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**Under the skin.
Additives to the theoretical and
dogmatic problems of constitutional
identity**

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Under the skin – Additives to the theoretical and dogmatic problems of constitutional identity¹

Abstract

In this paper, I aim to answer a part of the ideational questions emerging in the scope of constitutional identity with special regard on the Seventh Amendment of the Fundamental Law of Hungary and the Hungarian scientific literature. In the first part of the study, I review the scientific concept of identity, after which I introduce the theoretic definition of national identity and argue that the constitutional courts of the member states of the EU properly identify it with the concept they call constitutional identity. Thereafter I capture the essence of constitutional identity, by making distinction between this one and national identity, then based on the theory of Carl Schmitt I draw the lines between eternity clauses and the latter concept. I also differentiate between the two sides of constitutional identity which I call general and special sides. I argue that constitutional identity can only limit the power of other sovereigns and international entities but not the constitution amending power. Last but not least, I draft my own definition of constitutional identity that might be able to open new perspectives for the relevant scientific literature.

Introduction²

In the light of Article E) Paragraph (2) of the Fundamental Law of Hungary, it is obvious that the main point of the Seventh Amendment of the Hungarian constitution was to defend sovereignty.³ The aforementioned Article was amended with the following sentence emphasizing the definition of state provided by Jellinek⁴: “*the exercise of the competences of the European Union cannot limit the unalienable right of Hungary to preserve its territorial unity, population, form and political system.*”⁵ In correlation with this, Article R) of the constitution reflecting to the process of the European integration was also amended with the

¹ The Hungarian version of the study will have been published in Review of Public Law [Közjogi Szemle]. 2019. 3rd Vol.

² I am inexplicably grateful to dr. Boldizsár Szentgáli-Tóth, young research fellow at the Institute for Legal Studies of the Hungarian Academy of Sciences for his remarks and observations.

³ Before the 7th amendment Article E) Paragraph (2) ruled the following: “*With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.*”

⁴ Georg Jellinek: Allgemeine Staatslehre [General theory of state]. Verlag von O. Häring, Berlin 1914. pp. 394-433.

⁵ See: Fundamental Law of Hungary: Article E) Paragraph (2). <https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>

following 4th Paragraph: „*All entities of the state are obliged to defend the constitutional identity and Christian culture of Hungary.*”⁶

During the process of European integration the concept of constitutional identity emerged in the practise of the constitutional courts of member states as a boundary of integration. Article 4 Paragraph (2) of the Treaty on the European Union (TEU) declares: „*The Union shall respect [...] Member States before the Treaties as well as their national identities*”⁷ The Treaty identifies national identity with the „*fundamental structures, political and constitutional, [...] self-government, [...] territorial integrity [...] and maintaining national security*”⁸ of member states.

The constitutional courts of member states elaborated the content of their own national constitutional identities based on the concept of national identity incorporated in the TEU. In the frameworks of this process they aimed to define an inviolable core of the national constitution that could work as a limitation for the secondary legal sources of the EU. Even though constitutional identity not only emerged in the practise of the *Bundesverfassungsgericht* (*BVerfG*) but also in the practise of the European Court of Justice (ECJ),⁹ its concept is not clear even today. The Constitutional Court of Hungary dealt with the question of constitutional identity firstly in Decision No. 22 of 2016.¹⁰ in which only general statements were made and the relevant dogmatic and theoretic questions were not analysed in depth.¹¹

The author of this paper starts from the principle that the clarification of the referring dogmatic questions is the precondition of any further scientific discourse on constitutional identity, because that is the only way legal problems caused by this concept can be responsibly answered. Taking this into consideration, in the frameworks of this study I aim to capture a possible definition of constitutional identity and answer a part of the relevant dogmatic problems. First, I present the meaning of identity, then the concept of constitutional identity by summarizing not only the distinctions but also the connections between constitutional and national identity and I finally discuss the relation between eternity clauses and constitutional identity based on Carl Schmitt's theory.

1. The scientific concept of identity

The word identity originates from the Latin *identitas*, -atis, coming from the pronoun *idem* (*eadem*, *idem*) which basically means: 'the same'. Identity is a psychological, sociological and sociopsychological concept adapted by jurisprudence. For this reason the meaning of this word

⁶ See: Fundamental Law of Hungary: Article R) Paragraph (3). <https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>

⁷ Treaty on the European Union: Article 4 Paragraph (2). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>

⁸ Treaty on the European Union: Article 4 Paragraph (2). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>

⁹ Tímea Drinóczi: Az alkotmányos identitásról. Mi lehet az értelme az alkotmányos identitás alkotmányjogi fogalmának? [On constitutional identity. What can be the reason of the concept of constitutional identity?] MTA Law Working Papers 2016. 15. sz.

¹⁰ See: Decision No. 22 of 2016. ABH 2016, 456, pp. 456-474. [http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/\\$FILE/EN_22_2016.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf)

¹¹ The concept of constitutional identity was first used in Hungary by László Trócsányi, former judge of the Constitutional Court of Hungary in his 'parallel explanation' appended to Decision No. 143 of 2010. ABH 2010, pp. 698–722.

must be explained before starting the substantive discussion on constitutional identity that would make the concept of constitutional identity more circumscribable.

According to the relevant scientific literature, the word identity expresses that someone can identify himself/herself with his own or a group of people;¹² the ontological feeling of certainty which implies free acting and the identification with the own body of someone.¹³ Moreover, the dualistic meaning of identity inheres those features and attributes that makes a person or a community unique.¹⁴ Consequently, the word can be interpreted in two seemingly opposite ways. On the one hand, it emphasizes the identification with the collective: the feeling of belonging somewhere. On the other hand, it concentrates on individualization, under which it is meant how someone differentiates himself/herself from others and any group of people. It is worth mentioning, that according to Erik Erikson, who created one of the most significant theories on identity, identity is not a static but a dynamic concept changing in accordance with psychosocial stages of the lives of people.¹⁵ His opinion is similar to the one of the Hungarian political scientist, Barna Bodó, who believes that identity is a changing concept that can be examined in particular moments and is made up of factors defining the individual the most.¹⁶

In conformity with the upper mentioned, not only a person but any human community e.g. nations and nationalities can have identities. Such an identity-creating element can be for example gender, language, religion, traditions and history that defines both individuals and communities, because these all belong to the individual and collective integrity. Apart from the possible identity-concepts, I examine the national identity in the following chapter, which is one of the elementary preconditions of defining constitutional identity.¹⁷

2. National identity

On closer inspection, the concept of national identity reflects the elemental dogmatic dissonance featuring the scientific and public discourse on constitutional identity. Explaining the concepts of national identity incorporated in Article 4 Paragraph (2) of the TEU and constitutional identity used by the constitutional courts of member states, is a necessary requirement of any further discourse. In this heading I present the nature of national identity, after which I grasp the essence of constitutional identity.

Before clarifying the concept of national identity, the idea of nation must be examined. According to the theory of Anderson, a nation is an imagined community made up of equal persons who are connected to one another by a strong cultural bond.¹⁸ A nation is a historically evolved organic concept, which - besides the dominant nation - is made up of basically culturally and ethnically definable nationalities living inside the borders of the state, who can

¹² Ferenc Pusztai – Károly Gerstner – Ágnes Bíró: Magyar Értelmező Kéziszótár [Hungarian Interpretive Dictionary]. Akadémiai Kiadó, Budapest, 2008. pp. 416.

¹³ Györgyi Földes: Identitás. [Identity] In: Média- és kultúratudomány. 2008. 1. sz. pp. 92-108.

¹⁴ Hungarian Larousse Encyclopedia (2nd Vol.) [1992]. Akadémiai Kiadó, Budapest, pp.176.

¹⁵ Erik Erikson cited by: Katalin N. Kollár – Éva Szabó: Pszichológia pedagógusoknak [Psychology for pedagogue]. Osiris Kiadó, Budapest 2004. pp. 235.

¹⁶ Barna Bodó [2004]: Az identitás egyetemessége. [The universality of identity]. Polis Könyvkiadó, Kolozsvár 2004. pp. 13-15.

¹⁷ The scientific literature also uses the naming: national constitutional identity or constitutional identity of the member-state, identity of the member state and identity of the constitution. Hereafter, for the sake of simplicity, I use the naming: constitutional identity.

¹⁸ See: Benedict Anderson: Imagined Communities. New Left Books, London 1983.

also be called state-composing elements.¹⁹ Apart from national identity there are numerous identities (e.g. religious, ethical and moral, cultural, historical, political identities etc.) simultaneously existing in a society.²⁰ These identities not only alter slowly or more rapidly in accordance with the changes affecting the nation, but they even shape each other. This mixture of social and cultural values can be called national identity coming into existence as a result of effects of certain identities whether enhancing or moderating one another. This also indicates, that national identity is an extraordinarily abstract, political and sociological concept encapsulating the traditions, cultural values and the historical consciousness of the nationalities of a country, especially the dominant nation.²¹ These are the features making the nation a coherent community itself.²² It is no surprise, that these values are mostly rooted in religion, language, history or the approach of specific social institutions like family.²³ Consequently, under national identity incorporated in Article 4 Paragraph (2) of the TEU, not the above worded theoretic concept has to be meant. The reason for this is that it is a constantly changing abstract concept, therefore it would be quite displeasing if any legal effect came from this merely theoretic concept. As a result, I reckon, that based on the upper worded reasoning the constitutional courts of member states adequately implemented the concept of constitutional identity instead of the national one.

3. Constitutional identity

In the following chapter, I present the nature of constitutional identity through its differences from eternity clauses and the connections to the problem of constitutional amendments affecting constitutional identity. However, to be able to achieve this goal, I first review how constitutional identity becomes a legal concept.

3.1. The main aspects of constitutional identity in the theory of constitutional law

The way constitutional identity becomes a legal concept can be understood through the definition of constitution. There are basically two approaches regarding the idea of constitution. On the one hand, the formal definition of the constitution considers it as enforceable legal document standing above any other acts of state and regulating the grounds of the construction of state. On the other hand, taking the material definition into consideration, a constitution can be regarded as an attempt of a nation to define itself or a combination of values and principles

¹⁹ This definition mainly reflects the idea of a political nation corresponding better to principle of popular sovereignty.

²⁰ Michel Rosenfeld: *The Identity of the Constitutional Subject*. Routledge, New York 2010. pp. 30-41.

²¹ Garry Jeffrey Jacobsohn: *Constitutional Identity*. Harvard University Press. London 201. pp. 42.

²² Elke Cloots: National Identity, Constitutional Identity, and Sovereignty in the EU. *Netherlands Journal of Legal Philosophy*. 2016. 2nd Vol. pp. 82-98.

²³ Márton Sulyok: Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában. [National and constitutional identity in the practise of the constitutional courts of member states]. In.: Anna Mira Jakó: *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában*. [National and constitutional identity regarding the relation of the European Union and the member states]. University of Szeged - Faculty of Law. Szeged, 2014. pp. 44.

shared by a nation.²⁴ Moreover, there are definitions emphasizing the function of the constitution and stating that its main point is to grant the freedom of citizens and limit the power of public.²⁵ All these necessarily lead to, the conclusion that there is no value-neutral constitution.²⁶ So much so that since the French Revolution it has been a fundamental prerequisite of the liberal idea of constitution, that in case of not fulfilling the material requirements of constitutionalism (e.g. separation of powers and granting human rights), there is no constitution at all.²⁷

The material ideas of constitution highlight, that both constitutional law and the constitution itself emerge from and regulate culture,²⁸ thus the ideal and functioning constitution must be culturally embedded. According to this and the above mentioned attempts of definition, we can come to the conclusion, that constitutional identity becomes a legal concept as the drafter of the constitution selects some of the components of national identity and declares them in a legal document called constitution when creating it. This sets up a strong bond between the emotional and political attitude of the community standing under the power of the constitution and the social reality the constitution was made and going to work in.²⁹

3.2. The relation between national and constitutional identity

As I previously argued, national and constitutional identity are in a part to whole relation.³⁰ Constitutional identity is a concept budding on the soil of national identity, “*that has to be searched for in the frames of the constitution*”.³¹ As a consequence, constitutional identity can only exist if this narrower concept does not secede from the broader and cultural concept of national identity. This is what Balázs Schanda, judge of the Constitutional Court of Hungary highlights, according to whom constitutional identity just like the constitution must be in tune with the traditions of the nation.³² Jacobsohn also points out this correlation when stating, that the text of the constitution could be anything, but until the practice of reality did not seem to confirm it, it could not be called constitutional identity.³³ These statements raise the very legal question if - apart from the obvious examples - it could be a subject of legal evaluation how

²⁴ László Trócsányi: Nemzeti alkotmányok, európai integráció és alkotmányos identitás. [National constitutions, European integration and constitutional identity]. In: Acta Universitatis Szegediensis : Acta juridica et politica. 2017. 1st Vol. pp. 319-328.

²⁵ Dieter Grimm: Types of Constitution. In: Michel Rosenfeld – András Sajó [2012]: The Oxford Handbook of Comparative Constitutional Law. Oxford University Press, Oxford 2012. pp. 101–102.

²⁶ András Bragyova – Fruzsina Gárdos-Orosz: „Vannak-e megváltoztathatatlan normák az Alaptörvényben?” [“Are there any unamendable norms in the Fundamental Law?”] In: *Állam- és Jogtudomány* 2016. 3rd Vol. pp. 52-53.

²⁷ See: Declaration of the Rights of Man and of the Citizen Article XVI: „*Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.*”

²⁸ Jacobsohn op. cit. pp. 67.

²⁹ The absence of these conditions characterized the so called socialist constitutions. These constitutions fulfilled the requirements of constitutionalism in principle, but they did not prevail in the practise at all.

³⁰ Norbert Tribl: Az alkotmányos identitás fogalomrendszere jogelméleti megközelítésben [The conceptual system of constitutional identity in an approach of legal theory]. In: *Jogelméleti Szemle*. 2018. 1st Vol. pp. 156.

³¹ Jacobsohn op. cit. pp. 88.

³² Balázs Schanda: Alkotmányos értékek - alkotmányos identitás. [Constitutional values – constitutional identity] In.: *Pozsár* (et.al.): A szabadságszerető embernek - Liber Amicorum István Kukorelli [For the freedom-loving man – Liber Amicorum István Kukorelli]. Gondolat Kiadó, Budapest 2017. pp. 89-97.

³³ Jacobsohn op. cit. pp. 89.

much a value, a principle or an institution is embedded in the society and how anything legally binding could be derived from it.

Besides the legal and cultural quality and their enforceability, the lines between the two concepts can be drawn even based on their subjects. Obviously, the subject of national identity is the nation, whereas the subject of constitutional identity – according to the theory of Rosenfeld – was the constitutional self, made up of the citizens bound by the constitution, the drafter of the constitution and the constitution itself.³⁴ In contrast, it is a similarity that both concepts are constantly changing and come into being as a result of an organic evolution.

It can be seen, that there is both a dynamic and static approach of constitutional identity. The former regards constitutional identity as an organic evolution, whereas the latter considers it a snapshot. This is what Sulyok mentions, according to whom “*particular approaches, as a part of a dynamic examination but in static constitutional moments,*³⁵ *aim to determine those values, in the direction of which the constitutional policy, the rising attention of the public turns, and therefore becomes protected values of the constitutional jurisdiction.*”³⁶ Nonetheless, these approaches are nothing else but the two sides of the same coin. The exploration of the regulations amid the corners of the constitution is also an exploration of an organic development, because the constitution itself was also created as a result of this evolution.³⁷ Although, the organic approach implies the primacy of historical interpretation of the constitution, and even raises the problem of the relation of written and unwritten constitutions.³⁸ Regarding the idea of historical constitution included in the preamble of the Fundamental Law of Hungary and its achievements mentioned in Article R) Paragraph (3) this theoretical issue can raise serious further questions.³⁹

Beyond the differentiation between national and constitutional identity other lines must be drawn. In the following heading I dissertate on the dogmatic relation between constitutional identity and eternity clauses focusing on the practise of the *Bundesverfassungsgericht* (The

³⁴ Rosenfeld op.cit. pp. 66.

³⁵ Such a constitutional moment was the accession of Hungary to the EU causing fundamental constitutional changes. See: András Sajó: A Constitution without a constitutional moment. In.: International Journal of Constitutional Law. 2005. 3rd Vol. pp. 243–261.

³⁶ Sulyok op. cit. pp. 45.

³⁷ This „snap-wise” approach of constitutional identity is indicated by the naming: identity of the constitution.

³⁸ See on the problem of written and unwritten constitutions: Ádám Rixer: A történeti alkotmány lehetséges jelentéstartalmai [The possible interpretations of the historical constitution]. <http://jesz.ajk.elte.hu/rixer47.html> (2019.02.26.)

³⁹ See: Imre Képesy: Az Alaptörvényről és a történeti alkotmányról - Kerekasztal beszélgetés az ELTE Állam- és Jogtudományi Karán. [On the Fundamental Law and the historical constitution – Roundtable at Eötvös Lóránd University - Faculty of Law]. In: Jogtörténeti Szemle. 2012. 2nd Vol. pp. 59-61.;

Barna Mezey: A Nemzeti Hitvallás jogtörténeti elemei. [The historical elements of the National avowal]. In: Az új Alaptörvényről – elfogadás előtt. [On the new Fundamental Law – before accepting]. Országgyűlés Alkotmányügyi Bizottsága, Budapest 2011. pp. 38.;

András Milánkovich: Vívmányok a gyakorlatban. [Achievements in practise]. <https://arsboni.hu/vivmanyok-a-gyakorlatban/> (2019.02.22.)

Milánkovich András – Szentgáli-Tóth Boldizsár: Díszítő elem, vagy új értelmezési távlatok? A magyar közjog történeti dimenziói az Alaptörvény tükrében. [Ornamental element or new horizons of interpretation? The historical dimensions of Hungarian public law]. In: Közjogi Szemle, 2014. 4th Vol. pp. 65-74.;

László Sólyom: Alkotmány és alkotmányos kultúra Magyarországon. [Constitution and constitutional culture in Hungary]. <https://tite.hu/solyom-laszlo-alkotmany-es-alkotmanyos-kultura-magyarorszagon/> (2019.02.26.);

András Varga Zs.: Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében. [The achievements of the historical constitution regarding the cogent regulations of the Fundament Law]. Iustum Aequum Salutare. 2016: 4th pp. 83-89.;

Federal Constitution Court), before which I summarize the theory of Carl Schmitt on constituent and constitution amending power.

3.3. The antecedents of constitutional identity in the jurisprudence of Carl Schmitt

The theoretical bases of constitutional identity were created by the German scholar, Carl Schmitt, who published his iconic book *Verfassungslehre* (Studies on constitution) in 1928. The ideas of Schmitt basically influenced the evolution of the German constitutionalism through the eternity clause (*Ewigkeitsklausel*) incorporated in Article 79. Paragraph (3) of the German Fundamental Law (*Grundgesetz*). Schmitt made a distinction between the original constituent power (*pouvoir constituant originaire*) he claimed to be unlimited and the derived, thus limited constitution amending power (*pouvoir constituant dérivée*).⁴⁰ The former, because of its absolute quality, could not be restricted at all when drafting the constitution, whereas the latter on the grounds of having been derived from the constituent power was restricted by different conditions. The reason for this is that the constitution amending power did not have an authority to overwrite the will of the constituent power (basically the monarch or the people). According to Schmitt, only the constituent power had the right to make a decision on the form of its own political existence such as the form of state or government, separation of powers or the declaration of human rights.⁴¹ Schmitt argues that these elements could not be enumerated exhaustively but only as a way of illustration.

Schmitt divided the constitution into two levels: (1) the basic structure created and determined by the constituent power and (2) the other regulations of the constitution.⁴² The former included the fundamental elements and features of the political system, which Schmitt claimed to be the constitution in the real sense. Accordingly, its modification would cause such a great change that *de facto* a new constitution and political installation would be created that the constitution amending power was not entitled to execute. All in all, Schmitt presented the inviolable core of the constitution, which could not be changed by anyone excluding the sovereign who has the constituent power. To my mind, it is no extravagance to say that Schmitt probably thought about the concept which the contemporary constitutional lawyers call constitutional identity. Even though his work was not cited when drafting the *Grundgesetz* in 1949, Schmitt's ideas survived and still affect the eternity clause of the German constitution.⁴³

3.4. The connection between the eternity clause and constitutional identity

⁴⁰ See on the differences between the constituent and constitution amending power:

Virág Zsugyó: Az alkotmányellenes alkotmánymódosítás egyes elméleti kérdései az alkotmányosság tükrében. [Particular questions of unconstitutional amendments of the constitution with special regard on the idea of constitutionalism] In: Állam- és Jogtudomány. 2017. 3rd Vol. pp. 99-122.;

Richard Stacey: Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process. In: International Journal of Constitutional Law. 2011. 9th Vol. pp. 587-614.

⁴¹ Carl Schmitt: Constitutional theory. Translated by: Jeffrey Seitzer. Duke University Press, London 2008. pp. 55.

⁴² Schmitt op. cit. pp. 53.

⁴³ Monika Polzin: Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law. In: International Journal of Constitutional Law. 2016. 2nd Vol. pp. 411-438.

The content of the eternity clause incorporated in Article 79. Paragraph (3) of the German Grundgesetz (GG) is the following:

“Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”⁴⁴

Article 20. of the GG regulates the federal political system, popular sovereignty, separation of powers, the constitutional limits of the legislature and the right of resistance, whereas Article 1 of the GG declares the inviolability of human dignity and the obligation to respect human rights.⁴⁵ Regarding the theory of Schmitt and the upper mentioned Articles of the GG, it is obvious that the scholar’s idea of the basic structure and the eternity clause are heavily connected (to one another), which is also confirmed by the practice of the *BVerfG*.

Among others, the German Constitutional Court dealt with the question of constitutional identity in its *Solange I*.⁴⁶ and *II.*;⁴⁷ *Bananenmarkt-*;⁴⁸ *Maastricht-*⁴⁹ and *Lisbon-*decisions.⁵⁰ The *BVerfG* identified the German constitutional identity with state-sovereignty and the eternity clause of the GG. The Constitutional Court also declared that nothing but the constituent power (the people as the sovereign) has the authority to amend the eternity clause. As a consequence, constitutional identity emerged in the practice of the Constitutional Court in two aspects. Firstly, the secondary legal sources of the EU contrary to the German constitutional identity should not be implemented. Secondly, the eternity clause determined those rights of sovereignty that cannot be transferred to the EU without losing sovereign statehood. In the *Maastricht-*decision the *BVerfG* also drew the conclusion that acts of the EU contrary to the legal authorization incorporated in Article 23 of the GG and the founding treaties of the EU were not mandatory. It is also worth mentioning, that the *BVerfG* qualified the federal political system, the principle of culpability⁵¹, popular sovereignty and social statehood as the values and principles highly protected by constitutional identity and inviolable by the European integration.⁵²

Besides the numerous questions raised by the German example, it is also an important issue, whether eternity clauses are generally parts of constitutional identity, or the concept worked out by the *BVerfG* is an outrageous one. According to the vast majority of the scientific literature, constitutional identity is a constantly changing and dynamic concept, whereas eternity clauses are merely static, what clearly shows, that despite their strong connection, the two concepts must be separated. Notwithstanding this seeming contradiction, I would argue that eternity clauses are generally parts of constitutional identity, but the main difference is that the regulations they contain were purposively given a formal defence and were enhanced from other constitutional regulations. The connection of the two concepts could be summarized that there is no eternity clause without constitutional identity, but there is a constitutional identity without eternity clause.

⁴⁴ See: Basic Law for the Federal Republic of Germany Article 79. Paragraph (3): https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0417

⁴⁵ See: Basic Law for the Federal Republic of Germany Article 1 and 20: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0417

⁴⁶ BVerfGE 37, 271

⁴⁷ BVerfGE 73, 339

⁴⁸ BVerfGE 102, 147

⁴⁹ BVerfGE 89, 155

⁵⁰ BVerfGE 123, 267

⁵¹ 2 BvR 2735/14

⁵² Tímea Drinóczi: Tagállami identitás. [Member-state identity] In.: MTA Law Working Papers. 2018. 8th vol. pp. 9.

Making a picturesque semblance, the eternity clause is the island located on the river of constitutional identity. The river, just like constitutional identity, is constantly moving, and in this river, there is a stable point similar to the eternity clause emerging from it and which can be regarded as an autonomous unit. However, neither the island without the water surrounding it nor the eternity clause can exist without constitutional identity.⁵³ Subsequently, the two concepts are related to each other like the part and the whole, because it is possible that some components of constitutional identity are not included in the eternity clause. An excellent example of this is the eternity clause incorporated in Article 89. of the French Constitution of 1958, defending the republican form of state from the constitution amending power.⁵⁴ Besides the content of the eternity clause, the French constitutional identity includes laicity, solidarity, the principle of “*liberty, equality, fraternity*”, the indivisibility of the land and the protection of the French language.⁵⁵ Accordingly, the only thing that can be considered as something unique, is that the German constitutional identity and the eternity clause are creating such a strong and organic unity, but, as I previously argued, the connection between constitutional identity and eternity clauses is not coincidental but necessary.

The most significant similarity is that neither eternity clauses nor the values, principles and institutions included by constitutional identity can resist the will of the constituent power and can be altered by any other sovereign or international organisation but the sovereign they were created by. In contrast, constitutional identity can be changed by the constitution amending power, whereas such alternation of eternity clauses is unimaginable.

3.5. Identity written in the stone?

Despite the fact, that according to Schmitt’s theory the elements of constitutional identity cannot be amended, it is worth taking into consideration that this concept would make the constitution so rigid that it would obstruct the constitution amending power to adjust the constitution to the social reality in which the constitution exists. Moreover, it would raise further problems, if the components of constitutional identity could not be altered. As I reasoned above, national identity, the base of constitutional identity is also a permanently changing concept. Obviously, constitutional identity must keep up with the change of national identity, because in case of the opposite, the social reality, the belief and ethical persuasion of citizens and the regulations of the constitution would become quite estranged from one another and that would, after all, question the legitimacy and moral validity of the constitution.⁵⁶ Apart from the practical reason based on the upper dissertated, strict logic, the regulations included by constitutional identity could only be altered by creating and accepting a completely new constitution or holding a referendum. It is self-evident, that the former alternative is not plausible at all, and the latter is contrary not only to the Hungarian but plenty of other European constitutions.⁵⁷ It is also against the strict application of Schmitt’s theory, that national constitutional courts entitled to interpret the constitution must

⁵³ On eternity clauses, See.: *Bragyova – Gárdos-Orosz*: op. cit. pp. 35-63.

⁵⁴ See: Article 89. of the French Constitution of 1958. https://www.constituteproject.org/constitution/France_2008.pdf?lang=en

⁵⁵ László Trócsányi: Az alkotmányozás dilemmái. Az alkotmányos identitás és az európai integráció. [The dilemmas of creating a constitution. Constitutional identity and the European integration]. HVG ORAC, Budapest 2014. pp. 72.

⁵⁶ The problem of the collision of constitutional identity and the „identity beyond the constitution” is also indicated by Endre Orbán, Hungarian scholar of constitutional law. See: Endre Orbán: Quo Vadis, „alkotmányos identitás?” [Quo vadis, „constitutional identity?”]. In: *Közjogi Szemle*. 2018. 3rd Vol. pp. 11.

⁵⁷ See: Fundamental Law of Hungary: Article 8. Paragraph (3) point a)

necessarily declare that the content of constitutional identity cannot be amended by the constitution amending power. This would mean that the constitutional court created an eternity clause and took the place of the constituent power.⁵⁸

All these raise the very question, how efficiently a concept alterable by the constitution amending power of the member state could be referred to against the primacy of the EU-law. Even though, the interpretation of the constitution, thus defining the content of constitutional identity is the competence of the constitutional court, it is hard to imagine, that the constitutional court, which is also bound by the constitution, would interpret the constitutional identity in a way contrary to the direct or hidden political will incorporated in the constitution. Namely, in order to do that, the constitutional court would have to ignore or consider particular regulations of the constitution to be merely symbolic. This also indicates that constitutional identity, according to the aim of the legislator, can easily become a matter of politics and the constitutional court can be obliged to indirectly take a stand on political questions, which would also cause the constitution to be perceived a political instrument. Whether the constitutional court let this happen is only a question of its autonomy, independence and activism.

In addition, it is also worth considering, that the immoderately loose approach of constitutional identity would also make the constitution too fragmented. Taking the liberal idea of a constitution as a basis, the constitution would be made up of at least three different levels: (1) the definitive features of constitutionalism; (2) constitutional identity and (3) other constitutional regulations. These levels could be completed with (4) the eternity clause, as a fourth. Of course, these layers are connected and partly overlap one another, but such simplification of the constitution raises the further question if there is any hierarchy among the upper mentioned levels.⁵⁹

3.6. Attempts of definition

To sum it up, constitutional identity can be defined as the following: *Constitutional identity is the constitutional impression of national identity, including the conceptual features of constitutionalism and the socially strongly embedded principles, values and institutions of law that cannot be amended by any other sovereign or international organisation and that make the definitive national constitution unique and different from other constitutions.*

These principles, values and institutions of law alike the upper mentioned sociopsychological approach to identity, can be divided into two groups. The first one consists of the basic criteria of constitutionalism. These values and principles are necessarily a part of constitutional identity because without them a modern constitution cannot exist at all. Regarding that all member-state constitutions have these features,⁶⁰ I name this group of constitutional principles: *the general side of constitutional identity*. This side is opposable to the complexity of principles, values and institutions of law that makes the constitution of a particular member state different from other constitutions. I name this group: *the special side of constitutional identity*. The vast majority of the scientific literature identifies constitutional identity with the side I call special. I reckon, that

⁵⁸ This problem is raised by the basic-structure doctrine of the Indian Constitution, on which see: Virendra Kumar: Basic Structure of the Indian Constitution: Doctrine of constitutionally controlled governance. In.: Journal of the Indian Law Institute. 2007. 49th Vol., No. 3 pp. 365-398.

⁵⁹ On the hierarchy of the constitutional regulations, See: László Sólyom: Normahierarchia az alkotmányban. [Hierarchy of norms in the constitution]. In: Közjogi Szemle 2014. 1st Vol. pp. 1-7.

⁶⁰ Pietro Faraguna: Constitutional Identity in the EU—A Shield or a Sword? In: German Law Journal. 2017. 7th Vol. pp. 1627.

in a dogmatic aspect the conceptual features of constitutionalism are also a part of constitutional identity, even though member states only refer to the elements of constitutional identity giving a unique character of the constitution so as to slow the integration down. At the same time, this reference cannot be inconsistent because that could be contrary to the principle of the primacy of the EU-law and loyal cooperation.

Of course, the upper definition is merely a formal one, but I suppose, that such attempts of definition can contribute remarkably to the explanation of the basic misunderstandings and make the possible components of constitutional identity rest on firm foundations. In this paper, I do not aim to determine these components, but to mention some of the institutions incorporated in the Hungarian Fundamental Law and I try to be meaningful when determining the elements of the Hungarian constitutional identity. Beyond the ones included by Decision No. 22 of 2016. of the Constitutional Court of Hungary, these elements are the protection of the natural resources, Hungarian language, official celebrations of the state, achievements of the historical constitution,⁶¹ family and marriage. When defining these elements, as the majority of the scientific literature states, it is worth relying on the preamble of the constitution.⁶²

Afterword

In the current study, I aimed to answer a part of the dogmatic problems of constitutional identity. I made a distinction between national and constitutional identity and eternity clauses after which I discussed the issue of amendments affecting constitutional identity. Of course, the exquisite explanation of the theoretical and practical questions in connection with constitutional identity would not only exceed the frames of this study, but perhaps the capacity of any scholar of his

⁶¹ On the achievements of the historical constitution, See:
Decision No. 33 of 2012., ABH 2012, 99, pp. 110-111.
Decision No. 6 of 2013., ABH 2013, 175, pp. 186-187.
Decision No. 28 of 2014., ABH 2014, 786, pp. 788.
Decision No. 34 of 2017., ABH 2017, 794, pp. 798-799.
Decision No. 26 of 2015., ABH 2015, 596, pp. 618-619.
Decision No. 34 of 2014., ABH 2014, 943, pp. 988-989.
Decision No. 29 of 2015., ABH 2015, 697, pp. 706-708.

⁶² On the preamble of the constitution, See:

Armin von Bogdandy [2015]: The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe. In: *International Journal of Constitutional Law*. 2005. 3rd Vol. pp. 295-315.;

Lóránt Csink: Az Alaptörvény identitása – Honnan hová? [The identity of the constitution – In what direction?] In: Judit Tóth: Ünnepi kötet dr. Tóth Károly címzetes egyetemi tanár 70. születésnapjára. [Celebrational volume for the 70th birthday of Professor dr. Károly Tóth]. Acta Universitatis Szegediensis. Szeged 2015. pp. 134–141.;

Zsuzsanna Fejes: Constitutional identity and historical constitution clause in the Hungarian Fundamental Law and its effects on constitutional interpretation. In: Sente Zoltán - Mandák Fanni - Fejes Zsuzsanna (Szerk.): *Challenges and Pitfalls in the Recent Hungarian Constitutional Development*. L'Harmattan, Paris 2015. pp. 25-44.;

Patrik Szabó: Vissza a jelenbe? – A Nemzeti Hitvallás és a magyar alkotmánytörténet preambulumai. [Back to the present? – The National Avowal and the preambles of the Hungarian legal history]. In: *Jogtörténeti Közlemények* 2018. 4th Vol. pp. 54-59.

Trócsányi: op. cit.

Tushnet Mark [2010]: How do constitutions constitute constitutional identity? In: *International Journal of Constitutional Law*. 2010. 3rd Vol. pp. 671–676.;

Orgad Liav: The preamble in constitutional interpretation. In: *International Journal of Constitutional Law*. 2010. 4th Vol. pp. 714-738.

own. Therefore, my goal was to contribute to the scientific discourse on constitutional identity, hoping that one day there will be a professional dialogue adequately and responsibly handling the concept of constitutional identity solely concentrating on its professional and scientific aspects.

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