
Constitutional Identity in the Practice of the Constitutional Courts of Poland and Hungary: Comparative Analysis

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Abstract

This study takes into account the ambiguity of understanding the concept of constitutional identity in various judicial doctrines. The authors note significant differences in the interpretation of constitutional identity. The authors also believe that the conceptualization of constitutional identity in Poland and Hungary has a pronounced specificity, both in the approach to defining constitutional identity and in the ways of identifying it. A characteristic feature of the judicial doctrines of Hungary and Poland is the recognition of the importance of factors that go beyond the text of the constitution and the close connection with sovereignty. Whereas in Germany and Italy constitutional identity is constantly based on a certain part of the constitution, in Poland and Hungary its sources are much broader, which opens up the possibility of interpreting constitutional identities within quite wide limits. All these features, according to the authors, allow us to speak about the rather "defensive" or "confrontational-individualistic" nature of constitutional identity in Hungary and Poland.

Keywords: Constitutional identity; national identity; sovereignty control; identity control; differentiation of approaches to constitutional identity

Introduction

The concept of constitutional identity is "revealed" in a particular judicial doctrine, as a rule, as a result of a conflict between the communitarian law and the national constitutional law of different States. This is due to the desire of international justice bodies (primarily the European Court of Justice) to build a single European legal space. This aspiration of the Luxembourg Court often becomes a "point of tension" in the relations of jurisdictions (pan-European and national) and it leads to disputes about the right of the "last word". This "disharmony" is a prerequisite for the development of national doctrines of constitutional identity.

Despite all the differences, approaches to the conceptualization of constitutional identity are united by one common motive – the desire to create an effective tool for protecting the most important parameters of national constitutions, to argue for the need to protect the Constitution from undesirable transformations. However, the means to achieve this goal vary, which leads to the emergence of different models (types) of constitutional identity. We believe that the conceptualization of constitutional identity in Poland and Hungary has (or may have) a particular specificity, both in the approach to defining constitutional identity and in the ways of identifying it in the text of a particular Constitution. Based on this, we will consider certain features and ways of identifying constitutional identity using the example of specific judicial doctrines of Poland and Hungary. It will also be necessary to compare the approaches of these Visegrad Group countries with those of other European Union member countries.

Methods

This research utilized both general scientific approaches (induction, analysis, structural, synthesis, system, deduction, functional) and private scientific methods (comparative legal, formal legal). In our opinion, in order to get the most complete picture of such a complex object as constitutional identity, it seems crucial to consider the differences and similarities of existing types of conceptualization of constitutional identity. All this determines the value of using the comparative legal method.

Results and Discussion

Hungary

Let us consider the growth of the doctrine of "constitutional identity" in the practice of constitutional justice in Hungary. The "discovery" of Hungary's constitutional identity is usually associated with the ruling of the Hungarian Constitutional Court dated November 30, 2016 (Decision 22/2016 (XII.5), *AB on the Interpretation of Article E (2) of the Fundamental Law*).

In that ruling, the Hungarian Constitutional Court stated that, in extraordinary instances, it is rational to take into account if Hungary's obligations to the EU breach the basic rights of the person (such as human dignity) or the Hungary sovereignty, which is protected by the Hungarian Constitution. It is worth noting that the process of conceptualizing constitutional identity in Hungary has a political context (it was closely linked to the political debate on quotas for migration flows in the European Union). The influence of political factors on constitutional transformations has been noted by many researchers, for example, Mark Tashnet [1] and Keith Whittington [2]. Constitutional identity in the case of Hungary acts "as a protective mechanism against the EU decision on refugee quotas" [3, p. 109].

In the decision dated November 30, 2016, the word *identity* is used by the Constitutional Court of Hungary 58 times. In developing its doctrine, the constitutional justice body seeks to take into account the experience of conceptualizing constitutional identity in the judicial doctrine of other European countries (Germany, Italy and France, the Czech Republic, Poland, etc.). Based on an extensive review of the case law of the constitutional courts of the EU Member States, the Hungarian Constitutional Court sets out a number of restrictions on the joint exercise of powers: - "they can't break the Hungary sovereignty (*sovereignty control*)"; - "they can't result in a break of *constitutional identity control*".

Thus, the Hungarian Constitutional Court establishes two types of control (test) - *sovereignty review* and *identity review*. At the same time, the Court emphasizes that the direct subject of identity control and sovereignty isn't "verification of the validity or invalidity of acts of the Union". Commenting on the content of these types of controls, the Court points out that "by joining the European Union, Hungary did not renounce its sovereignty, but rather permitted the joint exercise of particular powers."

Commenting on the *identity review*, the Court first introduces the general concept of constitutional identity. Constitutional identity is interpreted by the Court as "the self-identification of Hungary based on the Basic Law and its individual provisions, according to the national recognition and accomplishments of our historical Constitution." This definition does not appear to be strict and precise, unlike, for example, the clear and unambiguous definition given by the German Constitutional Court. It can be stated that constitutional identity in Hungary has not become a legal concept in the full sense of the word; this definition of the Court is not quite operational (it will be extremely difficult to use it in judicial practice).

It is noteworthy to highlight such components of identity as "national recognition" and "achievements of the historical Constitution". It can be stated that in this case the body of constitutional justice does not adhere to the strict "positive" interpretation of constitutional identity. It can also be concluded that the constitutional identity of Hungary is closely linked to the national identity. Some researchers warn against such confusion of the two concepts. Thus, E. A. Lukyanova notes, that "the combination of identities (national and constitutional) is at least controversial, and at most erroneous" [4, p. 133]. Timea Drinochi adheres to a similar position. She proposes an autonomous "strict" term - "the identity of the Constitution", noting that the given definition looks preferable, since it has a real positive content and does not include a national, religious or ideological component [3, p. 119]. Elke Clouts also insists on the discrepancy between these two terms and warns against such a substitution of concepts [5, p. 98]. There is another point of view on the question of the correlation between national and constitutional identity [6].

In general, the doctrine of constitutional identity in Hungary is still in its infancy. It is necessary to note a number of rather original features inherent in the Hungarian experience of conceptualizing constitutional identity:

-first, it is a convergence (if not identity) with sovereignty ("sovereignty and constitutional identity have a number of common points"). Constitutional identity is a "fundamental value", the weakening of which "is possible only through

the final termination of one's sovereignty". This makes the Hungarian model the most confrontational and individualistic;

-secondly, the identification of such components of constitutional identity as "national recognition" and "achievements of the historical Constitution". These components do not have (unlike, for example, Germany and Italy) directly related to the text of the constitution.

Poland

In the case law of the Polish Constitutional Court, constitutional identity is closely tied to sovereignty (this brings Polish judicial doctrine closer to the Hungarian model, which is also based on sovereignty). This is evidenced by several decisions of the Constitutional Court of Poland.

Thus, the decision dated May 11, 2005 (*Polish Constitutional Tribunal decision dated May 11, 2005*) states that Poland's accession to the EU didn't underestimate the supremacy of the Constitution over the entire legal order in the sphere of sovereignty of the Poland Republic: "Poland's accession to the EU doesn't mean changing the Constitution." According to the Court, "Community law is not able to abolish the primacy of the Constitution" and, "in the event of an irremediable contradiction between EU law and Constitutions", The Constitutional Court "must rule in favor of the Constitution."

In another decision of the Polish Constitutional Tribunal It is also noted that there are a number of powers that cannot be transferred in accordance with Article 90 of the Polish Constitution: "the sovereignty of the Republic of Poland is expressed in the inherent powers of State bodies that constitute *the constitutional identity* of the State". These inalienable powers are included in the constitutional identity of the Republic of Poland as "the values on which the Constitution is based". Thus, the absolute boundary of the transformation of the Constitution is the constitutional identity of Poland. Pola Zebulak [7] and Alexandra Kustra [8] share a similar thought (about the existence of a «hard core» in the Polish Constitution).

Based on this, the Constitutional Court of Poland defines constitutional identity as "a concept that defines areas that are excluded from the transfer of powers", since they are "the fundamental foundations of the political system" and act as "a guarantee of preserving the constitutional identity of the Republic of Poland" and at the same time act as "limits to the empowerment" of European Union bodies.

The Court also notes that "the equivalent of the notion of constitutional identity in EU prime law is the notion of national identity". When conceptualizing constitutional identity, the constitutional justice body does not adhere to a strict "positivist" methodology based solely on a textual understanding of constitutional identity. The Court notes that "constitutional identity remains closely linked to the concept of national identity" and "includes traditions and culture". This is similar to the thesis of M. Rosenfeld that constitutional identity is constructed in relation to national identity and must constantly be in dynamic tension, both with national and other identities [9]. G. J. Rosenfeld, the author of the article, says that constitutional identity is constructed in relation to national identity and must constantly be in dynamic tension with both national and other identities. Jacobson also notes that constitutional identity "represents a certain combination of political aspirations and commitments that express the nation's past, as well as the determination to transcend that past" [10, p. 7].

In general, this interpretation of constitutional identity largely repeats the approach of the Constitutional Court of Hungary ("Hungary's self-identification is not a list of static and closed values").

In its Decision dated November 16, 2011 (*Polish Constitutional Tribunal decision dated November 16, 2011*), the Constitutional Tribunal confirms its position aimed at recognizing the primacy of the Constitution (which makes it possible to conclude that there is a stable precedent line). The scope of its jurisdictional control mainly concerns the Luxembourg Court's "right of last word": "The Constitutional Court is obliged to take its position in such a way that - in relation to fundamental principles concerning systemic issues - it is "The Court will have the last word in relation to the Polish Constitution. The Court of Justice and the Constitutional Court cannot be opposed as competing courts".

In its Decision dated 26 June 2013, the Polish Constitutional Court confirms all its main theses on constitutional identity as an absolute boundary, a kind of protective mechanism responsible for preserving the fundamental foundations of the constitution. It should be noted that the recent demonstrative decision of the Constitutional Tribunal on the primacy of the Polish Constitution over primary EU law is fully in line with the logic of the cases discussed above.

As Alexandra Kustra notes, "the importance attached by the Constitutional Tribunal to the concept of constitutional identity seems to make it synonymous with the idea of the existence of the so-called 'solid core' of the constitution" [8, p. 200.]. Summarizing the "Polish experience" of conceptualizing constitutional identity, we can distinguish the following characteristic features:

- Close connection with sovereignty ("the sovereignty of the Republic of Poland is expressed in the inherent powers of State bodies that constitute the constitutional identity of the State");
- an extensive list of principles included in the constitutional identity ("fundamental foundations"), which allows it to be understood widely;

-an obvious emphasis on EU law (the "last word" law of the Luxembourg Court), expressed in the relevant jurisdictional powers –*identity control*) prevents "duplication of jurisdiction between the two courts", preventing conflicts "between the decisions of the Constitutional Court and the decisions of the Court of Justice".

Summary

Approaches to defining constitutional identity in the European Union countries vary quite widely. Thus, constitutional identity is defined as: "essential structures of the Basic Law" (Germany); "fundamental principles of the constitutional order and inalienable human rights" (Italy) "self-identification based on the Basic Law and its individual provisions, in accordance with the national recognition and achievements of our historical Constitution" (Hungary); "fundamental foundations of the political system that are excluded from the transfer of powers" (Poland).

The above definitions can be roughly divided into "strict" and rather vague ones. In the first case, we have a rather specific definition of identity. Such a "strict" definition, based on the text of the constitution, is clearly present in the judicial doctrines of Germany and Italy. Accordingly, it is relatively easy to understand what the identity of Germany or Italy is, and clarity in this case is achieved by direct reference to the text of the constitution.

In the second case, the definitions of constitutional identity are not sufficiently clear. This applies in particular to the approaches of the constitutional courts of Hungary and Poland. It is immediately noteworthy that the definitions used by the courts are not directly related to the text of the constitution (unlike, for example, in Germany and Italy). Thus, in the interpretation of the Hungarian Court, in addition to the constitution itself, there are such additional elements as "national recognition" and "historical Constitution". When defining identity, the Constitutional Court of Poland explicitly points out its connection with the "concept of national identity" and notes that it "includes traditions and culture". In general, it can be stated that a characteristic feature of judicial doctrines is Hungary and Poland recognize the importance of factors that go beyond the text of the constitution.

Thus, while in Germany and Italy the constitutional identity is always based on a certain part of the constitution, in the countries of the Visegrad group its sources are much broader and not always related to the substantive constitution. The above-mentioned differences in approaches to the definition lead to significant differences in the methodology for identifying specific norms and principles that are part of the constitutional identity.

Conclusions

Differences in the conceptualization of constitutional identity are quite significant and allow us to speak about different models of constitutional identity. It can also be assumed that the differences in approaches are related to the goal setting of the constitutional justice bodies. In countries of the Visegrad Group's conceptualization of identity was significantly influenced by "constitutional fears" related to the future caused by the processes of political and legal integration in the EU. These "fears" are particularly important for the conceptualization of constitutional identity. Thus, many researchers (for example, A. Chaillot) have noted that constitutional identity is often "defensive" in nature [11-1].

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