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Constitutional identity as a normative constitutional concept

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ABSTRACT

Although constitutional identity is nowadays invoked by European states primarily against the extension of the powers of the EU institutions, it can also be understood as a substantive concept of national constitutional law. This article deals with constitutional identity as a normative constitutional concept. In this respect, the problem is the same as that which arises in the relationship between EU law and domestic law: namely, its fundamental indeterminacy and the possible arbitrariness of its application. The author argues that, therefore, constitutional identity can only be plausibly invoked if satisfactory answers can be given to the questions of exactly whose identity it is, what its source is, who and how its content may define, and what the constitutional function of this category is. The second part of the study examines the Hungarian constitutional identity according to this analytical framework, and concludes that, although its subject is the Fundamental Law, its definition, content and constitutional function are unclear and contradictory. Consequently, the current concept of constitutional identity in Hungary raises a number of problems for which no plausible answers have yet been found, and it is highly doubtful whether the doctrinal and practical difficulties related to it can be resolved at all.

KEYWORDS

constitutional identity, Hungary, constitutional principles, identity-building

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1. INTRODUCTION

Although the issue of constitutional identity arises primarily with regard to the relationship between the European Union and the Member States in the form of a barrier to the transfer of competences to the EU, and has entered mainstream constitutional discourse since the Lisbon Treaty, it is also worth examining it as a normative constitutional concept, at least for two reasons. First, both the Maastricht Treaty, which established the European Union, and the Lisbon Treaty concern respect for the national identities of Member States.[1] The discourse on constitutional identity has been inspired by the latter – that is, Article 4 TEU[2] –, but it also refers only to national identity, and this concept can only indirectly be derived from it, mainly by demonstrating that constitutional identity is an autonomous, substantive category of the national constitutional system. Second, Member States can effectively invoke their own constitutional identity to counter the potential expansion of EU competences only if the normative nature of such a notion can be justified and demonstrated, and moreover, if constitutional identity really encompasses the most important constitutional values and principles which impact domestic constitutional law.

In addition, some argue that this concept has its origins in constitutional theory (referring back to Carl Schmitt's *Verfassungslehre,* published in 1928),[3] and it could also be argued that in fact, constitutional identity is a reformulation of constitutional culture or traditions, which is a well-established concept, or has antecedents in constitutional law,[4] even if it was not called such, like the eternity clauses or certain judicial constructions which are very similar in substance to the present construction of constitutional identity.

As a matter of fact, the references to the national constitutional identity emerged in the jurisprudence of some European constitutional courts even before its recognition in EC/EU Treaties, even if this concept was already being referred to as a limit to European integration, and the question of primacy in the relationship between Community law and domestic law was at stake, just as it is today. One of the first, though indirect, references to constitutional identity emerged in the *Frontini* judgment of the Italian Constitutional Court in 1973 that developed the so-called *contolimiti* doctrine, according to which, although Italy's national sovereignty was limited through its participation in the European integration, the empowerment of the European Community did not expand 'to violat[ing] the fundamental principles of our constitutional order or the inalienable rights of man'.[5] Similarly, the German Federal Constitutional Court, in its famous *Solange I* judgment in 1974, albeit referring to the following even then as a barrier to European integration, said that the delegation of powers to the European Community must be

[1]For a detailed history of the development of the concept in the European Union, see Faraguna (2021).

[2]According to para 2 of this Article, '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

[3]Schmitt (1928) 103.

[4]See e.g., McHugh (ed) (2002); Gephart and Suntrup (eds) (2020).

[5]Corte costituzionale, Sentenza n. 183 del 1973 (Frontini). Nevertheless, the expression of 'constitutional identity' was used for the first time in the *Taricco* case in 2016. Corte costituzionale, Ordinanza n. 24 del 2017 (Taricco).

considered in the whole context of the German Basic Law, which meant that it must not affect the fundamental structure and identity of the Constitution.[6] The constitutionalization process of the European Union, even if it proved to be ultimately unsuccessful, gave new impetus to the discourse on constitutional identity. In France, for example, the Constitutional Council developed the doctrine of constitutional identity in 2006 by stating that EU directives may not be contrary to a rule or principle essential to French constitutional identity.[7] The next wave of discourse began after the entry into force of the Lisbon Treaty in 2009, pioneered by the German *Bundesverfassungsgericht*, thereby vindicating the power of 'identity review' (*Identitätskontrolle*) as a counter to EU law. As this ruling states,

> [t]he identity review makes it possible to examine whether the principles of Article 1 and Article 20 of the Basic Law, which are declared untouchable in Article 79 (3) of the Basic Law, are violated as a result of the actions of European institutions. This ensures that the primacy of application of Union law applies only by virtue of and within the framework of the continuing constitutional authorization. Both the ultra vires and the identity review can lead to Community law or, in future, Union law being declared inapplicable in Germany.[8]

Ultimately, even if this development has always been closely linked to progress with European integration, it has been underpinned by the ambition of national constitutional courts to develop a substantive constitutional concept of constitutional identity. This was most clearly expressed by the German Federal Constitutional Court in its 2014 decision on Outright Monetary Transactions when it distinguished the obligation to respect the constitutional identity of the Member States under Article 4(2) TEU from the core of the German Constitution under Article 79(3) of the Basic Law by holding that the protection of the latter is 'the sole responsibility of the Federal Constitutional Court'.[9]

This study is divided into two parts: first, since constitutional identity is an essentially contested concept, it is worth clarifying its most important features, or at least identifying those questions that need to be answered in order to talk meaningfully about constitutional identity. Second, it will argue that this concept can cause serious doctrinal problems in domestic constitutional law, which can be perfectly illustrated by the way it is used in Hungary. Nevertheless, it is important to note that these problems may arise in different ways and to different degrees in various countries.

2. BACK TO BASICS

As is the case with equally abstract constitutional concepts, a significant part of the discourse about constitutional identity relates to its conceptualization. These debates cover almost all possible conceptual elements, even if their intensity may vary from region to region, country to country, and according to the nature of the discourse. For example, as we shall see, there is no consensus among scholars even about who or what can be the subject of constitutional identity,

[6]BVerfGE 37, 271 (1974) (Solange I.).

[7]Conseil constitutionelle, Décision n° 2006-540 DC du 27 juillet 2006.

[8]BVerfGE 123, 267 (2009), 240-41.

[9]BVerfGE 134, 366 (2014), 29.

and different conclusions can be reached depending on the level of detail with which different legal systems regulate constitutional identity, or if they regulate it at all. Furthermore, constitutional identity may take on a different meaning in the legal system of the European Union or in the context of Member States or nation-states in general. Therefore, in order to make rationally debatable statements about constitutional identity as a constitutional concept, it is necessary to take a stand on the fundamental issues related to it, going back to basics until at least some consensus about them is reached. These questions concern precisely whose identity is at stake, what the source of constitutional identity is, who determines its content, and, finally, what its constitutional function is.

2.1. Whose identity?

The first relevant question to be decided is whose identity does it refer to anyway? Basically, there are two different approaches concerning this question. 'The notion of constitutional identity may refer to at least two different ideas: the identity of the constitution and the identity of the people or the political community ruled by such constitution.'[10] The American academic literature, in particular, defines constitutional identity as the identity of the people, meaning their attitude towards their constitution.[11] In the European discourse, constitutional identity is understood more as the identity of the constitution itself. Some scholars postulate that the core elements or values of the constitution are parts of constitutional identity; others claim only the specificities which make the constitution unique and distinguishable from all other constitutions.[12] The practice of constitutional courts also suggests that constitutions or the constitutional orders they embody have an identity. For instance, the German Federal Constitutional Court has clearly developed its claim of ultra vires and identity review of EU legislation in order to protect the values of Basic Law, in particular with regard to its eternity clauses (*Ewigkeitsklauseln*) defined by Article 79(3) of the German Constitution. The Czech Constitutional Court, also referring to its own eternity clause entrenched in Article 9 of the Czech Constitution, similarly concluded that 'the constitutional order of the Czech Republic, in particular its material core, must take precedence' over EU law.[13]

Although these two conceptions (referring to the identity of the people, or the constitution) seem to be mutually exclusive, they could in a sense be combined, insofar as this means people's identity as expressed by the constitution, even if this approach may rather mean a national identity that is recognised or expressed in the constitution. However, the persuasive force of this explanation is weakened by the fact that surveys show that in most cases there is a significant gap between the values of national constitutions and those of the majority of society.[14]

[10]Martí (2013).

[11]Rosenfeld (2010); Jacobsohn (2010).

[12]Faraguna (2017) 1626–27.

[13]ÚS 19/08, 85., 26 Nov. 2008.

[14]Versteeg (2014).

It is worth noting that the Treaty on European Union recognizes the national identity of Member States in Article 4 para 2, from which constitutional identity can be derived as the constitutional structures of the Member States, such as 'regional and local self-government', the 'essential State functions including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security', as well as 'national security', which are postulated as parts of national identity.[15] Similarly, the preamble of the EU Charter of Fundamental Rights declares that the EU respects 'the national identities of the Member States and the organisation of their public authorities at national, regional and local levels'. Consequently, this wording shows that in EU law the Member States have a constitutional identity. This line of this logic suggests that national constitutions can at most be the source of constitutional identity. This is also the approach of the Hungarian Fundamental Law of 2011, one of the few constitutions to contain an explicit provision on constitutional identity, referring to the constitutional identity of 'Hungary'.

2.2. What is the source of constitutional identity?

Whatever is the subject of constitutional identity – i.e., a people, a constitution, or a country –, the same two closely interconnected questions may arise: what is the source of constitutional identity, and how is it created and shaped: i.e., who determines it, and in what way?

The view that constitutional identity is the identity of the constitution is a very practical approach because in this case, self-evidently, the constitution itself will be the source of constitutional identity. In fact, the constitution can also be considered the most authentic source if the people are considered the subject of constitutional identity. But even if the constitution is recognised as the only or primary source of constitutional identity, we need a tool or procedure to specify its particular elements. This appears to be easier if the constitution contains eternity clauses that assume that immutable constitutional norms are identical to the elements of constitutional identity. However, sometimes the situation is not clear even in such a case.[16] For example, the German Federal Constitutional Court in its Lisbon judgment went further than the eternity clauses of the German Basic Law, listing citizenship, the military, civil monopoly on the use of force, criminal law, the right of final decision in financial matters (*Finanzhoheit*) and the socio-cultural shaping of life circumstances as among the components of identity of the constitution.[17]

Some authors suggest that the source of constitutional identity may be certain fundamental constitutional norms that define the character of the constitution. Some argue that the preamble of the constitutions can provide information on the values that the framers have given priority to, which can be included among the core principles of the constitutions as elements of constitutional identity.[18] In particular, constitutional provisions related to national language, culture, and historical specificities may fall into this category.[19] There are also examples of higher courts deciding on constitutional disputes that specify those constitutional principles or

[15]From the growing literature, see e.g. Besselink (2010); Saiz Arnaiz and Alcoberro Llivina (eds) (2013); van der Schyff (2016); Faraguna (2017); Fromage and de Witte (2021).

[16]Fabbrini and Sajó (2019).

[17]BVerfGE 123, 267 (2009).

[18]Polzin (2017) 1605.

[19]Polzin (2017) 1606.

provisions that define the 'basic structure' of the constitution, even if the constitution itself does not contain eternity clauses.[20]

The spirit of the Constitution is even more of an elusive concept as an attribute that is unamendable. The Norwegian Constitution exemplifies this, stating that a constitutional 'amendment must never, (…) contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'.[21]

Finally, some scholars argue that national identity includes both pre- and extra-legal values and elements.[22] In fact, there are even examples of this in the practice of constitutional adjudication. Thus, the Hungarian Constitutional Court declared that '[t]he Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law'.[23]

2.3. Who determines the content of constitutional identity, and how?

The next basic question is who has the power to define the exact content of constitutional identity? Do the elements of constitutional identity develop over a long period of time as a result of a natural process, or are they determined by specific decisions? In other words, is constitutional identity made, created, or does it evolve over time? For example, if we think that constitutional identity is not artificially created but it means people's attitudes towards the constitution, then it is reasonable to assume that constitutional identity is developed from traditions, deep-rooted convictions, and commonly shared values, rather than ad hoc ideas or sudden decisions. Of course, a compromise solution is possible again, in a way that the identity of a people, a constitution, or a constitutional system is based on long practice and cultural traditions but is institutionalised by the constituent power through formal constitutional changes. The same solution is also possible if we do not base constitutional identity on backward-looking qualities shaped by tradition, but rather attribute programmatic aspirations to this concept. In the latter construction, identity should not mean what we are (or have been), but what we want to be, or what we want to become. This approach can be corroborated by emphasizing the dynamic nature of constitutional identity, in particular in countries that have recently undergone major constitutional transformations that fundamentally alter the character of the constitutional system. But in the case of such an aspirational approach, it is even more plausible to assume that these aspirations considered as part of identity are expressed by the constituent power. Whatever the case, if we know the source of constitutional identity, we can also conclude who defined its content. The situation is clearest when the

[20]Like in India. See Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. (1973). The Czech Constitutional Court also referred to the core values of the Czech Constitution that delimit the legitimate scope of the transfer of powers from national authorities to the EU institutions, saying that 'the very essence of the republic as a democratic State governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and is to establish a change of the essential requirements of a democratic State governed by the rule of law'. ÚS 19/08 of 26 November 2008.

[21]See Article 121 of the Norwegian Constitution.

[22]Schnettger (2020) 20.

[23]22/2016. (XII. 5.) AB határozat.

constitution is seen as the source of constitutional identity, since it is then defined by the constituent power.

However, even in this case, the question remains how constitutional identity is construed by the constitution-maker. If constitutional identity is based on constitutional culture and traditions, then we should identify those constitutional values as its parts which are the permanent principles or elements of the constitutional history of a country, and which have determined for a long time the way in which public power is exercised and fundamental rights are understood.

The aspirational understanding of constitutional identity may be grounded on a majority principle, thereby upholding and realizing the values that have majority support in society. If the content of identity can be determined only by the community whose identity is at stake,[24] it is logical that the constituent power representing the people should determine its ingredients. This approach was probably followed by the French Constitutional Council when it declared a ban on the wearing of the veil, deriving the banning from the constitutional identity of the French people as a community of free and equal citizens.[25]

While it is an attractive idea that constitutional identity is defined by the constituent power, it does not seem to be sufficient, because constitutions do not usually make it clear what exactly constitutional identity is. In fact, constitutions only very rarely refer directly to their own identity; consequently, one has to extract this from the constitutional text. Very recent experience shows that constitutional or other high courts often have such an ambition. According to the practice of the German or Italian Constitutional Court, it is a judicial function to define constitutional identity, while the Czech Constitutional Court declared that the definition of sovereignty and the limits of the delegation of powers are political questions.[26] Furthermore, there are also examples of when high courts have developed certain judicial constructions which can be seen as parts of constitutional identity when the constitution does not contain unamendable constitutional provisions, such as the basic structural doctrine of the Indian Supreme Court.[27]

Notwithstanding, the practice seems to be more complicated, especially in the relationship between the EU and the Member States, which is where the issue of constitutional identity arises most frequently. Although some EU Member States have vindicated the right to determine the content of their own constitutional identity, from the point of view of EU law, ultimately, the European Court of Justice decides whether it accepts this reference in particular legal disputes. However, this does not simplify the issue, but rather complicates it. In terms of EU law, the European Court of Justice, when deciding whether to accept a Member State's invocation of its own constitutional identity in a dispute, in effect has the last word on the national constitutional identity of member countries. According to the Treaty on the Functioning of the European Union, the ECJ has exclusive power to review the legality of legislative acts of EU institutions (Art 263), and, in case of illegality, to declare such acts to be void (Art 264). This means that in case of a legal dispute between the EU and a Member State when the extension of EU competence is challenged by a Member State on the basis of its own constitutional identity, the

[24]Schnettger (2020) 15.

[25]Conseil constitutionelle, Décision n° 2010-613 DC du 7 octobre 2010.

[26]ÚS. 19/08, 26.11.2008.

[27]Kumar (2007).

ultimate arbiter is an EU body. However, this mechanism has been challenged by several national constitutional courts, as most recently exemplified by the so-called PSPP decision[28] of the German Federal Constitutional Court. These courts take the view that the TEU's requirement to respect the national identities of Member States is an absolute limit on the expansion of EU powers, and that the delimitation of national (constitutional) identity is an inalienable right of each Member State. As a matter of fact, in the absence of standard jurisprudence and well-elaborated doctrine of the ECJ on national constitutional identity, it is not clear on what basis the European Court of Justice accepts or rejects Member States' invocation of their constitutional identities. It may well be argued that at the end of the day the ECJ's practice is based on the common constitutional heritage of the Member States, but, as we have already seen, constitutional identity is usually understood to mean precisely those national characteristics that distinguish different constitutional polities from one another.

2.4. What is the function of constitutional identity?

As an autonomous constitutional concept, constitutional identity does not have a long past. The emergence of the identity clause in the Maastricht Treaty was inspired by the political desire to offset fears of closer European integration.[29] These fears and distrust were based on the fact that integration was beginning to extend to traditional areas of national sovereignty such as citizenship (introducing European citizenship) or financial union (anticipating a common currency), and that former economic cooperation was now openly complemented by political union between Member States. Just because of its highly political nature, the identity clause has received little attention in constitutional law scholarship, despite the fact that the alignment of national constitutions with the Maastricht Treaty required constitutional amendments in several Member States.

However, as I have written, constitutional identity became of interest to the mainstream international constitutional discourse only after the entry into force of the Lisbon Treaty, as the new wording of the identity clause specified the content of 'national identity', and clearly refers to such constitutional structures.[30] Since then, constitutional identity has been used by some EU Member States as a shield against the expansion of the EU, or as a new instrument in defence of national sovereignty. In theory, it could be used to prevent certain undesired constitutional changes, especially when there are no immutable norms in the constitution. It may be invoked, for example, in defence of the basic structure of the constitution or its fundamental values. However, it also raises theoretical problems, such as why the will of past constitution-makers should bind the freedom of present or future generations, and that it can be used to defend an undemocratic constitution as well. In these cases, it may be a challenge to traditional constitutional doctrines for which constitutional identity was simply not built in. Paradoxically, this may challenge the traditional structure of a constitution because it claims an internal hierarchical order of constitutional principles and provisions that is not contained in the constitutional text, or was not previously known at all.

[28] 2 BvR 859/15 2 BvR 859/15.

[29] von Bogdandy and Schill (2011).

[30] Fromage and de Witte (2021) 415.

In other words, it can be assumed that even if the current wave of constitutional identity is primarily a product of the recent development of European integration, the crystallization and improvement of this concept will impact domestic constitutional law too because the values and principles considered part of identity may determine the path or limits of further constitutional development.

3. CONSTITUTIONAL IDENTITY IN HUNGARY

3.1. The content of constitutional identity

So far, I have discussed rather general or theoretical possibilities and difficulties with the concept of constitutional identity, but let me now illustrate some practical problems using the Hungarian example. First of all, it is to be noted that constitutional identity was a completely unknown concept in Hungarian constitutional law before 2016. This notion did not emerge beforehand in the constitutional text, nor in the jurisprudence of the Constitutional Court, or in academic literature. The Court sometimes referred to the 'value order' of the Constitution without elaborating the meaning of this notion. Its first mention can be found in a dissenting opinion in a Constitutional Court decision in 2010 without any practical effect. The Court discovered the concept of constitutional identity a couple of years later in 2016.[31] However, the emergence of this concept did not follow from the previous constitutional case-law, but was produced by the political context of the day when the Court, fully packed by the governing parties,[32] after an unsuccessful constitutional amendment and an invalid national referendum,[33] at the initiative of the Commissioner of Fundamental Rights willingly assisted the government, which was unable to get constitutional backing for its fight against EU immigration policy. In this decision, the Court provided an abstract interpretation of the EU clause of the Fundamental Law. This clause gives constitutional consent to Hungary's EU membership. In this ruling, the Constitutional Court reserved the power to consider whether the joint exercise of powers between Hungary and the EU institutions violates, among other things, Hungary's sovereignty and self-identity based on its 'historical constitution'. The Court said that for this purpose, it may carry out so-called 'sovereignty control' on the one hand, and 'identity control' on the other. Unfortunately, the Constitutional Court did not define the concept of constitutional identity, but stated only that it will determine the meaning of constitutional identity on the basis of the whole Fundamental Law and its provisions, in accordance with their purpose, and on the preamble of the constitution and the achievements of the historical constitution, on a case-by-case basis. The Court said that there was an open-ended list of the elements of constitutional identity, and referred to some potential examples; namely, freedoms and liberties, the separation of powers, the republican form of state, public law autonomies, freedom of religion, the legitimate exercise of power, parliamentarism, the equality of rights, the recognition of the judiciary, and the protection of nationalities. In addition, the issue of the protection of constitutional identity may arise in cases affecting the living conditions of individuals, especially their privacy, personal

[31] 143/2010 (VII.14.) AB határozat.

[32] Szente (2022) 25-27.

[33] Szente (2016).

liberty, and social security protected by fundamental rights, as well as their responsibility for independent decision-making, and in the case of Hungary's linguistic, historical, and cultural traditions.

However, this practice did not continue, as the Constitutional Court did not elaborate any coherent jurisprudence of constitutional identity. Instead, the basic elements of constitutional identity were constitutionalized; i.e., built into the text of the Fundamental Law through constitutional amendments. When the government that came to power in 2010, after a brief interruption, regained its parliamentary supermajority, it immediately pushed the Seventh Amendment to the Fundamental Law through parliament in May 2018. This modification inserted a new sentence into the Preamble stating that 'the protection of our identity rooted in our historical constitution is a fundamental obligation of the State'. Almost the same requirement was repeated in a normative text that stated that '[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State'.[34] In parallel, the EU clause was complemented by a constitutional stipulation providing that the joint exercises of competences together with the EU institutions must 'comply with the fundamental rights and freedoms provided for in the Fundamental Law', and may 'not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.' Since this provision refers to the population of the country, we should presumably include in the scope of constitutional identity the provision inserted in Article XIV para (1) of the Fundamental Law, according to which

> '[n]o foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities. The basic rules on the requirements for the submission and assessment of such applications shall be laid down in a cardinal Act.'[35]

Nonetheless, we cannot be sure that these, or only these provisions, are components of constitutional identity. It seems that the list of identity values is open-ended, and it is not certain at all that the constitutional text alone is the source.

3.2. Sources and creators of constitutional identity

From what we have seen so far, it seems that since the national constitution (the 2011 Fundamental Law) has an identity; the source of constitutional identity is the constitutional text itself. Yet the situation is not so simple. The Hungarian Constitutional Court declared in 2016 that 'the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law', which seems to refer to a kind of transcendence over the constitution. Then, '[t]he Constitutional Court [itself] (…) unfolds the content of this concept from case to case'.[36] However, if constitutional identity is not created by the Constitution but derives from some source external to the Fundamental Law, and its content is determined by the Court, it is not clear what other (extraconstitutional) source constitutional identity has, and how the Court can deduce anything from it. One option could be

[34]Art R Section (4) of the Fundamental Law.

[35]See Ernő Várnay's article in this issue. Várnay (2022).

[36]22/2016. (XII. 5.) AB határozat.

specific Hungarian constitutionalism, as the Fundamental Law has apparently tried to revive the unwritten historical constitution of Hungary that was in force before World War II. The cited ruling of the Court also emphasizes that it would determine the content of constitutional identity 'on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution'. This approach coincides with the views of some government officials and apologists of the new constitution – namely, that the Hungarian constitutional system consists of the Fundamental Law and the historical constitution together.[37] Even more important is that this view is supported by the Constitution itself in stating that constitutional identity is rooted in the historical constitution, and that the provisions of the Fundamental Law must be interpreted in accordance with the achievements of the historical constitution.[38]

However, the definition of the content of constitutional identity in this way raises several serious problems. First, this solution opens the way for a source outside the constitutional text to determine the character and identity of Fundamental Law. This might be the so-called historical constitution, as the Fundamental Law explicitly refers to this. But the historical constitution as a source of constitutional identity is an extremely vague notion, especially considering that its most ardent supporters consider it a 'one-thousand-year-old' constitution, in force since the foundation of the state (1000 AD). This leads to extreme indeterminacy, as there is no guidance as to how constitutional identity can be specified on this basis. In addition, whatever the constitutional text says, some argue that it is not the whole historical constitution but only its 'achievements' (as Article R para (3) refers to them) that should be seen as the source of constitutional identity. But even this approach makes, on the one hand, the constitutional interpretation hopelessly indeterminate and, on the other, the Constitutional Court a quasi-constitution-maker, since the 'achievements of the historical constitution' is a modern concept which has no antecedents and there are no criteria for identifying its meaning. In fact, in the course of historical development, important 'achievements' may have been legal institutions that represented a major advance at the time, but a number of values, principles, and institutions of the historical constitution are hardly compatible with the requirements of modern constitutionalism, or are no longer even comprehensible today. The scope of freedom of the press, as a result of the revolution of 1848, for example, which the Court referred to in some of its rulings,[39] would be unacceptable today, but was still a revolutionary achievement in the mid-nineteenth century. Accordingly, it is not clear how the achievements of the historical constitution could characterize present-day constitutionalism when its fundamental institutions and principles (such as the conception of sovereignty based on the doctrine of the Holy Crown, the kingdom as the form of the state, the king or regent as the head of state, the bicameral Parliament, or the status of the Catholic Church as a state Church) are in irreconcilable contradiction with today's constitutional polity.[40] The historical constitution did not know of judicial review, or the European Union; did not recognize the principle of popular sovereignty or the neutrality of the state, and so on. These contradictions are obvious, because both the achievements of the

[37]Szájer (2014) 840-41.

[38]See the National Avowal (Preamble) and Art. R(3) of the Fundamental Law.

[39]28/2014. (IX. 29.) AB határozat; 3002/2018. (I. 10.) AB határozat.

[40]Szente (2013).

historical constitution and the whole Fundamental Law should equally be taken into account by the Constitutional Court when it develops the elements of constitutional identity.

An alternative could be the above-mentioned interpretation by the Constitutional Court, which, in addition to the historical constitution, also identifies the whole Fundamental Law as a source of constitutional identity. However, this is hardly a solution to the theoretical problems: if the most important provisions or principles cannot be objectively selected from a logically closed system (such as the constitutional provisions are) – since the Hungarian Constitution does not contain eternal clauses and in principle there is no internal hierarchy between the constitutional norms –, then the constitutional rules and values specified by the Court cannot be the most important ones either. In other words, if on the one hand it is said that constitutional identity contains core values and principles, but on the other hand one is unable to define them precisely, then there are in fact no core values and principles at all in the constitutional text – otherwise, the relevant provisions could be specified in an objective way. In these circumstances, constitutional identity cannot have durable and stable content, since its elements are determined on a case-by-case basis: in fact, according to the political interests of the moment.

In contrast to this objection, it cannot be argued that constitutional identity is a dynamic, ever-changing concept, because it is not the case that constitutional conventions, after a long period of time, change in the course of constitutional development, but rather that the Constitutional Court determines the content of constitutional identity on a case-by-case basis in relation to the political or constitutional issue at hand; i.e., adds something to values expressed earlier.

Related to the source of constitutional identity is the question whether it is created over a long period of time, through natural evolution, or whether its content is occasionally determined by a constitutional body. Since the Fundamental Law identifies the historical constitution as the basis of constitutional identity, one could assume that Hungarian constitutional identity consists of basic principles and values that have been historically developed, since pre-World War II scholars considered one of the main characteristics of the historical constitution to be that it was not created but the result of a long historical development. But, as we have seen, in 2016 the Constitutional Court claimed that it should define the content of constitutional identity on a case-by-case basis. We have also seen that this role was taken over by the constituent power itself when it defined the most important elements of identity in 2018 by amending the Fundamental Law. It is to be noted that the Court confirmed an earlier decision of 2021,[41] stipulating the power of so-called identity control; in particular, in relation to the transfer of powers to the European Union, and in doing so defined the content of constitutional identity, even though neither the Fundamental Law nor the law on the Constitutional Court grant such power to the Court. These seemingly mutually exclusive claims can, however, be placed in a coherent logical order such that although constitutional identity is essentially established by the constituent power, its detailed content is developed by the Constitutional Court through constitutional interpretation, respecting the historical constitution (or possibly its achievements). Notwithstanding this, it does not seem to be a satisfactory solution in the Hungarian context where constitutional identity is used as a political weapon by the governing parties that came to power in 2010 and which, apart from a brief period, have enjoyed a two-thirds parliamentary majority

[41] 32/2021. (XII. 20.) AB határozat.

throughout, with the latter having continuously exercised constituent power. The same supermajority has also been able to pack the Constitutional Court, which for more than five years has been composed only of members who were chosen by the governing parties. In these circumstances, the components of constitutional identity are dictated by the government majority, which situation can hardly justify the claim for special protection of the principles and values which are linked to identity. In Hungary, the governing parties have consistently exploited their overwhelming parliamentary majority; since the latter unilaterally adopted a new constitution in 2011[42] (while the constitution-making process was boycotted by a large part of the opposition), it has amended the constitutional text eleven times, mostly in order to serve its current political interests (for example, to overrule constitutional court rulings that were unfavourable to the government).[43]

Nevertheless, the problem is not only who ultimately determines the exact content of constitutional identity, but the contradiction that although the Fundamental Law declares that constitutional identity is based on a historical constitution that came to an end almost eight decades ago and was itself the result of centuries of development, its elements are determined by the constituent power or the Constitutional Court on a case-by-case basis. It might be a solution that the requirements of present-day constitutionalism are defined by filtering the constitutional experience of the past (which for all its uncertainty might be an attractive idea), but it is not clear what values might be common or endure between pre-WWII and contemporary Hungarian constitutionalism, nor how they might be established. Moreover, this is made impossible by the inherent logic of constitutional law, according to which the Constitution is a closed logical system without any internal hierarchy of norms, and which, without any external source, is the basis of the legal system itself, and, at the same time the supreme law of the land. To highlight certain provisions in the constitutional text and give them special constitutional status *vis-à-vis* other provisions is not a question of precedence of application between two constitutional rules or principles which occasionally conflict, which is normal and inevitable in each constitutional system, but presumes a hierarchy without constitutional basis. Thus, as far as the use of the historical constitution as an extraconstitutional source is concerned, it is also made impossible by the Hungarian public law tradition, according to which the idea of a written constitution is incompatible with the concept of the unwritten Hungarian historical constitution, which is essentially based on ancient laws and constitutional conventions.[44]

3.3. Identity-building for constitutional malfunctions

Taking a look at the functions of constitutional identity in Hungary, this concept was introduced into Hungarian constitutional law not as a natural result of constitutional development, but as an instrument of political aspirations. As has been said above, the Constitutional Court, after being packed by the governing parties, discovered this concept in 2016 only after the governing parties had failed to incorporate it into the constitutional text, and after an invalid national referendum initiated by the government for the same purpose.[45] In fact, the Court did not

[42]For details on the 2011 constitution-making process, see Tóth (ed) (2012).

[43]Szente (2021).

[44]Szente (2013).

[45]See Szente (2016).

control or counterbalance the exercise of power, but acted as an instrument of the government, and in doing so constitutional identity was used as a tool in the political struggle against the EU.

The Hungarian government also (unsuccessfully) referred to the EU's obligation 'to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional', when it challenged the EU's so-called conditionality procedure before the European Court of Justice, which allows for the withdrawal of EU funds if a Member State does not respect the EU's core values, such as the rule of law.[46]

In addition to this, constitutional identity as a normative concept can also be used to promote controversial ideological and undemocratic values such as the ideological (Christian) commitment of the state, the prohibition of same-sex marriage, or the possibility of life imprisonment without parole, and so on. There are already some signs of this kind of development in the recent jurisprudence of the Constitutional Court. For example, in a recent decision the Court extended the content of the right to human dignity to include the right to preserve one's individual self-identity, in relation to which the 'traditional social environment'… 'as a natural bond determined by birth' has a decisive impact. In other words, as the Court argued, everyone exercises their constitutional rights as a member of the community. If, for instance, the joint exercise of competences between the EU and Hungary is 'incomplete', and as a result foreign populations are allowed to reside permanently on the territory of Hungary, this may also impact the self-identity of individuals. The state is thus obliged to act against such changes to the social environment in order to protect human dignity.[47]

Accordingly, the constitutional entrenchment of constitutional identity, also taking into account its extreme indeterminacy, may be an effective tool in the hands of the politically captured Constitutional Court in opposing legislative or even constitutional reforms that run counter to the interests of the parties now in power. Assuming the Christian culture of the country as a basis for constitutional identity may, for example, be used to prevent the recognition of same-sex marriage or to protect preferential treatment for so-called historical churches.

It may be a serious threat to future legislative or constitutional reforms that the Constitutional Court did not want to narrow its own margin of manoeuvre concerning the content of constitutional identity at all, since '[t]he constitutional self-identity of Hungary is not a list of static and closed values', and

> [t]he protection of constitutional self-identity may be raised in […] cases having an influence on the living conditions of […] individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected.[48]

As a matter of fact, constitutional identity in its present form is doctrinally undeveloped; its application is inevitably arbitrary in constitutional adjudication, and it can be used as a political weapon through a politically subordinate court (such as the current Hungarian Constitutional Court). In Hungary, it was not suitable for preventing the dismantling of the system of the rule

[46]See C-156/21 - Hungary v Parliament and Council, [202].

[47]32/2021. (XII. 20.) AB határozat.

[48]22/2016. (XII. 5.) AB határozat.

of law, or at least making this more difficult.[49] Then, it may have unpredictable consequences for a future restoration of the rule of law. While it does contain some of the values of the current constitution, the 2011 Fundamental Law was not adopted by consensus, and its ideological underpinnings are controversial. Accordingly, the content of constitutional identity is also volatile and adapted to the political needs of the moment. It is therefore not justified to give special protection to this concept. What some authors have referred to as a potential problem of constitutional identity has in fact already occurred in Hungary – namely, the use of an essentially political concept as a legal institution.[50]

In balance, the performance of constitutional identity as a normative constitutional concept so far is as follows:

Advantages	Disadvantages
?	Indeterminacy
	Generating conflicts with the EU
	Confusing the internal logic of constitutional law constitutional
	Not reflecting real values of people
	Threat of abuse

4. CONCLUSIONS

Since constitutional identity is an essentially contested concept, in order to clarify its constitutional character and implications it is worth returning to basic questions such as whose identity is at stake (i.e., who is the subject of constitutional identity), what its source is, whether it is created over a long period of time or determined by the occasional decisions of specific subjects, and what functions it may have. There are several potential answers to these questions, but the answers must describe a logically coherent system in order for a consistent doctrine of constitutional identity to be validated.

The concept of constitutional identity in Hungary, despite its explicit form in the national constitution, raises a number of problems for which no plausible answer has yet been found, and it is highly doubtful whether the difficulties of principle and practice related to it can be resolved at all.

Whereas constitutional identity, according to the Fundamental Law of 2011, is based on the historical constitution, whose main characteristic was that its principles and institutions were not created but have evolved continuously over centuries, some specific elements of constitutional identity were created by the constituent power on an occasional basis: the Christian values in the Fundamental Law and the ban on the immigration of foreigners suddenly became part of

[49]For some of the vast literature on the dismantling of the rule of law, see for example Chronowski and Varju (2016); Chronowski and Varju (2015); Szente (2017); Halmai (2018); Pap (2018); Szente (2022).

[50]Walter (2012) 190.

constitutional identity, just as a completely new constitutional identity was adopted during the Communist era in 1949, or when the identity of this Constitution was similarly radically changed in 1989 through general constitutional revision.

Beyond this, the Fundamental Law neither contains any eternity clause, nor recognises any hierarchy between constitutional provisions. Thus it is not possible to determine on an objective basis what the basic characteristics or the elements of identity are of the ten-year-old, frequently changing Hungarian Constitution. Without any objective method of selection, postulation about the content of constitutional identity remains arbitrary and may be abusive, as the recent constitutional development of this country illustrates.

The Hungarian construction of constitutional identity is a hopelessly ill-conceived concept from the point of view of constitutional law, and its application so far has been arbitrary. It has not proven capable of consolidating and defending the rule of law and constitutional democracy, but rather, on the contrary, its use has contributed to their decline. As a tool in the hands of a packed and politically controlled Constitutional Court, it potentially threatens future constitutional reforms and restoration of the rule of law.

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