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Ways of Discovering Constitutional Identities in Different Jurisdictions¹

In legal scholarship there are different approaches regarding the constitutional identities. The paper presents the views of Georgian and foreign professors, some of which are contradictory. The main topic of the article is to single out and classify the ways of discovering constitutional identities. The author, drawing from examples of different states, puts forward 4 ways of discovering constitutional identities. According to the first model, constitutional identity can be discovered outside the text of a constitution, namely in declarations of independence. The example of this model is the United States. The second model suggests looking at the preambles of the constitutions. Here the example would be Turkey. The third way of discovering constitutional identities is to resort to the master text of the constitution. Here two subtypes can be distinguished. On the one hand, general norms in the constitution can bear the function of constitutional identity. On the other hand, it can be unamendable provisions. For each case the examples are drawn from the respective jurisdictions. The fourth model of discovering constitutional identities is to look at judicial decisions.

The article analyzes critically the possibility of unamendable provisions to be the bearers of constitutional identity. The author argues that not in every case an unamendable provision reflects the constitutional identity. The article suggests a kind of formula which can be used to tell in which cases can an unamendable provision be constitutional identity. The appropriate examples are given to test the formula.

Key Words: *Constitutional identity, unamendable provisions, models of discovering constitutional identities, declaration of independence, preamble*

1. Introduction

Constitutional identity is often used in different jurisdictions as a limit to constituted power. Courts use different measurements to check the constitutionality of constitutional changes. Among those are constitutional identities. In Georgian legal domain this component of constitutional law is understudied. Of course, there are some exceptions.² Therefore, the aim of this article is to reopen discussions about this topic.

The article discusses different theories and respective examples from the practice. Words “constitutional identity” aren’t fully clear. There are various opinions about it, which are discussed in

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¹ This article is a part of a bigger project, my doctoral thesis. The topics discussed in the article are expanded in my doctoral thesis, which currently is a work-in-progress.

² About constitutional identity see: *Gegenava D.*, For Understanding Constitutional Identities, in Sergo Jorbenadze 90, edited by Sergi Jorbenadze, Sulkhani-Saba University Press, 2019 (in Georgian).

the paper. The aim of the article is to contribute to the clarity of topic and also it aims to detect and classify the possible sources of discovering constitutional identities. Lately, some scholars also discuss the importance of constitutional identities in terms of union of the states.³ However, bearing in mind the specificity of the article, this aspect won't be covered.

2. Particularities of Constitutional Identities

2.1. The Essence of Constitutional Identity

Every constitution consists of a set of basic principles and features, which determine the totality of the constitutional order and make up the 'spirit of the constitution' and its identity.⁴ According to Professor Rosenfeld, constitutional identity is not national identity, and would cease having an identity of its own if it could simply be folded into the latter.⁵ By the same token, however, a nationstate's constitution could hardly produce an identity of its own without incorporating some features derived from national identity.⁶ This approach is also shared by Professor Vicky Jackson, who, when discussing functions of a constitution, says "constitutions ... may express and symbolize national identity".⁷ Georgian professor Dimitry Gegenava also follows this line of argumentation. He claims that before forming constitutional identities, state and national identities have to be formed first.⁸ National identity itself nurtures constitutional identity.⁹ Professor Jacobson, unlike the presented approach, believes that for establishing constitutional identities, "it obviously makes sense to study the text."¹⁰ According to him, "this provides us with a documentary transcript of how a particular group of framers provided for the governance of their polity, and it often includes their aspirations for its subsequent development."¹¹ Therefore, the future of constitutional identity is inscribed in its past.¹²

³ The EU law acknowledges the importance of constitutional identities of the member states. About this see: *Sajó A., Fabbrini F.*, The Dangers of Constitutional Identity, *European Law Journal*, Vol. 25, Iss. 4, 2019; *Scholtes J.*, Abusing Constitutional Identity, *German Law Journal*, Vol. 22, 2021; *Suteu S.*, Eternity Clauses in Democratic Constitutionalism, Oxford University Press, 2021, 113-121.

⁴ *Roznai Y.*, The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments, *Constitutionalism: Old Dilemmas, New Insights*, edited by Alejandro Linares Cantillo, Oxford University Press, 2021, 149, footnote 7.

⁵ *Rosenfeld M.*, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, Routledge, 2010, 29.

⁶ Ibid.

⁷ *Jackson V.*, What's in a Name? Reflections on Timing, Naming, and Constitution-making, *William & Mary Law Review*, Vol. 49, Iss. 4, 2008, 1253.

⁸ *Gegenava D.*, For Understanding Constitutional Identities, in *Sergo Jorbenadze 90*, edited by Sergi Jorbenadze, Sulkhani-Saba University Press, 2019, 339 (in Georgian).

⁹ Ibid.

¹⁰ *Jacobson G. J.*, Rights and American Constitutional Identity, *Polity*, Vol. 43, N. 4, 2011, 414.

¹¹ *Jacobson G.*, The Formation of Constitutional Identities, *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 131.

¹² *Jacobson G.*, Constitutional Identity, Harvard University Press, 2010, 349.

2.2. Ways of Identifying Constitutional Identities

Constitutional identity has been defined as ‘the core of fundamental elements or values of a particular state’s constitutional order as the expression of its individuality’.¹³ In this regard, we should view constitutional identity as such a specific feature, which distinguishes a constitutional framework of a particular state from the ones existing in other states. But, where exactly can we read constitutional identity? How much tangible is it? Below 4 different ways are proposed to answer these questions. One can come across a constitutional identity 1) outside the text of the constitution – in the declaration of independence, 2) in the preamble of the constitution, or 3) directly in the text of the constitution, and also 4) in court decisions. Below I present relevant examples for each model.

One can read constitutional identity outside the text of the constitution, namely in the declaration of independence of a state. A good example for this would be the United States, where “the core of its constitutional identity [is] encapsulated in the phrase ‘all men are created equal’ [which is] included in the 1776 Declaration of Independence.”¹⁴ However, the 1787 Constitution stands in massive contradiction to the principles of the Declaration of Independence.¹⁵ Indeed, there is language clearly complacent toward the existence of human bondage in America.¹⁶ The language used in the Supreme Law indicates a level of internal disharmony consistent with the many contentious debates surrounding that issue during the framing of the Constitution.¹⁷ Therefore, so long as slavery remained constitutionally tolerated, it was impossible to construct a coherent American constitutional identity.¹⁸ [It] would take nearly eighty years and a civil war to abolish slavery and to finally make for a coherent American constitutional identity.¹⁹

A preamble of the constitution may reflect constitutional identity. Preambles are the “mission statements” of the constitution and can be powerful symbols of the constitutional order and identity.²⁰ An example of this would be Turkey. The preamble of the Constitution of Turkey establishes the principle of secularism, which represents its constitutional identity.²¹

One can read constitutional identity from the actual text of a constitution. However, in the text, it may be enshrined as an unamendable clause or maybe not. The former is discussed in more details below in this article. Therefore, specific examples aren’t presented here. However, the latter is discussed in this section. The function of displaying constitutional identity maybe assumed by a

¹³ *Krunke H.*, *Constitutional Identity and Equality: the Challenge of the Nordic EU Member States*, *Comparative Constitutional Studies*, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 126.

¹⁴ *Rosenfeld M.*, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, Routledge, 2010, 131.

¹⁵ *Jacobson G. J.*, *Rights and American Constitutional Identity*, *Polity*, Vol. 43, N. 4, 2011, 428.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Rosenfeld M.*, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, Routledge, 2010, 187.

¹⁹ *Ibid.*

²⁰ *Ginsburt T., Bisaraya S.*, *Introduction, Constitution Makers on Constitution Making*, New Cases, Cambridge University Press, 2022, 25.

²¹ *Jacobson G.*, *The Formation of Constitutional Identities*, *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 132.

normal, non-entrenched clause of the constitution. Think about the Constitution of Japan. Its article 9, so-called peace clause, in comparative constitutional law is acknowledged as representative of the constitutional identity.²²

The last model of discovering a constitutional identity is through court decisions. According to this model, namely the court decisions allow discovering constitutional identities in some states. This is used in India. For the first time in 1973, the Supreme Court held that Parliament cannot amend the Constitution in a manner that alters its basic structure and changes its identity.²³ As the Court later indicated “the Constitution is a precious heritage; therefore, you cannot destroy its identity.”²⁴ “[J]udges shape constitutional identity through their decisions, and judges’ decisions are in turn shaped by their understanding of the identity of the constitutional project.”²⁵ Therefore, in different decisions, the Court would identify different clauses as parts of identity. One reason for such variable approaches is that the Court has not articulated any consistent method for determining what amounts to the basic structure of the Constitution, and how courts should conduct basic structure review.²⁶ For this reason, Professors Sajó and Fabbrini criticize the use of constitutional identity. They believe, there are 2 fundamental problems. On the one hand, it is an indeterminate concept that does not offer clear and consistent criteria on what falls under the label.²⁷ On the other hand, its application becomes unforeseeably and easily arbitrary in the hands of constitutional judges.²⁸ This critique can be acceptable in a certain manner. Out of the 4 models of discovering the constitutional identities, the concerns of the authors are mainly on the model, which uses court decisions for discovering constitutional identity. However, by the use of other models discussed above constitutional identities can be identified more decisively.

2.3. Changing Constitutional Identities

Constitutional identity isn’t an eternal feature. Professor Jacobson asks us to see its dynamic quality.²⁹ Therefore, some processes lead to the formation of constitutional identity. The formation of constitutional identity can’t be pre-planned and easily reached process, unless it’s accompanied by political processes, national unity and most importantly the spirit.³⁰ After the formation of

²² *Albert R.*, *Constitutional Amendments, Making, Breaking, and Changing Constitutions*, Oxford University Press, 2019, 68.

²³ *Chandra A.*, *A Precious Heritage?: the Construction of Constitutional Identity by Indian Courts*, *Comparative Constitutional Studies*, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 140-141.

²⁴ *Ibid.*, 141.

²⁵ *Ibid.*, 142.

²⁶ *Ibid.*, 144.

²⁷ *Sajó A., Fabbrini F.*, *The Dangers of Constitutional Identity*, *European Law Journal*, Vol. 25, Iss. 4, 2019, 471.

²⁸ *Ibid.*

²⁹ *Jacobson G.*, *Constitutional Identity*, Harvard University Press, 2010, 88.

³⁰ *Gegenava D.*, *For Understanding Constitutional Identities*, in *Sergo Jorbenadze 90*, edited by Sergi Jorbenadze, Sulkhan-Saba University Press, 2019, 335 (in Georgian).

constitutional identity, of course it can be changed as well.³¹ It would take the use of constituent power, which results in the adoption of a new constitution.³² However, according to the theory of constitutional dismemberment of Professor Richard Albert, a dismemberment of a constitution's identity results either in the extinguishment of a core constitutional commitment or the simultaneous extinguishment of a core constitutional commitment and the adoption of a new one.³³ However, unlike the adoption of a new constitution, according to the theory of dismemberment, formally the old constitution continues to be in force.³⁴ In conclusion, there are two ways of changing constitutional identity: through adoption of a new constitution or through its dismemberment.

2.4. Relationship between Constitutional Identity and Unamendable Clauses

2.4.1. Unamendable Clauses as Representatives of Constitutional Identity

Constitutions are designed to reflect society's identity and delineate the highest principles shared by the State's citizens.³⁵ [U]namendability is the guardian of the constitution's identity.³⁶ The entrenchment of founding principles or other symbolic issues may help to build a sense of constitutional identity.³⁷ Therefore, often clauses protected by unamendability represent constitutional identities. For example, in France republican form of governance is an unamendable provision and at the same time represents constitutional identity of the state.³⁸ The same can be said about the unamendable provisions of the Constitution of Turkey.³⁹ The Constitution of Norway is interesting in a sense, that it declares the spirit of the constitution unamendable.⁴⁰ In general, the "spirit of the constitution" means certain fundamental core values or principles.⁴¹ These are constitutional provi-

³¹ About this see: *Dixon R.*, Amending Constitutional Identity, *Cardozo Law Review*, Vol. 33, N. 5, 2012, 1847-1858.

³² *Kay R.*, Constituent Authority, *The American Journal of Comparative Law*, Vol. 59, 2011, 732.

³³ *Albert R.*, Constitutional Amendment and Dismemberment, *The Yale Journal of International Law*, Vol. 43, 2018, 39.

³⁴ *Albert R.*, *Constitutional Amendments, Making, Breaking, and Changing Constitutions*, Oxford University Press, 2019, 85.

³⁵ *Roznai Y.*, *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers*, Oxford University Press, 2017, 148.

³⁶ *Michel S., Cofone I., N.*, *Credible Commitment or Paternalism? The Case of Unamendability, An Unamendable Constitution? Unamendability in Constitutional Democracies*, Springer International Publishing AG, 2018, 137.

³⁷ *Landau D., Dixon R.*, Tiered Constitutional Design, *The George Washington Law Review*, Vol. 86, 2018, 486.

³⁸ *Jacobson G.*, *The Formation of Constitutional Identities*, *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon, Edward Edgars Publishing, 2011, 129.

³⁹ *Jacobson G.*, *Constitutional Identity*, Harvard University Press, 2010, 329; *Friedman, A.*, Dead Hand Constitutionalism: the Danger of Eternity Clauses in New Democracies, *Mexican Law Review*, Vol. 4, N1, 2011, 79. (In this case the author pays attention to the principle of secularism, which is an unamendable provision of the Constitution of Turkey and represents constitutional identity.)

⁴⁰ Constitution of Norway, art. 121.

⁴¹ *Roznai Y.*, *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers*, Oxford University Press, 2017, 142.

sions that very often comprise ‘the genetic code of the constitution’ and are core components of constitutional identity that should be resistant to change.⁴² “Genetic code” represents constitutional provisions, that define the particularity of a specific constitutional order.⁴³

2.4.2. When is It That an Unamendable Provision Doesn’t Reflect Constitutional Identity?

It’s important to note, that not every unamendable provision reflects constitutional identity. In order for an unamendable clause to bear the function of constitutional identity, it has to meet 2 requirements cumulatively. On the one hand, it’s important that a substantial amount of time is passed after adoption of such clause, and on the other hand, this clause has to function under different political majorities. What substantial amount of time is difficult to tell in years and also is unpractical. Therefore, in each instance, we have to assess whether the time passed after the adoption of a clause is enough, provided that the other component is satisfied, for the clause to bear the function of constitutional identity. If these requirements aren’t met cumulatively, then a particular constitutional clause can’t bear the function of constitutional identity. To support this argument, two examples are discussed below.

2.4.2.1. Example of Honduras

In the first place, let’s discuss the Latin American country – Honduras. The Constitution limited presidents to only one lifetime term in office, prevented any attempt to change the no-reelection rule by embedding it in eternity clause.⁴⁴ Besides, the Constitution prescribed a form of punishment for anyone attempting to change the term limit.⁴⁵ That person would “cease” to hold office and be barred from doing so for the subsequent ten years.⁴⁶ In 2009, President Zelaya proposed a non-binding referendum to gauge whether the population wished to amend this unamendable rule.⁴⁷ The Congress opposed to the President’s initiative and the acts of the President were challenged in the Supreme Court.⁴⁸ The Supreme Court declared the proposed referendum to be unconstitutional and with a warrant for his arrest the military arrested Zelaya in his pajamas, spiriting him out of the country to Costa Rica.⁴⁹ The Organization of American States (OAS) quickly turned the constitutional issue into

⁴² *Roznai Y., Okubasu D., M., Stability of Constitutional Structures and Identity Amidst ‘Political Settlement’: Lessons from Kenya and Israel, Comparative Constitutional Studies, Vol. 1 N. 1, Edward Elgar Publishing, 2023, 122.*

⁴³ To learn more about this, see: *Roznai Y., Unamendability and the Genetic Code of the Constitution, European Review of Public Law, Vol. 27, Iss. 2, 2015.*

⁴⁴ *Landau D., Roznai Y., Dixon R., Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, The Politics of Presidential Term Limits, edited by Alexander Baturo and Robert Elgie, Oxford University Press, 2019, 63.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Albert R., Constitutional Amendments, Making, Breaking, and Changing Constitutions, Oxford University Press, 2019, 139.*

⁴⁸ *Ginsburg T., Democracies and International Law, Cambridge University Press, 2021, 108.*

⁴⁹ *Ibid.*

an international one, calling for Zelaya's reinstatement and declaring the events to be a coup d'état.⁵⁰ Evidently, the Supreme Court of Honduras paid a lot of attention to the unamendability of the presidential term limit in the constitutional order.

Later, in 2014, the term limit clause was challenged in the Supreme Court, with the main arguments being that it violated right to vote and a politician's right to participate in elections.⁵¹ The court validated these arguments by relying chiefly on international human rights law.⁵² It noted that a number of human rights treaties, including the Inter-American Convention on Human Rights, had been ratified before the establishment of the 1982 Constitution, and that the drafters of the 1982 Constitution had a binding legal obligation to respect and protect the rights contained therein.⁵³ In the end, the Court held 3 provisions to be unconstitutional: 1) the term limit, 2) the provision making it unamendable, and 3) the provision punishing anyone seeking to change it with removal from office.⁵⁴ However, there's one detail that is alarming. The supporters of then-president Juan Orlando Hernandez for his reelection managed to change 4 out of 5 members of the Constitutional Chamber of the Supreme Court.⁵⁵ Therefore, there's an assumption that this decision raised significant questions of political pressure.⁵⁶

The example of Honduras clearly demonstrates, that constitutional unamendable clause, on the one hand, was used by the Court to protect the Constitution, however, on the other hand, several years later the Court declared the same provision unconstitutional out of political expediency. Hence, in this case an unamendable clause of the constitution could neither live substantial amount of time, nor function under different political majorities. Therefore, this unamendable provision, which was in force for some time, can't be said to have been the bearer of constitutional identity.

2.4.2.2. Example of Germany

Basic Law of Germany is interesting for a number of reasons. Firstly, it is an imposed constitution, whose main provisions, such as federalism, democracy and human rights were defined by the external forces.⁵⁷ These were the United States, the Great Britain and France.⁵⁸ The main goal of

⁵⁰ Ibid.

⁵¹ *Versteeg M., Horley T., Meng A., Guim M., Guirguis M.*, The Law and Politics of Presidential Term Limit Evasion, *Columbia Law Review*, Vol. 120, 2020, 231-232.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ *Landau D.*, Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine, *Law & Ethics of Human Rights*, Vol. 12, N. 2, 2018, 242.

⁵⁵ *Landau D., Roznai Y., Dixon R.*, Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, *The Politics of Presidential Term Limits*, edited by Alexander Baturo and Robert Elgie, Oxford University Press, 2019, 64.

⁵⁶ Ibid.

⁵⁷ *Roznai Y.*, Internally Imposed Constitutions, *The Law and Legitimacy of Imposed Constitutions*, edited by Richard Albert, Xenophon Contiades and Alkmene Fotiadou, Routledge, 2019, 61-62.

⁵⁸ *Rosenfeld M.*, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, Routledge, 2010, 195.

both the occupying powers and the German citizenry was to avoid a return to the conditions that led to war, and were eager to guard as much as possible against the resurgence of a tyranic regime.⁵⁹ As a result, provisions such as 1) principles democratic and social state, 2) federalism, 3) human dignity, 4) people as a source of power and 5) the right of a citizen to resist any person seeking to abolish this constitutional order if no other remedy is available were declared unamendable.⁶⁰ These provision have indeed withstood the time and the change of political majorities.⁶¹ German constitutional identity is anchored in the unamendable provisions of the Basic Law.⁶² Hence, it can be said with confidence that in the states similar to Germany can unamendable clauses represent constitutional identities.

3. Conclusion

It's not easy to understand constitutional identities. As it has been discussed, different professors have distinct perceptions about them. The aim of the article was to contribute to the understanding of constitutional identities. The article presents 4 different models, which can be used to track constitutional identities in different jurisdictions. One can find constitutional identities 1) outside the text of the constitution – in declarations of independence, 2) in preambles of constitutions, 3) in the actual text of a constitution, and/or 4) in the decisions of a court, which exercises constitutional control.

As stated in the article, generally, unamendable clauses represent constitutional identities. However, this formula doesn't work in every case. Based on the cases discussed, it can be argued that the unamendable provision reflects constitutional identity only when substantial amount of time has been passed after its adoptions and it has lived under different political majorities. These 2 requirements have to be met cumulatively.

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⁵⁹ *Ibid.*,196.

⁶⁰ Basic Law of Germany, art. 79, sec. 3.

⁶¹ About the German governmental parties see: German Political Parties, <<https://www.britannica.com/place/Germany/Political-process>> [10.11.23].

⁶² *Sajó A., Uitz R.*, *The Constitution of Freedom: an Introduction to Legal Constitutionalism*, Oxford University Press, 2017, 64-65.

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