



# A Sketch of the Anglo-Saxon Roots of Constitutional Identity

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**Abstract.** Constitutional identity has become a focal point of Hungarian political and public discourse in recent years and is increasingly being discussed also in the European dialogue. More and more people are familiar with the meaning and value of the concept in Hungarian public law, but perhaps fewer are aware of the Anglo-Saxon roots of the concept of constitutional identity. My paper aims to summarize the latter (only sketchily, given that the subject matter of the paragraphs of this paper could fill books), providing a starting point for contemporary arguments and reasoning.

**Keywords:** constitution, constitutional identity, constitutional theory, constitutional law

## 1. Introduction

The concept of constitutional identity is scarcely addressed in constitutional theory; there are even legal scholars who are sceptical not only of its significance but even of its existence, saying that the label of ‘constitutional identity’ is a useful political tool for wrapping political ideologies into it and presenting them as public and constitutional goals to achieve. Therefore, there are many who share the view that the concept of constitutional identity is a notion which cannot be derived objectively and cannot be perceived passively from a neutral point of view.<sup>1</sup>

Personally, I believe that although constitutional identity is not an objectively definable concept, its existence is undeniable, and its application in a globalized world, even more so in the context of the European Union, can provide a useful anchor in law.

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1 Tribe 1983. 440.

Although we may speak of different types of constitutional identity, such as written (the identity assumed by the constitutionalist), interpreted (the identity that can be read from the text of the constitution), discursive (the identity emerging from the communication of the political community),<sup>2</sup> it is clear that constitutional identity is a narrative, a story that is developed along constitutional principles, values, history, and experience. As Gary J. Jacobsohn puts it, the identity of a constitution is not an abstract invention or a well-rounded central core embedded in social culture, waiting to be discovered, but it is formed through experience, is a kind of dialogue and identity and also a mixture of many aspirations and opinions that express the nation's past and the determination of those who wish to transcend that past in some way.<sup>3</sup>

This paper goes back to the Anglo-Saxon roots of constitutional identity – not only because the concept was first elaborated on in any detail there but also because the continental interpretation of the concept is inextricably intertwined with EU integration, with the attempt to distinguish the legal systems of the Member States from the EU legal order,<sup>4</sup> which, compared to the Anglo-Saxon interpretation, is the subject of an extended explanation and a possible subject for another paper.

## 2. Constitution and Identity

To untrained ears, constitutional identity is a concept whose elements do not appear to be closely related or interrelated at first sight. Identity as a psychological and sociological concept is difficult to link with constitution, the written or unwritten document that forms the basis of the world's various national legal systems.

Constitution is a concept with multiple layers of meaning.<sup>5</sup> In absolute terms, it is the framework, or rather the result, of the emergence of a dynamic political entity that meets certain values. But a constitution is not just a political fact; it is also a law and a legal document.<sup>6</sup> The name can therefore refer to a norm, a political state, an object, or the document itself. Only some of these are usually used and rarely all of them.<sup>7</sup>

Constitution as a legal concept<sup>8</sup> has three levels of meaning: a theoretical level, reflecting on the constitution as an *ideo-historical* phenomenon and source of

2 Antal 2018. 299.

3 Jacobsohn 2013. 5.

4 For further details about the EU legal order in the Hungarian legal literature, see: Cserny–Téglási 2014. 13; Cserny–Orbán–Téglási 2018. 159–214. 208; Cserny–Orbán–Téglási 2019. 319–372. 366.

5 See also: Trócsányi–Schanda–Csink 2021. 29–35.

6 Takács 1989. 285.

7 For different aspects of the investigation, see: Möllers 2011. 5–37.

8 Regarding the concept of constitution, see: Cserny–Téglási 2013. 16–23; Téglási 2014. 11–18. András Téglási provides an interesting comparative analysis of the marking and naming of constitutions – see: Téglási 2011. 172–231, 263.

legitimacy. A normative level, which approaches the constitution as a positive norm, and, finally, a descriptive level, which takes a look at the constitution as a tool for describing institutions.

As will be mentioned later, if we start from the general or theoretical notion of a constitution, in which case by constitution we mean a regulated social order, then its identity as the identity of the constitutional arrangement is essentially equivalent to the concept of constitutional identity. If, however, the legal concept of the constitution is taken as a guide, the subject bearing the identity changes and the identity of the constitution in the legal sense (i.e. constitutional identity) and the identity of the constitutional order are determined by different factors. By examining constitutional identity, it is therefore important to determine the perspective from which we wish to approach the concept of constitution.<sup>9</sup> When the self-reflecting individual attempts to give a name to his or her consciousness and naming is an identity, it is a full articulation of the self. Identity can take many forms, and a person can have many identities, but identity is always a fixed point that organizes, guides, and controls the individual.<sup>10</sup>

Identity can best be defined as a social-psychological concept that examines the self-definition of an individual in a given social context. At the same time, identity is not a static state but a dynamic process that is not given to the individual but that we are all constantly building.<sup>11</sup>

However, identity is not only linked to the person as an individual but also to an organized group of individuals, which groups can behave as separate entities and have collective identities. Collective identity is built from the shared identity elements of individuals, which are no longer based solely on the experiences of the individuals who make up the group; this collective identity is more than the sum of the elements of individuals' identity. The identity of the community is the result of collective experience, of collective identity formation, which can take the form of religious, cultural, national, and thus constitutional identities.<sup>12</sup>

### 3. The Origins of the Concept of Constitutional Identity

Although the beginnings of the academic discourse on constitutional identity are generally dated to the end of the millennium, constitutional theories of identity have deep historical roots. In his *Politics*, Aristotle already asked the question on what basis should we say that a state has retained its identity or,

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9 Tribl 2020. 36–44.

10 Marján–Boros 2017. 117.

11 Bodó 2004. 13.

12 Patáki 1197. 326–327; Tribl 2020. 28–29.

conversely, that it has lost its identity and become a different state?<sup>13</sup> To answer requires us to distinguish between the physical identity of the state and its real, substantive identity. Aristotle does the same when he says that the identity of a *polis* is not represented by its walls but by its constitution, which for Aristotle refers to the particular distribution of offices within the polis – which modern jurisprudence understands by sovereign power – and the specific goal towards which the community aspires. When this purpose is altered, or when these offices are distributed differently, the constitution is no longer the same, and the identity of the state is transformed. A *polis* may therefore physically retain all its recognizable features yet have a different identity if its ‘compositional schema’ is transformed.<sup>14</sup>

The initiative concept of constitutional identity first emerged in modern jurisprudence in Germany, following the work of Carl Schmitt and Carl Billfinger, in the context of the possible limits of constitutional amendments and unconstitutional amendment of the constitution;<sup>15</sup> in European jurisprudence, the concept was first used by the German Federal Constitutional Court in its *Solange I* decision, which has since become a milestone in the European concept of constitutional identity.

The meaning of the concept of constitutional identity later diverged in Anglo-Saxon and European legal literature and thus nowadays has different meanings in the two legal literatures and legal thought. In the Anglo-Saxon trend, the understanding of jurisprudence and legal science remained unified, and the interpretation of the concept remained in its original context as used by Carl Schmitt, i.e. as a barrier to unconstitutional constitutional amendments, or to the ‘amendability’ of the constitution<sup>16</sup> (one should see the views on the ‘eternity clauses’ of certain constitutions<sup>17</sup> in order to understand the basic elements of the dilemma). However, in the continental meaning, there are significant divergences from the original content of the concept due to European integration, its development, and its relationship with the Member States, which, not surprisingly, fundamentally determine the direction of the interpretation of constitutional identity. In the continental interpretation, there are significant differences between the positions of jurisprudence and legal science, with the remark, of course, that the starting point remains the same: the relationship between the legal order of European integration and the constitutions of the Member States.

13 Aristotle. 32–49.

14 Jacobsohn 2006. 364.

15 Polzin 2016. 411–438.

16 For a thorough analysis of this question, see: Téglási 2014. 19–30.

17 Also see: Suteu 2021.

## 4. Anglo-Saxon Roots

In defining the concept of constitutional identity, the mechanisms deriving from the social-psychological notion of identity mentioned above must be applied in the coordinate system of constitutional law. The Anglo-Saxon definition of constitutional identity also provides a key to the continental interpretation, which is most notably attributed to the Anglo-Saxon legal theorists Gary J. Jacobsohn and Michel Rosenfeld. Michel Rosenfeld goes back to the Hegelian philosophy and, prior to the definition of constitutional identity, defines – as a quasi-prerequisite – the entity bearing identity, which he calls in his theory the ‘constitutional self’.<sup>18</sup> In the case of Michel Rosenfeld and Gary J. Jacobsohn’s theory, the starting point is that the bearer of constitutional identity can only be this particular ‘constitutional self’. This constitutional self can be equated in Jacobsohn’s theory with the constitutional system, which in European terminology is best identified as a constitutional arrangement. It is constituted by none other than the people who make up the political nation by virtue of popular sovereignty, the structure resulting from the interaction between the constituent power, *pouvoir constituant* conferred by the people, and the constitution established by the depositories of the constituent power, which is also a sovereign entity in its own right.<sup>19</sup>

Jacobsohn sees in the elements of constitutional identity the defining characteristics of the constitutional system, without which it would be transformed into something quite different.<sup>20</sup>

According to the theory of constitutional disharmony,<sup>21</sup> constitutional identity is in a constant state of change, which may be caused by incomplete or imperfect provisions in the text of the constitution or by the tension between the constitution

18 Rosenfeld 2010. 37–40.

19 This legal-theoretical premise is particularly worthy of consideration in the European interpretation of identity since in the continental understanding, the discussions of constitutional identity have so far been inconsistent in terms of whether identity is carried by the constitution itself, the political nation, or the constitutional system, nor is there a uniformly separate conceptual framework that consistently distinguishes between national identity, identity of the constitution, and constitutional identity. For the time being, therefore, the European discourse does not seem to have defined what exactly constitutional identity refers to.

20 At this point, the interpretation of Hungarian constitutional identity joins Jacobsohn’s theory. The Constitutional Court of Hungary has established a new value to be protected in relation to the Fundamental Law, namely constitutional identity or ‘constitutional self-identity’. The content of the Fundamental Law as a whole, and of its individual provisions, is developed on a case-by-case basis by the Constitutional Court of Hungary, with particular reference to the historical constitutional *acquis*. It is in fact a catalogue of constitutional principles and institutions without which the Fundamental Law would lose its national character. The cornerstones of the Hungarian constitutional identity, for example, are the following: the rights of freedom, the division of powers, the republican form of government, respect for public autonomy, freedom of religion, the legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and protection of the nationalities living with us. Gáva–Smuk–Téglási 2017. 13.

21 For more details, see: Jacobsohn 2010. 133–135.

and the social order. Constitutional identity is shaped through debates about constitutional identity itself. Constitutional identity retains its meaning and relevance and remains applicable only if its content reflects major changes in social morality, functionality, and operation. According to Jacobsohn, the courts and policymakers thus have a prominent role in shaping constitutional identity.<sup>22</sup>

Consequently, the phenomenon of constitutional identity must be examined in a process, a process of interaction of the above-mentioned factors, a process that can result in the emergence of elements of constitutional identity. It also follows from this that the individual constituent elements cannot be interpreted in isolation, as they only make sense in context, in relation to the past, present, and future of the medium that created them, the constitutional subject.<sup>23</sup>

Going back to Michel Rosenfeld, the American legal scholar further elaborated on Jacobsohn's theory. In his opinion, constitutional identity is in fact an essential link between the constitution, its wider environment, those who have created that identity, and those for whom it has been created.<sup>24</sup>

Rosenfeld also tried to develop certain models of constitutional identity based on historical processes, a classification based mainly on the form, quality, and current state of the constituent political community. On this basis, he distinguished a total of seven distinctive models. The central feature of the German model is that it is essentially based on the German *ethnos*, i.e. the culturally-linguistically determined people. In contrast, the French model favours the concept of civic *demos* over ethnicity. In the French model, the state and the nation are historical and legal rather than ethnic entities. The American concept stands close to the French model except that the French constitutional model, born out of the Enlightenment, had the community of the French more or less ready at the time, whereas the American constitutional model had to create the community of the Americans first.<sup>25</sup> The English model of constitutional identity is the result of a long and in many respects organic historical development but one that is very difficult to replicate elsewhere in this form. The following model is represented by Spain, which adopted its democratic constitution in 1978. Its distinctive character can be captured in two points. On the one hand, it seeks to strike a delicate balance between state unity and sub-national territorial units with their own ethnic identity. On the other hand, another peculiarity of the Spanish model is that it imported and incorporated several transnational norms, mainly linked to European integration.

The European transnational constitutional concept stands for the sixth model. In many respects, the European model is difficult to define precisely,

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22 Drinóczi 2016. 17.

23 Martonyi 2018. 21; Tribl 2020. 47.

24 Rosenfeld 2011. 756–776.

25 Chandler 2006. 763–764.

it is so novel and specific, but it has a strong impact on the whole European continent, directly on the EU Member States and indirectly on the others. This model, like the American one, is in many respects forward-looking rather than inward-looking or backward-looking, but at the same time – also due to its supranational nature – it seeks to achieve the ideal of a diverse political community, like the Spanish one.

Finally, the postcolonial model should be mentioned.<sup>26</sup> This is particularly the case in African and Asian states liberated after the Second World War. The postcolonial model is characterized by duality: firstly, the colonies wanted to rid themselves of their former colonizers and to disconnect from them as rulers, but, secondly, they could not immediately break with the legal and administrative structures that remained. The same chains they desired to break off were represented not only by colonialism in some form but also by a certain strange modernity when compared to their pre-colonial status.<sup>27</sup>

## 5. Conclusions

To sum up, in the Anglo-Saxon approach, the framework of constitutional arrangements and thus the organic development of the constitutional system gives the coordinate system of the application of constitutional identity.

In the words of Attila Antal, constitutional identity is therefore no different from the story, the narrative that emerges from the principles, values, origin stories, myths, understanding of the history and visions of the future embodied in the constitution. Put briefly, it means the very way in which we think about the constitution and constitutionalism.<sup>28</sup>

Tribe is perhaps right to argue that constitutional identity cannot be viewed and examined passively. However, at the same time, this does not mean that societies do not need to examine their constitutional identity while actively shaping it. Constitutional identity is not a one-way street. It is not only possible to examine the impact of dysfunctional constitutional provisions on the constitutional identity of a given state, but it is also possible that, by looking at different constitutional identities (written, interpreted, discursive), we can find constitutional provisions where political intent, the text of the constitution, and/or the application of the constitutional provision do not overlap and require a modification or a change of mindset.

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26 Chandler 2006. 763–764.

27 Halász 2019. 127–128.

28 Antal 2018. 298.

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