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Constitutional identity, identities and constitutionalism in Europe

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ABSTRACT

The notion of Constitutional Identity has attracted much scientific interest. However, it obscures, sometimes in a reductive manner, another legal reality: the existence of other identities, such as national, linguistic, and collective identities. Indeed, a reading of constitutions and constitutional court's decisions in Europe reveals a complex and evolving system of identities behind Constitutional Identity.

This paper argues that identity is not just a political argument but also a legal and normative one. From a constitutional law perspective, two main categories can be distinguished: a real identity existing prior to the constitutional norm, and a fictitious identity subsequent to the constitutional norm. These identities are interdependent and are linked to each other; the constitutional courts referring to Constitutional Identity in order to maintain this interweaving. Therefore, Constitutional Identity plays an argumentative function and, by determining the interpretation of constitutional norms and the meaning of constitutional concepts, it gives birth to different forms of constitutionalism in Europe.

KEYWORDS

constitutional identity, European Constitutional law, national identities, individual identities, European constitutionalism

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1. INTRODUCTION

The inclusion of identity in constitutional law is a growing phenomenon in Europe. Today, out of the 46 member states of the Council of Europe, 21 have a constitution that explicitly refers to the word 'identity'. Very recently, in two states – Russia[1] and Hungary –, the constitution was amended to better take into account the identity issue. More precisely, the constitutional reform that came into force in Russia on 4 July 2020 introduced a guarantee of Russian cultural identity, while the Hungarian constitutional revision of 15 December 2020 added, among other things, a provision in Article XVI that defines gender identity and protects the family and education in accordance with the constitutional identity and values based on Christian culture. Apart from the constitution itself, the case-law of constitutional courts is also mirroring the importance of identity. Very recently, the French Constitutional Council expressly referred to 'Constitutional Identity' in a decision of October 15, 2021 and for the first time specified the content of this term. It stated that the prohibition of delegating the exercise of public power to private persons was a principle inherent to the Constitutional Identity of France.[2]

From the outset, the 'music' which is played is not exactly the same in the different countries where identity is given a constitutional dimension. However, the same word is used again and again, even though it does not encompass the same principles from one state to another and does not have the same political or legal implications. One of the first challenges is to determine what are we speaking about when we refer to identity. First of all, a scientific approach involves questioning what lawyers can observe from a legal perspective. Do they have the scientific skills to analyse the 'identity phenomenon'? Indeed, at first, 'identity' refers not to a normative but an ethical term which requires a definition. Even if all dictionaries offer a lexical definition thereof, the notion exceeds its etymological description and use in day-to-day life and requires addressing in the philosophical, sociological, and psychological fields.[3] Furthermore, we can note that there is no consensual definition of identity either, either in its visible dimension, or in its temporal dimension. As demonstrated by Descartes, when wax burns, its form changes, but it does not lose its identity, despite the modification in the perception of the observer.[4] The famous antic Theseus Paradox also usefully addressed identity and change across time by raising the question whether a boat would remain the ship of Theseus if every part of the ship were totally replaced. As a consequence, for a lawyer, observing the complexity and the plurality of definitions means making a choice in order to draw the shape of the concept of Constitutional Identity. Consequently, the single common point among the choices is a meta-theoretic one, which consists of considering identity as a category, a Weberian 'ideal-type', which can encompass many different features. This diversity of approaches makes it even more difficult for lawyers to define the concept of identity.

Nevertheless, the obstacle can be avoided by observing the action of the constitution-framers and the case-law of constitutional courts. This paper is based on the results of the research

[1]Although Russia was excluded from the Council of Europe in March 2022 because of the war in Ukraine, the example remains relevant for the demonstration, as the last constitutional reform in Russia took place in July 2020.

[2]Decision n° 2021-940 QPC of 15 October 2021, *Société Air France*.

[3]Without being exhaustive, we can mention the following authors: Levi-Strauss (2010) and Halpern (2009).

[4]Descartes (1641) 423–24.

I conducted during my PhD,[5] dedicated to the analysis of the 'identity' phenomenon in Europe, its evolution, and its effects. I studied the constitutional texts of the member states of the Council of Europe as well as more than 350 decisions adopted by constitutional courts.

'Constitutional Identity', *per se*, is a notion constructed by constituent power and even more frequently by constitutional courts, generally in order to regulate the relationship between national and European legal orders. The revelation of Constitutional Identity mostly takes place when there is a conflict between a constitutional norm and a European norm.[6] The term 'national identity' as mentioned in Article 4§2 of the TEU[7] is not the exact equivalent of 'Constitutional Identity'. There is something else which is broader than the Constitutional Identity guaranteed by some courts. In reality, Article 4§2 TEU states that any constitutional system bears an 'identity'. According to European Union law, identity is present in all national constitutions. But for a long time the expression 'identity' was rarely expressly found in the constitutional law of member states. This is why the constitutional courts had to create the notion to be in conformity with EU law. In France, between 2005[8] and 2006,[9] the Constitutional Council changed its legal argumentation, shifting from the 'essential conditions for the exercise of national sovereignty' to the 'Constitutional Identity of France'. It clearly made a choice of terminology that had no other ambition than to confirm definitively that there could potentially be limits to European integration. A very similar evolution took place in Germany when the German Constitutional Court moved away from the *Solange 1* decision in 1974, when it only enshrined the identity of the Constitution,[10] to the 2009 decision on the Lisbon Treaty, when it harmonized its position with that of the French Council by employing the expression 'Constitutional Identity'.

But 'Constitutional Identity', as a notion constructed by constitutional courts, is far from being the only 'display' of identity. Through the analysis of constitutional case-law and texts, it is possible to observe that primary and secondary interpreters of constitutional norms have borrowed the definition given by Paul Ricœur according to whom identity is a matter of selfhood and sameness.[11] As a consequence, several characteristics – such as sameness, selfhood, alterity, permanence, and distinctiveness – [12] were identified in order to analyse identity from a constitutional law perspective. I was therefore able to draw up a reading grid of identity that is found within constitutional law of European states.

[5] Allezard (2021).

[6] See on this issue for example: Saiz Arnaiz and Ilivina (eds); Fatin-Rouge Stefanini, Levade, Michel and Medhi (eds); Burgorgue-Larsen (ed).

[7] According to Article 4.2 of the EU Treaty, 'The 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. (…)'. [Emphasis added]

[8] For example, French Constitutional Council, n° 2005-524/525 DC (2005); n° 85-188 DC (1985).

[9] French Constitutional Council, n°2006-540 DC (2006).

[10] German Constitutional Court, BvL 57/71, BVerfGE 37, 271, 29 May 1974, *Solange I*.

[11] Ricoeur (1996).

[12] The words which are used are different depending on the countries, but the general idea is the same. In France, for example, the former President of the Constitutional Council, Pierre Mazeaud, considered that French constitutional identity was something 'necessarily crucial and distinctive'. See Mazeaud (2005).

First, identity can be considered as *existing prior to constitutional norms*. In this case, identity is a goal to be achieved (to recognize an identity, to protect it, or to develop a specific identity) or a tool for achieving something else (to establish democratic features with positive discrimination for some communities or to take into account some particularities in the legislative process). In these cases, identity can be considered *a category without any specific normative content, and existing outside constitutional norms*. Sometimes, the word 'identity' is not expressly mentioned in Fundamental Laws and sometimes the substantive latter is completed by an adjective such as 'linguistic' or 'cultural'. All the constitutions refer to at least one of these types of identity. Usually, such an expression of identity is located in the preamble of the constitution, as the latter has mainly symbolic value. Its role is to provoke the self-identification of people. It defines collective and minoritarian identity. The importance of this is not irrelevant. Latvia is a good example of where such dynamics exist, as it adopted in 2014 a new preamble for its Constitution of 1922 in order to protect the Latvian identity. But the body of the constitution can also allocate a place to this expression. The 1976 Constitution of Portugal is a very accurate illustration of this second scenario, mentioning in five articles the word 'identity'. According to this first category, identity belongs to a person (an individual identity) or a group of persons (a collective identity). A distinction can be made between the identity of a 'real' constitutional subject who exists prior to the constitution, and the identity of a constitutional subject who is created by the constitution.

Second, identity can be considered as *engraved in constitutional norms*. In this case, identity has *a concrete normative substance*. According to this second category, constitutional norms can be the reflections of an identity which exists outside of the norms. Just like a mirror, the former reflect values or a pre-existing identity of people. Also, norms can be the origin of an identity, thanks to the interpretation by constitutional courts. Constitutional Identity belongs to this second scenario. It is also important to highlight that the concept of identity cannot exist without a subject. The legal literature disagrees on the holder of Constitutional Identity. According to Benedict Anderson, it is the people as an imagined community,[13] but it can also be the nation or the constitution itself. As Michel Rosenfeld explained, it can be a real subject or a fictive one.[14]

Thus, Constitutional Identity – as a concept – does not exhaust the subject of identity in constitutional law. It coexists with other forms of identity. But new questions are emerging: Are there any links between 'Constitutional Identity' and the other legal categories of identities? How do 'authentic interpreters' of law take into consideration identities which exist prior to the constitution? Also, what are the effects of an identity or of identities on constitutional systems and on European constitutionalism?

In this article, I argue that 'Constitutional Identity', together with the other existing identities, forms a system and, through their interaction they give constitutional law its own identity. Such a phenomenon helps further understand the European constitutionalism paradox. Behind the universal principles commonly enshrined in constitutional texts and protected by constitutional courts, in particular thanks to the consensual notion of Constitutional Identity, the identity argument enables states to defend relative and specific domestic measures and rules.

In the first section 2 demonstrate from a constitutional law perspective how identities are interdependent and form a system of identities in each European country (2). In the second part

[13] Anderson (1991).

[14] Rosenfeld (2009).

I show that such a system of identities determines the interpretation or reading of constitutional principles and, as a consequence, the identity of constitutional systems in Europe and threatens the unity of European constitutionalism (3).

2. THE EXISTENCE OF A SYSTEM OF IDENTITIES WITHIN EACH DOMESTIC CONSTITUTIONAL LAW

In all the States, when drafting the constitutions, the constitutional framers made a choice between substantial identities; in some cases, they chose to favour one identity over another. Once chosen, identity is confirmed by the constitutional courts, which sometimes go far beyond this choice through their interpretation (2.1). As a consequence a balancing of identities appears which might be different depending on its interpreters (2.2).

2.1. The constitutional selection of identities

First, *the choice between several identities is made by the constituent power and introduced into the constitutional text*. In reality, each State has a specific arrangement which is adapted to the domestic context,[15] mostly for political reasons such as unification, homogenisation, or differentiation from the common European policy or a common ideology. Some historical or political contexts are more conducive than others to the risk of competition between identities. Identity is particularly central to negotiations in conflict situations and may become the best guarantee of peace.[16]

In some cases, 'constitutional preconditions'[17] need to be taken into account but without historical pre-Constitutional Identity as such, and they are not necessarily fully reproduced in the constitutional text.[18] During the 'constituent moment', whether or not particular pacification issues are at work, a contest of legitimacy is held between an inherited identity, seen as historical, and a chosen, projected identity, seen as futuristic. There are processes that explicitly exclude the question of plural identities in order to focus on a common identity, whereas in some cases constituent processes will consider minority identities in order to create a common identity. Nevertheless, all the constitution-making processes share a common point: the identity issue is at the heart of the negotiations, whether this brings people together or disunites them.

In Poland, under the communist regime, the Catholic religion and Church were the seat of resistance against the communist invader and were seen as a legitimate alternative to the regime.[19] Therefore, when the post-communist Constitution was discussed, and more

[15]Ginsburg (2018) 9.

[16]Ginsburg (2018) 1.

[17]Von Bogdandy and Schill (2011) 46. They explain that constitutional preconditions (*Verfassungsvoraussetzungen*) played 'an important role in the discussion in Germany, i.e., conditions for the existence of a national constitution that are not directly enshrined in them, as part of national identity'.

[18]Von Bogdandy and Schill (2011) 14: The authors invite readers to consider that the pre-political or pre-constitutional national identity is not necessarily fully reproduced in the constitutional text.

[19]Zubrzycki (2001) 639. According to the author, 'religion and the Church were the site of resistance, and served as an alternative legitimate system assuming symbolic, organizational, and institutional functions'.

precisely, when the preamble to the Constitution was drafted, the Catholic Church tried to make the most of the Christian identity. A twofold question submitted by the Church dominated the constituent debates: 'In the name of what should we abandon values that are cherished by all Poles? In the name of what values should we replace them with the concept of citizenship?'[20] Whereas the Catholic Church was initially hostile to an explicit reference to God in 1993, once it lost some influence in parliament with the defeat of Lech Wałesa in 1995 it decided to secure the Catholic identity by enshrining it in the 1997 Constitution. But at the end of the debates, the Catholic Church finally accepted the demand for neutrality and a multicultural definition of the Polish people during the transition, while at the last minute[21] it managed to reach a compromise between Christian and universal values by including an *invocatio dei*.[22]

An initial pact can also be later challenged when different identities came into conflict during the constituent process. The Spanish Constitution of 1978 is another example of the reconciliation of identities in a constitutional text. The latter took into account Basque, Catalan, and Galician nationalist aspirations in terms of the recognition of their linguistic and cultural identities and therefore their differences.[23] On the 1977 Constituent Committee, where the seven political groups present in the Cortes were represented, the debates mainly focused on the 'national issue'.[24] In order to ward off regional ambitions, sovereignty was made indivisible and attached to a unitary people by the constitutional text.[25] Nevertheless, Catalonia in particular, in order to gain autonomy and above all political recognition, based the reform proposals of its statute on the 'particular and historical rights' of the 'Catalan people'.[26] But such a reconciliation of identities was difficult to maintain over time, as the 2017 crisis in Catalonia showed. The declaration of the Parliament of Catalonia of 10 October 2017,[27] which followed the unconstitutional 'referendum of self-determination'[28] of 6 September 2017,[29] clearly highlighted the relationship between legitimacy and identity. The Declaration of Independence began with:

[20]Quote from an official document of the Catholic Church, Zubrzycki (2001) 645.

[21]Garlicki and Garlicka (2013) 400. At the time, the normative value seemed to be *a priori* symbolic, but the provision has a very different echo in today's Poland where the Constitutional Court ruled in October 2020 that abortion resulting from foetal abnormalities was unconstitutional.

[22]Garlicki and Garlicka (2013) 400.

[23]Martínez-Herreran and Miley (2010) 6.

[24]Martínez-Herreran and Miley (2010) 7.

[25]Spanish Constitution, art. 2.

[26]See in particular Article 5 of the draft Statute of Catalonia of 2005. According to Martínez-Herreran and Miley (2010), 'Article 5 of the proposed reform referred to 'historical rights', specifically proclaiming that 'the self-government of Catalonia is also based on the historical rights of the Catalan people, on its secular institutions, and on the Catalan legal tradition, which this Estatut incorporates and modernizes…'.

[27]This was the first declaration of independence, but it followed various resolutions of the Parliament along the same lines. Ruiz Ruiz (2017) 294: 'Resolution 742/IX of 2012 solemnly proclaimed the imprescriptible and inalienable right of Catalonia to self-determination as an expression of its sovereignty as a nation and affirmed the opening of a new stage, based on the right to decide. In Resolution 5/X of 23 January 2013, a declaration of sovereignty was formulated, together with "the initiation of the process to implement the exercise of the right to decide so that the citizens of Catalonia can choose their collective political future'.

[28]Act of the Catalan Parliament, No19/2017, September 6th, 2017.

[29]Spanish Constitutional Tribunal, STC 114/2017, October 17th, 2017.

> To the people of Catalonia (…), the Catalan nation, its language and its culture have a thousand years of history (…) Catalonia restores today its full sovereignty, lost and widely expected for decades in an honest and loyal institutional coexistence with the peoples of the Iberian Peninsula…

and was finally signed by 'the legitimate representatives of the people of Catalonia'.

Second, *constitutional courts, as guardian of the Fundamental Law, also contribute to making a choice between different identities.* They may reproduce the choice of a common identity already made by the constituent power. In some cases, they may find in the constitution itself some guidelines for their interpretation. For example, Article 3 of the Croatian Constitution states:

> Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.

This sounds like Article R[30] of the Fundamental Law of Hungary.[31] We can also refer to the eternal clauses which are binding in Germany or Turkey, for example. Article 2 of the Turkish Constitution, which explicitly refers to the Preamble, combined with Article 174, establishes secularism (*laiklik*) as a material limit on constitutional revision. These articles paved the way for the Turkish Constitutional Court to confirm the primacy of the historical secular identity over constitutional norms. After consistent case-law refused the reintroduction of the headscarf and the fez in public space through legislation,[32] in 2008 the Court reviewed a constitutional revision and declared it formally and substantially unconstitutional. According to the Court, the proposed amendments violated Article 2 of the Constitution and infringed the secularism principle established by Atatürk.[33] Ireland is another example of where religious identity included in the Preamble is invoked by the judge upon judicial constitutional review.[34]

But all the constitutions do not enshrine such a binding guide for interpretation. In these cases, the constitutional court decides, through its interpretation, what identity should be guaranteed. For example, in a decision from 2009, the German Constitutional Court, after referring to Germany's National Socialist history, confirmed that the entire Constitution should be interpreted antithetically to that period,[35] according to the system of values discovered in the

[30] According to Article R,
'(1) The Fundamental Law shall be the foundation of the legal system of Hungary.
(2) The Fundamental Law and the laws shall be binding on everyone.
(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution.
(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.'

[31] Hungarian Constitutional Court, 2/2019 (III. 5.), March 8, 2019.

[32] Roznai and Yolcu (2012) 178.

[33] Turkish Constitutional Court, E. 2008/16; K. 2008/116, June 5, 2008.

[34] For example: Irish Supreme Court, *McGee v. The Attorney General*, 1974, IR 284 or *McGee v. The Attorney General*, 1974, IR 284.

[35] German Constitutional Court, 1BvR 2150/08, November 4, 2009, §42a 'The Basic Law can be largely particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime, and from its structure through to its many details seeks to learn from historical experience and to rule out a repeat of such injustice once and for all'.

famous *Lüth* decision in 1958. The influence of identity on the interpretation of the entire constitutional text is therefore still relevant today in Germany.

Because constitutionally protected identities can compete with each other or be in conflict, they have to be balanced either by the constituent power or by constitutional judges.

2.2. The evolutive balance between identities

Identities coexist in constitutional law, but their cohabitation is not fixed. The constituent power and, more commonly, judges, may reverse the primacy of one identity over another. As a result, identities are like a pendulum whose balance can change.

These interactions and changes of balance may happen between identities which belong to the same category, such as collective identity, individual identity, religious identity or linguistic identity. The nature of constitutionally protected identity may change over time for different reasons that can be political or societal. The question 'why?' is not, *per se*, at the heart of a legal analysis, but lawyers may observe the 'how?'.

In Hungary, the adoption of the new Constitution in 2012 led to a complete change of collective identity. Whereas in the late 1980s, when moving away from communism, a liberal identity – that is, an exogenous identity with a performative role – was chosen, in 2012 the new Hungarian Constitution emphasized a particular and historical collective identity that claimed Christian values that can be analysed as endogenous. The result is a clear departure from the time when, by importing the German jurisprudential definition of the constitutional principle of human dignity,[36] the Hungarian Constitutional Court could display its liberal anchorage. In the 1990s, the right to human dignity became a framework right ('mother-right'- '*anyajog*'), which itself became a hermeneutic reference for judges through which they could create new rights. Moreover, the doctrine of the invisible Constitution forged by László Sólyóm, the first President of the Hungarian Constitutional Court, allowed the court to freely interpret all fundamental rights in the light of the European principles enshrined in the European texts that Hungary hoped to ratify one day. Pierre-Alain Collot confirms that 'the post-socialist transition was thus to derive its moral value from strict compliance with formal legal guarantees',[37] whether understood as European – it should be pointed out today – or to operate its 'revolution through the rule of law' ('*jogállami forradalom*', as László Sólyom called it).[38] Today, as V. Orbán stated, the 'revolution through the ballot box' enshrined a very specific interpretation of European principles, as we will see below.

In Norway, since a 2012 constitutional reform, there are now two different identities that need to be balanced. In its new version, Article 2 of the Constitution combined both 'human rights, democracy and the rule of law' on one side and a new reference to 'our Christian and humanist heritage' as a 'basic value' on the other side. With this addition, which had *a priori* a symbolic echo, the constituent power intended to preserve a balance between the outward-looking identity and the identity inherent to Norway, both of which permeate the constitutional text as a whole. In this case, there is also an interaction between these two identities and the constitutional judge is in charge of their balance.

[36]For example, German Constitutional Court, BVerfGE 6, 32, January 16, 1957; BVerfGE 30 173, *Mephisto*, February 24, 1971.

[37]Collot (2006).

[38]Tóth (2020).

Linguistic identity may also be considered. Following the fall of the Soviet Union, an explicit balance was established in the Baltic States in favour of their own language *versus* Russian. As a consequence, Russian speakers received limited rights. And in 2019, the Latvian Constitutional Court ruled that school education was to be provided only in Latvian and thus further restricted the use of Russian language.[39]

But the balance may also occur between identities belonging to different categories. The balance between different identities is tailored to each state and determined by constitutional principles and norms which are reconciled by identity. The Irish Constitution is a good example of the interaction between a collective religious identity (a Catholic identity) and an individual non-religious identity. Until the 2018 constitutional reform on the liberalization of abortion,[40] in Ireland there was clearly a constitutional balance in favour of a collective identity and against a non-religious individual identity, especially in relation to the possibilities of its expression. However, even in the absence of an explicit provision systematically imposing collective identity and its practices, Irish law was previously capable of becoming more liberal in other areas, such as sexual orientation by authorizing same-sex marriage,[41] even though the Catholic religion does not allow this. In this case, the importance and legislative weight of the collective Catholic identity enshrined in the constitutional text loses its influence when individual identity is favoured. The balance between the two types of identity is therefore encouraged by the secondary constituent power and confirmed by the constitutional judge.

In Turkey, the opposite direction of evolution has been observed. For a long time the Constitutional Court has restricted individual religious expression in preference for a collective secular identity of the state. The ban on wearing a headscarf at university has for a long time been a symbol of the balance between the secular identity enshrined in the Constitution and the Muslim identity desired by a majority.[42] Individual identity and its expression were balanced with secularism; the Muslim identity being officially excluded from the constitutional text. However, recently, the balance has recently shifted to the other side. In 2012, the Turkish Constitutional Court validated a law on state-funded Islamic education in schools as an obligation for the state. Commentators on this reversal have referred to the new flexibility of Turkish secularism as a collective identity.[43]

[39]Constitutional Court of Latvia, n°2018-12-01, April 23, 2019.

[40]36th amendment to the Irish Constitution, Constitutional Law n°29-2018, September 18, 2018 abolishing the 8th amendment of 1983.

[41]Adoption of the 34th Amendment, May 22, 2015.

[42]Roznai and Yolcu (2012) 176. For the authors, 'As Turkey struggles with the tension between its vast majority of Muslims and its aim to preserve the modern republic's secular character, the headscarf has become a symbol of the conflict between popular Islam and secularism'; Göl (2009) 795-810.

[43]Turkish Constitutional Court, E. 2012/65, K. 2012/128, September 20, 2012; See Oder (2017): 'The relevant law is a touchstone for populist policies fostering the majority religion, particularly Muslim identity. In this case, the Court upholds the law providing for courses of Islamic instruction in the middle and high schools curricula. The law provides extra elective courses of Islamic instruction fully endorsed by the state. It does not prescribe such courses for any other religion. Drawing on a new concept of "flexible laicité" for Turkey that embodies the "positive obligation of the state" to facilitate and provide religious services for the majority religion (Islam), the Court upheld the new law. Such an obligation is hardly deducible from the Constitution with its neutral guarantees for freedom of religion and the secular state principle'.

In France, another form of evolution has taken place regarding the balance between individual identities and general identity. Whereas for a very long time the principles of equality and of the indivisibility of the Republic have been the main legal grounds for rejecting any positive discrimination or the recognition of any rights to minorities or communities, in 2004 the Constitutional Council softened its position in order to recognize specific rights of certain 'populations'.[44] In 1991, the Constitutional Council rejected the idea of a 'Corsican people component of the French people', considering that there was just one 'French people'. In 1999, it ruled that the European Charter for Regional or Minority Languages could not be ratified since the Charter could challenge the principles of indivisibility of the Republic, and of the equality of all citizens. The Council underlined that the principle of unity of the French people had constitutional value and that the constitutional principles of France were against collective group rights, whether defined by community of origin, culture, language, or belief. Nevertheless, a few years later, the constitutional judge accepted that some special measures could be taken in favour of the Polynesian population due to 'local necessities' and in order to protect the local labour market. Similar measures adopted in New Caledonia were declared constitutional in 1999.[45] Minority rights are still not recognized by French constitutional law, but the identity of the populations of overseas territories coexists in the Constitution alongside general identity.

The way identities are balanced or disbalanced is actually determined by the links that exist between them. The coexistence of identities within constitutional law is not without consequences. Their interactions or interdependence give birth to the specific identity of the constitutional law itself. If the notion of 'Constitutional Identity' is employed by the courts to describe 'the structuring foundation of the state and the backbone of its legal order',[46] we can go further and consider, along with Gary J. Jacobsohn[47] and Michel Rosenfeld,[48] that Constitutional Identity as a concept corresponds to the identity of the Constitution and of the constitutional law.

3. CONSTITUTIONAL IDENTITY AS THE IDENTITY OF CONSTITUTIONAL LAW

Constitutional Identity is not just a consequence of the combination of different types of identities. It enables the protection of the main concepts of constitutional law and their exercise. Among others, it protects the *kompetenz-kompetenz*[49] of the state against the European Union. Thanks to its argumentative function (3.1), Constitutional Identity guarantees a specific interpretation of the constitution, or more precisely, of the constitutional principles, which are in reality shaped in a certain manner by the different identities chosen in each European constitutional system (3.2).

[44]French Constitutional Council, Decision n°2004-490 DC, 12 February 2004, *Loi organique portant statut d'autonomie de la Polynésie française*.

[45]French Constitutional Council, Decision n°99-410 DC, 15 March 1999.

[46]Levade (2010) 117.

[47]Jacobsohn (2010).

[48]Rosenfeld (2009).

[49]German Federal Constitutional Court, BVerfGE 123, 267, *Lisbon*, June 30th, 2009.

3.1. The argumentative function of constitutional identity

The main constitutional concepts which are used in constitutional theory – such as the State, the people, democracy, human rights and the Rule of Law – are substantially the reflection of the arrangement of identities. The existence of a federal State – like in Belgium since 1993 –, or of a consociational democracy[50] – like in Macedonia in 2001 and Bosnia and Herzegovina in 1995 –, or of a multinational people[51] – like in Russia –, relies on an identity which is the determining criterion of those specific forms of state, democracy, and people. Very often, the selection of identities to be included in the constitutional text accords with the adoption of measures – constitutional or legislative – that support such choice. As a consequence, constitutional fundamental concepts are interpreted in the light of these rules.

In France, the collective identity excludes from the public sphere the existence of minorities as well as the additional rights granted to them. As previously mentioned, in its decision on Corsica the French Constitutional Council rejected the existence of the Corsican people considering it was contrary to the principle of unity of the French people and te indivisibility of sovereignty. Therefore, it protected a unitary form of the state.[52]

In contrast, states that recognize minorities or communities sometimes grant them specific rights in order to allow them easier access to representation in parliament or give them veto power over certain pieces of legislation. In this case, the concept of the state can change if, as in Spain or Italy, certain Regions have competences which are different from others. They represent asymmetrical regional states. Italy is one of those unitary states whose unity is challenged by a particular territorial history and regional claims. Italian territory was created between 1860 and 1870 by a military unification of cities, duchies and regions.[53] Thus, the 1948 Constitution represents 'a compromise between a centralized state that has existed in Italy since unification, and a more flexible federal state.'[54] This compromise is reflected in the consecration of a high degree of decentralization to the regions. Nevertheless, this delegation of power varies from region to region, since only five of them have been granted special autonomy.[55] Nevertheless, in order to reduce this asymmetry, constitutional revisions were made in 1989[56] and 2001[57] with the hope of initiating federalization by reducing the gap in competences between the special and ordinary regions. Such a manoeuvre reinforced the sense of identity of the five regions,[58] particularly Sardinia. Sardinia adopted a new Statute of

[50]Lijphart (1969).

[51]Pierré-Caps (1995).

[52]French Constitutional Council, n°91-290 DC, May 9, 1991, *Loi portant statut de la collectivité territoriale de Corse*.

[53]Ninet and Gardner (2016) 392.

[54]Rogoff (1997) quoted by Ninet and Gardner (2016) 393.

[55]Italian Constitution, art.116.

[56]Constitutional Law n°3, April 12, 1989.

[57]Constitutional Law n°3, October 18, 2001. This brings about a complete change in the relationship between states, regions and local autonomies. It grants more competences to regions with ordinary status, thus reducing the gap with regions without special status.

[58]Ninet and Gardner (2016) 394.

Autonomy in 2006,[59] which began with a simple declaration of 'autonomy and sovereignty of the people of Sardinia'[60] and of which 'the principles and characteristics of regional identity were the founding reasons'.[61] But the claims based on identity found their limits expressed by the constitutional judge who was asked for an opinion on the Statute.[62] The Court explicitly denied the possibility for an entity to invoke an ethnic or cultural distinction to claim sovereignty.[63] The Italian Constitutional Court ended up reaffirming a certain conception of Italian regionalism[64] that was certainly specific but with which the Statute was incompatible.[65] The Court then defined identity claims according to a model of regionalism – still asymmetrical – made for Italy, without enumerating its characteristics but denying characteristics that were closer to the standard model of a federation or confederation.[66]

Even today, federal states are made more complex by identity. The specific form of Belgian federalism is explained by a disagreement between the Flemish and Walloon communities, the former preferring a community federalism – based on language – and the latter tempted by regional federalism[67] – based on territory. In an attempt to reconcile the two visions, the constitutional revision of 1993 punctuated the process of securing linguistic identities by introducing a very complex federalism with the existence of two categories of federated entities; namely, linguistic regions and cultural communities. Therefore, the Constitution provides for a dual level of regulation in linguistic matters by sharing competence between the national legislator and the three federated entities – the Flemish, French, and German-speaking communities. The rules thus adopted must comply with two principles: that of personality, and that of territoriality; i.e., in accordance with the linguistic identity of the individual to whom the rule is addressed and in accordance with the territory of application of the rule.[68] The two requirements cannot always coincide. Conflict may therefore arise from time to time which requires hierarchy between the two principles.

Not only may the form of the state be shaped by identity, but also the concepts of democracy and people. For example, in Bosnia-Herzegovina the free expression of citizens is not based on their individual equality but precisely on their difference as three constituent peoples. Bosnia-Herzegovina clearly illustrates the difficulties of combining identities in a single state and the structural contortions that a constitution can admit without managing to avoid certain compromises. On the one hand, the bicameral parliamentary organisation is

[59]Law n°7, March 23, 2006.

[60]'Autonomia e sovranità del popolo Sardo'.

[61]'Principi e craterri della identità regionale: ragioni fondanti dell'autonomia e sovrenità'.

[62]Italian Constitutional Court, n°365/2007, October 24, 2007.

[63]Italian Constitutional Court, n°365/2007, October 24, 2007, §1.3.

[64]Reminding in particular of Article 1 of the Constitution, which provides that the sovereignty of the people belongs to them as a whole.

[65]Italian Constitutional Court, n°365/2007, October 24, 2007, § 6.2.

[66]Italian Constitutional Court, n°365/2007, October 24, 2007, §7.1.

[67]Parent (2011) 287.

[68]Parent (2011) 36; See also Constitutional Court of Belgium, 96/2014, June 30, 2014 and Sinardet (2008) 141-47.

designed according to the ethnic structure of the population.[69] Article II (1) and (4) of the Constitution provides for the election of delegates to the House of Peoples proportionally to the ethnic structure. Thus, in the House of Peoples, five of the fifteen members elected by the Republic of Srpska must be Serbs, and of the ten elected by the Federation of Bosnia-Herzegovina half must be Bosnians and half Croats. The House of Representatives, on the other hand, is elected by entities and not according to ethnic identity: twenty-eight members are elected by the Federation and fourteen by the Republic of Srpska. The Constitution establishes a legislative veto in the hands of the three constituent peoples if the 'vital national interests' of these peoples are at stake, including identity. The Constitutional Court has deduced from this provision equal participation in decision-making processes and especially in the legislative field of the three constituent peoples.[70] A legislative project can be blocked by a majority of Serbs, Bosnians, or Croats in the House of Peoples. The constitutional judge is the guarantor of the proper use of this 'ethnic veto right'[71] by the constituent peoples,[72] and ensures that it respects both the interests of the state and those of the other constituent peoples.[73] However, the House of Peoples has become more of a 'veto body'.[74] Therefore, such democracies are consociational and the peoples are multinational. The concept of peoplehood is thus awarded several applications depending on the identities it is comprised of.[75] While the formal aspect allows for the inclusion of different identities, it is often challenged by them.

States may also be confronted with the issue of how far citizenship should depend on or coincide with ethno-cultural nationality.[76] A demand for multinationality took place in the Spanish constituent debates of 1978, but the nation-state model prevailed. Article 2 of the Constitution recognized the Spanish nation as a 'nation of nations'.[77] The Spanish nation born of this interweaving is given a form that supersedes that of the constituting nations. Indeed, its constitutional powers circumscribe those of the nations. The Spanish Constitutional Court has recalled this on many occasions by limiting the autonomist or independentist aspirations of the

[69]See on the question of bicameralism and the function of the second chamber, Commission on Democracy through Law, CDL-AD(2006)019, July 10, 2006, (see the Constitutional Court of Bosnia-Herzegovina, U-23/14, December 1, 2006).

[70]Constitutional Court of Bosnia-Herzegovina, U5/98, Part III, July 1, 2000, §108, 123: On the definition of mechanisms to ensure the protection of vital national interests. This decision effectively ensured the proportionate representation of each constituent people.

[71]Moreover, it is interesting to read the observations of Maziau (2006) 413-35, who considers this competence to be 'a political competence' of the Court.

[72]Constitutional Court of Bosnia-Herzegovina, U2/2004, May 28, 2004 and U8/2004, June 25, 2004. For the first time, the constitutional judge assessed 'vital interests' blocking legislative process. Other examples, U10/05, July 22, 2005 or U7/06, March 31, 2006.

[73]Slaveski and Kozarev (2012) 420.

[74]Grewe and Riegner (2011) 32.

[75]Zubrzycki (2001) 662.

[76]Brubaker (1997) 43.

[77]According to Solé-Tura (1985) 101.

Catalan and Basque nations, in line with the aforementioned position of the French Constitutional Council.[78]

On the other hand, the Swiss Constitution recognizes four official languages in the confederation. According to the latter, the cantons are free to define their official languages, but only insofar as they respect the traditional territorial distribution of languages and respect indigenous linguistic minorities.[79] In 1965, the Swiss Federal Court recognized the quadrilingualism of the State and the principle of linguistic territorialisation that it implied and that the judge therefore takes into account in their office.[80]

The concepts of state, democracy, and peoples have different applications depending on the countries, and this might be explained by the identities which are engraved in the constitutional text and the importance awarded them. But the interpretation by the constitutional courts may also put different levels of emphasis on the protection of fundamental rights and the guarantee of the Rule of Law. For example, the Russian Constitutional Court upheld an *ad hoc* and circumstantial limitation on the freedom of expression linked to the possession of an individual identity – namely, the possibility of promoting homosexual orientation towards minors, on the basis of constitutional moral values in particular.[81] In another field, on the occasion of the ratification of the Charter for Regional and Minority Languages, the French Constitutional Council explained that the freedom of expression enshrined in Article 11 of the Declaration of the Rights of Man and of the Citizen was to be reconciled with the language of the Republic,

[78]See in particular Spanish Constitutional Tribunal, STC 31/2010, 28 June 2010, §9: 'the people of Catalonia are not […] a legal subject that competes with the holder of national sovereignty, the exercise of which led to the establishment of the Constitution'.
The same analysis may be repeated regarding the decision associated with the Basque Parliament's law n°9/2008 (Spanish Constitutional Court, STC 103/2008, September 11 2008) allowing the organization of consultative referendums in order to open negotiations with the State on the possible secession of the Basque Country. The Court stated that if the Basques can negotiate their exit from the State, this is because they constitute themselves as Basque people and this is contrary to the Constitution. The Court ruled in § 3 that: 'The identification of an institutional subject with such qualities and competences is, however, impossible without a prior reform of the Constitution in force'. In this case, therefore, it is the prerogatives of an entity which, according to the Court, can be assimilated to a people, which make its existence unconstitutional.

[79]Commission on Democracy through Law, n° 39, *La consolidation de l'État et l'identité nationale*, CDL-STD(2003) 039, Chisinau, July 4, 2003, 90.

[80]Swiss Federal Court, RO 91 I 480, 485, March 31, 1965, *Association école française de Zurich*.

[81]Constitutional Court of Russia, n°24-P/2014, 23 September 2014. 'The Constitution of the Russian Federation gives no grounds to recognize as unconditionally lawful public activity aimed at discrediting, inclining to denial of constitutionally significant moral values, predetermined by historical, cultural and other traditions of the multinational people of the Russian Federation. […] In the legislation of the Russian Federation mechanisms of realization of these provisions, which by virtue of Article 15 (Section 4) of the Constitution of the Russian Federation are an integral part of the legal system of Russia, are based on traditional ideas of humanism in the context of peculiarities of national and confessional composition of Russian society, its socio-cultural and other historical characteristics, in particular on the formed as universally recognized in the Russian society (and shared by all traditional religious confessions) ideas on marriage, family, maternity, fatherhood, childhood, which received their formal legal fixation in the Constitution of the Russian Federation and on their particular value. Accordingly, dissemination by a person of his convictions and preferences concerning sexual orientation and concrete forms of sexual relations must not encroach upon dignity of other people and call in question public morality in its understanding having formed in Russian society, so far as other would contradict fundamentals of legal order' [sic].

which is French, enshrined in Article 2 of the Constitution in order to limit the use of regional languages.[82]

As we have demonstrated, the identity embedded in constitutional law determines the interpretation of the principles, which is very heterogeneous, and which is at the foundation of constitutionalism. Depending on the identity which is awarded precedence, the concepts at the roots of constitutionalism are imbued with different content.

3.2. Constitutional identity as the cradle of different forms of constitutionalism in Europe

Beyond the terminology, from one state to another, constitutional principles are interpreted differently. Nevertheless, there is a common link between this interpretation and Constitutional Identity. The fundamental concepts which are shaping a common European constitutionalism are also relative and could be qualified as 'identi tarian' ones. In Poland, in 2010, the Constitutional Tribunal expressly pointed out the principles of sovereignty, democracy, and Rule of Law as components of constitutional identity.[83] In Hungary, in 2016, the protection of constitutional identity by the Constitutional Court was based on the three principles of sovereignty, democracy, and human dignity that were explicitly linked together.[84]

It seems that those concepts follow a 'particular path', according to an analysis of Valery Zorkin, President of the Constitutional Court of the Russian Federation.[85] They are also the reflection of an arrangement between identities within constitutional law, and they are the result of the reconciliation between constitutional norms made by the constitutional judges. The case-law of the Moldovan Constitutional Court illustrates the ambivalence of the use of 'universal' concepts adapted to the identity enshrined in the constitutional text. Referring to the notion of Constitutional Identity, the Moldovan Constitutional Court stated that its components, such as democracy, are European constitutional values.[86] However, in some other decisions adopted by the court, the understanding of these principles appears to be specific to Moldova. More precisely, in a decision concerning the interpretation of Article 13 of the Constitution and the designation of the Romanian language as the national language, the Constitutional Court explained that the interconnected constitutional principles, which are proclaimed in the Declaration of Independence and enshrined in the Constitution, refer to national identity and linguistic identity.[87] In the case of concurring interpretations of the constitutional text, the judge shall refer to the Preamble, which embodies a certain interpretation of the principles. According to the Court, the principles protected by the Constitutional Identity are 'universal in name only' and the interpretation of the principles by the judge shall be secured by referring to the Preamble.[88]

[82]French Constitutional Council, n°99-412 DC, June 15, 1999, cons. 7.

[83]Polish Constitutional Tribunal, K32/09, November 24, 2010.

[84]Hungarian Constitutional Court, 22/2016 (XII.5.) AB, November 30, 2016.

[85]Zorkin (2018) 505.

[86]Moldavian Constitutional Court, 44a/2014, October 9, 2014.

[87]Moldavian Constitutional Court, 8b/2013 and 41b/2013, December 5, 2013.

[88]See for example the reference to the preamble made by the Polish Constitutional Court: Sledzińska-Simon and Ziolkowski (2017) 8.

The 'universal' concepts of European constitutionalism are, therefore, clearly shaped by identities at the national level. Identity is tied to the essential concepts of constitutionalism: i.e., sovereignty, the form of the organization of the State, and of democracy. When a constitutionally protected 'identity' and its guarantees change, these concepts are also impacted. For instance, the French Constitutional Council has established a link between sovereignty, people, and French as the official language. The indivisibility of sovereignty is guaranteed by the official language, according to the Constitutional Council. If there were to be a change regarding the language, this would lead to a change of the French concept of sovereignty.[89]

When Constitutional Identity is employed as a shield against a supranational rule, the domestic courts intend to protect a certain interpretation of principles that are nevertheless common to the member states of the Council of Europe.

In a preventive way, the Czech Constitutional Court, in its decisions concerning the analysis of the compatibility between the Constitution and the Lisbon Treaty,[90] has chosen not to define the principles that constitute the core of the Constitution (that is, 'a sovereign, unitary and democratic state governed by the rule of law and based on respect for the rights and freedoms of man and citizen'). If it had given up this 'minimalist approach' and found that Czech values had been abandoned, it would have been obliged to find that, despite the terminology, the European and Czech principles were different in terms of identity.

The Hungarian Constitutional Court has been much more precise in its definition of Constitutional Identity. It awarded it higher status than the will of constituent power and associated it directly with national values and traditions. Tamás Sulyok, President of the Hungarian Constitutional Court, explained in a lecture given at the Slovak Constitutional Court in 2018 on the occasion of its 25th anniversary that identity is directly linked to fundamental rights.[91] According to him, the decisive question is: 'When do individual human rights prevail and when do we have to give priority to national identity?' The Constitutional Court's preservation of Constitutional Identity provides an answer to this question. In this way, the balance between identities is tipped in favour of the chosen collective identity.

Thus, the identity of constitutional law in Europe varies depending on the balance between identities and on the inclusiveness or exclusiveness of the dominant identity. The greater importance this latter is awarded within the constitutional system, the more the interpretation of the principles will comply with this identity and, as a consequence, individual and real identities which are different from the dominant one will be relegated to a restricted individual sphere. If identity is not considered to be transcendent, but only the result of the will of the constituent, restrictions on the expression of identities in the individual sphere will be less important. This is the case, for example, in France, where constitutional law refuses to recognize identities that would modify the interpretation of the principles of unity of the people and invisibility of the Republic.[92] An identity that can be described as 'republican' implies a certain interpretation of

[89]French Constitutional Council, n°99-412 DC, June 15, 1999, *Loi relative à la ratification de la Charte européenne des langues régionales et minoritaires*.

[90]Czech constitutional court Pl. ÚS 19/08, November 26, 2008 and Pl. ÚS 29/09, November 3, 2009, *Lisbon II*.

[91]Sulyok (2018).

[92]For example: Conseil constitutionnel français, 91-290 DC, May 9, 1991, *Loi portant statut de la collectivité territoriale de Corse*.

the principles and, in fact, limitations on the influence of other identities on constitutional law. The expression of personal identities is free insofar as this is exclusively reserved for the private sphere.

The recent inclusion of the notion of 'Constitutional Identity' in the Hungarian constitutional text or of Russian 'cultural identity' in the Russian Constitution is therefore not just symbolic. It is a tool given to the constitutional judge in order to provide a coherent or consistent interpretation of the Constitution, aligned with the identity considered as collective to which other identities must conform in the public space.

4. CONCLUSION

In conclusion, I specify why is it important to establish a distinction between 'Constitutional Identity' as a notion and the 'identity of constitutional law' as a wider concept. It is because this helps understand that Constitutional Identity has not fallen from the sky, and it is not just a manifestation of constitutional courts' opportunism. Constitutional Identity is frequently deployed by judges in front of the European Court of Justice and the European Court of Human Rights[93] because it has deep roots in constitutional law, and the use of the notion by the judge is therefore legitimized.

Constitutional Identity is a composite concept that is derived from other identities existing within constitutional law. Identities are interdependent and influence constitutional law – more precisely, the formation and the interpretation of the principles of constitutionalism. Constitutional Identity is a notion that mirrors such an arrangement; such a system among identities. The concept of Constitutional Identity understood as the identity of constitutional law results from the choice between identities which is made by the constituent power, and more specifically guaranteed by the constitutional judge, and from the importance awarded them in relation to each other and their possible reconciliation or exclusion. In this way, constitutionalism cannot be separated from the substance of the identity of constitutional law and today oscillates in Europe between universalism and particularism.

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