



**The Functions of Constitutional Identity
Performed in the Context of Constitutionalization of
the EU Order and Europeanization of the Legal Orders
of EU Member States**

by

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Abstract

This article provides an analysis of the functions performed by constitutional identity in constitutional discourses of both the EU and its Member States, in the context of emerging post-Westphalian and supranational constitutionalism. The analysis tries to demonstrate that constitutional identity may serve as one of the key normative ideologies, legitimation strategies and ordering schemes of EU constitutionalism. It reasserts through functional analysis the suitability of constitutional identity for organizing and explaining multiple constitutional orders in a non-hierarchical and inclusive way.

The article is based on a socio-legal approach, deliberately avoiding the predominant legal realist and legal positivist discourses. This is due to the fact that a functional analysis presupposes admitting the existence of ideal, legal and socio-legal dimensions of constitutional concepts and institutions and the taking into account of social implications produced by their functioning. The article deliberately takes a constitutionalist stance on the EU and the EU integration. It is focused on the contribution of constitutional identity for the further constitutionalization of the EU from a socio-political and constitutionalist perspective.

Key-words

constitutional identity, judicial dialogue, constitutional ideology, sovereignty, supranational constitutionalism, legitimacy



1. Taking Constitutional Identity's Functions in the Establishment of Constitutional Dimension of the EU Seriously^I

Every constitutional concept has its typical functionality. It is constructed in order to perform specific functions in theoretical, positive legal and empirical discourses. This paper is grounded on the idea that constitutional identity^{II} as a constitutional concept has a tri-dimensional functionality – theoretical, legal and social, which is a result of the tri-dimensionality of the constitution, perceived as ideal, legal and factual (Tanchev 2003: 112).

Constitutional identity is not only a legal concept. It is also an element of the development of European constitutionalism when tackled as a civilization and a cultural phenomenon.^{III} That is why constitutional identity can also be perceived as part of the development of the European constitutional civilization in the post-Westphalian age. Post-Westphalian constitutionalism is the product of multiple factors, three of which have special importance. These are: the emergence of supranational constitutionalism and global governance; the information and mobility revolution; and the opening up of national constitutional orders during the second half of the XX and the first decades of the XXI century to international and supranational legal orders (Carozza 2008).

In this respect constitutional identity has the task of strengthening the constitutional dimension of European integration, and the transformation of the EU into a constitutional, rather than an only international or administrative union. Moreover, it must legitimize the linkage of national constitutional systems, which are based on sovereignty and hierarchy, with a supranational pluralistic constitutional order. Thus, constitutional identity is both a conceptual challenge to Westphalian constitutional theory and constitutional law, and an incentive for a novel constitutionalization of the EU using post-Westphalian constitutional paradigms, concepts and normative ideologies. Constitutional identity is one of the first elements of a new conceptual reality which must address the challenges to the classical principles and concepts of Westphalian constitutionalism emerging from globalization, the constitutionalization of international law and the opening of national constitutional orders to supranational constitutional standards.

The mission of constitutional identity is to provide an alternative to holistic sovereignty as a key principle of Westphalian constitutional law and hierarchy as predominant element

of Westphalian constitutional geometry. This is necessary because both sovereignty and hierarchy have conceptual, as well as pragmatic, problems when applied in the context of global, supranational and post-national constitutionalism, the crisis of territoriality, and constitutional pluralism. Moreover, normative entrenchment (e.g. in article 4, paragraph 2 of the Treaty of the European Union), theoretical debate and judicial dialogue on constitutional identity enhances not only the administrative and regulatory dimension of the relationship between the supranational legal order of the EU and the legal orders of EU Member States (MS), but also the constitutional dimension.

Constitutional identity is among the new normative ideologies of post-Westphalian supranational constitutionalism. Constitutional conceptualization of the new socio-legal reality of a proliferation of constitutional regimes and pluralization of constitutional levels can be achieved by the proper construction of the concept of constitutional identity and its typical functionality.^{IV}

Hence it is necessary to delimit the functional catalogue of constitutional identity. This will enable the clarification of the typical goals which can be achieved by putting into practice of this relatively new concept.

Constitutional identity accomplishes several main functions which are partially interrelated. These are the legitimation function, the safeguarding function, the linking function, the differentiating function, the ideological function and the function of constitutional and political self-understanding. All these functions contribute towards the development of a constitutional dimension of the EU and for its transformation into a post-national constitutional polity of states and people (van Gerven 2005: 34 - 52). Their task is to substantiate the emergence of a composite constitutional order in which a structuring of some of the main organizing principles of the Westphalian constitutionalism – sovereignty, hierarchy and a vertical separation of powers - are complemented by constitutional identity as a more flexible concept, more adequate to the dynamics of relations between the post-national constitutional system of the EU and the national constitutional systems of its MS.



2. Constitutional Identity as a Legitimation Strategy for the Supranational Constitutionalism of the EU

The provision of constitutional identity in EU law and its conceptual development in judicial dialogue between the Court of Justice of the EU (CJEU), and constitutional courts of EU MS, are part of efforts for the establishment of a democratically legitimated supranational constitutionalism, institutionalized as the EU. Every constitutional project needs legitimation. This is especially true when it is grounded on novel, or reformulated, supportive ideologies and concepts such as constitutional pluralism and multilevel constitutionalism.

Constitutional identity is a point of intersection between post-Westphalian constitutional ideology, post-national legitimacy and the constitutionalization of international law which led to the emergence of supranational EU constitutionalism. This is because it is at the same time an element of post-Westphalian constitutional theory, a central argumentative and legitimation strategy of the theoretical, normative and jurisprudential discourses in European constitutionalism at the beginning of the XXI century, and a key principle of constitutional law of the EU.

The legitimation of the constitutionalization of the EU legal order can be grounded predominantly on rational legitimacy;^v since the EU is a relatively new system it does not enjoy sufficient traditional legitimacy. It is a depersonalized system of rules and institutions which is deliberately constructed as a non-leadership institutional scheme based on power sharing and dispersion of political authority. Thus, the EU cannot also be legitimated through charismatic legitimacy.

Consequently, the concept of constitutional identity must produce a rational legitimacy for the transfer of constitutional competences from the MS to the EU, for the limitation of MS' sovereignty, and for the primacy of supranational legal standards adopted by the institutions of the quasi-autopoietic^{vi} EU constitutional system over the national constitutions of MS. Some theorists even believe that constitutional identity may start to function not only as a legitimation for the limitation of constitutional supremacy and the state's sovereignty regarding constitutional provisions and sovereignty aspects which are not covered by its protective scope, but also transform into a post-Westphalian alternative to sovereignty (von Bogdandy and Schill, 2011: 9). Thus, constitutional identity claims to



become one of the key supportive normative ideologies of post-Westphalian constitutional law.

Constitutional identity performs a legitimation function in respect of several phenomena, which develop on the border between the supranational constitutionalism of the EU, and the national constitutional systems of EU MS. It aims to legitimate the process of transfer of constitutional competences and elements of state sovereignty from MS to the EU. In this context, legitimacy may stem from the role of constitutional identity as a safeguard for the inviolability and non-transferability of the core constitutional values, principles and elements of the institutional design of MS.

The legitimation of the transfer of sovereignty may be grounded on different reasons. It may stem from the substantive prosperity which EU citizens get from the EU, the efficiency and problem solving capacity of the EU institutional system, and its capacity to give adequate responses to challenges of globalization and the world risk society (Beck 1992) etc.

However, these are substantive criteria for the legitimation of a transfer of sovereignty. Taken in isolation they are not safeguards for the preservation of fundamental values, principles and institutions which have developed for centuries in national constitutional systems, and have been enshrined in the civilization code of each of the national communities participating in the EU. Hence, constitutional identity must serve as a safeguard for the fundamental constitutional codes of national communities. It has to legitimize the transfer of constitutional competences to the EU which are located outside the value and institutional core of domestic constitutions and consequently also outside of constitutional identity's protective realm.

At the same time, constitutional identity legitimates the establishment of limitations to the primacy of EU law. It creates historically, anthropologically or socio-politically grounded legitimate exceptions, defined in legal terms by legislators, or much more frequently by courts, which must selectively prevent the encroachment of the supranational order of the EU into the domestic legal order of EU MS.

Consequently, constitutional identity is supposed to simultaneously legitimate the linking and the separation of supranational and domestic legal orders, and outline the limits to the mutual cross-fertilization of the constitutional orders of EU MS, resulting in horizontal judicial dialogue, reception and transplantation (Watson 1993) of institutions,



and in the migration of normative ideologies and ideas. It must more clearly define commonalities and differences between EU constitutionalism and the constitutional traditions of EU MS.

EU constitutionalism is itself a result of the creative mixture of constitutional solutions and constitutional design borrowed from national constitutional models of EU MS, as well as from third countries such as the USA. This makes the EU constitutional order somewhat eclectic. The degree of heterogeneity increases if one considers the divergence of national constitutional traditions, historical experiences and socio-legal contexts which have shaped the constitutional design and constitutional ideology of EU MS.

An example is the mismatch between the republican traditions of France, Italy, Germany, Austria and Central and Eastern European states, and the monarchical traditions of Great Britain, Belgium, Netherlands, Luxemburg and most of the Scandinavian states. Other important instances of incongruence concern the role of religion in society, and the principle of secularism. Thus, the Polish, Romanian and Greek Constitutions put an emphasis on the traditional role of religion as a national identity building factor. In that context, the concept of constitutional identity may serve as a device for the adjustment of the diversity and plurality of constitutional orders in the composite constitutional structure of the EU, allowing for the primacy of EU law while considering important and legitimate national sensitivities.

It should be noted that there is a fracture and internal schism in the function of constitutional identity in generating a rational legitimacy for the linking of European and domestic constitutional orders, and in shaping the demarcation line between constitutional supremacy and EU law primacy. Identity, the result of a self-identification of citizens with the basic outlook and the core parameters of constitutional design, is largely emotional, and thus not a purely rational phenomenon. It rests upon beliefs which often produce imagined reality. Thus, the shaping of collective identity is frequently an emotional process of moulding the “collective Self” of a political community and not necessarily a rational process of the negotiation of values, principles and institutions which should serve as elements of constitutional identity.

Consequently, constitutional identity, which is supposed to rationally legitimize the linking of national constitutional orders with the supranational constitutional order of the EU, is based not only on rationality but also on emotional perceptions, affiliations and

motives. That is why constitutional identity is an element of both “emotional” and “rational” constitutionalism. It is part of the normative ideology of post-Westphalian European constitutionalism, and can eventually become part of the collective beliefs of EU citizens regarding the constitutional pillars of their constitutional and political coexistence. Thus, constitutional identity is also a component of the psychological dimension of law and of the emotional discourse of constitutionalism.

Constitutional identity has a legal shape defined through its institutional components. They can be explicitly proclaimed by the constitutional legislator or - much more frequently - defined by constitutional and supreme courts based on rational judicial argumentation. Hence constitutional identity is a phenomenon which is not speculative. This is because constitutional identity has concrete legal components;^{VII} it is part of the normative legal discourse and of the rational constitutionalism. However, constitutional identity cannot be exhaustively rationally proven through legal arguments.^{VIII}

Consequently, it seems that the idea for rationalizing the linking of national and EU constitutional orders, based on the legitimation of the transfer of sovereignty through the establishment of safeguards for national constitutional identity, may be grounded on a “constructive mistake”. For it consists of an attempt at generating rational legitimacy via a concept which is preconditioned upon emotions, beliefs and convictions.

This is why the legitimation function of constitutional identity may sometimes produce negligible results in political practice; the generation of legitimacy is an affective process which can hardly be accomplished through direct constitutional engineering (Sartori 1994) and theoretical or jurisprudential construction of complex and even vague concepts such as constitutional identity.

Constitutional identity is also a presumptive bearer of traditional legitimacy. It might be perceived of as a product of socio-legal practices and processes, which shape with time the value and institutional consensus of a political community, and produce its constitutional identity. Time is an important factor in forming constitutional identity. The time dependency of constitutional identity is exactly the reason why it can be suggested that constitutional identity might produce traditional legitimacy. In other words, an assumption of the evolutionary character of constitutional identity, and its gradual construction in the course of national constitutional history, led to an expectation that it contains at least some



of the key elements of constitutional tradition and constitutional culture of a political community.

Constitutional identity, as a bearer of traditional legitimacy, should contain the transgenerational consensus of a political community. Thus, its entrenchment through explicit institutionalization in national constitutions or in EU constitutional law, its definition via judicial dialogue, and its preservation by virtue of limitation of the primacy of the EU law, produces legitimacy for parallel processes of the constitutionalization of EU law, the Europeanization of national constitutional law and the safeguarding of the domestic constitutional core.

It must be re-emphasized that the legitimation of the establishment of supranational constitutionalism of the EU, and of the emergence of global constitutionalism by virtue of preservation of the fundamental values, principles and institution for each of the participating states, is not a purely rational process. Thus, the legitimation function of constitutional identity, in its rational as well as traditional dimensions, may prove to be, to some extent, an artificial construction due to its great dependence on rational constitutionalism and the neglect of its emotional aspect. This is an important issue, since the concept of constitutional identity was launched in constitutional discourse with the precise idea of justifying its potential as a novel way of combining principles and concepts which otherwise are nearly irreconcilable. These are the primacy of EU law and the transfer of sovereignty, on the one hand, and the supremacy of national constitutions and holistic and indivisible sovereignty, on the other.

As a matter of fact, the stagnation of the process of constitutionalization of the EU is, to a great extent, the result of an inability to adopt clearer decision regarding the distribution of sovereignty shaped in the context of classic theoretical and legal solutions of the Westphalian constitutionalism. Compromise theories such as “pooling of sovereignties” (MacCormick 1999) have provided satisfactory explanations for a while, until the political and constitutional dimension of the EU rose to unprecedented levels. The holistic version of Westphalian sovereignty has become fragmented into sector-based humanitarian, financial and other sovereignties (Kalmo and Skinner 2010). Last but not least, the EU MS’ control over ultimate decision making in important spheres of transferred sovereignty became increasingly limited, although the EU did not become sovereign in their place. This problem is a consequence of the broader, and principle, issue

of the impossibility to grasp and master the new reality of supranational constitutionalism with the conceptual schemes of Westphalian constitutional law developed during the “long XIX century” (Hobsbawm 1996).

In that sense constitutional identity will continue to have an importance in EU constitutionalism to compensate for the lack of clearer solution regarding political sovereignty and legal hierarchy. Constitutional identity is also useful in the context of global constitutionalism based on constitutional pluralism, as they are both non-hierarchical phenomena. In other words, constitutional identity is a concept which has the potential to legitimate the linking and differentiation of networked, polycentric or semi-hierarchical constitutional orders. Constitutional identity diminishes in importance as a legitimation concept and strategy in the case of an existence of a clear hierarchy, e.g. in the form of a Kelsenian normative pyramid, and in the context of straightforward hierarchical solutions regarding the structure of power, authority and sovereignty.

Another important problem forming a partial impediment to the legitimation function of constitutional identity involves the fragmentation of legitimation. The overall legitimation of the relative primacy of EU law over domestic constitutions, produced by constitutional identity, is accomplished not only at the EU level but (until Brexit) in 28 different, and even to some extent divergent, constitutional contexts. In other words, the establishment of the relative primacy of EU law, or the countervailing preservation of the relative supremacy of domestic constitutions, does not draw its legitimation from European citizens as holistic political community, but from domestic political communities – the MS’ nations. Moreover, this legitimation is not only jurisdictionally fragmented, but also asymmetric with regard to the argumentative strategies used by national constitutional courts in judicial dialogue with the CJEU, as well as by national politicians.

This is another manifestation of the “no demos” problem,^{IX} this time targeting the capability of constitutional identity to serve a pan-European legitimation function. Such a function is possible, but only through an understanding of a composite European public which is fragmented into a plurality of national constitutional communities.^X

3. The Safeguarding Function of Constitutional Identity. Constitutional Identity as Safeguard, Complement or Alternative to State Sovereignty?

The safeguarding function of constitutional identity consists of several interrelated processes: the protection of the inviolable core of national constitutionalism through its definition, the delimitation of lines which must not be crossed in the course of the encroachment of supranational constitutionalism into the national constitutional order, and the provision of substantial limitations for the transfer of constitutional competences and sovereignty to supranational regimes.^{XI}

Constitutional identity is a safeguard for the preservation of the core of state sovereignty, or of those aspects of sovereignty which are defined as essential and inviolable by the constitutional legislator or by constitutional courts. This is due to the inclusion of some of sovereignty's key aspects in the scope of constitutional identity.

Sovereignty is traditionally understood as an existential category which is closely related to state authority and public power. It is principally provided by constitutions with regard to its essential features, and in respect of its fundamental role as the cornerstone of Westphalian statehood. Sovereignty is proclaimed as a holistic and indivisible phenomenon, which assigns supreme power and defines the supreme power center. Thus constitutions neither explicitly acknowledge its main aspects nor delimit its components.

In contrast, constitutional identity, developed via judicial dialogue, is composed of concrete principles, values and institutions which are defined as non-transferrable elements of the state's sovereignty. Thus, constitutional identity is a naturally composite concept, which permits the construction, deconstruction and reconstruction of its structure and content; whereas sovereignty in its classical Westphalian outlook applied during the age of Modernity is a holistic concept which cannot be disaggregated into particles if it is to preserve its role as the supreme source and depository of public power.

However, since the last decades of the XX century state sovereignty underwent a process of fragmentation, produced by the proliferation of the public power functions and public power centers and levels, and the pluralization and diversification of sovereignty holders. The fragmentation and deconstruction of sovereignty is paralleled by two processes. The first is the asymmetric transfer of state sovereignty to supranational and, implicitly, to subnational holders, in the course of EU integration, constitutional globalization and subnational constitutionalization. The second is the sharing of state sovereignty with new power centers that have emerged in the course of the development of constitutional pluralism and global governance.



Consequently, new post-Westphalian theories of sovereignty, in itself the predominant Westphalian constitutional concept, have developed in order to explain the structural changes of sovereignty in the context of global constitutionalism, supranational constitutionalism and global governance. They proclaim the possibility of fragmentation of sovereignty, for sovereignty pooling (Keohane 2002: 746 – 749) and for the understanding of sovereignty as no longer existential and normative, but as a limited and attributive paradigm (Grimm 2015: 71-75, 120-121).

Hence constitutional identity as a post-Westphalian concept does not safeguard sovereignty in its traditional version as holistic category, but in its current version as a composite phenomenon; it puts the emphasis on separate aspects of sovereignty, constructing them as sectoral sovereignties. Thus, constitutional identity accomplishes its safeguarding function regarding sovereignty by protecting its specific manifestations in the constitutional axiology (constitutional principles and values) and in institutional design.

Consequently, constitutional identity indirectly serves as a safeguard of sovereignty in the process of providing direct safeguards for specific elements of value and institutional design, against the primacy of supranational legal standards. This mediated and indirect protection of state sovereignty by constitutional identity is a result of differences in their nature.

Constitutional identity is a category which is related to a self-identification by the political community with the fundamental aspects and cornerstones of national constitutionalism. It is focused on giving answers to the questions: “who we are as a constitutionally organized political community”; “what is our collective constitutional Self?”; “what are the durable characteristics of our constitutional tradition”; “what differentiates us from other constitutionally organized political communities”; and “what is the core of our value and institutional constitutional consensus”.

At the same time sovereignty is a category which determines the ultimate source, subject and beneficiary of power^{XII} and delimits the legitimate confines of state authority. Sovereignty is a concept which should give an answer to the questions: “where is the power center of the constitutionally organized political community”; “who possesses supreme power and the legitimate monopoly over public coercion” (Weber 1922); and “what are the parameters of the accomplishment of power and authority perceived as legitimate by the political community”. Hence constitutional identity demonstrates the value and

institutional core consensus of the political community encoded in the constitution, ultimately derived from tradition, whereas sovereignty defines the power center, the source of constitutional ontology, the scheme of power lines, and the basic structure of authority enshrined in the constitutional model of society.

That is why constitutional identity cannot serve as an all-encompassing justification for limiting the primacy of EU law in all spheres of domestic constitutionalism. Constitutional identity may protect only those aspects of sovereignty which are directly related (or in fact proclaimed by constitutional courts or constitutional legislators to be related) to hard-core elements of constitutional consensus produced by the constitutional self-identification of a community.

Moreover, constitutional identity should not serve as a broad instrument for the limitation of the primacy of EU law used by the domestic political elites for tactical reasons. It is a selective limitation to the primacy of EU, and other, supranational constitutional and legal standards because it protects only some of the core elements of constitutional design. If constitutional identity is also interpreted as being an instrument for limiting of the primacy of EU law, with regard to non-essential but otherwise important elements of the constitutional design^{XIII}, then it will turn itself into something like an unamendable or entrenched clause. However, constitutional identity and unamendable and entrenched clauses are concepts with a different teleology and frequently with different content.^{XIV}

Another aspect of the safeguarding function of constitutional identity concerns its role as a guarantor of the supremacy of the constitution and thus for constitutionally enshrined values, principles and institutions.^{XV} The role of constitutional identity as a safeguard for constitutional supremacy is the formal expression of its safeguarding function over state sovereignty. This follows the fact that the supremacy of the constitution, in the domestic legal hierarchy of sources of law, is both a result of, and a safeguard for, the supremacy of the sovereign will in the national public order.

In the context of the judicial dialogue between the CJEU and national constitutional courts constitutional identity functions as a limitation to the primacy of EU law and as a safeguard for the supremacy of some of the elements of the constitutional design of EU MS. However, constitutional identity establishes “counter limits” (Martinico 2007: 205-230 and Faraguna 2015: 27) to the primacy of EU law, not by applying hierarchical



argumentation, but through ascription of value preference and via the insulation of key elements of constitutional design from the derogative effect of EU legal standards. This is due to the dynamic and asymmetric character of constitutional identity. In contrast to the formal and rigid principles of the primacy of EU law, and the supremacy of domestic constitutions of EU MS, constitutional identity does not allow for the application of universally applicable hierarchical schemes for conferring precedence of legal standards or for normative conflict resolution.

In that sense constitutional identity is a more appropriate concept for the linking and delimiting of constitutional orders in a non-hierarchical, polycentric and networked way. Thus, it seems that sovereignty can be used in the multilevel constitutionalist model,^{xvi} whereas constitutional identity is also suitable in the context of the constitutional pluralism paradigm.^{xvii}

So far, constitutional identity has been presented as a safeguard for state sovereignty and the supremacy of the national constitution. Both political sovereignty and constitutional supremacy are key elements and safeguards for the state as an autonomous, and self-contained, political and legal order. Thus, constitutional identity is a safeguard for the statehood of EU MS.

At the same time constitutional identity is a safeguard for the primacy of EU law and legal order over the constitutions and the constitutional orders of EU MS. This draws from the fact that constitutional provisions, which are not part of constitutional identity, are subjected to the primacy of EU law. Thus, paradoxically, to an extent constitutional identity creates preconditions for the transfer of state sovereignty to the supranational constitutional regime of the EU and for the primacy of EU law.^{xviii}

Naturally, a clarification must be made, that the transfer of sovereignty and the primacy of the EU law are not unconditional. That is why they are safeguarded by constitutional identity only insofar as the conditions provided in advance by the domestic constitutional legislator or constitutional court are fulfilled.^{xix} They are usually defined as substantial limitations to the transfer of constitutional competences, or directly as elements of constitutional identity.

In fact, it seems impossible to radically redefine the limit of permissible primacy of EU law in favour of the absolute supremacy of domestic constitutions, and thus to deny the relative primacy of EU law over the constitutional order of EU MS, without dismissing the



constitutional nature of the EU. Hence the unlimited expansion of the scope of constitutional identity can consequently lead to the destruction of the EU constitutional system, and to its transformation into a supranational administrative regime.

Such a de-constitutionalization of EU law, and its restructuring into a purely administrative system for the coordinated and collective management of certain tasks established as a response to globalization, may additionally enhance the democratic deficit of the EU. This is due to the fact that the transfer of wide ranging competences from the MS to the EU must be paralleled by the construction of systems of checks and balances, of power polycentrism, for democratic control and accountability and for the protection of human rights. These are all attributes of a constitutional, and not just of an administrative order and regime.

Another problem is that the transfer of sovereignty, and the permitting of a relative primacy of EU law over the constitutions of EU MS, by virtue of judicial dialogue based on national constitutional identity, are not unambiguous phenomena. The adjustment of EU and domestic legal orders on the basis of constitutional identity, shaped through judicial dialogue, is an asymmetric, evolutionary and reflexive process. It produces a partial deconstruction of sovereignty and hierarchy. Frequently it does not lead to the establishment of new hierarchies, new Grundnorm^{xx} (Pernice 2006: 22-29) or rules of recognition,^{xxi} but to a toleration of legal provisions and legal orders and to polycentric dependencies. That is why it is difficult to say when the demarcation line between the legitimate and illegitimate primacy of EU law over domestic constitutional order has been definitely crossed.

Moreover, the loss of sovereignty of EU MS does not automatically produce a symmetrical acquisition of sovereignty by the EU. Thus, EU integration seems to be a “zero sum game” for both the EU and its member states in respect of sovereignty.

However, the problem might be much more complex; for it not only concerns the redistribution of sovereignty in pluralist or multilevel constitutional settings, but moreover demonstrates the structural change of the very concept of sovereignty, and its increasing incapacity to explain emerging supranational constitutionalism and global governance. In the context of mixed power schemes combining hierarchy with network, as ordering and explanatory paradigms, constitutional identity may prove to be a much more adequate concept for the preservation of the hard core of the constitutional foundations of national



communities, than the rigid and holistic concept of sovereignty which necessarily presupposes hierarchical perspectives and solutions.

4. Constitutional Identity as a Bond in a Composite Constitutional Setting Serving Linking and Differentiating Functions between Legal Orders

The linking, and differentiating, functions of constitutional identity are to some extent paradoxically interrelated. Constitutional identity is divisive in two aspects. Firstly, it exposes differences between the national constitutional systems of EU MS, and secondly, it draws a demarcation line between domestic constitutional systems and supranational constitutional regimes, especially between the EU's constitutional system and the constitutional systems of its MS. The differentiation is usually accomplished with a view to both the fundamental constitutional axiology, and the key features of institutional design.

At the same time constitutional identity performs a linking function in two main aspects. Firstly, constitutional identity can serve as a fundament for the development of a common constitutional tradition of countries which have similar constitutional identities. Such attempts for the establishment of common constitutional traditions can be made at a regional level (Scandinavian, Central European, South European etc.) or at the European level, depending on the political purpose, the degree of proximity of the constitutional identities and constitutional traditions and the density of the required constitutional and political integration. Thus, the objective coincidence of constitutional identities or the deliberate development of common or similar constitutional identities are preconditions of, and may serve as tools for, the establishment of supranational constitutional identity at a regional or European level, and eventually for the development of a novel constitutional civilization at the supranational level.^{XXII} Hence, such a supranational constitutional civilizational model could be the product of either a common historic and socio-political experience, or of constitutional engineering.^{XXIII}

Secondly, constitutional identity indirectly performs a linking function for constitutional systems through the delimitation of fundamental differences between them which must be preserved. In other words, by defining the sphere of inviolable and irrevocable national constitutional values, principles and institutions constitutional identity



reciprocally, indirectly and tacitly leaves aside from its protective scope those value and institutional aspects of national constitutional design which can be submitted to the primacy of supranational legal standards, can be subject to transfer of sovereignty and can be sacrificed in the course of linking with other national and supranational legal orders. Outside the scope of constitutional identity one can find these institutions, values and principles which can be amended through implementation, reception and transplantation of foreign normative examples and can be modified in the light of ideas which have migrated from other supranational or national legal orders.

Limits to the transfer of sovereignty and, vice versa, to the primacy of supranational law can be formal, procedural or substantial. Formal and procedural limits however are usually not directly related to self-identification as a process of value self-definition of the members of the political community. They typically concern the formal framework and basis of the process of linking different constitutional orders. Formal and procedural limits may provide for important strategic or tactical impediments of the intersystem integration, which however are not related to identity – be it national, political, or constitutional.

The specifics of the linking and differentiating functions of constitutional identity result in the fact that it is limitation to the transfer of sovereignty and to the primacy of EU law, and eventually of other supranational standards, which possesses a substantive character, with value and anthropological dimensions. Constitutional identity is both a limitation, and a linkage, between value and institutional normative orders based on durable self-identification of the political community with core issues and fundamental parameters of the constitutional order. That is why constitutional identity is closely related to, and based on, substantial counter-limits for the transfer of sovereignty and for the penetration of supranational constitutional standards into the domestic legal order.

5. Constitutional Identity as a Core Concept of the Post-Westphalian Constitutional Ideology^{XXIV} of Supranational Constitutionalism in the EU

Constitutional identity is a stimulus for the development of supportive normative ideologies at the European and national levels, by constitutional theory and even by constitutional courts during judicial dialogue with the CJEU. Constitutional identity is part

of the new narrative for mutual recognition of value and institutional orders and for the establishment of a polycentric and pluralist supranational constitutional order.

The ideological function of constitutional identity contributes to the development of the political dimension of the EU and for its establishment as a constitutional union and not just as an international organization or supranational technocratic administration. Constitutional identity is an important part of post-Westphalian ideologies. It serves as an element in the process of the development of matrixes and paradigms for the “ordering of constitutional orders” (Tanchev 2014: 171) constructed in the form of multilevel constitutionalism, or constitutional pluralism, and going beyond traditional schemes for linking domestic and international legal systems via monist or dualist systems.

Constitutional identity has the potential to become part of post-Westphalian constitutional ideology. Constitutional identity is a principle of both national and post-national constitutionalism. On the one hand, it is a safeguard for the sovereignty of the nation state, and is supposed to be the zenith of national political choice in constitutional design. On the other hand, the new constitutional discourse on constitutional identity, which is predominantly led in the framework of EU constitutionalism, is an attempt at putting constitutional identity into practice, as one of the new principles of supranational constitutionalism with its universalist and post-nationalistic aspirations.

Hence constitutional identity simultaneously defines nation-specific and universally valid elements of constitutional design. Constitutional identity reflexively, and indirectly, determines the scope of universally valid elements of constitutional design by delimiting the inviolable constitutional core of national constitutional order. In the latter case, it actually paves the way for the establishment of post-national and supranational constitutionalism in general, and thus for the constitutionalization of the EU’s legal order in particular.

It is possible that constitutional identity could be recognized as a constitutional principle of the national constitutional systems of EU MS. It could be proclaimed as a safeguard, a supplement or even an alternative to the constitutional principle of sovereignty, depending on its outlook, design and the constitutional teleology which is going to be developed on its basis. Constitutional identity may also serve as a contextual and substantial concretization of sovereignty perceived as a non-holistic concept, composed of sector sovereignties. Thus, constitutional identity may function as a precursor



to the change of sovereignty, from a holistic and indivisible Westphalian concept, into a fragmented, composite and relativized post-Westphalian paradigm. This is another manifestation of the ideological function performed by constitutional identity.

Respect for national constitutional identity is already a principle of EU constitutional law. It has been enshrined in article 4, paragraph 2 of the Treaty on the European Union and has become an underlying concept in important case law of the CJEU (e.g. the cases C-62/02 “Omega”, C-208/09 Sayn-Wittgenstein etc.). This principle is systemically intertwined with the principles of conferral, relative primacy of EU law, and the respect for the national sovereignty of MS. Thus, constitutional identity gradually became part of the constitutional axiology of European constitutionalism. It must be stressed that it is an element of constitutional axiology and of constitutional ideology, not only at the supranational EU level, but also at the level of EU MS.

Globalization and European integration enhance the constitutional dimension of subnational constitutional orders (Sassen 2007) in federations and unitary states with functional federalism such as Spain, Italy and UK. In that context, the respect of national constitutional identity by both the supranational constitutional regimes such as the EU, and subnational units, increases in importance. The opposite is also true – the emergence and development of constitutional identities in subnational political communities, e.g. the Basques and Catalans in Spain, or the Scottish in the UK, imposes the need for their due respect.

In that vertical dialogue between multiple constitutional identities which proliferate at subnational, national and supranational levels, the concept of constitutional identity acquires not only an ordering, but also an ideological importance. Constitutional identity is an attempt at providing a partial remedy to the rigidity of sovereignty as a traditional ordering; it is also an analytical paradigm, used for the explanation of multilevel power relations, applied in the simpler hierarchical world of Modernity, thus being part of the constitutional ideology of the nation state.

Constitutional identity gradually becomes part of post-Westphalian constitutional ideology due to its flexibility, and capability at giving relatively adequate answers to the power reality of supranational and global constitutionalism. Constitutional identity functions in the context of, and in conjunction with, classical normative ideologies such as the legitimate monopoly of the state over power, authority and coercion (Weber 1972: 821



ff.) and the state and law as ordering instruments in polycentric and pluralistic societies. However, constitutional ideology is also part of a realm of post-Westphalian normative ideologies such as open statehood (Hobe 1996: 127–154) and constitutional pluralism.

Hence, constitutional identity is a central and important component of the constitutional ideology of emerging global and post-Westphalian constitutionalism. It has the capacity to serve as a normative ideology because it is a combination of rational and emotional aspects of constitutionalism.^{xxv} Constitutional identity possesses the characteristics of rational constitutionalism, with its role as a safeguard of constitutional values, principles and institutions. Moreover, it serves as a legally determinable borderline between national and supranational (and eventually also subnational) constitutionalism and as a tool for linking and differentiating as well as for assigning primacy of multiple constitutional orders which cannot be ordered only on a hierarchical basis.

The belief in the existence of a collective constitutional Self of national political communities, de-personalized values, aims and will and of transgenerational consensus on the basic elements of constitutional design is an example of the mixed nature of constitutional identity, which is at the same time rational and emotional. The belief that members of a constitutionally organized political community are capable of negotiating and agreeing on value and institutional constitutional consensus, whose core is shaped as constitutional identity, is also based on a mixture of rational and emotional constitutionalism. The same is true for the belief in the capacity of constitutional identity to become a functioning and effective instrument, for the linking and dividing of constitutional and not just of international or administrative orders, and to serve as a safeguard for the constitutional, and not just the political consensus of communities. It underlines the emotional and ideological importance of the concepts under analysis; for the concepts of the constitutionalization of the bond between national and supranational legal orders, and the conception of the EU as a constitutional and not as just an administrative or international system, are daring ones. They are preconditioned on the existence of constitutional ideologies and constitutional paradigms which have both rational and emotional aspects.

Thus, constitutional identity is a rationally constructed concept which also possesses an emotional intensity. It is predetermined by beliefs, yet itself produces beliefs which are not always the immediate result of its rational nature. That is why constitutional identity has the



characteristics of a constitutional ideology. It possesses a logical background, rational core and structure, and at the same time presupposes the axiomatic acceptance of some of its constructive premises which should secure a sufficient level of confidence in its capability to give adequate responses to constitutional issues.

Constitutional identity is an attempt at remedying the dysfunctionality of some classical normative ideologies, and especially the difficulties of using sovereignty as a universal analytical and ordering paradigm in the context of supranational and global constitutionalism. Moreover, constitutional identity itself has the features of a normative ideology. That is why it must not only be rationally proven and practically effective, but also has to be emotionally persuasive, in order to become a durable element of the post-Westphalian constitutional ideology of supranational constitutionalism in general, and EU constitutional law in particular. Hence the ideological function of constitutional identity is based on its persuasive and convincing force.

Last, but not least, it has to be mentioned that constitutional identity offers the opportunity of self-reflection to a political community, on the parameters of its constitutional tradition, constitutional culture and the core of its transgenerational constitutional project. In that regard constitutional identity also accomplishes a function of constitutional self-understanding.

The process of determining the collective constitutional Self is usually organized along formalized and judicial lines. It is based on the case law of constitutional and supreme courts as authoritative speakers of a political community. However, such an approach lacks sufficient democratic legitimacy, misses important socio-legal and anthropological arguments, and produces elitist results which might not have sufficient persuasive force for the people. The definition of constitutional identity by the courts, and not by the people themselves, or by their elected representatives, collides with key normative ideologies deeply enshrined in the mainstream constitutional theory of the XIX and XX centuries. These relate to constituent power, democratic representation and parliamentarism which underlies modern representative democracies. The judicial shaping of constitutional identity casts the shadow of “gouvernement des juges” (a peril which was classically defined by Charles De Montesquieu and Edouard Lambert). It questions both the legitimacy and the capability of judges to define, on a case-by-case basis, the constitutional



consensus of a political community predetermined by the socio-legal context in which it exists.

In contrast, the establishment of constitutional identity via wide public deliberation seems rather utopian and is exposed to populist biases. The determination of constitutional identity as a form of collective self-reflection, through parliamentary debate, is also not convincing in the context of the current crisis of representative party democracy experienced by some European societies as well as by the EU itself.

This dilemma is a specific manifestation of the difficulties faced by the classic theory of democracy in explaining emerging post-Westphalian constitutionalism. It is an example of the increasing role of the courts in the context of supranational and post-Westphalian constitutionalism.

6. Instead of a Conclusion: the Role of Constitutional Identity for Preserving the Constitutional Character of the EU

Constitutional identity is one of the relatively new doctrines which conceptualizes, and tries to influence, the development of the EU not only as an internal market, free trade and free movement zone, or supranational regulatory regime, but also as the most developed supranational constitutional order. The functionalist analysis of constitutional identity contributes to the development of the constitutional ideology of supranational constitutionalism in general and of EU constitutionalism in particular.

Constitutional identity serves as a bridge between domestic constitutionalism, formed during Westphalian modernity, and post-Westphalian EU constitutionalism. It is an attempt at a reconciliation of multiple constitutional orders, which cannot be adjusted in the traditional ordering paradigms of Westphalian constitutional geometry – hierarchy and the pyramid. This is due not only to the lack of a clear solution to the distribution of sovereignty in the EU, but also to the structural changes of sovereignty concepts themselves in supranational, post-national and global settings.

Constitutional identity has emerged as an EU legal concept during the phase of European integration which followed the transformation of the European Communities into the European Union, and has been devoted to its constitutionalization. It set down its firm roots in article 4, paragraph 2 of the Lisbon Treaty, and has been further developed by



the judicial dialogue of the CJEU and some of the most active constitutional courts of EU MS. It is a well-known fact, widely discussed in the theory, that provisions for the protection of national identity have had to be paralleled by the proclamation of the primacy of EU law in the Treaty on the European Union. However, the Lisbon Treaty did not dare reproduce this “two-pillar model”, composed of primacy of EU law tempered and counterbalanced in respect of national identity which was provided by the misfortunate Treaty on the Constitution of Europe. Despite this, the provision for the protection of national identity from derogation or infringement by primary EU law establishes a reason for jurisprudential definition of the borderline between domestic and supranational constitutional orders. This is due to the fact that the “judicialisation” of national identity, and its gradual transformation into constitutional identity in the course of judicial dialogue between the CJEU and national constitutional courts, clearly highlights the constitutional dimension of this relatively novel fundamental concept of the European composite and pluralistic legal order. The intensive theoretical debate, and extensive case law on constitutional identity over the last years,^{xxvi} demonstrate the potential of constitutional identity to serve not only as a central paradigm in post-Westphalian constitutionalism but also to enhance the constitutional dimension of the EU.

Most of the literature on constitutional identity in recent years has been focused on the case law of the CJEU and MS’ constitutional courts, and on the definition of constitutional identity on the basis of criteria enshrined in positive constitutional law. Hence a legal realist analysis championed the debate, followed by a legal positivist discourse on constitutional identity. In contrast, the interest regarding the functions which constitutional identity performs in the context of a supranational and pluralist constitutional setting has been rather pale.

This article is an attempt to prove that a functional analysis of constitutional identity is an important part of the efforts for shaping a post-Westphalian theory of supranational constitutionalism, part of which is also the concept of constitutional identity. Thus, a functionalist approach to constitutional identity also contributes to a further constitutional conceptualization of the EU.

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¹ Here I make use of some parts of the wording of the title of Ronald Dworkin’s book “Taking Rights Seriously”. Cambridge, Massachusetts: Harvard University Press, 2001.



^{II} In this article I am following the approach according to which the concept of national identity provided in article 4, paragraph 2 of the Treaty on European Union should be read as “national constitutional identity”. For the relevant discussion see e.g. Millet, F.-X. *L’Union Européenne et l’identité constitutionnelle des états membres*. Paris, L.G.D.J, 2013, Guastafarro, B. *Beyond the Exceptionalism of Constitutional Conflicts: the Ordinary Functions of the Identity Clause*. Jean Monnet Working Paper № 1, 2012, Konstantinides, T. *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*. – In: *Cambridge Yearbook of European Legal Studies*, Vol. 13, Marti, J. L. *Two different ideas of constitutional identity: identity of the constitution v. identity of the people*. – In: Saiz Arnaiz, A., C. Alcobarro Llivina (eds.). *National Constitutional Identity and European Integration*. Mortsel: Intersentia, 2013 and Toniatti, R. *Sovereignty lost, constitutional identity regained*. – In: Saiz Arnaiz, A., C. Alcobarro Llivina (eds.). *National Constitutional Identity and European Integration*. Mortsel: Intersentia, 2013.

^{III} The idea that the modern constitutions codify historical, socio-legal and civilization patterns and experience and are producing common constitutional language enshrined in key normative concepts has been recently proposed by Andras Jakab in his book “*European Constitutional Language*”. Cambridge: Cambridge University Press, 2016.

^{IV} According to M. Rosenfeld Europe has to establish its own constitutional identity which has to be based on the existing aspects of collective identity but must also be oriented towards the future and must adapt and transform its own components (Rosenfeld 2005:317).

^V Regarding the rational, traditional and charismatic legitimacy see Weber (1968:151).

^{VI} For the concept of autopoiesis see Teubner (1993).

^{VII} For example some authors suggest that the German constitutional identity coincides with the “eternity clause” of the German Constitution. See von Bogdandy and Schill (2011: 15-17). The French and the Italian constitutional identities are also frequently related to the unamendable “republican clause” provided by the 1958 French and the 1946 Italian Constitutions. However both the constitutional jurisdictions of these countries and the French and the Italian doctrine believe that the French and the Italian constitutional identities are not limited to the “republican clause” and that this clause should be interpreted extensively so as to include elements upgrading the mere republican form of government.

^{VIII} M. Rosenfeld stipulates that the constitutional identity is in part conscious, in part unconscious. Thus he also points at the double nature of the constitutional identity as both rational and emotional phenomenon (Rosenfeld 2005:318)

^{IX} The “no demos” problem has been central part of the discussions on the establishment and development of EU constitutionalism. See Innerarity (2014: 1-36).

^X For the fragmented European public sphere see Pernice (2006: 16-18).

^{XI} B. Guastafarro believes that the constitutional identity is safeguard for the cultural diversity of the EU member states, for their regulatory autonomy and for their discretion for allowing the primacy of the EU law (Guastafarro 2012:1).

^{XII} This is formula elaborated by Abraham Lincoln in his Gettysburg Address.

^{XIII} In that case constitutional identity will be serving the function of prevention of negative historical cycles and remedying problems inherited by previous constitutional regimes, which however are not a product of fundamental constitutional self-identification of the community.

^{XIV} For the opposite opinion equalizing the entrenched clauses with the constitutional identity see von Bogdandy and Schill (2011: 15-16).

^{XV} Barbara Guastafarro questions the wide spread opinion that the constitutional identity serves for conflict resolution between the EU law and the national constitutional law only in exceptional hypotheses. According to her the constitutional identity matters not only in exceptional cases but also in all cases of application of the EU law which invoke its adjustment to the national constitutional law. See Guastafarro (2012:1). For the contrary opinion see von Bogdandy and Schill (2011: 16-17).

^{XVI} More about the multilevel constitutionalism see Walker 2009.

^{XVII} More about the constitutional pluralism see Krisch 2011.

^{XVIII} According to J.-D. Mouton ‘the protection of the national identity has double protective function: against the EU when it can infringe this identity with its activity and with the accomplishment of its competences but also when the EU controls the member states regarding the way they respect the democratic values’. See Mouton (2013: 227).

^{XIX} Typical examples are the case law of the German Federal constitutional Court and the Italian “counter



limits” doctrine.

^{XX} Regarding the concept of Grundnorm see Kelsen, 2009.

^{XXI} Regarding the rule of recognition see Hart (1997: 100).

^{XXII} According to A. von Bogdandy and St. Schill the national identity of the EU member states must be deliberately constructed as identity of states which are members of the EU (Bogdandy, A., St. Schill 2011: 10).

^{XXIII} C. Closa is skeptical regarding the possibility for establishment of common European identity due to the impossibility of the EU to achieve the empirical criteria for commonality and specificity (Closa 2005: 416).

^{XXIV} Under “constitutional ideology” I understand the system of beliefs that shape and underline the durable perceptions of the socio-legal community regarding important aspects of the value and institutional constitutional design. In that sense the constitutional ideology is composed of different key normative ideas and is part of the “ideal constitution”. For the concept of “ideal constitution see Blondel (1995: 217-218) and Tanchev (2003: 112)

^{XXV} See note №. 5.

^{XXVI} Examples of such extensive case law on national constitutional identity are both the jurisprudence of CJEU on the relative primacy of the EU law over the domestic constitutions (e.g. cases C-62/02 “Omega”, C-208/09 Sayn-Wittgenstein etc.) and the case law of the German, French, Italian, Spanish and Polish constitutional courts.

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