

Mirosław Granat¹

Constitutional Identity and its Functions

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Abstract

This article is the result of the scientific meeting organized by the KUL, in June 2021, concerning the topic of the constitutional identity. One of the intriguing problems in constitutional law is just the problem of constitutional identity. Constitutional Identity has three functions. The most important consistent that identity determines the “core” or “nucleus” of each constitution.

The answer to radical question “what is the preamble to the Polish Constitution for?” should be that it mostly serves to express constitutional identity. This the basic function of this part of the Polish Constitution. Above all, constitutional identity “emerges” from national identity. Both identities are connected with each other in the preamble of the Polish Constitution.

¹ ORCID ID: 0000-0002-8439-6940, professor, Department of Constitutional Law, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw. E-mail: m.granat@uksw.edu.pl.

Streszczenie**Tożsamość konstytucyjna i jej funkcje**

Artykuł jest wynikiem spotkania naukowego zorganizowanego przez KUL w czerwcu 2021 r. na temat tożsamości konstytucyjnej. Jednym z intrygujących problemów prawa konstytucyjnego jest właśnie problem tożsamości konstytucyjnej. Tożsamość konstytucyjna pełni trzy funkcje. Najważniejszą konsekwencją jest to, że tożsamość określa „rdzeń” lub „jądro” każdej konstytucji.

Odpowiedź na radykalne pytanie „po co jest preambuła do Konstytucji RP?” powinno być, że służy głównie do wyrażania tożsamości konstytucyjnej. To podstawowa funkcja tej części Konstytucji RP. Przede wszystkim tożsamość konstytucyjna „wyłącza się” z tożsamości narodowej. Obie tożsamości są ze sobą powiązane w preambule Konstytucji RP.

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One of the most intriguing problems in constitutional law, be it Polish or foreign, is the issue of constitutional identity. This category raises a number of research difficulties, but the primary point here is related to the question of how to understand constitutional identity. What is constitutional identity? What purpose does it serve? Why is it required?

It seems that constitutional identity has three functions. Firstly, it points out the most significant provisions in the constitution. Identity includes the basic principles of the constitution, provisions on human rights, and above all, the values related to these provisions². Identity understood in this way determines the “core” or “nucleus” of each constitution. Such a definition of constitutional identity seems best. Therefore, this concept is discussed in more detail later in the article.

Secondly, constitutional identity defines the limits of possible changes to the constitution. It functions as a kind of a check on the intentions to revise the constitution. This understanding of identity and its functions seems

² Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford University Press, 2017.

to be prevalent in the doctrine of constitutional law in Poland. Therefore, a discussion on such a concept of identity is beyond the scope of this article³.

Thirdly, identity plays the role of a specific “barrier” in determining the relationship between national law and European Union law. For example, identity was examined in such a context by the Polish Constitutional Tribunal (especially in the judgement of 2010, K 32/09) and by other constitutional courts in Europe. Identity was useful in determining the powers of Polish state bodies which could not be transferred to the Union.

In the judgement in question, the Constitutional Tribunal “applied” the category of constitutional identity in order to justify the act of establishing a specific hierarchy of constitutional principles. According to the Tribunal, the identity of the Polish Constitution is determined by “the inalienable competences of the organs of the state”, which are defined by various constitutional provisions. Moreover, the Constitutional Tribunal stated that “the inalienable competences” result from the sovereignty of the state, the normative expression of which is the Polish Constitution itself⁴. The competences under the prohibition of conferral reflect the values on which the Constitution is based. These competences constitute “the hard core” (“the cardinal foundations of the state system”). It follows from the Tribunal’s reasoning that the court relied on the powers of the state (those that can never be transferred to the organs of the European Union)⁵. A characteristic feature of the Tribunal’s approach to constitutional identity was that it closely related this category to law.

I. Understanding of identity

It is very difficult to explain the concept of constitutional identity. Due to its nature, it seems to be a structure which is almost impossible to define. Therefore, we can understand it in several ways, each with its own meaning and consequences.

³ Cf. M. Granat, *Tożsamość konstytucji*, [in:] *Zmieniać Konstytucję Rzeczypospolitej Polskiej czy nie zmieniać?*, ed. D. Dudek, Lublin 2017.

⁴ *Problemy zmiany Konstytucji*, ed. R. Chruściak, Warsaw 2017.

⁵ Cf. the judgement of the CT of November 24, 2010, file ref. no. K 32/09, OTK ZU 2010, no. 9A, item 108.

I would like to emphasize that the Constitutional Tribunal (or any other court, in Poland or elsewhere), does not “establish” >what identity is<. At most, the Tribunal contributes to its understanding by examining the constitutionality of the law (e.g. when it examines the hierarchy of principles of law or adjudicates on issues related to European law).

Constitutional identity is “discovered” by means of the reconstruction of historical facts from the life of a nation and state, mainly as reflected in judicial decisions. In this way one can “discover” this identity. Above all, constitutional identity “emerges” from national identity. Both are connected with each other. In Poland, such a link between these identities can be seen primarily in the preamble (introduction) to the Constitution. The preamble is where both identities meet.

It seems that the most intuitive understanding of constitutional identity refers to the lack of changes in the constitution. Identity would then mean the “stability” or “unchangeability” of constitutional provisions. Any changes would be contrary to identity. Constitutional identity would simply mean the letter of the constitution. Obviously, such an understanding of identity would be unsustainable. Under this approach, any change to the constitution would be a shock to its identity. In this light, it seems unnecessary to postulate such an approach to understanding identity.

It seems that a more relaxed approach to the concept of constitutional identity is preferable, namely identity as a subset of unchangeable constitutional provisions. Under this approach, identity allows changes to be made in the periphery of the constitution but not in its core. The “substance” of the constitution should remain immune to change, while other, lower-rank provisions may be modified. This approach can be called the pragmatic approach to understanding identity⁶. However, it seems that identity is best understood as a constitutional value. Adopting this way of thinking means that identity is a value which allows for changes in the constitution, including ones which affect its core, but at the same time it does not make it possible to “turn everything upside down”. To put it in a different way, it seems that the constitution must be constant and unchangeable in some dimensions (e.g. the pro-

⁶ Cf. M. Granat, *Rozumienie zmiany Konstytucji RP a tożsamość konstytucyjna*, [in:] *Problemy zmiany Konstytucji*, ed. R. Chruściak, Warsaw 2017, p. 272.

tection of human dignity in the Polish Constitution), and subject to change in other dimensions (e.g. concerning how the executive branch of power is to be structured in Poland).

II. Preamble to the Constitution and constitutional identity

The preamble is important for understanding the identity of the 1997 Constitution, as it presents the circumstances in which this law was adopted. It shows that there were numerous tensions in the process of drafting the Constitution. These were resolved through the so-called “inclusive” approach to the key controversies going beyond what is commonly referred to as a “compromise”.

When reading the preamble, we can see great events from the history of Poland “taking place”. Examples include the First and the Second Republic of Poland with references to the “best traditions” of these states.

The preamble establishes the Third Republic. At the beginning of this state, the Constitution is adopted by the nation for the good of that Republic. It seems the preamble expresses the circumstances which can be described as the so-called “constitutional moment”. This is a special point in time when a constitution is adopted. Usually, it takes place at turning points in a nation’s history. It is important for constitutional identity. A “constitutional moment” seems to be one of the elements which make up constitutional identity.

Paradoxically, the introduction to the Constitution of Poland was written in the final stage of its drafting. However, this circumstance is irrelevant to constitutional identity.

In my opinion, the answer to the radical question: “What is the purpose of the preamble to the Polish Constitution?” should be that it mostly serves to express constitutional identity. This is the basic function of this part of the Polish Constitution. It is at the heart of the preamble and is more important than the functions traditionally assigned to preambles, such as those concerning interpretation or education. It seems that it is constitutional identity that opens the space for the interpretation of the Constitution, because it shows the “normative environment” of the Constitution, as legal theorists call it. The preamble presents a picture of ourselves as a nation and society, and sets out

the ideals which guide us. It can be compared to a selfie, in which each person should be able to find him – or herself. The point is that if a preamble has a “purpose” (function), it is to express constitutional identity.

The relationship between the preamble and identity makes it possible to explain the growing importance of preambles for the political changes which are currently taking place in Europe. It seems that in an illiberal democracy identity serves to undermine the principles of ordinary constitutionalism. This seems to be the case in Hungary. The preamble plays a greater role in an illiberal doctrine than in traditional constitutionalism. An intriguing illustration of this point is the National Avowal in the Fundamental Law of Hungary of 2011. There is no room here for analysing the National Avowal in detail, but this introduction in fact decrees the shape of Hungary’s constitutional identity as “managed” by politicians. This is probably why the legislator stipulated that the preamble should have a direct impact on the interpretation of the provisions of the Basic Law (Art. R of the Basic Law of 2010).

III. Constitutional identity and constitutional change

The next topic is the importance of constitutional identity for understanding the problem of changing the basic law. Identity serves to deepen this understanding. In order to assess a draft amendment to the constitution, it is necessary to look at it primarily from the point of view of constitutional identity.

Owing to identity, the discussion on an amendment to the constitution can be shifted from procedural issues to the substance of the amendment. Identity “governs” the understanding of change from the perspective of substance. Therefore, it is possible to discuss more precisely which changes are acceptable and which are not, which are “good” and which are “bad”. Constitutional identity is a guide to changes and organizes thinking about them⁷. It acts as a sort of a check, which makes certain changes difficult or excludes them at a given moment. It separates permissible changes (e.g. ones which develop the constitution) from those which can damage the constitution. For ex-

⁷ A. Śledzińska-Simon, *Koncepcja tożsamości konstytucyjnej: wymiar indywidualny, relatywny oraz zbiorowy*, „Przeгляд Prawa i Administracji” 2016, no. CVII, pp. 335–357.

ample, in Poland, an even far-reaching amendment to the Constitution, formally introduced pursuant to Art. 235, does not have to violate its identity (e.g. a change in electoral law: a proposal according to which an adult citizen would have the votes of his or her children). On the other hand, an apparently ‘minor’ change may damage the constitution. For example, it seems that a new definition of marriage or family under Art. 18 would pose a threat to constitutional identity.

Referring to the identity of the Polish Constitution of 1997 may contribute – as is the case in some countries – to establishing the category of the so-called “unchangeable” provisions. These are taboo (they can never be changed). For example, they are found in the Constitution of the Fifth French Republic. Identity seems to be one of the reasons for establishing such a category. Identity makes it possible to distinguish “supra-constitutional” provisions. For example, in the Polish Constitution of 1997, such a provision should be Art. 30 on human dignity⁸.

IV. Summary

To sum up, the constitution is a legal act whose significance goes beyond current policy making. Its change cannot depend only on some political party having a majority. Draft amendments to the constitution must take into account constitutional identity and serve the goals related to this identity⁹.

Therefore, the issue of changes to the Constitution of Poland should not be treated only as a “procedural matter” under Art. 235 of the Constitution. Then it would become only a matter of legislation (a technical problem). The issue of constitutional identity would not arise then or it would become something “exotic”. In such a situation, the legislator could adopt any amendment to the Constitution. However, such an approach to constitutional change is dangerous for the state system. This is why the category of constitutional identity is so important.

⁸ Compare regulations in USA and Germany A. Barak, *Human Dignity. The Constitutional value and the Constitutional Right*, Cambridge University Press, 2015, pp. 185–208, 225–242.

⁹ *Zasady zmiany konstytucji w państwach europejskich*, eds. S. Grabowska, R. Grabowski, Warsaw 2013.

It has already been pointed out several times in the present article that constitutional identity is not an abstract or imaginary concept¹⁰. Quite the opposite. Each concept of identity has its own meaning. In some countries, identity serves as the basis for distinguishing particularly important constitutional provisions (the so-called supra-constitutional provisions). In Poland, it was used by the Constitutional Tribunal to construct “competences under the prohibition of conferral” to the European Union. Finally, it appears in discussions on Art. 235 of the Polish Constitution, i.e. on the scope of admissible changes to the Constitution. It seems that each concept of constitutional identity has its own meaning and performs its functions.

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¹⁰ Ibidem, p. 277.