

SPECIAL WORKSHOP 44

(RE-)BIRTH OF A STATE AS A MATTER OF LAW: BALTIC SEA REGION PERSPECTIVE

Time and place: Friday (July 12) 8:30, room 4.A07

Convenors:

Jolanta Bieliauskaitė (Mykolas Romeris University, Lithuania)

Tomas Berkmanas (Vytautas Magnus University, Lithuania)

Vaidotas A. Vaičaitis (Vilnius University, Lithuania)

About the workshop:

This workshop is inspired by centennial jubilee of (re-)birth of the Baltic States and other Baltic Sea Region countries, such as Poland, Finland and other, after the World War I. This historic celebration is a good starting point to rethink vulnerable interwar democracy in all the region of the Baltic Sea, which gives us better understanding not only of revolutionary events of the 1990s, but also – contemporary crises of democracy in the region from legal perspective.

The workshop aims at putting the phenomenon of the (re-)birth of a state in a legal context from different perspectives using the experience of the Baltic Sea Region States as a certain 'retrospective laboratory'.

The workshop consists of two parts. In the first part the (re-)birth of a state is presented as a complex of rhetorical, factual and legal dimensions and as the return to legitimate order based on the principle of self-determination as one of the pillars of global society.

The second part of the workshop is focused on the experience of particular states:

- Changes in the idea of legal sources throughout the years of independence and their connection to the changes in the political thinking and European institutionalization in Finland.
- Aspects of state continuity and execution of the state power under the aggression and occupation of the USSR and Nazi Germany in Latvia. The constitutional importance of the national resistance movement.
- Lithuanian multi-level constitutional path towards re-establishments of statehood in 1918-1920 and 1990-1992, according to Andrew Arato concept of "Post Sovereign Constitution Making".

08:30 – 09:15	Tomas Berkmanas (Vytautas Magnus University, Lithuania) <i>[Re]birth of a state as a complex of rhetorical, factual and legal dimensions</i>
09:15 – 10:00	Artur Ławniczak (University of Wrocław, Poland) <i>The rebirth of a state as the return to legitimate order</i>
10:00 – 10:30	Coffee break
10:30 – 11:15	Markku Kiikeri (University of Lapland, Finland) <i>The history of legal sources in Finland during the independence</i>
11:15 – 12:00	Jānis Pleps (University of Latvia, Latvia) <i>The state continuity and execution of the state power: example of Latvia</i>
12:00 – 12:45	Vaidotas A. Vaičaitis (Vilnius University, Lithuania) <i>Restoration of independence and adoption of constitutions in the Baltic states (1989-1992): case of Lithuania</i>

ABSTRACTS

[Re]birth of a state as a complex of rhetorical, factual and legal dimensions

Tomas Berkmanas (*Vytautas Magnus University, Lithuania*)

The (re)birth of a state in the presentation will be analysed based on the differentiation between three layers of interrelated factors that influence this process. Firstly, *rhetorical* dimension is always present there in the form of declarations, invitations, proclamations, emotional references and the like, especially in multitude-to-people transformational and leader(s)-formational events. However, they are usually only a supportive, albeit very important and, in many cases, crucial, tool. Second and rather separate dimension is *factual* one, the dimension of something 'real' outside of the realm of logos/consciousness that influences the transformational processes related to the (re)birth of the state. In economical modernity it usually takes the form of economic factors; in more legal terms, there are certain anomalies related to our right to property (or 'things-relational') that substantially trigger the state (re)birth processes. Of course, not only – other usual factors or anomalies are body-relational and privacy-relational. Finally, the third dimension returns us back to the domain of logos. These are *legal* factors and they can take two rather different forms. First of all – and this is closely related to the factual domain – there could be references to certain aspects of natural right (like nation's right to self-determination). However, in this case, more usually we are confronted with the elaboration of the dimension of statehood's tradition or, in other words, the discourse of the continuation of statehood. Of course, the latter form of legal factor is possible only in the case of a *rebirth* of a state. Summa summarum, in this presentation a (re)birth of the state will be analysed as a complex and multi-layered process where those three dimensions make separate and rather unique, albeit also very much comparable, formations in each individual case. The platform for exemplification will be the Baltic experience/historical layer with certain glimpses to other regions.

The rebirth of a state as the return to legitimate order

Artur Ławniczak (*University of Wrocław, Poland*)

The birth of a state is the phenomenon, which is in a majority of cases connected with the natural process of development of mankind. We can treat a state as a necessary political organization in post-tribal world, so its appearance is something inevitable. Of course there are ephemeral statehoods without probable perspective for renewing of existence, but the history of human race shows, that the rebirth of a state is the typical and legitimate situation in global history.

Therefore, the annihilation of a state has generally in the majority of cases brutal character and is incompatible with natural law or postulate for peaceful cooperation between the groups of people. The destruction of living sociopolitical organization with the head of state and other institutions of public law is mostly just only from the point of view of social Darwinism, but not in the plain of logical or developed international law, which is constructed as a realization of the principle of cooperation between the nations.

It's possible and necessary also to analyze the history of Israel, Poland and Lithuania as case of rebirth of statehood after rather long period of time. The memory of common past, national tradition and also formal and informal signals from international community show, that the statehood may exist even after state's occupation in the sphere of international conscience.

It means, that in a dimension of eternal legitimacy it's hard to say, that any state in the legal way can absolutely cease the existence. Even without real presence in the political map of the world the political subject, which once was the member of "transnational community of states", has in the area of natural law or "immortal just order" the possibility of official return to the "global society of free nations".

In conclusion it is necessary to underline, that a validity of principle of self-determination should be treated as one of the pillars of global society.

The history of legal sources in Finland during the independence

Markku Kiikeri (*University of Lapland, Finland*)

The birth of the Finnish state 1918 resulted drastic changes in legal thinking in Finland. The Swedish and Russian traditions were present. The first decades were characterized by the strong participation of lawyers in the Finnish political and legal-political work in preparation and parliamentary sessions. The theory and doctrines of legal sources were designed around this phenomenon. This led to the peculiar and unique construction and constitution of Finnish legal theory of legal sources, incomparable to other European states. The legal scholars of that time were important part of making rules, especially in the newly designed constitutional committee. The idea of legal sources was rule-positivistic. Gradually the governmental proposals gained a strong position on how to interpret rules in Finland. The position of the constitutional committee could be described as “opinion juris” during that period.

Throughout the years the preparation of laws became more bureaucratic, and the administration within the government gained its central role. The constitutional committee remained as the basic institution pre-controlling the constitutionality of the governmentally proposed laws. In courts, however, the idea of legal sources remained combination of rules and governmental proposals. The interpretation was characterized by a strong linguistic and conceptual legal positivism.

When Finland entered into the system of European human rights (1991) and the European union (1995), there was a pressure to reconsider the traditional idea of legal sources. “European” doctrines were emphasizing the “principled” interpretation of law and importance of case law. That type of European idea gained, at least in scholarly works, attention. However, despite the “European” pressure, Finland seemed maintain its traditional idea of legal sources. Principled and case law approach was not completely adopted. This resulted certain tension of how law was to be seen. At the moment the courts are under strong pressure to change the way they argue and reason the cases, especially because of the diminishing quality of legislative preparation.

This study attempts to describe the changes in the idea of legal sources throughout the years of independence and connect them to the changes in the political thinking and European institutionalization in Finland. Furthermore, there is an effort to consider the changes the European systems and “Europeanization” have brought to the Finnish legal thinking, culture and judicial work in this context of legal sources.

The state continuity and execution of the state power: example of Latvia

Jānis Pleps (*University of Latvia, Latvia*)

1. The Republic of Latvia restored national independence on the basis of the principle of state continuity. That means that the Republic of Latvia that was founded on November 18, 1918, despite the aggression and occupation by the USSR that took place in 1940, has continued its uninterrupted existence.
2. After the aggression and occupation by the USSR that took place in 1940 the Republic of Latvia continue existed as an independent state and a recognized subject of international law. In this period existed limitations for the execution of the state power but still all the years of occupation Latvia had official institutions which executed state power.
3. The issues of the execution of the state power first was analyzed in the opinion of judges of the Latvian Senate – supreme court of Latvia (13th March/ 3rd April, 1948). After the regaining independence this issues are analyzed in the decisions of the Constitutional Court (for example, 29th November, 2007 Case No.2007-10-0102 and 13th May, 2010 Case No.2009-94-01) and Supreme Court (for example, 22nd June, 2018 Case No.SKA-237/2018).
4. Latvian diplomatic service abroad represented the Republic of Latvia all the years of occupation and never lost their recognition. Diplomatic service abroad executed their powers to protect interests of the Republic of Latvia and their citizens and to regain independence of Latvia.
5. During Nazi occupation the national resistance movement was trying to organize centralized institution (13th August, 1943 – Latvian Central Council) for regaining independence. The legal basis for the national resistance movement was the 1922 Constitution of Latvia. The core of the Latvian Central Council was the Presidium of the last legally elected Latvian Parliament – 4th Saeima. The speaker of the 4th Saeima executed also functions of the head of state and proclaimed the Declaration of the Restoration of the Latvian State (8th August, 1944). After his death his functions executed the vice-speaker of the 4th Saeima.
6. Actions of the Latvian diplomatic service abroad in the period of occupation was internationally recognized and they represented the Republic of Latvia. After the restoration of independence, Latvia recognized their activities as legally binding.
7. Actions of the national resistance has crucial symbolic and constitutional importance. Their activities represented the will of the people of Latvia and delegitimized activities of all puppet institutions created by the USSR or the Nazi Germany.

Restoration of independence and adoption of constitution in the Baltics (1989-1992): case of Lithuania

Vaidotas A. Vaičaitis (Vilnius University, Lithuania)

Concept of so-called Post Sovereign or multi-level Constitution Making, developed by Andrew Arato (Oxford, 2016), is grounded on idea, that contemporary constitution making is much more complex phenomenon than traditional adoption of constitution by constituent assembly, because it also includes so called round-tables compromises, provisional constitutions and some other necessary steps. But in the 1990s in the Baltics all of this was even more complex, because Estonia, Latvia and Lithuania were trying also to stress illegality of 50 year soviet occupation and establish certain legal continuity with interwar republics. All three countries chose a bit different constitutional path to re-independence and constitutionalism: Estonia and Lithuania adopted new 1992 constitutions, while Latvia decided to re-install its interwar constitution of 1922.

In particular, Lithuanian multi-level constitutional path towards re-establishment of statehood in 1989-1990 and adoption of 1992 constitution was as follows: i) in 1989 (still under the soviet occupation) so called Lithuanian Soviet Supreme Council (soviet quasi-parliament) adopts democratic electoral rules, pushed by round tables with pro-independence movement Sajudis; ii) organization of new parliamentary elections (to the Lithuanian Soviet Supreme Council) in 1990 February-March (won by Sajudis); iii) after elections Lithuanian Soviet Supreme Council renames itself into Lithuanian Supreme Council; iv) Lithuanian Supreme Council declares restoration of independent Lithuanian Republic; v) on the same day it symbolically restores validity of the last interwar (undemocratic) Lithuanian Constitution of 1938; vi) on the same day it adopts provisional constitution and suspends validity of 1938 Constitution; vii) in 1992 the same Lithuanian Supreme Council adopts permanent constitution of 1992, viii) which is to be ratified by popular referendum.