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BALTIC DIVERSITY: COMPARING CONSTITUTIONS

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Summary

The article deals with a comparative approach when analysing the constitutions of Estonia, Latvia and Lithuania. The title „Baltic diversity" departs from the general assumption that these states are similar and therefore put together, whereas they are in fact very different when it comes to language, religion, historical experiences. The basic idea is that their constitutions as all constitutions must be analysed and studied in the light of historical experiences of the state. The role as such of the constitution and its provision (or non existing provision) on independence is illustrated by examples from Estonia, Latvia, Lithuania, Norway and Sweden. The constitutional traditions, and the diversity between Estonia, Latvia and Lithuania, are further discussed through their interwar experiences (institutions aimed at constitutional control) and the present readiness to meet future challenges (including a discussion on constitutional amendments, political rights of permanent residents and the EU-citizenship).

Introduction

The idea to choose the heading „Baltic diversity" is to reflect on a comparative approach to make use of when analysing the constitutions of Estonia, Latvia and Lithuania. First of all, what does the term „Baltic" mean? It is used as a practical term used when discussing Estonia, Latvia and Lithuania. But far too often these states are treated as if there were no differences between them. However, they differ from each other when it comes to language (Estonian is a fenno-ugric language while Latvian and Lithuanian belong to the group of Baltic languages), religion (Estonia and Latvia are Lutheran with important Russian orthodox minorities, Lithuania is Catholic) and historical experiences (Estonia and Latvia have been under foreign rule – under Denmark, the Teutonic order, Sweden, Russia – whereas Lithuania was an important Northern European power in the 14 the century, before the union with Poland and the forthcoming partitions whereby Lithuania became a part of Russia). Considering these differences, what is „Baltic" about them except the geographical location by the Baltic Sea? In fact also other countries could be labelled „Baltic" like Denmark, Finland, Germany, Poland, Russia and Sweden for the same geographical reason. Put together, we could argue that there are maybe more differences than similarities between the countries in the „Baltic region".

Despite these remarks, it is still possible to make use of the term „Baltic" for practical reasons when considering the recent past, i.e. the Soviet experience and its deep impact on Estonia, Latvia and Lithuania. It is a truism to mention the consequences of that period with the innumerable complicated questions and problems of a practical and legal nature that remain to be resolved. There is also a unity when it comes to the geopolitical location and issues related to security policy and means of integration into the international community.

Membership of the North Atlantic Treaty Organisation and the European Union are the hot topics at the moment in all three states. Both organisations have a number of criteria that new members must fulfil; among these criteria there are some very delicate questions that touch upon national sovereignty and democracy as such, for example, the EU citizenship.

An approach to constitutional comparisons

The idea is to consider the differences while at the same time departing from the common historical legacy and political questions. This hopefully provides a useful approach for comparative constitutional research. It is of no surprise to emphasise the importance of historical knowledge when analysing the present. This is particularly clear, not only in the context of Estonia, Latvia and Lithuania but also at a general level.

The constitution is an autobiographic document in any country, whether the past was dramatic or quiet, whether there were periods of glory or occupation. It reveals achievements and fears equally, as well as old fashioned interpretations or traditions kept to the present day. For example, the understanding of „the third state power" is not understood as the judicial branch in the traditional Swedish constitutional thinking. Rather, this notion refers to journals and the free press since freedom of the press and the general rule of the public nature of official documents enjoy a special constitutional protection in Sweden since the late half of the 18th century[1]. And if there is no formal (written) constitution as in the United Kingdom, this is of course a part of the history, as well as a constitution consisting of several separate documents as in Sweden[2].

Thus, a constitution may appear as a state-founding act as in the USA and Norway. In both countries, and mostly for symbolic reasons, it seems very unlikely that the old constitutions (of 1787 and 1814 respectively) will be thoroughly revised into a modern set-up, unlike the situation in Sweden where the Instrument of Government of 1974 replaced the former one of 1809. The constitution as such has seen numerous changes and it never had a position equivalent to a state-founding act; the Swedish state has existed well enough without it. In this context constitutional provisions on independence of the state may serve as an illustrative example. Similar to the present constitutional provisions of Estonia, Latvia and Lithuania, the Constitution of Norway includes an introductory statement on the independence of the realm[3]. There is no such a statement at all in the Constitution of Sweden, and this is easily explained by the fact that Sweden has never been occupied. The non-experience of what subordination to foreign rule can mean probably explains e.g. the absence of a constitutional provision on the state language, to mention but one example of vital interest to Estonia, Latvia and Lithuania.

Constitutional diversity

The constitutional diversity between Estonia, Latvia and Lithuania is considerable even if there are many traits in common. Searching inspiration from historical experiences has been a natural start in each country when restoring independence. This has indeed been the way to proceed in Lithuania and Estonia in considering the constitutions of the interwar time when drafting the new ones. Latvia went even further in this process, re-instating the whole Constitution of 1922 and modernising it step by step by later amendments. And even if the interwar time does represent some negative political and constitutional experiences, they still made up an asset in experiences as such when new constitutional solutions were being drafted (e.g. compared with some of the former Soviet Socialist Republics in Central Asia having no such experience at all). Considering that the present constitutional choices are

[1] The first Freedom of the Press Act was adopted in 1766.

[2] These are the Act of Succession (1810), the Instrument of Government (1974), the Freedom of the Press Act (1949) and the Fundamental Law on Freedom of Expression (1991).

[3] Art. 1 Constitution of Estonia (1992), Art. 1 Constitution of Latvia (1922, as amended), Art. 1 Constitution of Lithuania (1992), Art. 1, Constitution of Norway (1814).

inspired also by foreign constitutional ideas and international conventions, the constitution making process can be described as an eclectic method.

I) Connecting with the past has been a matter of underlining statehood and constitutional continuity with the interwar state. However, while looking back and fixing some necessary legal and constitutional ties, there is also a challenge to meet the future in the same document. Adopting a new constitution as in Estonia and Lithuania has thus made up an important basis for improving former arrangements, whereas the old Latvian constitution has seen amendments of features that could not be realised before. Some examples could be mentioned in the context of constitutional control.

In Lithuania the establishment of the present Constitutional Court is due not only to foreign ideas and institutions, for example deriving from Italy or France and their bodies for constitutional control. The interwar experience included important scientific contributions in constitutional law by M. Römeris. There was also a legal set up providing for a kind of institutionalised control of legislation through the Statutory Court with regard to the Klaipeda Region; the aim was to ensure the functioning of the Lithuanian Constitution in the Region of Klaipeda in a period where the internal political situation was indeed complicated [1].

The early Estonian interwar constitutional discussions (1919-1920) included considerations of a supreme judicial instance with considerable influence on legislation. Except abstract review ex ante, the National Court was also to proclaim the statute instead of the Riigikogu (Parliament). Since this model implied too great an interference into the sphere of the legislature, the idea was abandoned [2]. Towards the end of the interwar time, a special institution aimed at (constitutional) control resulted in the creation of the Legal Chancellor in 1938. Albeit a changed function and position compared with the present Legal Chancellor, the very existence of an earlier institutional version should not be underestimated when preparing new constitutional arrangements. The same can be said about the discussions on the first National court, and the creation of the present Constitutional Review Chamber.

Even in Latvia the introduction of some kind of judicial review of legislation was considered among scholars, many of whom belonged to the ethnic, linguistic or religious minorities. One of them, H. Stegman, in fact gained a seat in Parliament in 1934 and proposed a constitutional reform. The idea was to establish a special state court that would review legislation and its conformity with the Constitution, and this proposal was voted upon in Saeima and failed with only one vote. The idea of a constitutional revision stopped after the seizure of power in 1934 [3, p. 311–371]. The present Constitutional Court was introduced in 1996, after abandoning the initial idea to adapt a model similar to the Estonian specialised chamber of the Supreme Court. Except devices for constitutional control, the constitutional project of the interwar time that has been improved and established in present time is the Bill of Rights. The intention in the 1920s was to add a Bill of Rights as a second part to the Constitution of 1922, but for political reasons this was never realised. Instead the draft was used when elaborating what was to become the present day catalogue, adopted in 1998.

II) The Latvian choice of re-instating the interwar constitution – the only constitution that Latvia had – is certainly a step of a highly symbolic character. The interwar republic - or to put it the French way in counting constitutions/constitutional periods, the *First Republic* - remains, even if the state has seen some crucial changes. The choice to make use of the 1922 Constitution had some advantages, for example that some previous pieces of legislation more easily could be made use of and thus constitute an important help in the creation of the new legal framework. However, it seems that the approach to meet the future through an old document modernised step by step can be questionable, and even problematic.

Considering that the Constitution of 1922 may be changed easily, in three readings by decisions of a 2/3 majority of the Saeima among which 2/3 have to be present, in all by 46 MPs or a 46 per cent vote since there are 100 MPs – there will always be a danger that

material, short-sight changes come to fast in order to meet the public opinion of the day[1]. This procedure should be compared with the Estonian and Lithuanian constitutions, both of which are designed to provide a greater degree of constitutional rigidity and thus stability. The Constitution of Estonia is amended by repeated decisions by an absolute majority (51 per cent) of all MPs with parliamentary elections in-between; the Constitution of Lithuania is amended by repeated decisions by 2/3 of all MPs with a lapse of three months between the decisions[2]. It should be noted that in each country the amendment of some constitutional provisions are subject to referendum[3].

The amendments so far have meant many positive changes for the constitutional framework of Latvia, for example the prolongation of the term of the Saeima (Parliament) from three to four years, the establishment of the Constitutional Court and the introduction of a Bill of rights at the constitutional level (Chapter 8, adopted in 1998). But what if constitutional amendments are adopted in the name of „modernization", like provisions unfavourable to the development of democracy in the long run? A recent example that should be discussed concerns the recent amendment on political rights. In addition to the existing right of Latvian citizens to participate in the activities of the state and to hold a position in the civil service, Article 101 now provides that „Local governments shall be elected by Latvian citizens who enjoy full rights of citizenship". It is true that the phrase does not include the word „only" (cf „shall be elected by Latvian citizens *only*"). Still, nothing is mentioned about the voting rights at the local level of permanent residents, whether they are stateless persons originally from other parts of the USSR or citizens from the EU. Considering the fact that Latvia is heading towards membership of the EU, it would be natural to expect an amendment paving the way for the EU-citizenship and the rights of permanent residents from other EU countries that follow. In that context it is relevant to expect an equally inclusive approach also to other permanent residents in Latvia, mostly non-citizens from the former USSR. An additional observation apart from this is that the amendment to Article 101 makes a rather curious impression since the Constitution of 1922 does not contain any other provisions on local government.

Naturally, the debate on political rights at the local level follows from the citizenship issue and the composition of the population with considerable non-Latvian minorities. Similar to Estonia and Lithuania, the historical background is crucial for explaining the existence and position of various ethnic, linguistic or religious minorities living in Latvia and the political approach to this delicate complex. However, by re-instating the Constitution of 1922, the political approach is not helped by the fact that the constitution can be amended with such ease – in this respect the rules on constitutional amendments do not provide any help for stable and long-sight solutions. Compared to Estonia and Lithuania, constitutional stability is undoubtfully bettered secured in the modern constitutions of these states, which is advantageous in the consideration of future international relations and obligations.

Some concluding thoughts

Comparing the constitutions of Estonia, Latvia and Lithuania remains a stimulating exercise in history combined with present political considerations. For a foreign observer these states provide a most vital and inspiring field of scientific studies of constitutional issues. Maybe it is even more so for a Swedish observer since some questions of principle tend to be overseen or even forgotten in Sweden, indeed also a result from historical experiences and traditions of constitutional thinking. This certainly adds to the diversity within the „Baltic region". Probably this may explain a less vivid approach to constitutional issues in Sweden compared to Lithuania; it seems very unlikely that the Instrument of Government of

[1] Art. 76 Constitution of Latvia (1922, as amended).
[2] Art. 165 Constitution of Estonia (1992), Art. 148 section 3 Constitution of Lithuania (1992).
[3] Art. 162 Constitution of Estonia (1992), Art. 77 Constitution of Latvia (1922, as amended), Art. 148 sections 1-2 Constitution of Lithuania (1992).

1974 will be celebrated in 2004 in comparison to the attention drawn to the 10th anniversary of the Constitution of Lithuania in 2002.

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Baltijos valstybių įvairovė: konstitucijų palyginimas

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SANTRAUKA

Straipsnyje „Baltijos valstybių įvairovė: konstitucijų palyginimas“ lyginamuoju metodu analizuojamos Lietuvos, Latvijos ir Estijos Konstitucijos. Autorė atsisako paplitusio požiūrio, kad Baltijos valstybės yra panašios ir dėl to yra grupuojamos kartu, ji pabrėžia, kad labai skiriasi jų kalba, religija ir istorinė patirtis. Šių valstybių konstitucijos turi būti analizuojamos turint omenyje valstybių istorinę patirtį. Taip pat aptariamas Estijos, Latvijos, Lietuvos, Norvegijos ir Švedijos Konstitucijų vaidmuo ir jose įtvirtintas (ar neįtvirtintas) nepriklausomybės principas. Straipsnyje nagrinėjama konstitucinių tradicijų įvairovė, konstitucinės kontrolės mechanizmai, Konstitucijų ir šių dienų valstybių perspektyvų atitikimas (Konstitucijos pataisos, sietinos su integracija į Europos Sąjungą, nuolatinių gyventojų politinės teisės, Europos Sąjungos pilietybė).