

<https://doi.org/10.22364/jull.15.01>

The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity

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The aim of this article is to analyse the doctrine of supra-constitutionality, as developed by the Constitutional Court of the Republic of Lithuania, and its impact on the concept of the Lithuanian constitutional identity. The article deals with origins of the doctrine of supra-constitutionality, its content and consequences for the paradigm of constitutional law. This doctrine follows from the fundamental constitutional acts of the State of Lithuania, first and foremost, from the Act of Independence of 16 February 1918. From the standpoint of the current Constitution of 1992, these acts are considered to be pre-constitutional acts of constitutive (re-constitutive) nature, adopted by the supreme representative institutions of the People, which expressed the will to establish (re-establish) the independent democratic State of Lithuania. Therefore, the fundamental constitutional acts of the State of Lithuania are particular primary sources of the Lithuanian constitutional law. Their core provisions establish the unamendable fundamental constitutional principles – independence of the State, democracy, and the inherent nature of human rights. These principles have supra-constitutional force and cannot be denied by any constitution of Lithuania. On the contrary, it is the Constitution that derives from the fundamental constitutional acts and must unconditionally protect the irrevocable constitutional values. Thus, the element of supra-constitutionality present in the fundamental constitutional acts is not contrary to the concept of the Constitution, as supreme law. It is rather the cornerstone of the modern Lithuanian constitutionalism, which together with other constitutional traditions expressed by those acts allows us to define the constitutional identity of Lithuania.

Keywords: fundamental constitutional act, Constitution, supra-constitutionality, constitutional identity.

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Introduction

This year both Latvia and Lithuania commemorate a centenary of their constitutions of 1922. This centenary demonstrates the significant historical achievement of Latvia. The uniqueness of the Constitution of the Republic of Latvia (*Satversme*)¹ starts with its original Latvian name that is recognisable in the legal world and is rightly associated with the continuity of the modern democratic state of Latvia, having survived the brutal Soviet and Nazi occupations. The *Satversme* is also a symbol of the longstanding European constitutional tradition, being the oldest valid constitution in Central and Eastern Europe, as well the sixth oldest valid republican constitution in the world.

In this regard, Lithuania's constitution building achievements are rather modest. The current Lithuanian Constitution will only mark its 30th anniversary at the end of this year, while the first democratic Constitution of the modern state of Lithuania – also adopted one hundred years ago – was only in force for four years. The democratic ideas and principles expressed in the Lithuanian Constitution of 1922 were revived years later: firstly, by the Resistance to the Soviet occupation in 1949, and, secondly, by the current Constitution of 1992.

Accordingly, the topic of this article is related with the common aspirations that all the constitutions serve. Such an aspiration is expressed in the preamble of the *Satversme* as the will to guarantee throughout the centuries the existence and development of the Latvian people, to ensure freedom of each individual. In other words, the focus is on both eternal and universal values, which are above any constitution and on which, therefore, any constitution should be built. Where can we find them? First and foremost, in the constituent acts that established the statehood.

On the other hand, according to the well-known traditional axiom, the Constitution is supreme law and the basis of the whole legal system, with which any other legal act should comply. It is stated both in the text of the Constitution of the Republic of Lithuania² and in the established case law of the Constitutional Court³. Therefore, it may be a rather provocative question to ask about what acts could be above the Constitution. However, then another question can be posed: what an assessment should be given to other primary sources of constitutional law, such as the declaration of independence, which also can be seen as stemming from the will of the People who organised itself into the state community, or a civic Nation. Whether those sources are of equal rank with the Constitution, or they should be regarded as subordinate to the Constitution, which lost its legal significance with the appearance of the latter? Or they should mean something more and above than the Constitution? These are essential questions to understand the meaning of the Constitution as well as

¹ Constitution of the Republic of Latvia (*Satversme*) (15.02.1922). Available: <https://www.satv.ties.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/> [last viewed 15.06.2022].

² Constitution of the Republic of Lithuania (25.10.1992). Available: <https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192> [last viewed 15.06.2022]. According to its Art. 7(1), “any law or other act that contradicts the Constitution shall be invalid”.

³ E.g., Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta1269/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta850/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 15.06.2022]. In these rulings the Constitutional Court also noted that the source of the Constitution is the state community, the civic nation, itself.

the fundamentals of the statehood and constitutionalism. Moreover, they are not purely theoretical when we start to deal with the limits on the people, as a sovereign, and the state power to amend the Constitution or decide other important issues for the life of the state⁴.

On 30 July 2020, the Constitutional Court of the Republic of Lithuania adopted a historical ruling, whereby it established a comprehensive official constitutional doctrine regarding the fundamental constitutional acts of the state of Lithuania⁵ (though some elements of this doctrine can be traced to the Constitutional Court's rulings of 18 March 2014 and 11 July 2014⁶). This doctrine is an object of this article, as it contains a doctrinal element of supra-constitutionalism found within the Constitution, as supreme law.

The aim of this article is to reveal the content of the doctrine of supra-constitutionality, as developed by the Lithuanian Constitutional Court, and its relevance to the constitutional identity of Lithuania, by examining the concept of the fundamental constitutional acts of the State of Lithuania and their impact on the Constitution. The research is carried out by employing historical, logical, comparative and teleological methods of research. Although, taken individually, the fundamental constitutional acts of the state of Lithuania have been the object of research⁷, their relationship with and impact on the Constitution has not been properly examined until the ruling of the Constitutional Court of 30 July 2020, with the exception of certain elements of supra-nationality dealt with in the collective monograph on constitutional disputes⁸.

1. Concept of the fundamental constitutional acts of the state of Lithuania

One can rely on the aforementioned definition of the Constitution as supreme law, which is the basis of the whole legal system, and with which all other legal acts should comply. One can also describe the Constitution as a social contract, i.e., a commitment by all the citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules provided by the Constitution, as well as

⁴ See: *Sinkevičius, V.* Konstitucijos keitimo apribojimai? Jurisprudencija, Vol. 22, issue 2, 2015, pp. 206–230.

⁵ Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

⁶ Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 in case No. 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012, paras III.2, III.3, III.7 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta853/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.5.3 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 15.06.2022].

⁷ *Sinkevičius, V.* Kovo 11-oji: nepriklausomybės atkūrimo teisinė konstrukcija. Jurisprudencija, Vol. 121, issue 3, 2010, pp. 55–71; *Sinkevičius, V.* Lietuvos Laisvės Kovos Sąjūdžio Tarybos 1949 m. vasario 16 d. deklaracija Lietuvos teisės sistemoje. In: Regnum est: 1990 m. Kovo 11-osios Nepriklausomybės aktui – 20 (Liber Amicorum Vytautui Landsbergiui). Vilnius: Mykolo Romerio universiteto Leidybos centras, 2010, pp. 55–73; *Jakubčionis, A., Sinkevičius, V., Žalimas, D.* Aggression by the Soviet Union and the Occupation of Lithuania in 1940–1990. Resistance to the Soviet Occupation: the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 136–141; *Sinkevičius, V.* The Act of 11 March 1990 on the Re-Establishment of the Independent State of Lithuania. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 159–165; *Žalimas, D.* Legal Status of Lithuania's Armed Resistance to the Soviet Occupation in the Context of State Continuity. In: International Law from a Baltic Perspective. Leiden/Boston: Brill Nijhoff, 2021, pp. 167–175.

⁸ *Birmontienė, T., Danėlienė, I., Jarašiūnas, E., Sinkevičius, V., Žalimas, D.* Konstituciniai ginčai. Vilnius: Mykolo Romerio universitetas, 2019, pp. 20, 25–27, 34.

a normative basis for the common life of the people and guidelines for the whole national legal system⁹.

Furthermore, if we look more carefully at the origins and the purpose of the Constitution, as a social contract and a normative basis for the common life of the people, we can observe that no Constitution is usually written on the basis of *tabula rasa* – the Constitution does not appear out of nowhere and overnight. On the contrary, before adopting the Constitution, the people have to establish and organise themselves into a state. This is usually achieved through the declaration of independence that is the “birth certificate” of the state, in which the foundation of the newly born state is laid down. That is why it can also be referred as a fundamental constitutional act of the state. It is an act that establishes the core of constitutionalism for an established state and remains “valid” throughout the lifespan of that state. Therefore, it is natural that the subsequent drafting and adoption of the Constitution should also inevitably rely on it. Together with the Constitution the declaration of independence forms a block of constitutionality of a certain state. Such a role of the declaration of independence has been similarly described by the constitutional courts of Moldova¹⁰ and Slovenia¹¹.

Due to the five decades of foreign occupation in the 20th century, Lithuania, just as the other two Baltic states, has more than one fundamental constitutional act in which we find the foundation of the modern statehood. The Lithuanian Constitutional Court identified three of them:

- 1) **The Act of the Independence of 16 February 1918**, adopted by the Council of Lithuania¹² (hereinafter also – the Act of Independence), which established the “independent State of Lithuania, founded on democratic principles”. It was later followed by the Resolution of 15 May 1920 of the Constituent *Seimas*, which decided on the republican form of government.

⁹ E.g., Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta1269/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta850/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 8.1. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

¹⁰ The Moldovan Constitutional Court referred to the Declaration of Independence as the “birth certificate” of the Republic of Moldova, which served as a constitutional basis for the development of the new state, including the key role in drafting of the text of the Constitution; whereas the concept of a block of constitutionality (*bloc de constitutionnalité*) was borrowed from the French Constitutional Council. See: Judgment of the Constitutional Court of the Republic of Moldova of 5 December 2013 in case No. 8b/2013, paras 47–51, 73–75, 87–91. Available: <https://www.constcourt.md/public/ccdoc/hotariri/en-Judgment-No36-of-5122013-on-Romanian-Language-eng82ea4.pdf> [last viewed 15.06.2022].

¹¹ The Slovenian Constitutional Court emphasised the significance of two independence documents – the Declaration of Independence and the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia – for the constitutional order of the country: both of them laid down the constitutional foundation of the Slovene statehood, including the principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state, upon which the value concept of the constitutional order is based. See: Decision of the Constitutional Court of the Republic of Slovenia of 26 September 2011 in case No. U-I-109/10, paras 7, 8. Available: <http://www.us-rs.si/documents/4b/dc/u-i-109-102.pdf> [last viewed 15.06.2022].

¹² Resolution of the Council of Lithuania (16.02.1918). Available: <https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-16-february/365> [last viewed 15.06.2022].

- 2) **The Act of Restoration of the Independence of 11 March 1990**, adopted by the Supreme Council (Re-Constituent *Seimas*) of the Republic of Lithuania¹³ (hereinafter also – the Act on Restoration of Independence), which restored the independence of the Republic of Lithuania on the basis of the continuity of state.
- 3) **The Declaration of 16 February of 1949 of the Council of the Lithuanian Freedom Fight Movement**, adopted by the then supreme authority of the Resistance to the Soviet occupation¹⁴ (hereinafter also – the Declaration of the LFFM Council), which expressed the principles of the eventual restoration of the independence of the Republic of Lithuania based on state continuity.

From the standpoint of the current Constitution, the Lithuanian Constitutional Court described the fundamental constitutional acts of the State of Lithuania in the following manner: they “are pre-constitutional constituent (re-constituent) acts, adopted by the supreme representative institutions that expressed the will of the People to establish (re-establish) the independent democratic state of Lithuania. Therefore, these fundamental constitutional acts of the state of Lithuania, as the primary sources of Lithuanian constitutional law, may never be altered or repealed”¹⁵.

This description allows us to distinguish three particular features of the fundamental constitutional acts of the state of Lithuania. First, they are pre-constitutional acts, as they were adopted before the current Constitution of 1992. Second, they are of constituent (re-constituent) nature, as they established the modern State of Lithuania or restored (sought to restore) its independence. The Act of Independence is a constituent act, while the rest two fundamental constitutional acts, based on the former, are of re-constituent character (the Act on Restoration of Independence restored the independence of the state of Lithuania, while the Declaration of the LFFM Council pursued this aim). The Constitutional Court referred to the Act of Independence as to the act that established the modern state of Lithuania as a subject of international law, regardless that the Act itself proclaimed “the restoration of the independent state of Lithuania”, as from the legal point of view the previous state of Lithuania (the Grand Duchy of Lithuania that had been also a part of the Commonwealth of Two Nations) was irreversibly extinguished. Therefore, according to the Act of Independence, in pursuance of the right of peoples to self-determination, the new state of Lithuania, as a subject of international law, was established. Meanwhile, the proclamation of the “restoration of the independent state” has to be perceived as reflecting a historical and ideological rather than legal concept: the Act of Independence marks the legal beginning of a modern national state of Lithuania, the core and the name of which together with the creative and organisational potential was inherited from the former “empire”¹⁶.

Third, all the three fundamental constitutional acts of the State of Lithuania were adopted by the unique supreme political representative institutions of the respective

¹³ Act of the Supreme Council of the Republic of Lithuania on the Re-establishment of the Independent State of Lithuania (11.03.1990). Available: <https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-11-march/366> [last viewed 15.06.2022].

¹⁴ Declaration of the Council of the Lithuanian Freedom Fight Movement (16.02.1949). Available: <https://lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364> [last viewed 15.06.2022].

¹⁵ Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.4. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

¹⁶ Römeris, M. Lietuvos konstitucinės teisės paskaitos, I dalis. Kaunas: „Spindulio“ spaustuvė, 1937, pp. 37, 192.

time-period. First and foremost, their uniqueness lain in their particular mandate: regardless the differences in their formation¹⁷, they expressed the will of the people to (re)establish the independent democratic State of Lithuania by adopting respective fundamental constitutional acts¹⁸. In other words, as particular representative institutions, they all had the most important constituent (re-constituent) powers that can be regarded as being primary with regard to the constituent power to adopt the Constitution. Since no other representative institution is mandated with such powers, the fundamental constitutional acts are not subject to amendments and cannot be abolished. At this point, we arrive at one of the premises for supra-constitutionality.

2. Doctrine of supra-constitutionality: Premises, essence and significance

Thus, the doctrine of supra-constitutionality attributable to the fundamental constitutional acts of the state of Lithuania is based on two premises. First, the assignment of those acts to the category of the primary sources of constitutional law adopted by the primary (re)constituent power. The division between the primary and secondary constituent power of the people was made by a pioneer of the Lithuanian doctrine of supra-constitutionality Konstantinas Račkauskas in his book “On the Issues of the Lithuanian Constitutional Law”¹⁹ published in emigration already in 1967. In this context, the establishment or re-establishment of the state is an act of primary constituent power, while the Constitution is perceived as an act of secondary constituent power. Naturally, the secondary power is derived from the primary and is empowered by the latter to adopt the Constitution. As a consequence, the secondary constituent power cannot trespass the limits established by the primary constituent power. On the contrary, it is the Constitution that arises out of the fundamental constitutional

¹⁷ The Council of Lithuania was elected at a special conference of representatives of the People; the Supreme Council was elected by universal elections at the end of the Soviet occupation; the LFFM Council was formed by the Resistance to the Soviet occupation.

¹⁸ *Maksimaitis, M.* Lithuania's Act of Independence of 16 February 1918. In: *Lithuanian Constitutionalism: the Past and the Present*. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 61, 64; *Jakubčionis, A., Sinkevičius, V., Žalimas, D.* Aggression by the Soviet Union and the Occupation of Lithuania in 1940-1990. Resistance to the Soviet Occupation: the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. In: *Lithuanian Constitutionalism: the Past and the Present*. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 135–137; *Sinkevičius, V.* The Act of 11 March 1990 on the Re-Establishment of the Independent State of Lithuania. In: *Lithuanian Constitutionalism: the Past and the Present*. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 161–162.

¹⁹ See: *Račkauskas, K.* Lietuvos konstitucinės teisės klausimais. New York: „Darbininko“ leidykla, 1967, pp. 15–17, 19, 31. According to him, the Act of Independence is regarded as being the accomplishment of the primary constituent power of the people to create their state. As the Act of Independence provided for the Constituent *Seimas* the important duty to set the fundamentals of the state of Lithuania, the Constituent *Seimas* could not oppose to the Act. The legal ground and powers of the Constituent *Seimas* itself arose out of the Act of Independence. Therefore, the Constituent *Seimas* was not a sovereign body so as being able to change its title and competence; its powers were limited by the duty to set the fundamentals of statehood in addition and with full respect to those already established by the Act of Independence. Therefore, the constituent power of the people to establish the Constitution is not absolute and should be subjected to the primary constituent power expressed in the Act of Independence. Meanwhile, the power to change the Constitution should be placed in this hierarchy lower than the constituent power, as it is already qualified and limited by the Constitution.

acts adopted by the primary constituent power²⁰. Furthermore, the constituted power is limited by the constituent power and should not change the entire Constitution.

Legal researchers Andras Sajó and Renata Uitz point out that in our times, constitutionalism presupposes the subordination of the established constituent power to its own rules and denies the possibility to revoke those rules at any time²¹. This excludes the possibility for the constituent power to operate on a permanent basis and without subjecting itself to any rules. Even more, the constituted power (even if it is a referendum held under the Constitution) has to be exercised in accordance with the rules established by the constituent power²².

Second, the purpose of the Constitution, which is to safeguard the *raison d' être* of the state as the common good of the people²³, without which the Constitution would become meaningless. In other words, the Constitution cannot be perceived as “a suicide pact” (the maxim known already from time of the US President Lincoln)²⁴. Following the tradition of American constitutionalism, this means that the Constitution cannot be employed against itself, including for the destruction of its foundation – the sovereignty of the people and their state. Similarly, the Moldovan Constitutional Court clearly stated that “the Constitution is not a suicide pact”, therefore it cannot be interpreted against such “fundamental constitutional values, as national independence, the territorial integrity or the security of the State”²⁵.

Consequently, taking into account the origins and the purpose of the Constitution, one can make the conclusion that there are certain fundamental principles that have been established before the adoption of the Constitution and that are above the Constitution; the Constitution has to comply with and to develop those principles; they have to be found in the core provisions of the fundamental constitutional acts

²⁰ That is why the Lithuanian Constitutional Court noted that the constitutions of the State of Lithuania, including the current Constitution of 1992, derive from the Act of Independence; the current Constitution also arises out of the Act on Restoration of Independence and the will of the People expressed in the Declaration of the LFFM Council. Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras. 6.1.1, 6.2.1, 6.3.3. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

²¹ Sajó, A., Uitz, R. *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford: Oxford University Press, 2019, p. 56.

²² That is why the Lithuanian Constitutional Court emphasised that the Constitution equally binds the State community, the civic Nation, itself; therefore, the supreme sovereign power of the People may be executed, *inter alia*, directly (by referendum), only in compliance with the Constitution. Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 15.06.2022].

²³ Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta1269/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 19 August 2006 in case No. 23/04, para. II.1 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta1337/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 September 2009 in case No. 16/2009, para. III.3.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta1287/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta850/content> [last viewed 15.06.2022].

²⁴ Posner, R. A. *Not a Suicide Pact: the Constitution in a Time of National Emergency*. Oxford: Oxford University Press, 2006, pp. 153–154.

²⁵ Judgment of the Constitutional Court of the Republic of Moldova of 2 May 2017 in case No. 37b/2014, para. 188. Available: http://www.rulac.org/assets/downloads/Cst_Court_of_Moldova_Judgment_Neutrality.pdf [last viewed 15.06.2022].

of the State of Lithuania. This is exactly what the doctrine of supra-constitutionality is about.

It is not a surprise that the Act of Independence should be distinguished in this context. According to K. Račkauskas, this Act is “a supra-constitutional document, with which no constitution or law can be in conflict”²⁶. The other two fundamental constitutional acts aimed at the implementation of the Act of Independence in the concrete historical situation. More precisely, the Lithuanian Constitutional Court clearly identified the core provision of the Act of Independence, which reflects the essence of the Act. It is the provision on the “independent State of Lithuania, founded on democratic principles”. In its Ruling of 30 July 2020, the Constitutional Court stated about supra-constitutionality in the following way: “the provisions of the fundamental constitutional acts of the state of Lithuania that consolidated and implemented the unamendable fundamental constitutional principles – independence, democracy, and the innate nature of human rights and freedoms – have supra-constitutional force; they may not be denied by any constitution of the State of Lithuania. On the contrary, the Constitution, as supreme law, enshrines and unconditionally protects these constitutional values. If the Constitution were interpreted in a different way, as mentioned before, the preconditions would be created for abolishing the restored “independent State of Lithuania, founded on democratic principles”, as proclaimed by the Act of Independence of 16 February 1918”²⁷.

Thus, first and foremost, the fundamental constitutional principles – the independence of the State, democracy and inherent nature of human rights – have been acknowledged as being supra-constitutional. They are also expressed and consolidated in Art. 1 of the current Constitution, which proclaims the State of Lithuania to be “an independent democratic republic”. Due to their origins found in the core provision of the Act of Independence, the fundamental principles of Article 1 of the Constitution, such as the independence of the state, democracy and the inherent nature of human rights, have the status of unamendable, or eternal, clauses, which cannot be denied by any constitutional amendment; nor even by a referendum²⁸. In such a way, the doctrine of supra-constitutionality substantiates the hierarchy of constitutional principles and the existence of absolute material criteria for the constitutionality of constitutional amendments, when express provisions regarding the unamendability or eternity of constitutional clauses are absent in the text of the Constitution. Thus, the doctrine of supra-constitutionality does not in any way deny the supremacy of the Constitution. On the contrary, it derives from the Constitution as well as it rather contributes to the safeguarding and strengthening of the pillars of modern constitutionalism. Among those pillars, the inherent nature of human rights is implied and follows from the core provision of the Act of Independence regarding the “independent State of Lithuania, founded on democratic principles”, as it is perceived to be an immanent element of democracy. Already in 1978, another famous Lithuanian emigrant lawyer Jonas Varnas noted that “democracy is a life style based on social justice, acknowledgment of a human value in any human being, equality of all human beings

²⁶ Račkauskas, K. Lietuvos konstitucinės teisės klausimais. New York: „Darbininko“ leidykla, 1967, p. 15.

²⁷ Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.4. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

²⁸ Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. 1.5.3 of the argument. Available: <https://lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 8.2. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

and love to the close ones. It also supposes the moral duty to respect any human being and his or her personality²⁹. In addition, apart from that core provision of the Act of Independence, the core provisions of the Act on Restoration of Independence and the Declaration of the LFFM Council, which declare state continuity and identity as the legal ground for the restoration of independence, are also acknowledged as having supra-constitutional force; the concept of independence of the state of Lithuania inevitably includes the continuity of the State during the former foreign occupation and its identity with the State of Lithuania established by the Act of Independence³⁰.

In general, the Lithuanian doctrine of supra-constitutionality resembles to the doctrine of the unamendable core of the Constitution, as developed, among others, by the Latvian Constitutional Court. The latter proclaimed that the fundamental values, upon which the State of Latvia is based, including the fundamental rights and freedoms, democracy, sovereignty of the state and people, separation of powers, the rule of law, cannot be infringed by amendments to the *Satversme*³¹. Legal research (including that conducted by Ineta Ziemele)³² further linked this substantial limitation on constitutional amendments to the doctrine of the Basic norm (*Grundnorm*) that is found in the 1918 Act on the Proclamation of the State. This Act itself provides for the constitutional core of the Republic of Latvia (an independent and democratic State established by the Latvian people on their land). The *Satversme* stems from that core. Therefore, this Basic norm can only be altered through a revolution or revolt rather than through the amendments to the *Satversme*. By developing the doctrine of supra-constitutionality, the Lithuanian Constitutional Court has advanced a similar constitutional doctrine at the official jurisprudential level.

3. Supra-constitutionality and constitutional identity

At this point we also encounter the concept of constitutional identity that is employed by a number of the European institutions of constitutional control. As such, constitutional identity encompasses the constitutional principles and provisions, which reflect the essence of the constitutional system and constitute the exceptionally safeguarded constitutional core³³.

Although it is not expressly mentioned by the Lithuanian Constitutional Court, constitutional identity follows, first and foremost, from the fundamental constitutional acts of the State of Lithuania. As it is clear from the Ruling of the Constitutional Court of 30 July 2020, the concept of constitutional identity is broader than that of supra-constitutionality: apart from the unchangeable constitutional core safeguarded by the doctrine of supra-nationality, it also includes the constitutional traditions that are established by the fundamental constitutional acts of the State of Lithuania, expressed in the text of the current Constitution and can in principle be subject to

²⁹ Varnas, J. Dėl demokratijos esmės. Tėvynės sargas, Vol. 40, issue 2, 1978, p. 47.

³⁰ Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras 6.2.1, 6.3.1. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

³¹ Judgment of the Constitutional Court of the Republic of Latvia of 7 April 2009 in case No. 2008-35-01, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf#search=lisbon [last viewed 15.06.2022].

³² Ziemele, I., Spale, A., Jurcena, L. The Constitutional Court of the Republic of Latvia. In: The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions, Bogdandy, A., Huber, P., Grabenwarter, Ch. (eds). Oxford: Oxford University Press, 2020, p. 505.

³³ Jarašiūnas, E. Valstybės suvereniteto kategorija tarpsisteminės sąveikos srityje: konstitucinio tapatumo alternatyva ar jo esminis elementas? In: Konstitucija ir teisinė sistema (Liber Amicorum Vytautui Sinkevičiui). Vilnius: Mykolo Romerio universitetas, 2021, pp. 43–44.

changes, once the opposite constitutional amendments are adopted (although some of those elements, such as the republican form of government and the restrictive aspect of geopolitical orientation, can be called *de facto* unamendable)³⁴.

Thus, the concept of constitutional identity of Lithuania following from its fundamental constitutional acts is a mixed one. In part, it resembles the German model of unamendable identity consisting of the eternity clauses³⁵, substantiated by the doctrine of supra-constitutionality. In other part, it follows the French pattern of the relative identity³⁶ so far as other constitutional traditions are involved.

The majority of those constitutional traditions that do not have the status of an eternity clause have been established by the Declaration of the LFFM Council³⁷. They include a parliamentary republic (expressed by adherence to the spirit of the 1922 Constitution thereby rejecting the legacy of the authoritarian constitutions of 1928 and 1938). They also include the Western geopolitical orientation of the State (implying, on the one hand, non-alliance with the post-Soviet blocks and, on the other hand, membership in the European Union and the NATO), as well as the inconsistency with the Constitution of both the Nazi and the Soviet totalitarian regimes, including the prohibition of a communist party. In such a particular way, on the one hand, those constitutional traditions reflect national elements of the constitutional identity of Lithuania based on its specific historical experience and legal heritage; on the other hand, they are developing, safeguarding and strengthening the unamendable pillars of constitutionalism – the independence of the state, democracy and inherent nature of human rights as an inseparable element of a democratic constitutional order.

Summary

Traditionally the Constitution is perceived as supreme law, the source of which is the People organised in the state community (or a civic Nation). However, usually the Constitution is preceded by fundamental constitutional acts establishing or re-establishing a respective state.

The source of all the fundamental constitutional acts of the State of Lithuania (the Resolution of the Council of Lithuania of 16 February 1918, the Act of the Supreme Council of the Republic of Lithuania on the Re-establishment of the Independent State of Lithuania of 11 March 1990, and the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949) is the same – the will of the people (a civic nation). Thus, like the Constitution, all the fundamental constitutional acts of the state of Lithuania are primary sources of constitutional law. However, their particularity is predetermined by the purpose to organise the people into the state community. Only to a limited extent they pursue the aim that is typical for the Constitution – to lay down the more detailed normative basis for the life of the state community.

³⁴ See: Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras. 6.1.2, 6.1.3, 6.2.2, 6.2.3, 6.3.2, 6.4, 8.2. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

³⁵ See: *Calliess, Ch.* Constitutional Identity in Germany. One for Three or Three in One? In: *Constitutional Identity in a Europe of Multilevel Constitutionalism*, *Calliess, Ch., Van der Schyff, G.* (eds). Cambridge: Cambridge University Press, 2019, pp. 153–181.

³⁶ See: *Jarašiūnas, E.* Valstybės suvereniteto kategorija tarpsisteminės sąveikos srityje: konstitucinio tapatumo alternatyva ar jo esminis elementas? In: *Konstitucija ir teisinė sistema (Liber Amicorum Vytautui Sinkevičiui)*. Vilnius: Mykolo Romerio universitetas, 2021, pp. 64–65.

³⁷ See: Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.3.2. Available: <https://lrkt.lt/en/court-acts/search/170/ta2220/content> [last viewed 15.06.2022].

Taking this into account, one can notice the following particular features of the fundamental constitutional acts of the state of Lithuania. First, they are pre-constitutional acts, as they were adopted before the current Constitution of 1992. Second, they are of constituent (re-constituent) nature, as they established the modern State of Lithuania or restored (sought to restore) its independence. Third, they were adopted by the supreme representative institutions of the People of the respective time-period, which were pursuing the primary constituent (re-constituent) power, i.e. the unique representative institutions that expressed the will of the people to (re)establish the independent democratic state of Lithuania.

This leads us to two main premises of supra-constitutionality inherent in the fundamental constitutional acts of the state of Lithuania. First, the constituent power that adopted the Constitution (even if it was done by a referendum) can be regarded only as secondary *vis-a-vis* the primary constituent power of the people that adopted the fundamental constitutional acts of the state of Lithuania. Therefore, the power that adopted the Constitution could not amount to the primary (re)constituent power. Even more this applies to the constituted power that is established and acts under the Constitution (the *Seimas*, as the representation of the people, or even a referendum held in accordance with the Constitution). Thus, neither the secondary constituent power, nor the constituted power can amend or abolish the fundamental constitutional acts adopted by the primary (re)constituent power of the people. That is why, the Constitution arises out of the will of the people, as expressed in the fundamental constitutional acts of the State of Lithuania, and those acts are the source of the respective constitutional provisions.

Second, the purpose of the Constitution is to safeguard the *raison d'être* of the state as a common good of the people, without which the Constitution would become meaningless. In other words, the Constitution cannot be perceived as “a suicide pact”, i.e. it cannot be employed against itself, including for the destruction of its foundation – the sovereignty of the people.

The conclusion following from these two premises is that the core provisions of the fundamental constitutional acts of the state of Lithuania must be acknowledged as having supra-constitutional force, even if they are incorporated into the text of the current Constitution of 1992. This is the essence the doctrine of supra-constitutionality, as developed by the Constitutional Court of the Republic of Lithuania in its ruling of 30 July 2020.

The supra-constitutional force is acknowledged to the unamendable fundamental constitutional principles – independence of the state, democracy, and the inherent nature of human rights, as namely these values constitute the *raison d'être* of the state of Lithuania in accordance with, first and foremost, the Act of the Independence of 16 February 1918. Thus, the Constitution cannot be interpreted contrary to these irrevocable constitutional values and must unconditionally protect them. By the same token, the unamendable fundamental constitutional principles serve as a substantial criterion for constitutionality of constitutional amendments.

Other provisions of the fundamental constitutional acts of the state of Lithuania, which are not so essential for the existence of the state and sovereignty of the people, nevertheless are expressing the constitutional traditions of Lithuania. Together with the unamendable fundamental constitutional principles they define the constitutional identity of Lithuania.

Thus, however paradoxical it may sound, the doctrine of supra-constitutionality does not in any way deny the supremacy of the Constitution. On the contrary, it

rather shares the purpose of various national doctrines dealing with the core of the Constitution, including that of the *Satversme*, which is to safeguard the foundation of our modern statehood as well as provide effective value-based responses to the challenges and at times even extraordinary threats to the European constitutionalism.

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