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Essential Elements of the Democratic Rule of Law as an Expression of Constitutional Identity in the Czech Constitution¹

Introduction

I would like to start this article with a personal experience. Several years ago, during my study visit to the USA, I was discussing constitutional comparative law with an American colleague. At one point he asked me what ideals I understood the Czech Constitution to express. I wasn't quite sure what he meant, so I asked him to tell me how he perceived the American constitution. He replied that for him the ideal expressed in the U.S. Constitution is the freedom of the rider on horseback in an open landscape, limited by nothing but the horizon and his own interests and abilities. This seemed to me to be a very illustrative expression of the basic philosophy on which the Founding Fathers built the American constitutional system. I then tried to find a similarly apt statement of the Czech constitutional philosophy, but failed. Only later did I connect the notion of constitutional identity to this discussion. However, the attempt to find that Czech constitutional ideal, i.e. the Czech constitutional identity, periodically comes back to me. The present text is an attempt to move further in the search for it. It consists of two parts. In the first part I focus on the concept of constitutional identity in a general comparative perspective and its connection with constitutional philosophy. In the second part I try to apply these premises to the Constitution of the Czech Republic, specifically its core values denominated by the Czech Constitution as the essential elements of the democratic rule of law and analyze, whether they can be used to define Czech constitutional identity.

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1. Source and definition of constitutional identity

Even with an increasing amount of legal discourse on the topic in recent years, constitutional identity remains a fundamentally contested, in some aspects, even a controversial concept. A variety of definitions and approaches are found in the literature and case law. Two basic approaches derive from the two basic meanings of the word identity: (1) who or what a person or thing is, what qualities define it; (2) or very close similarity, affinity, or sameness, being identical. From the point of view of constitutional law and constitutional identity, both meanings have significant importance. Constitutional identity in the meaning of defining qualities of the constitution or constitutional system is a key factor in the process of interpreting a constitution. Constitutional identity in terms of sameness is an instrument of self-preservation of a constitution, and thus a key concept related to constitutional amendments and unchangeable provisions in a constitution. Many constitutions require that even after amending them, the constitutional system must remain “the same,” or in other words it still must retain its constitutional identity.

The key in-depth analysis was conducted by Gary Jeffrey Jacobsohn, who argues that “a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.”²

Michel Troper, on the other hand, sees constitutional identity as the result of a process of extracting certain essential principles distinct from other constitutional provisions, the purpose of which is to protect the integrity of the constitution so as not to weaken the constitution’s crucial connection to the people or nation it is intended to serve.³ He thus understands constitutional identity as part of the constitutional text, which is manifested in specific provisions enshrining the basic immutable principles of the state system. Examples include the requirement of a republican form of government enshrined in the constitutions of France or the USA, secularism in the Turkish constitution, or the protection of the essential elements of the democratic rule of law in the Czech Constitution. This perspective corresponds with the concept of the common constitutional traditions of the EU Member States,⁴ which has been elaborated and defined in more detail by the CJEU in its case law.⁵

² G.J. Jacobsohn, *Constitutional Identity*, Cambridge 2010, p. 7.

³ M. Troper, *Behind the Constitution? The Principle of Constitutional Identity in France* [in:] *Constitutional Topography: Values and Constitutions*, eds. A. Sajó, R. Uitz, The Hague 2010, p. 202.

⁴ See Article 6(3) of the Treaty on European Union (2012/C 326/01) and Article 52(4) of the Charter of Fundamental Rights of the European Union (2012/C 326/02).

⁵ See for example judgment of 17th December 1970, No. 11/70 *Internationale Handelsgesellschaft*, or judgment of 14th May 1974, No. 4/73 *Nold*.

Synthesizing what was said above, we can identify two general approaches to the perception of constitutional identity. According to the first approach, constitutional identity identifies a particular constitutional regime. It is therefore a certain set of elements or features that, when present in a constitutional system, mean that it is still the same (identical) constitutional system. Conversely, if any of these elements cease to be present, it will mean that the constitutional system is different. In the second approach, constitutional identity defines the intention of the sovereign, that is, in simple terms, who the people, who have adopted a given constitution, understand themselves to be. Its aim, then, is not so much to assess whether it is still the same constitutional system, but to define the constitutional sovereign, to say who we are. The first approach can, in theory, be implemented quite formally, based on certain constitutional mechanisms (e.g. form of government, form of state, system of checks and balances). The second approach, however, is inherently value-based.⁶

Constitutional identity is characterized by the fact that, unlike personal identity, it is a collective identity. This implies a particular dynamic tension between individual difference and belonging to a particular community. As in the case of personal identity, on the one hand we want to be different from others, but at the same time we want to belong to a particular group or community. We can observe here another dichotomy related to the discourse on constitutional identity focusing on the question as to whose identity it refers to: the constitution itself or the political community ruled by the constitution? As summarized by Zoltán Sente, European discourse focuses on the identity of the constitution itself, while U.S. scholars focus on the identity of the people and their attitude towards their constitution.⁷ In the Czech context, we can observe tension between the legal approach to constitutional identity, as defined by the Czech Constitutional Court and constitutional scholars, and popular approach, based on people's reflection of the nation's past and their aspirations.⁸

Constitutional identity must relate to the constitutional community as a whole, which can be a very difficult task in the case of some states, given the degree of social differences and the distinctiveness of different social groups. Setting certain principles accepted by all actors and thus creating a fair playing field for political competition is one of the key tasks of a constitution, which also reflects constitutional identity.⁹ For example, the Constitution of South Africa states in its preamble: "We, the people of South Africa, [...] believe that South Africa belongs to all who live in it, united in our diversity." If we consider not political or class differences, but regional or national differences, federalism may be a suitable element of constitutional identity to overcome

⁶ M. Tomoszek, *Podstatné náležitosti demokratického právního státu*, Praha 2015, p. 115.

⁷ Z. Sente, *Constitutional identity as a normative constitutional concept*, "Hungarian Journal of Legal Studies" 2022, Vol. 63, No. 1, p. 6.

⁸ D. Kosař, L. Vyhnaněk, *Constitutional Identity in the Czech Republic. A New Twist on an Old-Fashioned Idea?* [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Callies, G. van der Schyff, Cambridge 2019, pp. 112–113.

⁹ A. Arato, *Civil Society, Constitution, And Legitimacy*, Lanham 2000, p. 168.

these differences while preserving a common identity, as we can see in the example of the USA, India, or even Czechoslovakia.

2. Constitutional identity in the context of constitutional philosophy and comparative constitutionalism

We can understand the term “constitutional philosophy” in various ways. In a more general perspective, it is the idea of constitutionalism expressed by the existence of a constitution in itself and its philosophical foundation related to the community of individuals or state that establishes such a constitution. In a more specific perspective, constitutional philosophy is understood as a philosophy of a given constitution, i.e. a specific philosophical basis for a specific constitutional text, which, as a result of the specifics of a given state’s context, its historical, cultural, religious backgrounds and other developments, and the specifics of its constitutional and legal system, differ for each state. In other words, in this meaning constitutional philosophy defines on which philosophical foundations a given constitution is built. Most constitutions express, at least metaphorically, such ideas in their preambles or introductory provisions.

The question of constitutional identity is as old as the idea of constitutionalism itself. Aristotle, in his work *Politics*, reflects on the identity of a community of citizens (*polis*) in relation to the constitution of such a community: “the state is a partnership, and is a partnership of citizens in a constitution, when the form of government changes, and becomes different, then it may be supposed that the state is no longer the same, just as a tragic differs from a comic chorus, although the members of both may be identical. [...] And if this is true it is evident that the sameness of the state consists chiefly of the sameness of the constitution, and it may be called or not called by the same name, whether the inhabitants are the same or entirely different.”¹⁰

It is already clear from this notion that the concept of constitutional identity must be distinguished from national identity, although they can often overlap, combine or merge, depending on the content of a particular constitutional document. Some similarity between the two is seen in the fact that both national identity and constitutional identity bring together unknown, alien individuals into a national or constitutional community, often united by nothing other than the constitution or nationality. These communities can be described as so-called imagined communities, which have replaced family or tribal ties leading gradually to the emergence of an absolutist monarchy.¹¹

It is therefore not surprising that modern constitutionalism as well as the idea of the nation-state were born out of the philosophical ideals of the Enlightenment. The need to find a new bond to maintain social cohesion among individuals arose with

¹⁰ Aristotle, *Politics*, trans. B. Jowett, Kitchener 1999, p. 55.

¹¹ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London 2006, p. 7.

the end of feudalism, which was based primarily on hierarchical fief relations, the legitimacy of which stemmed from God himself, so that no consent or acceptance from subjects was necessary.¹² However, a nation-state must already have a clearly defined territory and population on which it can exercise state power, and therefore Georg Jellinek's still valid three-element definition of a state applies: territory, population, and state power.¹³

Basing a constitutional identity on a national or ethnic basis can also pose a risk, being a useful tool for populist political parties to enforce various restrictions on equality, especially for minorities, for example in times of migration or other socio-economic crises. Such tendencies are a manifestation of the fact that, with regard to the sources of constitutional identity (discussed in more detail below), constitutional identity generally corresponds with how a given community perceives its identity. These might not necessarily be only liberal democratic ideals of freedom, equality, and justice; history teaches us that it can also be slavery, segregation, or the superiority of a single pure race or a particular ideology.¹⁴ The Czech Constitution has, as a result of historical experience, abandoned the concept of a nation,¹⁵ and consistently uses the term "people."

Abandoning earlier (pre-modern) theories of legitimacy (and related sovereignty) creates a vacuum that is filled by a constitutional identity. According to Michel Rosenfeld, that vacuum is filled in three ways. First comes (1) negation in the form of overcoming or even rejecting previous constitutional regimes. Negation, however, is just another contribution to the void, so in order for a constitutional community to emerge, it is necessary to begin to construct a positive narrative about the identity of that community, or to paint a certain positive image that captures its identity. The consolidation of constitutional identity is achieved through (2) metaphor, the use of external similarity (e.g. structure or scale), or (3) metonymy, which transfers a label or concept to another object based on criteria other than similarity.¹⁶

All three of these elements are illustrated by examples from the constitutional order of the Czech Republic. The negation of the practices of the previous regime are seen clearly, for example, in Art. 11 para. 1, second sentence, of the Charter of Fundamental Rights and Freedoms¹⁷ or Art. 14 para. 4 of the Charter,¹⁸ but also in Art. 12 para. 2 of the Constitution of the Czech Republic.¹⁹ Metaphors are used often in both

¹² M. Rosenfeld, *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*, New York 2010, pp. 17–18.

¹³ G. Jellinek, *Všeobecná státopěda*, Praha 1906, p. 148 *et seq.*, pp. 412–456.

¹⁴ D.J. Galligan, M. Versteeg, *Social and Political Foundations of Constitutions*, Cambridge 2013, p. 10.

¹⁵ J. Plaňavová-Latanowicz, *National and European Identity – Opposing or Complementary Concepts in Czech, Polish and EU Law?*, "Studia Europejskie" 2019, Vol. 23(1), p. 72.

¹⁶ M. Rosenfeld, *Constitutional Identity* [in:] *Oxford Handbook of Comparative Constitutional Law*, eds. *idem*, A. Sajó, Oxford 2012, p. 759.

¹⁷ Published under No. 2/1993 Coll., hereinafter referred to as "Charter"; the provision states: "The right of ownership of all owners has the same legal content and protection."

¹⁸ The provision states: "A citizen cannot be forced to leave his or her homeland."

¹⁹ Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, as amended, herein-

the preamble to the Constitution and preamble to the Charter, for examples references to values shared by other democratic states or to the traditions of Czech and Czechoslovak statehood. Metonymy is seen, for example, in the term “democratic rule of law,”²⁰ which combines the term democracy, which is linked to a political system, with the rule of law, which is a legal concept.

The more common approach today is to view the concept of the democratic rule of law as a combination of basic principles of rule of law with basic principles of democracy.²¹ However, the concept of rule of law can be understood in different variations, in a narrow or wide sense,²² and similarly there are different categories of democracy, which is illustrated by tension between procedural²³ and participative²⁴ democracy. This makes it quite hard to precisely define whether a certain country is perceived as democratic or not,²⁵ or adheres to the rule of law or not, and thus the basic principles of democracy and the rule of law, which are the minimum threshold, are not understood uniformly. The concept of the democratic rule of law also cannot be understood as additive in the sense of certain states being democratic and adhering to rule of law, because the provision does not state democratic and respecting the rule of law (*demokratický a právní stát*). The provision is qualitative, indicating a higher level of blending democracy and the rule of law.²⁶ The concept of the democratic rule of law is therefore not just a combination of certain democratic principles and certain principles of the rule of law, but the key element is the qualitative shift from the formal (or rather façade) rule of law to the substantive (material) rule of law and participative democracy, allowing the fulfillment of basic constitutional values. The Czech Constitutional Court expressed the key feature of concept of the democratic rule of law in this way: “The Czech Constitution [...] subordinates the interpretation and application of legal norms to their substantive meaning, makes law conditional on respect for the fundamental constitutive values of a democratic society and measures the use of legal norms by these values.”²⁷

The value element is essential, because constitutional identity is often used for resolving conflicts within the constitutional community, between particular individuals and others, which are typically manifestations of the tension between identity

after referred to as “Czech Constitution”; the provision states: “No one can be deprived of citizenship against his or her will.”

²⁰ In Czech: “Demokratický právní stát,” Article 1 para. 1 of the Czech Constitution.

²¹ For example, see the structural distinction of principles of rule of law analyzed in V. Šimíček, *Commentary to Art. 1 para. 1* [in:] J. Filip et al., *Ústava České republiky, komentář* [Commentary to the Czech Constitution], Praha 2010, pp. 27–28, and democratic principles analyzed in V. Šimíček, *Commentary to Art. 9 para. 2* [in:] J. Filip et al., *Ústava České republiky, komentář...*, pp. 158–159.

²² B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, p. 91.

²³ See e.g. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London 1976, p. 269 et seq.

²⁴ R. Dahl, *Democracy and Its Critics*, New Haven 1989, p. 211 et seq.

²⁵ For comparative analysis of different countries see L. Diamond, *Defining and Developing Democracy* [in:] *The Democracy Sourcebook*, eds. R. Dahl, I. Shapiro, J.A. Cheibub, Cambridge 2003, p. 36 et seq.

²⁶ V. Mikule, R. Suchánek, *Commentary to Art. 1 para. 1* [in:] V. Sládeček et al., *Ústava České republiky, komentář* [Commentary to the Czech Constitution], 2nd ed., Praha 2016, p. 12.

²⁷ Decision of the Czech Constitutional Court from 21.12.1993, No. Pl. ÚS 19/93, Part A.

(sameness) and difference. Constitutional identity must provide answers to three fundamental questions related to the Constitution: "To whom is the constitution addressed? What should the constitution provide? And, how can the constitution be justified?"²⁸

For the first question, the easy answer is that the constitution is addressed to the citizens of the state whose constitution is in question. However, not everyone who is in the territory has the status of a citizen, and even for these individuals the constitution has major implications, especially in the area of fundamental rights. History provides numerous examples of systemic discrimination, such as slavery or apartheid, which have been reflected (and sometimes based) in the relevant constitutional documents. Today, it is particularly the case of migrants, who represent an ever-growing segment of the population.

The justification of the constitution is constructed today in a more or less similar way in all constitutions and is based on social contract theory. In the case of the Czech Constitution, this is evident in the first sentence of the preamble (We, the citizens...²⁹), similar to the US Constitution (We the people...). This provides an answer to the question of which subject can confer legitimacy on the constitution, which is closely related to the question of to whom the constitution is addressed. Logically, however, justification must be based also on facts other than who adopted the Constitution. After all, neither the Czech Constitution nor the U.S. Constitution were adopted by the people who are invoked by the constitutional text, but by a particular constituent assembly that had varying degrees of legitimacy to create and adopt the constitution. That said, it must be noted that the adoption of a constitution by referendum is one of the most common ways of adopting constitutions (see, for example, Switzerland in 1848, Chile in 1925, France in 1958, Estonia in 1992, Poland in 1997, or Syria in 2012). In addition to the constitutional subject – the people – social legitimacy is also important for the constitution as such, and especially for constitutional identity, providing justification for a new constitutional regime, whether it is a transition from a totalitarian regime to a democracy, a response to a social crisis or the resolution of a major social conflict.

The most difficult question concerns the content of constitutional regulation. In this respect, constitutions can quite legitimately follow very different conceptions based on contemporary contexts, political circumstances, historical experiences, or the objectives of the constitutional arrangements being adopted. Thus, the same institutions can fulfill fundamentally different roles in different constitutions. In the Federal Republic of Germany, federalism is an insurance policy for democratic order, while in Belgium it was introduced as a last-ditch attempt to hold together a deeply divided country. Some constitutions enshrine state religion and allow for an intense link between church and state, while others are strictly secular. As Hannah Pitkin notes: "to understand what a constitution is, one must look not for some crystalline core or

²⁸ M. Rosenfeld, *Constitutional Identity...*, p. 761.

²⁹ In Czech: „My, občané...“

essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept helps us to hold in tension."³⁰

This is closely linked to the issue of constitutional stability and amendments.³¹ Pavel Holländer asserts that the "imperative of immutability, which establishes the identity of the constitutional system, is immanent to the constitution and is contained in it even if it is not explicitly stated."³² If we see constitutional identity as the identity of a particular constitutional regime, it is necessary to somehow determine which changes of constitutional rules immediately lead to a change in constitutional identity and which do not. In other words, which constitutionally enshrined principles can be changed without changing constitutional identity and which constitutional principles define constitutional identity and are therefore immutable.

Similarly, it is important to note that the immutability of certain fundamental building blocks of the constitutional system can only prevent regime changes that take place through constitutionally prescribed procedures. Thus, for example, preventing parliament from passing a law that would extend the terms of office of its members indefinitely. However, it cannot protect the constitution from a violent coup d'état or de facto seizure of power. Jellinek points out in relation to immutable provisions that they can only be repealed by force, not by law.³³ The crucial difference, however, is that the absence of legitimacy is usually evident in the case of a violent seizure of power, while the appearance of legitimacy can be created by using constitutionally enshrined procedures. Some totalitarian regimes have created (or tried to create) the illusion that they respect rule of law because they have laws and courts, or that they are democratic because they hold elections.

Thus it can be concluded that constitutional identity is directly related to continuity. As long as constitutional identity is preserved, continuity is preserved, even though the specific wording of the constitutional text may change. Conversely, even without a change in the constitutional text, there can be a change in constitutional identity that stems from discontinuity: a typical example is the situation of Poland, which still has its 1997 Constitution in an (almost) identical form, yet it can be argued that since 2015 there has been a change in the understanding of constitutional identity, that at certain point there has been a break that has led to the creation of a new constitutional regime. The refusal of the Council of Ministers to publish the judgments of the Constitutional Tribunal can be seen as such a moment, effectively negating (without amending the Constitution) its function as the judicial guardian of constitutionality.

Finally, it is also necessary to point out the tension between an objectively defined constitutional identity and an ideologically influenced or conditioned understanding of constitutional identity, which then becomes a mere instrument of propaganda or

³⁰ H. Pitkin, *The Idea of a Constitution*, "Journal of Legal Education" 1987, Vol. 37, No. 2, p. 167.

³¹ For more detailed elaboration of this issue, see *How Constitutions Change. A Comparative Study*, eds. D. Oliver, C. Fusaro, Oxford 2013; and Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford 2016.

³² P. Holländer, *Materiální ohnisko ústavy a diskrece ústavodárce*, "Právník" 2005, roč. 144, č. 4, p. 327.

³³ G. Jellinek, *Všeobecná státověda...*, p. 512.

purposeful constitutional change. We know from history (but also from the present, as will be demonstrated below via the example of Hungary) a number of cases where constitutional identity or the ideological resources of constitutions have been misused to undermine or eliminate the democratic rule of law.

3. Constitutional Identity in the Czech Constitution

In the constitutional system of the Czech Republic, constitutional identity is closely linked to the concept of the essential elements of the democratic rule of law, enshrined in Art. 9 para. 2 of the Czech Constitution as a limit to constitutional amendments. It is therefore an example of an explicit, albeit ambiguously defined, clause limiting the scope of changes to the constitution. If we look at the concept of the essential elements of the democratic rule of law through the lens of the concept of constitutional identity, the essential elements can be applied on two levels: they identify the main features of the constitutional system of the Czech Republic, in the sense of determining whether it is still the same constitutional system even after some constitutional changes have been made (ensuring the identity of the constitutional system), but they also define the value framework of the Constitution of the Czech Republic, thus fulfilling the unifying and reconciling function of constitutional identity.

Acknowledging the comparative context, the question arises whether the concept of the essential elements of the democratic rule of law should be understood universally or as something specific to the Czech Republic, or even as a compromise between a universal and particularistic approach. If the essential elements of the democratic rule of law are to define the constitutional identity of the Czech Republic, this would suggest that they also contain elements specific to the Czech Republic since it is difficult to imagine a constitutional identity that would merely copy the constitutional identities of other states. On the other hand, there is certainly room for the Czech constitutional identity to subscribe to universal principles recognized in the family of Western democracies. Therefore, if there is no solution universally regarded as the only possible one, the constitution-maker must have made a choice that is sometimes so fundamental and embedded in our constitutional identity that it is impossible to reverse this decision.

This leads to the conclusion that the protection of the essential elements of the democratic rule of law comprises both the generally accepted basic attributes of the democratic rule of law (e.g. today we cannot imagine the democratic rule of law in which there is no parliament or the sovereignty of the people is not guaranteed, etc.), as well as elements specific to the Czech Constitution that are not present in some other states, which undoubtedly belong within the concept of the democratic rule of law (e.g. a specialized Constitutional Court, an individual constitutional complaint, the republican character of the state, the separation of state and church). This composite conception is confirmed by Yaniv Roznai, according to whom the content of the material

core of a constitution can be divided into universal principles common to all democratic societies and particularistic principles that are typical of certain political cultures.³⁴

From a practical perspective, when courts define and interpret constitutional identity, the key question appears to be the extent to which it is defined purely on the basis of the constitutional history and traditions of a given state. This, of course, depends on the specific conditions and contexts of particular constitutional systems. George P. Fletcher's view that in interpreting the constitution it is necessary to turn inward and reflect on the constitutional identity and legal culture in which the interpretation is made,³⁵ is strongly linked to long-standing U.S. constitutional tradition, culture, and history, and thus is not suitable to be applied in relation to so-called "new" constitutions, which lack such extensive context, background, and related discourse. Especially in a situation when a new constitution replaces an older totalitarian document, constitutional identity serves as a tool for discontinuity.

However, constitutional identity alone is incapable of resolving the complex issues presented to a constitutional court. In the early years after adopting a new constitution, the decisions of the constitutional court significantly contribute to determining, what exact identity a given constitutional system develops. In the Czech Republic, the Constitutional Court has often pondered adhering to the historical Czech constitutional tradition preceding the communist regime and leaning toward the modern European constitutional tradition.³⁶

When considering the relationship between constitutional identity and the essential elements of the democratic rule of law, it is essential to determine whether the concept enshrined in Art. 9 para. 2 of the Czech Constitution is a reference to a universal principle, so that it can only be defined on the basis of universal, universally accepted standards, and to what extent it is a manifestation of a specific Czech constitutional identity. I believe that universal elements represent only part of the concept of the essential elements of the democratic rule of law and reflect the fact that the Czech Republic identifies itself as part of a community of states based on respect for these principles. David Kosař and Ladislav Vyhnaněk argue that the emphasis placed by the Czech Eternity Clause expressed in Art. 9 para. 2 of the Czech Constitution on the values and aspirations shared with other states of Western and Central Europe reflects the sentiment of early 1990s, when "the Czech Republic aimed to deal with its past and then 'return to Europe.'"³⁷

³⁴ Y. Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, "American Journal of Comparative Law" 2013, Vol. 61, No. 3, p. 714. Similarly also O. Preuss, *Klausule věčnosti: Je možné odstranit liberální demokracii?*, Plzeň 2015, p. 237.

³⁵ G.P. Fletcher, *Constitutional Identity* [in:] *Constitutionalism, Identity, Difference, And Legitimacy, Theoretical Perspectives*, ed. M. Rosenfeld, Durham 1994, p. 223.

³⁶ R.G. Teitel, *Reactionary Constitutional Identity* [in:] *Constitutionalism, Identity, Difference...*, p. 235; see also J. Elster, *Constitutionalism in Eastern Europe: An introduction*, "University of Chicago Law Review" 1991, Vol. 58, No. 2, pp. 447, 476–477, 481.

³⁷ D. Kosař, L. Vyhnaněk, *The Evolution and Gestalt of the Czech Constitution* [in:] *The Max Planck Handbooks in European Public Law*, Vol. 2, *Constitutional Foundations*, eds. A. von Bogdandy, P.M. Huber, S. Ragone, Oxford 2023, p. 101.

However, universally accepted principles are not sufficient in themselves to define the Czech constitutional identity. The prime example of a provision, which cannot be perceived as universally accepted, is the Eternity Clause itself.³⁸ Besides certain core principles, shared only by some other constitutions, the Czech Republic also has its own unique constitutional identity, which is based on its historical experience, social conditions, culture, and tradition and is reflected in the choices made by the constitution-maker in shaping the constitutional system of the Czech Republic. In summary, this means that the notion of the essential elements of the democratic rule of law has a certain universal component that reflects the external relations and the anchoring of the Czech Republic within the international community (i.e., where we agree with other states), and a specific component that is unique to the Czech Republic and distinguishes it from other states.

Based on an analysis of the case-law of the Czech Constitutional Court,³⁹ the following elements define Czech constitutional identity:

- A) Elements deriving from constitutional traditions common to democratic states respecting the rule of law:
 - a) Sovereignty of the people (government of the people, by the people, for the people),
 - b) Free political competition and free elections,
 - c) Firm time-limits for public offices,
 - d) Decision-making of majority respecting the protection of minorities,
 - e) Separation of powers,
 - f) Independence of judiciary and judges,
 - g) Core (essential content) of fundamental rights,
 - h) Testing limitations of fundamental rights by the test of proportionality,
 - i) Principle of legality, rule of law, and essential requirements for quality of legislation,
 - j) Legal certainty, transparency, predictability, and prohibition of arbitrary decision-making,
 - k) Basic constitutional values such as human dignity, freedom, and justice,
 - l) Responsibility and control of public officials;
- B) Elements specific to the Czech Constitution:
 - a) Eternity clause (unchangeability of certain parts of constitution),
 - b) Republican form of state,
 - c) Ideological and religious neutrality,
 - d) Existence of a specialized Constitutional Court,
 - e) Prohibition of decreasing procedural protection of fundamental rights,
 - f) Reservation of regulation of certain issues to a statute issued by Parliament,
 - g) Unitary state respecting the right to self-government,
 - h) Right to resistance.

³⁸ For detailed comparative analysis of the explicit and implicit limitations of constitutional amendments, see Y. Roznai, *Unconstitutional Constitutional Amendments...*, p. 685 *et seq.*

³⁹ For details, see M. Tomoszek, *Podstatné náležitosti...*, pp. 154–169.

Last, but not least, it must be noted that the constitutional identity is not an immutable component of constitutionalism, set in stone at the moment of the adoption of a constitution, but a dynamic component of constitutionalism that evolves as a result of decisions taken either in the legislative process or in the constitutional judiciary. In making specific decisions, therefore, we should not ask what solution derives from our constitutional identity, but whether our preferred solution fits with our perception of our constitutional identity, so in other words, if we do make such a decision, will it change us. In making this decision, of course, we must look back to how we have perceived our constitutional identity in the past, and if we wish to depart from an earlier conception, we should make a compelling case for doing so, e.g. on the basis of social developments or the unsustainability of the previous conception.

Conclusions

Defining constitutional identity is a rather problematic task, as there is no universal agreement on its definition. It is possible to distinguish opinions which perceive constitutional identity either as a set of certain constitutional rules that are the basis of a given constitutional system and make it possible to determine whether it is still an identical system, or approaches that perceive identity as an expression of the identity of the constitutional sovereign, i.e. to whom a given constitution is addressed. Quite logically, the first approach prevails in legal scholarship, as it is more tractable from a legal perspective and has concrete implications, especially in the area of reviewing constitutional amendments.

Constitutional identity has a variety of sources, but the unifying element for most authors who have addressed this question is the context of the constitution's creation. This can be thought of as a reaction to the previous regime, to the specific circumstances from which the new constitution emerged, but also as an expression of who the people adopting the new constitution feel they are. Identity can also be expressed aspirationally, i.e. who we want to become, or traditionally, i.e. who we want to remain. Of course, a combination of these approaches is also permissible, because usually the purpose of adopting a constitution is both to preserve the basic constitutive values of a given society, but at the same time that society has certain aspirations that it wants to achieve by establishing a given constitutional regime.

In the case of the Czech Republic, constitutional identity is directly related to the concept of the essential elements of the democratic rule of law. The very naming of this concept defines the basis of the constitutional identity of the Czech Republic, according to which the Czech Republic is a democratic state governed by the rule of law and wants to remain so in the future. However, the constitutional identity is not defined in any more detail in the constitutional order, which is why the Constitutional Court of the Czech Republic has undertaken this task. When defining in more detail the content of the concept of the essential elements of a democratic state governed

by the rule of law, the basic problem is whether it is a universal concept (i.e. what is usually understood in different states as the essential elements of a democratic state) or whether it stems specifically from the Czech context (i.e. how the Czech constitutional system understands the democratic rule of law). Although identity is something specific to each constitutional system, in a comparative approach it is clearly visible that many elements of constitutional identity are present in a majority of democratic states respecting the rule of law (e.g. separation of powers, judicial independence, or protection of human rights). Still, there are some issues these states may differ in (relationship of state and church, form of state, territorial self-government), making them unique and distinguishable, and as a result constitutional identity will contain both components. The essential elements of the democratic rule of law must therefore be interpreted to contain both groups.

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Summary

Maxim Tomoszek

Essential Elements of the Democratic Rule of Law as an Expression of Constitutional Identity in the Czech Constitution

The present article consists of two parts. The first part focuses on the concept of constitutional identity in a general comparative perspective and its connection with constitutional philosophy. In the second part, these premises are applied to the Constitution of the Czech Republic, specifically its core values denominated by the Czech Constitution as the essential elements of the democratic rule of law in order to analyze whether they can be used to define Czech constitutional identity and what specific principles constitute the constitutional identity of the Czech Constitution.

Keywords: constitutional identity, democratic rule of law, Czech Constitution, constitutional philosophy, constitutional values, eternity clause.

Streszczenie

Maxim Tomoszek

Podstawowe elementy demokratycznych rządów prawa jako wyraz tożsamości konstytucyjnej w czeskiej konstytucji

Niniejszy artykuł składa się z dwóch części. Pierwsza część koncentruje się na koncepcji tożsamości konstytucyjnej w ogólnej perspektywie porównawczej i na jej związku z filozofią konstytucyjną. W drugiej części założenia te zostały zastosowane do Konstytucji Republiki Czeskiej, a konkretnie do jej podstawowych wartości określanych przez czeską konstytucję jako zasadnicze elementy demokratycznego państwa prawa, w celu przeanalizowania, czy można je wykorzystać do zdefiniowania czeskiej tożsamości konstytucyjnej, oraz ustalenia, jakie konkretne zasady stanowią tożsamość konstytucyjną czeskiej konstytucji.

Słowa kluczowe: tożsamość konstytucyjna, demokratyczne rządy prawa, czeska konstytucja, filozofia konstytucyjna, wartości konstytucyjne, klauzula wieczności.