

Two Conferences on the European Models of Constitutionalizing Memories and the Hungarian Experience

Report on the ‘Conference on the Tradition, Constitution and European Integration’ Organized by the Centre for Social Sciences, in Collaboration with the French Embassy in Hungary, 23-24 September 2021, Budapest & the “Conference on the History, Constitution and Identity in Hungary”, Organized by the Centre for Social Sciences, 18 November 2021, Budapest.

*Marina Bán & Boldizsár Szentgáli-Tóth **

Abstract

The two conferences on the European Models of Constitutionalizing Memories and the Hungarian Experience (“Conference on the Tradition, Constitution and European Integration” and “Conference on the History, Constitution and Identity in Hungary”) were organized by the Eötvös Loránd Research Network’s Centre for Social Sciences on 23-24 September and 18 November 2021, respectively. The conference report gives an overview of the main topics and findings of these two conferences.

Keywords: conference report, Centre for Social Sciences, European integration, constitutional identity, legal traditions

The Centre for Social Sciences, Institute for Legal Studies hosted two conferences in the autumn of 2021 on the European models of constitutionalizing legal traditions, with special focus on Hungarian developments. This report gives a cursory overview of the various topics and thoughts explored and debated in these two conferences, focusing on constitutional identity and its different interpretations within the European legal space.

On 23-24 September 2021, in collaboration with the French Embassy in Hungary, the Institute for Legal Studies organized a conference with the title “*Tradition, constitution and European integration*”. Experts from France, Hungary and other jurisdictions provided broad and insightful comparative observations about the different understandings of constitutional identity, with particular focus on the case law of the CJEU. They further examined the interpretation of constitutional identity in Germany, and in Central and Eastern European countries with special regard to Hungary. Fundamental theoretical issues were also raised.

As far as the case law of the CJEU is concerned, presenters called for a substantial cooperation and dialogue with the national constitutional courts. They stressed that instead of mutual recognition and willingness to cooperate, the current judicial dialogue is characterized by hostile rhetoric and attitudes, which leads to the frequent mis-conceptualization of constitutional identity. The participants further underlined the insufficient endeavors of the CJEU to convince the European public about the validity of its judicial reasoning. Furthermore, stakeholders were not satisfied with the efficiency of the dialogue mechanism between national courts and the CJEU. By contrast, the ECtHR was mentioned as a positive example because its jurisprudence provides a broader margin of appreciation for national judges to consider the domestic context and the constitutional identity of the particular country. Furthermore, Protocol 16 ECHR established an opportunity for national judges to request advisory opinions

* Marina Bán: postdoctoral researcher; Center of Excellence for International Courts, University of Copenhagen. Boldizsár Szentgáli-Tóth: senior research fellow, Eötvös Loránd Research Network, Centre for Social Sciences, Budapest.

from the ECtHR in case of uncertainty around the interpretation of the ECtHR case law. For these reasons, participants called for a substantive judicial dialogue between the CJEU and national constitutional courts to elaborate on the concept of constitutional identity jointly, based on mutual respect and collegiality.

It has also been argued that national constitutional identity is not considered with sufficient gravity in CJEU case law, as the concept of national identity in its current form could not replace a real reflection on the constitutional characteristics of each Member State. Moreover, the CJEU applies selected interpretative methods in its decisions with the inherent purpose to avoid and eliminate risk factors. This is most probably owed to the Court's fear of potential uncertainties surrounding the interpretation of constitutional identity, and due to the willingness of national constitutional courts to prioritize national constitutional norms and principles over secondary EU law. The long-standing conflict between the national approach vindicating the supremacy of national constitutions over EU law and the European requirement of ensuring priority to European legal instruments over national constitutions should be balanced properly. This cannot be achieved without the strong engagement of both the national constitutional courts and the CJEU. The conference participants further discussed that most fears surrounding the incorporation of constitutional identity into CJEU case law are probably not well-founded, since the CJEU may rely on multiple tools of the founding treaties to avoid an overly broad interpretation of the identity clause stipulated in the TEU.

German and Hungarian constitutional case law on constitutional identity was also analyzed in depth, and several similarities were pointed out between the approaches followed by these constitutional courts. Nevertheless, owing to the decisions' discrepancies, the Hungarian court's concept does not reach the German standard in terms of comprehensibility and cohesion. The Hungarian Constitutional Court has failed to identify an applicable standard behind constitutional identity, declaring that its substance should be determined through a case-by-case assessment. In addition, the Hungarian Constitutional Court stated that constitutional identity is not established, merely acknowledged by the Fundamental Law of Hungary, and the entire text of the Fundamental Law could serve as the basis for identifying the primary elements of constitutional identity. Therefore, the Hungarian interpretation of the concept is closer to the traditional understanding of national identity rather than constitutional identity with a normative and enforceable substance, and should not serve as a normative basis for constitutional identity, such as, for example, the eternity clauses in Germany.

A further problem with the relevant Hungarian constitutional jurisprudence is the lack of differentiation between the internal and external functions of constitutional identity. Constitutional identity should impose a limitation on the primacy of European legal instruments and on the amendments to the constitution. However, according to Hungarian case law, the meaning of constitutional identity may change with the introduction of an amendment to the constitution. In this way, constitutional amendments would not necessarily comply with the principles of the already existing constitutional framework. The conference presenters recommended for the Hungarian Constitutional Court to submit a request for preliminary ruling to the CJEU on the role of constitutional identity in the European legal space, and a substantive review of constitutional amendments based on the concept of constitutional identity.

As far as theoretical issues are concerned, the following questions were raised and elaborated upon in an attempt to answer them in the course of the conference: *(i)* What are the main elements of constitutional identity, and how can one define them? *(ii)* Who is authorized to determine the exact definition of constitutional identity? *(iii)* What are the sources of constitutional identity? *(iv)* Which are the main functions assigned to constitutional identity in the fields of constitutional and legal interpretation? *(v)* Is constitutional identity a static or a dynamic concept?

These were the primary theoretical concerns, but because the answers have far-reaching practical consequences, the gravity of these issues should not be underestimated, and further extensive discussion should be devoted to the clarification of these matters.

The second conference formed part of a postdoctoral research study within the framework of the *Imagine Project*, a research project led by Professor Jan Komárek, at the Center of Excellence for International Courts (iCourts), Faculty of Law, University of Copenhagen, and funded by an ERC Starting Grant. This research consortium delves into the idea of constitutional imaginaries: ‘sets of ideas and beliefs that help to motivate and at the same time justify the practice of government and collective self-rule.’ These imaginaries are necessary legal fictions in order to support political rule. The baseline of the Imagine Project is the analysis of European constitutional imaginaries, starting from Eric Stein and Joseph Weiler to their present-day successors, contrasting them with case studies on national constitutional imaginaries in Central and Eastern Europe. The conference described below is a part of the Hungarian case study, where distinguished Hungarian experts of the topics discussed the Hungarian model of constitutionalizing historical traditions within the European legal space. The conference took place on 18 November 2021, its title was “*History, constitution and identity in Hungary.*”

The participating experts explained that the historical constitution of Hungary is a theoretical concept originating in the late 18th, early 19th century. In the aftermath of the Hungarian defeat of the 1848 Revolution and War of Independence, the opponents of Germanization, Habsburg imperialism and assimilation relied on a collection of historical documents. They identified them as the country’s historical constitution because these documents played a crucial role in the development of the Hungarian state. In the 19th and 20th centuries, the historical constitution was referred to in order to ensure the continuity of the state in times of occupation and oppression. This approach is strongly linked with the Holy Crown of Hungary and its use has been the subject of intense academic and political debate, in particular, the way it is presented in constitutional documents. Although the doctrine of the historical constitution was largely neglected under the communist regime, the debate surrounding it resurfaced amidst the democratic transition. Moreover, in 2011, upon the adoption of the Hungarian Fundamental Law, the country’s new constitutional charter, it contributed to the development of a new legal concept, the ‘achievements of the historical constitution’. Article R of the Fundamental Law obliges the Constitutional Court to identify and consider these achievements during its decision-making process. Despite lacking basis in case law and possessing a very shaky and heavily debated doctrinal basis, the Constitutional Court at least attempted to integrate the concept. It referred the achievements of the historical constitution to define the constitutional identity of Hungary, and to underline Hungary’s sovereignty. In its recent *Decision No. 22/2016. (XII. 5.) AB*, the Constitutional Court strengthened the sovereignty-based discourse and took a stance against the primacy of EU law with the justification that in certain situations the historical constitution of Hungary obliges a departure from EU law. The recurrence of this concept in Hungarian constitutionalism begs the question why the country’s historical roots and their presence in constitutional case law remains relevant to this day.

The aim of the conference was twofold. (i) First, it sought to examine why historical roots remain present and relevant in Hungarian constitutionalism. (ii) Second, it tried to answer the question how history in the country’s constitutional development may yield additional, previously unexplored viewpoints and approaches to Hungary’s past and current relationship with the EU’s constitutional imaginaries.

The conference’s framework moved beyond a strictly legal doctrinal setting as regard its methodology, examining the broader implications of the constitutional relevance of the historical past. This involved assessing the intellectual history of how references to the past

remained relevant throughout Hungarian constitutionalism, including the concept of the historical constitution, as well as the use of historical narratives in constitutional law and academic debate throughout the years and their impact on the shaping of Hungarian constitutional identity. The conference explored these issues by mapping the historical roots of political and legal thinking about historical narratives. These include the inception of Hungary's historical constitution in the 18th and 19th century, the events of the 20th century and their impact on constitutional debates (such as the Treaty of Trianon, the communist regime and the democratic transition), and how history appears in the Fundamental Law and the case law of the Constitutional Court.

Thus, the conference provided a local constitutional perspective that has remained quite neglected in research on current developments in Hungary. The analysis of how historical references are built into Hungarian constitutional law contributes to the debate surrounding the role of Hungary in the EU constitutional order, and the country's growing opposition of some EU values. In the post-1867 Habsburg Empire, the Hungarian political elite moved from being oppressed to being elevated as equals to the Austrian elite, thus becoming somewhat of an oppressor of other minorities themselves. This imperial role may fuel current ideologies which may be called 'Hungarian exceptionalism' and ambitions to regain the country's role among the leading powers of the EU. This can be rationalized with the historical constitution concept, providing the justification and basis for such continuity and exceptionalism. Opposition to the EU's unifying efforts and the challenges to the primacy of EU law may have their roots in the difference of historical interpretation on the constitutional level. In this way, constitutional doctrines such as the achievements of the historical constitution become tools to define the independence of Hungary and reject ideas perceived as originating from imperial and supranational oppressive powers.

The conference intended to answer the following questions: *(i)* Who shapes and for what reason (or have shaped in the past) the use of history as a constitutional narrative (on the political level)? *(ii)* How do the historical roots of the state appear in Hungarian constitutional law? *(iii)* What role does the reference to history play (or what role has it played) in the Hungarian constitutional vision (at the political, scientific, legal and historical levels)? *(iv)* Why do historical documents and legal concepts remain relevant to this day? *(v)* How can the use of historical narratives in the Hungarian constitutional vision support or reject European constitutional ideas? *(vi)* What unexplored, further perspectives can be gained on the reasons for the current political processes present in Hungary by examining the use of history in Hungarian constitutionalism?

The presentations covered the following main topics: *(i)* History, constitution and identity: The appearance of the historical past in the Hungarian constitution and its influence on Hungarian political identity in different periods from the 19th century to the present day. *(ii)* Hungarian constitutional identity, sovereignty and imperial powers: The use of Hungarian historical narratives to express the country's independence and its relationship with the great powers from the 19th century to the present day. *(iii)* History and the Fundamental Law: The presence of history in the Basic Law and 21st century constitutional law. *(iv)* Historical constitution over the centuries: The evolution of the historical constitution and its definition and changes over the last two hundred years.

In conclusion, both conferences served as valuable platforms for insightful and intense discussion on constitutional identity within the European legal space, and its relationship with national historical traditions. The conferences pointed out that the uncertainties around this concept, especially in the Hungarian model are considerable, therefore, further efforts must be dedicated to tackle these complex issues. For this reason, future conferences and research projects should continue to conceptualize these issues to provide a deeper understanding of the

influence of legal traditions on the current constitutional framework of EU Member States, and their role in the strengthening European integration.