Pleps, Edgars Pastars, Ilze Plakane, *Konstitucionālās tiesības* (Latvijas Vēstnesis 2014) [Jānis Pleps, Edgars Pastars, Ilze Plakane, *Constitutional Law* (Latvijas Vēstnesis 2014)] 50 – 51.

¹⁴ Tom Ginsburg 'Constitutional endurance' in Tom Ginsburg, Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 112 – 116.

constitution, rejects the relevancy of the previous constitutions and devoids it of its mythological legitimacy. A new constitution excludes the possibility of returning to the old constitution, because most often society has accepted the deficient nature of the former constitutional regulation. If the new constitutional model fails to prove itself, then, most likely, another new constitution will be drafted rather than the functioning of the old constitution restored, as evidenced in the constitutional tradition of France.¹⁵

However, there are a few cases in the history of constitutionalism of the world, when, after a longer or shorter break, the functioning of the former constitution has been reinstated. It has been most frequently related to the restoration of the political system, namely, upon the return of a specific form of governance, the constitution of the respective regime can also be reinstated.¹⁶ For instance, this was the case when, following the 100 days of power of Napoleon Bonaparte, Louis XVIII, upon returning to power, reinstated the Constitutional Charter of 4 June 1814.¹⁷

The functioning of the Spanish Constitution of 18 March 1812¹⁸ was suspended and renewed on multiple occasions during the political battles between the proponents of absolutism and constitutionalism. On 4 May 1814, King Ferdinand VII called it off with a manifesto claiming it to be the embodiment of the French revolution, anarchy, and terror. The Constitution, however, earned the role of a modernization and reformation symbol of Spain, now drawing the hopes for the future of ever more people. On 9 March 1820, Ferdinand VII was forced to reinstate the functioning of the Constitution. The French military support, however, allowed suspending it once again already on 1 October 1823. For the third time, the Constitution was reinstated by Queen Maria Cristina on 13 August 1836.¹⁹

In the last century, the constitution was reinstated by Austria. The Constitution of 1 October 1920²⁰ was amended significantly already in 1929, whereas on 1 April 1934, a new Constitution was adopted. Following WWII, on 19 December 1945, the validity of the Constitution of 1920 was reinstated, and it is still valid today.²¹ However, a much more versatile experience in this area has been contributed by the reinstatement of constitutionalism in the Baltic States.

¹⁵ See more: Jean-Jacques Chevallier, *Histoire des institutions et des régimes politiques de la France de 1789 à 1958* (Dalloz 2001).

¹⁶ Zachary Elkins, Tom Ginsburg, James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 215 – 221.

¹⁷ ‘Charte constitutionnelle du 4 juin 1814’ <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/charte-constitutionnelle-du-4-juin-1814.5102.html>> accessed 25 January 2016; see more: Jean-Jacques Chevallier (n 15) 178 – 180.

¹⁸ ‘Spanish Constitution of 1812’ <<http://www.drbronsontours.com/bronsonspanishconstitutionof1812.html>> accessed 25 January 2016.

¹⁹ Татьяна Алексеева *История испанской конституции* (Проспект 2011) [Tatjana Aleksejeva *The history of Spanish constitution* (Prospekt 2011)] 20 – 21; 28 – 29.

²⁰ ‘Bundes-Verfassungsgesetz’ <<http://www.verfassungen.de/at/at18-34/oesterreich20.htm>> accessed 25 January 2016.

²¹ Manfred Stelzer *The Constitution of the Republic of Austria: A Contextual Analysis* (Hart Publishing 2011) 1 – 17.

II. PRACTICAL CONSIDERATIONS OF RESTORING A CONSTITUTION

After regaining independence, post-Soviet countries, which had had previous statehood experience, had an opportunity to continue to interrupted constitutionalism. It was particularly important for the Baltic States — Estonia, Latvia, and Lithuania — which did not proclaim their statehood anew, but rather reinstated it based on the doctrine of state continuity.²² It is the official opinion of the Baltic States that the Baltic States, established in 1918, continued existing without interruption, regardless of the USSR aggression and occupation occurring in 1940. This, however, means that the Baltic States did not found new countries in 1990–1991 (“second republics”), but rather restored the *de facto* illegally interrupted statehood.²³ It was largely fitting for the reinstatement of statehood to be based on the former constitutional regulation or to even reinstate it.²⁴

1. Latvia

In this sense Latvia was in the most favourable situation, because, during the interwar period, it had only one Constitution adopted on 15 February 1922. Following the *coup-d’etat* of 15 May 1934, its functioning was suspended. The authoritarian regime, however, did not manage to adopt a new constitution. Even though, following *coup-d’etats* and suspension of functioning of a constitution, it usually loses its political importance, what happened with the Constitution of Latvia was quite the contrary. During the authoritarian regime and, even more so, during the Soviet occupation, the Constitution of Latvia grew into a symbol of an independent and democratic state.

After the occupation of Latvia, the doctrine of continuity of the Republic of Latvia was based also on the Constitution of Latvia, emphasizing that the annexation of the Republic of Latvia by the USSR occurred by violating the national constitutional regulation. On 23 July 1940, Kārlis Zariņš, the ambassador of Latvia in London, submitted a memorandum to the Foreign Office of the United Kingdom, in which he indicated that he would continue to represent interests of the Republic of Latvia and qualified the acts of the USSR in Latvia as illegitimate. K. Zariņš also indicated that the People’s *Saeima* (a puppet parliament, which was elected under Soviet rule)²⁵ by declaring accession to the USSR breached

²² See more: Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers 2003); Ineta Ziemele, *State Continuity and Nationality: Baltic States and Russia: Past, Present and Future as Defined by International Law* (Martinus Nijhoff Publishers 2005).

²³ ‘Judgement of the Constitutional Court of the Republic of Latvia’ (Case No.2007-10-0102, 29.11.2007.) <http://www.satv.tiesa.gov.lv/upload/judg_2007_10_0102.htm> accessed 25 January 2016.

²⁴ Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Constitutional Law* (Iustus Förlag 2001) 25 – 55.

²⁵ “The elections of July 14 and 15, 1940 to the Parliament (Saeima) of occupied Latvia were held under conditions of political terror after an illegal and unconstitutional election

Article 1 of the Constitution, which can be amended only via a referendum.²⁶ Alfrēds Bīlmanis, the ambassador of Latvia in Washington, also objected to Latvia's incorporation into the USSR which occurred by breaching Articles 1, 76 and 77 of the Constitution of Latvia and by brutal force.²⁷

The meaning of the Constitution has to be particularly highlighted in connection to the national resistance movements against the occupying regime. The Central Council of Latvia, where the representatives of the five largest political parties of Latvia joined to collaborate, in its political platform in 1944 emphasized the validity of the Constitution (the *Satversme*) and the necessity to resume the state authorities of Latvia on the terms of the Constitution.²⁸ In its memorandum of 17 March 1944, the Central Council of Latvia emphasized repeatedly the validity of the Constitution and called for the formation of a government of the Republic of Latvia on the terms of the Constitution. The memorandum was signed by 189 political and public figures of the Republic of Latvia.²⁹

In exile, upon the request from bishop Jāzeps Rancāns, the deputy speaker of the last legitimate elected parliament of Latvia, the five judges of supreme court of Latvia - the Senate of Latvia in exile rendered responses to two particular questions, 'Is the Constitution of Latvia of 1922 still in full force and effect, and, if affirmative, which state authorities according to the Constitution are legitimate and still exist *de facto*.'³⁰

In their conclusions 13th March, 1948, the judges of the Senate of Latvia substantiated the existence of the Republic of Latvia based on the doctrine of continuity and the validity of the Constitution, and acknowledged the rights of J. Rancāns to act as the President of the state.³¹

One of the main goals of J. Rancāns's activities was to popularize and strengthen the idea of a democratic republic and the Constitution of 1922. He called 'to protect [...] the Constitution, which is the legal foundation of Latvia, and, alongside with our ambassadors, to do everything that is possible to protect and liberate the independent Latvia.'³²

law had been adopted. [...] the illegally and fraudulently formed Saeima did not represent the will of the People of Latvia. It had no constitutional powers to change the state system and liquidate the sovereignty of the State of Latvia". See also: 'Declaration of the Supreme Soviet of the Latvian SSR "On the Renewal of the Independence of the Republic of Latvia"' <<http://www.humanrights.lv/doc/latlik/neatkdek.htm>> accessed 25 January 2016.

²⁶ 'Note of K Zarins, Latvian Envoy in London, Protesting against the Incorporation of Latvia into the U.S.S.R. as being Unconstitutional and Illegal' in *Latvian – Russian Relations. Documents* (second printing, Augstums Printing Service, Inc. 1978) 209 – 210.

²⁷ 'The Latvian Minister in Washington does not Recognize the Incorporation of Latvia into the Soviet Union' in: *Latvian – Russian Relations. Documents* (n 26) 211.

²⁸ 'Latvijas Centrālās padomes platforma' in *Bīskaps Jāzeps Rancāns. Dzīve un darbs*, Heronims Tichovskis (red.) (Astras apgāds 1973) ['The platform of the Central Council of Latvia' in *Bishop Jāzeps Rancāns. Life and Work*, Heronims Tichovskis (ed) (Astras apgāds 1973)] 186.

²⁹ 'Memorandum of the Latvian Central Council' <http://www.atmina.unesco.lv/upload/lcc_memorandum_en.pdf> accessed 25 January 2016.

³⁰ 'Latvijas Senāta senatoru atzinums' (1948) 29 *Latvju Ziņas* ['The conclusion of the senators of the Latvian Senate' (1948) (29) *Latvian News*].

³¹ *ibid.*

³² Ādolfs Šilde, *Valstsvīri un demokrāti* (Grāmatu Draugs, 1985) [Ādolfs Šilde, *Statemen and democrats* (Friend of Books 1985)] 228.

The authority of the Constitution of 1922, and the conviction that the independent State of Latvia should be restored on the basis of it, consolidated in these discussions in exile. Professor Arveds Švābe wrote, ‘Anyone who in their simplemindedness or meanness advocates that the constitution of 1922 is no longer in force or is useless [...] helps our enemies to destroy the legal foundation of the State of Latvia and to dig a grave for our independence.’³³

During the process of the reinstatement of independence, the idea of restoring the old constitution was perceived with scepticism — no extensive scientific studies about the old constitution had been performed during the Soviet era, and it was practically unknown to the majority of society. Lawyers’ articles explaining the contents and application possibilities held a significant importance in promoting the Constitution. For instance, senior lecturer at the Latvia State University, Valdis Cielava, recognised in an extensive essay analysing the contents of the Constitution that “some principles and legal procedures of this Constitution can be viewed as democratic, even by today’s criteria”.³⁴ Whereas a Latvian lawyer resident in Germany, Egils Levits,³⁵ explicitly pointed out: “This ‘middle-aged,’ by European standards, Constitution (currently, older constitutions are in force in many countries) is completely free of the influences of Soviet legal and political thinking and today (I emphasise it — today) it is suitable as the fundamental law of an independent and democratic (in the modern and not socialist sense) state.”³⁶

By exercising the rights of citizens of Latvia to decide on the restoration of the independence of the State, 138 members of the newly elected Supreme Council of the Latvia SSR 4th May, 1990, voted for the independence of Latvia. The Declaration of independence establishes the *de facto* renewal of the Latvian independence of the Republic of Latvia, confirming the doctrine of Latvian State continuity.³⁷ Based on the doctrine of continuity of the Republic of Latvia, the Supreme Council of Latvia also reinstated the validity of the Constitution in the entire territory of Latvia with Article 3 of the Declaration of 4 May 1990 “On the restoration of independence of the Republic of Latvia”.³⁸ However, at that time, there was a predominant opinion that Latvia needed a new constitution and that the Constitution of 1922 was obsolete.³⁹ Therefore, with Article 4 of the

³³ Arveds Švābe, ‘Gaitu sākot’ (1947) 1 *Tiesībnieks* [Arveds Švābe, ‘Beginning the way’ (1947) 1 *Lawyer*] 1 – 2.

³⁴ Valdis Cielava, ‘Latvijas Satversme: vēsture un mūsdienas’ (1989) 76 *Cīņa* [Valdis Cielava, ‘Latvian Constitution: history and present’ (1989) 76 *Fight*] 3.

³⁵ After the restoration of independence of Latvia – member of parliament and minister of justice (1993 – 1994), justice of the European Court of Human Rights (1997 – 2004) and justice of European Court of Justice (from 2004).

³⁶ Egils Levits, ‘Jaunā pamatlikuma projektu analizējot’ (1991) 149 *Diena* [Egils Levits, ‘Analyse of the project of the new fundamental law’ (1991) 149 *Day*] 2.

³⁷ ‘Judgement of the Constitutional Court of the Republic of Latvia’ (Case No.2007-10-0102, 29.11.2007.) <http://www.satv.tiesa.gov.lv/upload/judg_2007_10_0102.htm> accessed 25 January 2016.

³⁸ ‘Declaration of the Supreme Soviet of the Latvian SSR “On the Renewal of the Independence of the Republic of Latvia”’ <<http://www.humanrights.lv/doc/latlik/neatkdek.htm>> accessed 25 January 2016.

³⁹ Romāns Apsītis, ‘Neatkarības deklarācijas pieņemšanas gadadienā’ (2005) 16 *Jurista*

Declaration, the Supreme Council suspended the validity of the Constitution, except for Articles 1, 2, 3, and 6, determining the constitutional legal basis of the State of Latvia — the principle of an independent democratic republic and the national sovereignty, the territory of an independent democratic republic, as well as the procedure of electing the parliament. According to Article 6, during the transition period, it was possible to implement those constitutional and other legislative acts of the Latvian SSR which are in effect in Latvia when this Declaration is adopted, insofar as they do not contradict Articles 1, 2, 3 and 6 of the Constitution of the Republic of Latvia.

Whereas in Article 7 of the Declaration, the Supreme Council proposed the task of creating a working group for developing a new constitution that would suit the current political, economic, and social circumstances of Latvia,⁴⁰ nevertheless, a new constitution was not drafted. Article 1 of the constitutional act “On the statehood of the Republic of Latvia” adopted on 21 August 1991 prescribed that the statehood of the Republic of Latvia is established by the Constitution. The Supreme Council clearly stated that only the laws and the resolutions of the Supreme State power and State administrative institutions shall be in force in the territory of the Republic of Latvia (Article 3 of the constitutional act). Thus the laws and regulations of the USSR were rendered null and void in the territory of the Republic of Latvia. The Republic of Latvia thereby declared that, hereafter, legally binding laws and regulations shall be passed only by the institutions of the Republic of Latvia.⁴¹

The powers of the Supreme Council and the transition period ended with the convening of the 5th *Saeima* (the Parliament) on 6th July, 1993. The legal basis for the election was the Law on the Election of the 5th *Saeima*. The Law on the Election of the 5th *Saeima* was a modified version of the *Saeima* Election Law 1922 which was based on the Constitution of 1922. On 6 July 1993, the *Saeima* (the Parliament) started its work by adopting the announcement on the Constitution taking full effect.⁴²

2. Lithuania and Estonia

The situation of Estonia and Lithuania was different, in that in both countries the authoritarian regimes had adopted authoritarian constitutions, the validity of which would not have been acceptable either politically or legally in the modern day. The authority of these constitutions was also

Vārds [Romāns Apsītis, ‘The anniversary of the Declaration of Independence’ (2005) 16 *Lawyer’s Word*] 1 – 2.

⁴⁰ Egils Levits, ‘4.maija Deklarācija Latvijas tiesību sistēmā’ in *4.maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju*. Tālav Jundzis (red.) (LU žurnāla “Latvijas Vēsture” fonds 2000) [Egils Levits, ‘The Declaration of independence in the Latvian legal system’ in *4th May. Collection of the articles, memories and documents about the Declaration of independence*, Tālav Jundzis (ed) (Foundation of journal “Latvian History” 2000) 52 – 68.

⁴¹ ‘21 August 1991 Adoption of the Constitutional Law on the Statehood of the Republic of Latvia’ <<http://www.21augusts.lv/en/about-21-august>> accessed 25 January 2016.

⁴² About the Constitution of Latvia see also: Anita Rodiņa, Jānis Pleps, ‘Constitutionalism in Latvia: reality and developments’ in *New Millenium Constitutionalism: paradigms of reality and changes* [Njar 2013] 431 – 472 <<http://concourt.am/armenian/library/cclibrary/2013/newmillenium.pdf>> accessed 25 January 2016.

disputed by the national resistance movements. For example, the Lithuanian national resistance movement was based on the spirit and ideas of the former democratic constitution of Lithuania – the Constitution of 1 August, 1922.⁴³ But the Estonian national resistance movement organized a provisional government on the basis of the Constitution of 28 July 1937 in 18 September, 1944. Estonians also had the government in exile until restoration of the independence *de facto*.⁴⁴ However, also in both cases, the reinstatement of the old constitutions played a symbolic and political role.

On 11 March 1990, the new elected Supreme Council of Lithuania where a majority was obtained by supporters of the independence of Lithuania, reinstated the independence of statehood with several consecutive constitutional acts. At first, with the act “On the reinstatement of the State of Lithuania”, the reinstatement of an independent State of Lithuania was proclaimed. Afterwards, the Supreme Council adopted a law “On the reinstatement of validity of the Constitution of 12 May 1938”. With this law, the validity of the USSR Constitution of 1977 and the Lithuanian USSR Constitution of 1978 was annulled, and the validity of the Constitution of the Republic of Lithuania of 12 May 1938 was reinstated, except for the parts which regulate the status of the President of the State, the *Seimas* (the Parliament), the State Council, and the State Audit Office. In effect, it meant that only the validity of the fundamental principles of the Constitution was reinstated. With the next law, however, the Supreme Council of Lithuania suspended the validity of the Constitution of 12 May 1938 and confirmed the temporary fundamental law of the Republic of Lithuania, which regulated the exercising of the state power until the drafting and adoption of a new constitution.⁴⁵ In this way, the pre-war statehood of Lithuania was symbolically reinstated, and the aggression of the USSR towards Lithuania in 1940 was condemned.⁴⁶

The lawyers of Lithuania were aware that the reinstatement of the validity of the Constitution of 12 May 1938 was a matter of principle; however, in fact, the implementation of this decision would not be feasible, as it would lead to legal uncertainty and chaos. Bearing in mind the changes in the political, economic and social circumstances, a temporary fundamental law was drafted and adopted, opting for the need to draft a new constitution.⁴⁷ An official reinstatement of the Constitution of 12 May 1938

⁴³ ‘Lietuvos Laisvės Kovos Sąjūdžio Tarybos Deklaracija’ in Vaidotas A. Vaičaitis, *Hermeneutinė teisės samprata ir konstitucija* (Justitia 2009) [‘Lithuanian Partisans Declaration’ in Vaidotas A. Vaičaitis, *Hermeneutic conception of law and constitution* (Justitia 2009)] 44.

⁴⁴ Lauri Mälksoo (n 22) 149 – 153.

⁴⁵ Paulius Vinkleris, ‘Teisinė 1990 m. kovo 11 d. aktų prigimtis’ in *Kovo 11-oji — Lietuvos Valstybės Nepriklausomybės atkūrimo diena* (Žaltvykslė 2008) [Paulius Vinkleris, ‘The birth of the legal act 11th March, 1990’ in *11th March – day of the restoration of the independence of the Lithuanian State* (Žaltvykslė 2008)] 299 – 304.

⁴⁶ Česlovas Bauža, ‘Valstybės atkūrimo prielaidos ir eiga (1988 – 1991)’ in *Kovo 11-oji — Lietuvos Valstybės Nepriklausomybės atkūrimo diena* (Žaltvykslė 2008) [Česlovas Bauža, ‘Conditions and way of the restoration of the state (1988 – 1991)’ in *11th March – day of the restoration of the independence of the Lithuanian State* (Žaltvykslė 2008)] 207.

⁴⁷ Pranas Kūris, ‘Lietuvos nepriklausomos valstybės atkūrimas ir tarptautinė teisė’ in *Kovo 11-oji — Lietuvos Valstybės Nepriklausomybės atkūrimo diena* (Žaltvykslė 2008) [Pranas Kūris, ‘The restoration of the independent Lithuanian state and international law’ in *11th*

was necessary as its validity was not suspended in the procedure prescribed therein or in line with the will of the Lithuanian people, but rather as a result of the USSR aggression in 1940. Thus, the Supreme Council of Lithuania, with its laws, ensured formal continuity of the Constitution.⁴⁸

A similar constitutional solution was used in the process of reinstating the independence of Estonia. On 8 May 1990, the Supreme Council of Estonia adopted a law on the national symbols of Estonia. This law, among other things, prescribed the reinstatement of Articles 1, 2, 4, 5, and 6 of the Constitution of Estonia of 28 July 1937, which established the status of Estonia as an independent state, the principle of sovereignty of nation, the validity of the laws of Estonia and the Estonian language as the official language, along with the colours of Estonia. On 16 May 1990, a law was adopted on the principles of the provisional form of the government of Estonia.⁴⁹ Thus, the reinstatement of constitutional provisions of 28 July 1937 in Estonia, regulating the core principles of the system of the state, was performed indirectly, by wording it as the reinstatement of symbols of statehood. Even though some political parties were advocating the reinstatement of the Constitution of 28 July 1937, it was clear from the very beginning of the independence restoration process that a new constitution would have to be drafted, corresponding to the modern-day reality.⁵⁰ The idea of reinstating the Constitution of 28 July 1937 was substantiated by the need to strengthen the continuity of the Republic of Estonia and to renew statehood in a correct and accurate way. Nevertheless, following serious public and political discussions and taking into account the social reality and the development of law, a new constitution was drafted.⁵¹ However, the preamble of the new constitution precisely consolidates the continuity of statehood of Estonia.⁵² The preamble of the Constitution of 28 June 1992 states that it has been adopted by the Estonian nation, based on Article 1 of the Constitution of 28 July 1937.⁵³ This solution was hailed as “the magic formula for eating the cake and still having it at the same time”. It allows combining the idea of the continuity of the Estonian statehood and adoption

March – day of the restoration of the independence of the Lithuanian State (Žaltvykslė 2008)] 289; Dainius Žalimas, *Lietuvos Respublikos nepriklausomybės atkūrimo 1990 metais teisiniai pagrindai* (Žaltvykslė 2008) [Dainius Žalimas, *The legal foundations of the restoration of the independence of the Republic of Lithuania* (Žaltvykslė 2008)] 94 – 96.

⁴⁸ Paulius Vinkleris, ‘Teisinė 1990 m. kovo 11 d. aktų prigimtis’ in *Kovo 11-oji – Lietuvos Valstybės Nepriklausomybės atkūrimo diena* (Žaltvykslė 2008) [Paulius Vinkleris, ‘The birth of the legal act 11th March, 1990’ in *11th March – day of the restoration of the independence of the Lithuanian State* (Žaltvykslė 2008)] 302 – 303.

⁴⁹ Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Constitutional Law* (Iustus Förlag 2001) 30 – 31; Kalle Merusk, ‘The Republic of Estonia’ in *Constitutional Law of the EU Member States*, Leonard Besselink, Paul Bovend’Eert, Hansko Broeksteeg, Roel de Lange, Wim Voermans (eds) (Kluwer 2014) 446 – 447.

⁵⁰ Darius Butvilavičius, ‘Estijos Respublikos 1992 m. Konstitucija’ in *Konstitucinio regulavimo įvairovė* (Mykolo Romerio Universitetas 2006) [Darius Butvilavičius, ‘The Constitution of the Republic of Estonia, 1992’ in *Diversity of the constitutional regulation* (Mykolo Romerio University 2006)] 279 – 281.

⁵¹ Märt Rask, ‘Dear reader’ (2012) XIX *Juridica International* 1.

⁵² Lauri Mälksoo (n 22) 48.

⁵³ ‘Constitution of the Republic of Estonia’ <<http://www.president.ee/en/republic-of-estonia/the-constitution/>> accessed 25 January 2016.

of the new Constitution.⁵⁴

The legal science suggests that Estonia and Lithuania restored their respective pre-war constitutions partially in order to replace them with new constitutions. Both countries followed the doctrine of continuity and with the reinstatement of their old constitutions confirmed the continuity of state legal personality with that of the pre-war republics. Since these constitutions were not democratic in their nature and did not correspond to the modern understanding of constitutionalism, it was more convenient to draft new constitutions instead of amending the old ones.⁵⁵

3. Georgia

It was rather surprising to have the option of reinstating the old constitution not only in the case of Latvia, but also in that of Georgia. Georgia had declared independence under the circumstances of the Russian civil war after the October revolution (1917 – 1921), and on 21 February 1921, its Constitutional Assembly adopted the Constitution of an independent state. However, this Constitution was short lived, as on 25 February 1921, the Soviet Russian army invaded Tbilisi and established Soviet rule in Georgia.⁵⁶ After proclaiming independence, Georgia preserved its Constitution of 1978, by introducing substantial amendments in it. Nevertheless, after the President, Zviad Gamsakhurdia, was overthrown on 21 February 1992, the Military Council announced the reinstatement of the validity of the Constitution of 21 February 1921. However, this Constitution was not actually applied, as the legal and political situation in the country had changed.⁵⁷ Likewise, apparently, the restoration of the old constitution was necessary for the Military Council to consolidate its political authority, in order to create pre-conditions for the further development of the statehood of Georgia. It is confirmed by the fact that already on 6 November 1992 the Law “On the state power” was adopted, which must be viewed as a temporary “small” constitution. It is admitted in the legal science that the Constitution of 1921 could not turn into actual reality due to the poor legitimacy of its mechanism of reinstating validity.⁵⁸

Taking into account the contents of the Constitution of Georgia of 21 February 1921, it could be assumed that it was legally possible to reinstate its validity. However, apparently, the Constitution of Georgia,

⁵⁴ Lauri Mälksoo, ‘Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in International Law’ (2000) 69 *Nordic Journal of International Law* 299.

⁵⁵ Ringolds Balodis, ‘Latvijas Republikas konstitucionālo tiesību evolūcija un transformācija 20. - 21. gadsimta mijā’ in *Tiesību harmonizācija Baltijas jūras reģionā 20. - 21. gadsimta mijā* (Latvijas Universitāte 2006) [Ringolds Balodis, ‘Evolution and Transformation of constitutional Law of the Republic of Latvia at the Turn of the 20th and 21st Centuries’ in *Harmonization of law at the Baltic Sea Region at the Turn of the 20th and 21st Centuries* (University of Latvia 2006)] 449 – 450.

⁵⁶ George Papuashvili, ‘The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years’ (2012) 2 *European Public Law* 326 – 332.

⁵⁷ *ibid* 333.

⁵⁸ Автандил Деметрашвили ‘Грузия. Вводная статья’ in *Конституции государств – участников СНГ* (Норма 2001) [Avtandil Demetraschvilli ‘Georgia. Introduction’ in *Constitutions of states – participants of the CIS* (Norma 2001)] 175.

unlike the Constitution of Latvia, lacked the necessary symbolic and political authority for the public to recognize its legitimacy. The new 24 August, 1995, Constitution of Georgia became a basis for constitutional development of Georgia. But in the preamble of the new constitution, it was stated that the basic principles of the Constitution of Georgia of 1921 are taken account in the constitution.⁵⁹

CONCLUSIONS

The practice of reinstating the validity of constitutions proves that the constitutional legislator chooses this mechanism under extraordinary circumstances. In the case of the Baltic States, the idea of reinstating the old constitutions was rooted in the doctrine of state continuity. Since the Baltic States restored the illegally *de facto* interrupted statehood, it was *de facto* needed to reinstate also the constitutional regulation of this statehood. This step had a historic and symbolic importance, upon restoring the historic justice and stopping the validity of constitutions imposed by the USSR occupation. The case of Georgia in this context is peculiar, as this country, though based on the historic experience of statehood, nevertheless decided to create a new country after the collapse of the USSR. The old constitution in this case was rather as an instrument in a political battle, in which the Military Council used to try and boost its legitimacy and find the grounds for alternative development of Georgian statehood.

The restoration of the old constitutions mostly played a symbolic role. The constitutional legislators of Georgia, Lithuania, and Estonia regarded the restoration of the old constitutions rather as political grounds, on the basis of which new constitutions would be built. It was only in the case of Latvia where the reinstatement of the old constitution meant also its practical implementation, by giving up the drafting of a new constitution. It was largely related to the specific circumstances of Latvia, because the constitution of Latvia was drafted for a democratic republic and during the years of the USSR occupation it had earned a symbolic role. The constitutions of Estonia and Lithuania were authoritarian constitutions, the reinstatement of the state power model of which could not have been possible without substantially amending the constitution. Likewise, it is unlikely that the countries politically could have afforded to reinstate constitutions dating back to an authoritarian system. The old constitution of Georgia also provided for a model of a democratic republic and in many aspects was even more modern than the constitution of Latvia. However, this constitution lacked legitimacy and a lucky coincidence of circumstances to turn it into a legal reality.

In all of the mentioned countries, the reinstatement of constitutions was faced with the consequences of the Soviet regime. During the USSR, objective research on previous constitutional regulation and its contents was considerably limited; moreover, society lacked knowledge about the historic development and constitutional regulation of their country. Therefore, the

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‘Constitution

of

Georgia’ <http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf>
accessed 25 January 2016.

reinstatement of old constitutions was a very bold decision of the constitutional legislator, by bringing back such constitutions to the legal reality the contents of which were unknown to the general public, whereas the lawyers often lacked practical skills and understanding in applying the constitutional norms. The sceptical approach by constitutional legislators to the old constitutions is understandable, as they mostly used them for political aims in order to legitimise the statehood and to create legal grounds for drafting new constitutions.

The restoration of the validity of a constitution is not merely a technical decision of a constitutional legislator, which renews the historic constitutional reality. A constitution is not merely a technically legal document; in order for it to function successfully, it requires political legitimacy, symbolic value, and authority in society. Therefore, reinstatement of old constitutions was possible in systems, where the public still linked the regulation of the old constitution to their future in a certain constitutional statehood. Due to these reasons, successful reinstatement of constitutions is a rare occurrence in the constitutional practice of the world. Therefore, the decision of the constitutional legislator of Latvia to renew the validity of the old constitution must be regarded as a unique occurrence. This political decision meant that the constitution was returned to the legal reality, the validity and application of which had been suspended for more than fifty years. No other country has conducted a similar constitutional experiment.

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