Constructing the Constitutional Self

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Constructing the Constitutional Self: Meaning, Value, and Abuse of Constitutional Identity

Abstract: The concept of constitutional identity has been criticized for being too indeterminate and prone to abuse by authoritarian governments. It has been suggested that constitutional identity should be eliminated from European constitutional discourse. This article argues against the banishment of constitutional identity. First, it shows that the critiques of constitutional identity fail to engage with the concept properly and do not offer a credible alternative. Second, the article advances an account of the concept and normative value of constitutional identity. Third, the article argues that such an account of constitutional identity allows us to recognize instances of its abuse.

1. Introduction

Constitutional concepts are coming into and growing out of fashion at a rapid pace. New vocabularies are introduced without reflection and often as a reflex; and they are abandoned in a similar way, without serious and nuanced consideration. Perhaps this is a consequence of the dynamism of our times, or it simply validates the idea that there is no unique and final vocabulary to describe our constitutional universe.[1] But, as a consequence, some concepts become outmoded even before they are properly understood. This seems to have been the faith of constitutional identity.

Until recently, constitutional identity was seen as an accommodating and pluralistic solution to the problem of competing claims of constitutional authority in Europe.[2] How this came to be is well-known. The supremacy claims of EU law were met with resistance from some constitutional courts in the Member States. Such resistance was based on the notion that there are certain core principles, values, and structures in domestic constitutions which are so fundamental that they pose limits to the supremacy of EU law. This idea was, for example, central to the Italian Constitutional Court's *controlimiti* doctrine and the German Constitutional Court's (FCC) analysis in *Solange I* and *II*:

[1] R Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1979).
[2] See e.g. A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417.

in both instances, domestic courts reserved the right to assess the compatibility of EU law with the most central principles of their constitutions, such as fundamental rights.[3] In an attempt to provide the justificatory grounds for such claims, constitutional courts sometimes framed them in the language of sovereignty.[4] But – as the traditional conception of sovereignty was considered to be an inadequate conceptual foundation for European constitutional (dis)settlement and perhaps even inimical to the process of European integration – grounding of national constitutional limits to the supremacy of EU law in such a vocabulary was deemed mistaken (at best) and hazardous (at worst).[5]

The gradual introduction of the concept of constitutional identity in EU law was thus perceived as a welcome development that would put sovereignty claims to rest.[6] First introduced in the Treaty of Maastricht in the form of 'national identity',[7] it has since been more firmly connected with the constitutional structures of the Member States.[8] It is now widely assumed that Article 4(2) TEU, despite its unclear wording, requires respect for a distinctly constitutional identity: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional'. At the same time, and particularly after the mention of constitutional identity in the Treaty of Lisbon, national constitutional courts have increasingly been referring to this concept to demarcate the essential parts of domestic constitutional frameworks which are not subject to the supremacy of EU law.[9] In comparison to sovereignty, constitutional identity seemed to have limited the grounds upon which the national courts could review the compatibility of EU law with their own constitution, and it was celebrated as a more open and dialogical concept which would reduce the scope of constitutional contestation.[10] But the

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[3] *Frontini v Ministero delle Finanze* (1974) 2 CMLR 372; *Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreideund Futtermittel* (1974) 37 BVerfGE 271, [1974] CMLR 540; *Re Wünsche Handelsgesellschaft* (1986) 73 BVerfGE 339, [1987] CMLR 225.

[4] See e.g. *Maastricht judgment* (1993) BVerfGE 89, 155; *Brunner v European Union Treaty* CMLR [1994] 57.

[5] See e.g. N MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) *European Law Journal* 259.

[6] For a particularly insightful analysis, see: F-X Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDG, 2013).

[7] The Treaty of Maastricht, Article F.

[8] See the (failed) Treaty Establishing a European Constitution, Article I-5(1), where the connection between national and constitutional identity was first made.

[9] For a comprehensive overview of the use of constitutional identity arguments in the Member States see Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) and J Scholtes, 'Abusing Constitutional Identity' (2020) *German Law Journal*, forthcoming, 5-8 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698001).

[10] Francois-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014).

meaning and normative value of the concept were far from clear: the parts of constitutional framework that constitutional identity referred to, and the reasons to respect it, remained elusive.

Before almost any theoretical headway had been made on these questions, the wheel started turning. As Europe's authoritarian regimes began to use constitutional identity to shield parts of their domestic law from European scrutiny, the chorus of legal academics demanding the exclusion of the concept from European constitutional discourse became louder.[11] This is an understandable reaction to a serious problem. Constitutional identity arguments have been abused in these Member States to protect the features of constitutional framework that constitutionalize the institutional preconditions of authoritarian rule or introduce policies which are openly at odds with some of the most central European values.[12] As a consequence, the appeal of constitutional identity in academic circles has diminished, and proposals to move to new vocabularies - or revert to old ones - abound. But as much as the meaning and normative grounds of constitutional identity were unclear when it was introduced, such renunciation of constitutional identity neither engages with this concept seriously nor does it offer a credible alternative. Thus, there is a need to reconsider some of these arguments and reflect on the meaning, value, and abuse of constitutional identity in a more rigorous way.

In this article, I want to caution against the premature banishment of constitutional identity. In the first part of the article, I will argue that some of the most prominent critiques of constitutional identity fail to recognise the material, conceptual, and normative complexity of the problem they set out to solve. In the second part, I will offer a conceptual account of constitutional identity and suggest several ways in which we may understand its value. In the final part, I will explain how the proper conceptual and normative explanation of constitutional identity allows us to identify instances of its abuse.

2. Critiques of constitutional identity

Two lines of critique of constitutional identity have become particularly prominent in recent years. The first argues that the concept is hopelessly indeterminate. According to this objection, there is no

[11] Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journa*l 457; R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59.

[12] See the discussion of the recent use of constitutional identity in Hungary and Poland below.

credible way of supplying the notion of constitutional identity with enough content and substance, and this leads to the rule of law problems. For example, in their recent intervention, Fabbrini and Sajó argue that any of the possible ways of delimiting the content of constitutional identity eventually runs into insurmountable difficulties. If, for example, the unamendability of constitutional provisions is taken as the marker of the content of constitutional identity, then this will clearly not be adequate in systems which do not have eternity clauses in their constitutions. Moreover, as Fabbrini and Sajó suggest, even in systems that do have them, such clauses are subject to interpretation. As they put it, 'even a textually identifiable constitutional identity component is subject to creative interpretive extensions',[13] and – where there is no explicit demarcation of constitutional identity – its content remains a 'subjective judicial choice'.[14] They thus argue that constitutional identity suffers from 'dramatic indeterminacy which leads to arbitrary use' and 'cannot satisfy the requirements of the rule of law'.[15] This critique does have some merit, and there is work to be done on the criteria for determining the scope of constitutional identity. But – at the same time – the critique fails in several important ways.

First, it is not clear that constitutional identity is distinctly indeterminate. It resembles many other constitutional law concepts which do not usually attract this kind and amount of critique. It would, for example, be absurd to think that concepts such as democracy, legitimacy, equality or dignity should be banished from constitutional discourse only because they are indeterminate or contested. Second, the critique relies on a rather formalistic understanding of constitutional law and adjudication: it seems to object to constitutional concepts which are 'open to components which refer and include pre-legal elements', are not 'legally sanitized',[16] or are simply subject to judicial interpretation.[17] If we were to abandon all constitutional concepts which necessitate some form of extra-legal analysis, rely on deeper cultural meanings, or require interpretation, we would soon be left without any constitutional concepts at all. Third, the critique does not properly examine the implicated values. Not only does the critique presuppose that the rule of law equals legal certainty, but it also assumes that legal certainty is of such paramount importance that it ought to take precedence over any value that constitutional identity might have. Legal certainty is, of course, important but it is not the only

[13] Fabbrini and Sajó (n 11) 467.
[14] Ibid 468.
[15] Ibid 472.
[16] Ibid 465.
[17] Ibid 467.

requirement of the rule of law and needs to be balanced against the potential value of constitutional identity. In other words, without explaining why constitutional identity may be valuable we cannot conclude that legal certainty ought to take priority. There are often very good reasons to value flexibility in constitutional law, as opposed to (crudely understood) legal certainty, and we simply cannot know this lest we engage in a deeper normative analysis. For instance, and in European context at least, it is not straightforwardly clear that the flexibility ingrained in the system that respects constitutional identity is not to be preferred to a potential hierarchical solution that would seek to eliminate such flexibility, especially if that allows for diversity of approaches based on a single, although by no means uniform, legal criterion.[18] So, this critique raises important questions but rests on a range of unsupported (and some unsupportable) assumptions, while – at the same time – it does not probe the value of constitutional identity.

The second critique cuts much deeper and suggests that constitutional identity is particularly prone to abuse. This is partly connected to the indeterminacy point: if a concept is indeterminate, then it can be interpreted in ways which are not normatively attractive. But, as I said, the same applies to many other concepts we use in constitutional law. Hence, the main point this critique makes is that there is something about constitutional identity that makes it particularly apt for abuse by governments with nationalistic, populist, or authoritarian tendencies. In particular, it is the connection with identity that makes it parochial and suitable for resisting liberal democratic values with more universalistic ambitions. I suspect that this is, in fact, the main motivation behind Fabbrini and Sajó's indeterminacy critique, which on its own does not explain their dissatisfaction with the concept;[19] the possibility of abuse is also central to concerns about constitutional identity recently raised by Kelemen and Pech.[20]

There are some typical examples used to illustrate the problem of abuse. In 2016, the Hungarian Constitutional Court – at that point already packed and loyal to Viktor Orbán – issued a ruling indicating that it would support his defiance of the Council Decision on refugee settlement quotas based on the notion of constitutional identity;[21] and in 2018, the Polish government invoked

[18] This is similar to the usual complaint that departing from strictly understood supremacy undermines equality of the Member States. But if all states are equally allowed to rely on constitutional identity, then the conclusion that there is an unjustified unequal treatment of the Member States does not follow. See F Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 *German Law Journal* 1015.

[19] Fabbrini and Sajó (n 11) 469-472.

[20] Kelemen and Pech (n 11).

[21] Hungarian Constitutional Court, Decision 22/16 (XII.5.) of 30 November 2016 (for an analysis and translation of main parts of the decision, see G Halmai, 'Abuse of Constitutional Identity. The Hungarian

constitutional identity to support its judicial reform which was set to completely undermine, if not eradicate, judicial independence by allowing the executive to interfere with the composition and functioning of the courts.[22] There are two elements common to both attempts to use constitutional identity in this way. On the one hand, constitutional identity claims were not backed by plausible arguments about the deep and structural features of the constitutional framework but were either more or less openly fabricated, or, at best, unsupported. And on the other, such claims were invoked to support policies which were in clear violation of the central values of EU law articulated in Article 2 TEU, such as dignity, equality and the rule of law. Correspondingly, the complaint against such use of constitutional identity is two-fold. First, because the notion of constitutional identity is underdetermined, it can be interpreted as a trump card that allows the Member States to prioritize their current local policies over obligations that might arise from EU law. And second, because of the nexus with identity, it is not a coincidence that such policies are often based on nativist ideologies which fly in the face of fundamental European values.

This is all correct. But the critics go even further than this in arguing that constitutional identity is inherently dangerous and that it ought to be replaced with unrestricted supremacy of EU law. Kelemen and Pech, for instance, contend that 'the issue is not simply that Polish and Hungarian governments are using the [constitutional identity] arguments in bad faith (although they certainly are doing that)' but that 'these autocratic governments are simply carrying arguments about constitutional identity to their logical conclusions'.[23] Their preferred solution is to eliminate the notion of constitutional identity from European constitutional space and replace it with the traditional understanding of EU law supremacy which would know no such constitutional identity-based exception.[24]

Although important, this critique does not marshal enough evidence to support the conclusion that constitutional identity should be jettisoned. First, it is not clear whether Kelemen and Pech recognize that many of their claims actually depend on the existence of distinction between the use and abuse of constitutional identity. Their argument oscillates between the claim that constitutional

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Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) *Review of Central and East European Law* 23); Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248, 24.9.2015.

[22] The Chancellery of the Prime Minister, 'White Paper on the Reform of Polish Judiciary', Warsaw, 7 March 2018, para 170.

[23] Kelemen and Pech (n 11) 64-65.

[24] Ibid 61.

identity is prone to abuse in current political context, and the claim that the bad faith use of constitutional identity simply takes this notion to its logical conclusion. They cannot have it both ways. For if these are the instances of abuse of constitutional identity, then there must be an understanding of constitutional identity against which we can recognize such abuses; if such abuses actually take constitutional identity to its logical conclusion, then constitutional identity is dangerous as such and there is no understanding against which we can distinguish its use from abuse. There is however nothing in Kelemen and Pech's intervention that supports this latter reading, and – in fact – they persistently rely on the distinction between the use and abuse of constitutional identity to support their arguments. For instance, they say that the use of constitutional identity in good faith has not been necessarily problematic when we could assume that 'all national judiciaries would engage in sincere cooperation and mutual accommodation';[25] that 'it is clear that appeals to "constitutional identity" provision of the EU Treaties should not be used to justify violations of core EU values';[26] that Article 4(3) TEU requires 'compliance with the principle of sincere cooperation' which 'the Polish government is clearly violating';[27] that judicial reforms justified in terms of constitutional identity are 'in obvious violation of Poland's own constitution';[28] and that constitutional identity poses 'limits' on national authorities.[29] If we can indeed distinguish between the use and abuse of constitutional identity, then it does not immediately follow that the concept should be abandoned, but that we should first try to develop a better understanding of the meaning of the concept that would enable us to single out the instances of abuse, and – should there be some normative value to such concept – devise institutional processes that would identify and reject its abuse.[30]

Second, there is no evidence to suggest that the problem which motivates the critique will disappear if we abandon the concept of constitutional identity. Fabbrini and Sajó for example argue that 'the possibility of a nationalist interpretation is coded in the politics of certain countries' (to which

[25] Ibid 60.
[26] Ibid 69.
[27] Ibid 70.
[28] Ibid.
[29] Ibid 71. Similarly, Fabbrini and Sajó argue that constitutional identity could in fact enable national courts and the CJEU to 'find a constructive compromise' which would allow for accommodation of national specificities (Fabbrini and Sajó (n 11) 470).
[30] This is something that Kelemen and Pech implicitly support when they plead for a more prominent role of the CJEU and European Parliament in making sure that the values from Article 2 TEU and the principle of sincere cooperation from Article 4(3) TEU are respected in instances when the Member States invoke constitutional identity clause. Kelemen and Pech (n 11) 73.

we may add – *all* countries, as no European country is immune to this possibility),[31] and that 'the intellectual weaknesses of a concept do not decide its success in practice'.[32] Similarly, Kelemen and Pech suggest that 'autocratic authorities care little about conceptual logic or an honest reading of EU law'.[33] If we read these, otherwise correct, statements together, it is doubtful that there are grounds for optimism and for suggesting that the problems will fade away if the constitutional identity exception to the supremacy of EU law is eliminated. It seems, in fact, that the critics of constitutional identity are proposing a solution to which they have previously denied any significance: if concepts and their logic do not affect the practice, then what is the purpose of tackling these problems by removing such concepts?[34]

A more fundamental concern with this argument is that it neglects the material and historical conditions that brought about the specificities of EU constitutional order with its competing claims of supremacy. It is not the case that constitutional identity is used only because it is there, but it is used because there are social, political, cultural, and legal reasons why the courts in the Member States resort to it. None of these reasons will disappear with the disappearance of constitutional identity, and this in fact may cause a relapse into vocabularies much less friendly to EU integration. At the very least, it is clear that the spectre of authoritarianism will not evaporate if constitutional identity is eliminated from European constitutional space, and there are good reasons to think that authoritarians and nationalists would use any available concept to pursue their political agendas. Finally, while the critique is naïvely legalistic in suggesting that a simple change in the concept that we use can change the material conditions that led to its use, it is also legalistically naïve in neglecting how difficult it would be to eliminate the concept of constitutional identity from existing law, both because of the allusion to constitutional identity in Article 4(2) TEU and because it is now embedded in constitutional doctrines of the Member States.

Third, this critique neither pays attention to the potential value of constitutional identity, nor does it properly justify its own preferred solution to the problem. Recall that, for Kelemen and Pech, the most appropriate answer to the problem is to embrace the unrestricted supremacy of EU law. In their view, pluralistic foundations of European constitutional order should 'be replaced with a more traditional understanding of the primacy of EU law - namely that developed by the CJEU in a long

[31] Fabbrini and Sajó (n 11) 470.
[32] Ibid 472.
[33] Kelemen and Pech (n 11) 69.
[34] For an elaborate and persuasive argument along these lines see Scholtes (n 9) 21-23.

line of jurisprudence since *Costa*'.[35] But they provide no arguments to support this conclusion. For Fabbrini and Sajó, the problem is that the arguments from constitutional identity undermine 'enhanced European integration' and show 'an anti-integration inclination or bias'.[36] There is nothing in their contributions, however, that speaks about the potential justificatory grounds of the supreme constitutional authority of EU law: European integration is simply taken to be synonymous with the supremacy of EU law, and it is simply assumed that such supremacy is uncontroversial. To be clear, I do not think that these claims are without any merit, but that they are not supported with arguments: it appears as if the absolute supremacy of EU law is an undisputable default position, the justification of which is simply reinforced or made more visible by the threat of authoritarianism.[37]

The constitutional situation in Europe is, for better or worse, much more complex than that. It is hard to think about the grounds of EU law supremacy without realizing that much of these grounds rest on the possibility of the Member States to retain the fundamental features of their constitutional orders while still being a part of the integration processes. At the same time, these critiques do not consider any potential value of constitutional identity, or potential value of a European constitutional order that respects such an identity. There is also no mention of some relative value of such a system when compared to a possible system that uses a less integrationist constitutional register to articulate the claims of diverse constitutional orders, or its relative value when compared to a possible disintegration that could ensue as a consequence of closing the channels that protect domestic constitutional specificities.[38]

To sum up, these recent critiques raise some serious questions about constitutional identity. They could be right if it turns out that constitutional identity is particularly apt for abuse by authoritarians and nationalists and has no inherent value that would make the risk of protecting it worthwhile. What is missing from these critiques, however, is a serious consideration of the meaning, purpose, and potential value of constitutional identity. It might be the case – or at least I will suggest

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[35] Kelemen and Pech (n 11) 61.
[36] Fabbrini and Sajó (n 11) 472 and 468.
[37] See e.g. M Baranski, F Brito Bastos, and M van den Brink, 'Unquestioned supremacy still begs the question', *VerfBlog,* 2020/5/29, https://verfassungsblog.de/unquestioned-supremacy-still-begs-the-question/.
[38] In his other writings Kelemen suggests that the only choice is between primacy and leaving the EU, for the 'states that see EU law as incompatible with inviolable elements of their constitutional identity remain free to leave the Union'. R Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 *Maastricht Journal of European and Comparative Law* 136, 141.

so – that the concept is not without value and that it has some internal resources to resist the so-called abuse problem.

3. Meaning and Value of Constitutional Identity

I have argued elsewhere that the concept of constitutional identity denotes the core evaluative commitments that arise in a particular community by virtue of the fact that such a community has a constitution.[39] This meaning – I believe – tracks the way in which the concept has been used, but also captures a family of related terms which are utilized to express the idea that some features of constitutional framework are valued so highly that they may require special treatment. The institutional consequences of constitutional identity range from blocking the supremacy claims of parallel constitutional orders (as is the case in the EU), to raising the stakes when it comes to their constitutional change, or taking precedence over other provisions and principles in constitutional interpretation.[40] Let us look more closely at the key properties of constitutional identity that follow from this understanding.

First, constitutional identity incorporates evaluative commitments that are purportedly ascribable to a constitutional community. While it is difficult to ascertain what this precisely means, and how such kind of agreement/consensus is to be expressed or accessed, it is important to note a nuance that follows from this. Constitutional identity's habitat is not straightforwardly in the domain of the normative: it refers to the facts about normative attitudes of a community. This is not to say that constitutional identity is not expressive of values. The arguments based on constitutional identity often refer to values and principles that are fundamental to a particular constitutional community. But - while constitutional identity does express values - such values are not justified or accessed directly but are mediated through factual attitudes of a range of actors in a constitutional system. This means that constitutional identity requires separate normative grounds which would show that these attitudes require respect, or that the values they express are indeed valuable.

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[39] Some of the analysis in this part builds on the arguments made in B Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017) ch 2.

[40] See more on constitutional identity in general in Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) and Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

Second, not all normative attitudes obtaining in a constitutional community can be considered a part of its constitutional identity. The reference to identity is meant to narrow the scope of relevant attitudes only to those that are self-definitional. Such attitudes need to be not only widely shared, but they must also be non-trivial and connected to the sense of the self of a constitutional community. They need to be deeply embedded in constitutional practices to the extent that – if compromised – constitutional community would lose its very evaluative core, and they need to form a significant part of the way in which members of a constitutional community recognize themselves as being a part of it. So, constitutional identity refers to a subset of attitudes which are identified with a reference to their wide acceptance and depth of embeddedness.

Third – and perhaps most important – this form of identity is constitutional. Although it is based on core evaluative attitudes which cannot be renounced without the political community ceasing to be what it is, the evaluative attitudes delineated by constitutional identity are not just any attitudes that happen to obtain in a community at a particular point in time. As intimated earlier, they have to arise in virtue of the fact that such a community has a constitution. What this means is also uncertain. But I want to suggest that without unpacking this element of constitutional identity we cannot make progress in understanding its meaning and value.

Three corresponding questions arise from these observations. First, what makes a subset of evaluative attitudes that bear a relevant connection with the constitution a part of an identity? Second, what makes an identity constitutional? And third, once this is solved, what makes these attitudes valuable or worthy of respect? The first two questions are structural: they are meant to shed some light on the concept itself and help us identify the range of attitudes that determine the content of plausible constitutional identity claims. The third is normative: given the structural features of the concept, can it be appropriately justified, and are there enough resources that would alleviate the indeterminacy concerns and keep the alleged propensity for abuse in check? I will start by saying something about the first two questions in order to clarify the structural features of constitutional identity, and I will then analyse each of these structural features in light of the third question to probe the value of constitutional identity. I shall then turn to the question of abuse in the next section.

3.1 Identity?

In relation to the first question, it is fruitful to begin the analysis from the broader notion of evaluative identity. If constitutional identity is about the evaluative attitudes that are a part of the identity of a constitutional community, it is important to shed some light on the notion of evaluative identity first, and then understand if and how it may play out in complex constitutional settings. One way of articulating the notion of evaluative identity is to say that it comprises a set of values that are a precondition for occupying an evaluative perspective.[41] As Charles Taylor puts it, 'identity refers us to certain evaluations which are essential because they are the indispensable horizon or foundation out of which we evaluate or reflect'; to be without them is to be 'a kind of extensionless point, a pure leap into the void'.[42] This understanding of evaluative identity speaks about both its structural and normative features.

There are two key structural elements of evaluative identity: authenticity and depth. Understanding the attitudes that are constitutive of an identity includes the process of distinguishing more and less genuine interpretations of one's own evaluative commitments. We can see this process as a 'struggle of self-interpretations', whereby an attempt is made to work out 'which is the truer, more authentic, more illusion-free interpretation, and which on the other hand involves a distortion of the meanings things have for me'.[43] As Williams puts it, 'the point is not that the intuitions should be in some ultimate sense correct, but that they should be ours'.[44] But the concept of identity is not subjective, as might be thought, but subject-related: the attitudes constitutive of identity need to be true of the self, and – as a consequence – the claims of identity can be false. This dimension of identity is thus best captured by the notion of authenticity. At the same time, it would not be accurate to describe identity claims as static or completely dependent on an unreflective description of existing attitudes. When pondering existential commitments constitutive of evaluative identity, we are not only working out which commitments are authentic, but also who we are and who we want to be, and identity hence includes a transformative dimension. Furthermore, the notion of identity incorporates

[41] Of course, this notion of evaluative identity builds on a specific philosophical tradition of thinking about identity which is not uncontroversial. But it is perhaps less controversial than one might think. For example, Korsgaard (writing in Kantian tradition) also starts from having a practical identity as a precondition for finding anything else valuable. CM Korsgaard, *The Sources of Normativity* (Cambridge University Press 1996).
[42] C Taylor, *Human Agency and Language: Philosophical Papers I* (Cambridge University Press 1985) 35.
[43] Ibid 27.
[44] But – as he rightly points out – 'The problem is who *we* are'. Williams, *Ethics and the Limits of Philosophy* (Routlege 2006) 102.

deep commitments that are not only authentic but also self-definitional. It does not refer to values we merely happen to be committed to at a particular moment in time; rather, these are the values that we identify with and that characterize the subject we wish to be recognized as. As a consequence, an evaluative attitude cannot be a part of identity if it is not widely shared or deeply entrenched.

The normative dimension of evaluative identity is best explained in terms of inescapability. In this conception, the idea is not that an evaluative identity is valuable in and of itself; rather, the suggestion is that such identity is unavoidable. Because any evaluation must proceed from an evaluative standpoint, incrementally and by holding some values constant while changing others, the identity – which encompasses deepest evaluative attitudes – serves as the ground for any evaluation. And because it is impossible to overcome oneself at once, some evaluative judgments that are part of identity are inescapable, although they are by no means unchangeable over time.

There is also another sense in which we may think of our core values as inescapable: we cannot stop having them and continue being ourselves. The thought here is that if a self chooses to abandon its self-definitional values and commitments, it seizes to be the self that made this choice. We could of course ask if renouncing such core and self-constituting values would undermine the integrity of the self; or we may ask what reason there may be to require alienation of the self from the deepest layer of evaluative meanings.[45] But these questions could only arise if a possibility of such self-renouncement really exists: because a self that evaluates is necessary for any evaluation, a detachment from its deepest evaluative commitments and projects would lead to a loss of both the possibility to evaluate and the self.

As I will detail later, the abuse of evaluative identity can be based on misinterpretation of its structural or normative features. On the one hand, the misinterpretation of the structural features involves including certain attitudes into the notion of constitutional identity which do not satisfy the requirements of authenticity and depth: they often neither reflect the prevailing attitudes, nor are they self-definitional. On the other, it is sometimes presupposed that the concrete attitudes pertaining to current evaluative identity are valuable in and of themselves, rather than merely as an inescapable starting point of reflection: such current attitudes are not beyond critique and adjustment from the perspective of other evaluative commitments. In other words, while *some* attitudes are necessary for

[45] In Bernard Williams' view such alienation would isolate the agent 'from his actions and the source of his action in his own convictions'. Bernard Williams, 'A Critique of Utilitarianism' in JJC Smart and Bernard Williams (eds), *Utilitarianism For and Against* (Cambridge University Press 1973) 116.

occupying an evaluative perspective, and while *an* evaluative identity is necessary, no *particular* attitude or identity is indispensable.

3.2 Constitutional?

The notion of evaluative identity can only get us so far in understanding the notion of constitutional identity. From all the evaluative attitudes that might be ascribed to community's identity, we need to specify the commitments that arise in virtue of the fact that such a community has a constitution. The second question thus concerns the connection of such identity with the idea of constitution. And it is the constitutional dimension of constitutional identity that gives such evaluative attitudes the form necessary to be considered expressive of the collective selfhood of a constitutional community. The key point I wish to make in relation to this question is that we can distinguish between two aspects of constitutional identity – particular and general – and that without explaining the interplay between them we cannot fully grasp the meaning and value of constitutional identity.[46]

Particular constitutional identity is based on the constitutional experience and tradition of a specific constitutional community. It proceeds from the historical heritage of a society that is ruled by a constitution, and refers to its particular constitution and its interpretation over time in a multitude of local practices.[47] Although it is local, particular constitutional identity does not have to be parochial. While it does refer to the specificities of the constitutional community, it may well support ideals or values with more universalistic ambitions. All that matters is that the source of such values comes from the specific experience of the community in question. The example is the specifically German understanding of human dignity: while it belongs to particular constitutional identity because dignity is understood idiosyncratically, it expresses the equal value of all human beings which is a universalistic ideal.[48]

Much attention has been paid to this dimension of constitutional identity. In fact, most discussions about constitutional identity in EU law refer to cases which are to be understood in light

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[46] B Tripkovic (n 39) 46-58.

[47] Often the orientation of the particular constitutional identity will be visible from the constitutional text or its preamble. For some examples see Gary J Jacobsohn, 'Constitutional Values and Principles' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 778-779.

[48] See e.g. AL Bendor and M Sachs, 'The Constitutional Status of Human Dignity in Germany and Israel' (2011) 44 *Israel Law Review* 25.

of particular constitutional identity, and this has led some to believe that constitutional identity is necessarily particularistic or parochial. The least problematic cases are those of *Sayn-Wittgenstein* or *Omega* kind. In *Sayn-Wittgenstein*, the CJEU accepted that prohibition of aristocratic titles in Austria was part of its particular constitutional identity with a specific understanding of what a republican form of government requires;[49] in *Omega*, the court allowed the restriction to the free movement of services based on a specific understanding of dignity in German constitutional order.[50] In both instances, a case could be made that constitutional identity claims satisfy the threshold structural conditions of authenticity and depth. The evaluative commitments expressed in such claims are also firmly embedded in constitutional practices of these two systems, and they arguably belong to their particular constitutional identity. In other words, these really are the commitments which are reflective of constitutional values in these two member states. But the real question is what is the value of such claims and what are the reasons to respect them?

There are at least three reasons why particular constitutional identity might have some normative force. The first one pertains to legitimate expectations and consistency. We have seen that the critics of constitutional identity argue that it undermines legal certainty. This comes as a consequence of a potentially divergent application of EU law in different Member States when their constitutional identities vary. From the standpoint of EU law, constitutional identity does create a level of uncertainty (although not unequal treatment, as is sometimes argued, for all constitutional identities are to be equally respected).[51] But, from the standpoint of domestic law, constitutional identity may bring some stability in expectations given that the fundamental constitutional features are not subject to exceptions and fluctuations. For example, if a particular understanding of dignity in German constitutional system creates certain expectations of those subject to its authority, then this probably creates a prima facie reason not to undermine it; the depth of evaluative attitudes from constitutional identity is also likely to make such expectations firmer. However, while particular constitutional identity has an important role to play when it comes to consistency, it can be under-determined. Constitutional identity may refer to indeterminate categories such as the 'spirit' of a particular constitution and can be interpreted in an unpredictable fashion. But to the extent that its content can be made reasonably precise in a given constitutional system, and as long as its

[49] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* ECLI:EU:C:2010:806.
[50] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614.
[51] See e.g. Fabbrini (n 18).

interpretation remains within certain constraints, constitutional identity can and does contribute to legal certainty, and this dimension needs to be taken into account in any analysis of its value.

Another reason to respect constitutional identity pertains to the collective autonomy of the citizens and the ability of constitutional community to determine its own destiny. If an understanding of a certain value or principle – such as dignity or republican form of government – takes a specific shape in a constitutional system, which reflects the fundamental beliefs of the members of the constitutional community, it can command some authority in that constitutional system and perhaps also respect of other constitutional frameworks that interact with that system. It may be thought that any concession to specific understanding of values, even if they are widely shared in a local community, opens the space for problematic versions of relativism. But the respect for different constitutional identities does not mean that anything goes. Values which are typically thought of as universal, such as dignity, often pose constraints within which some specification is necessary if they are to be protected in concrete legal contexts. As long as the specific understandings of values in domestic constitutional systems do not violate such constraints, they are to be welcome as they, by virtue of such specification, actually contribute to the protection of universal values.

There is, of course, more to be said about the conditions under which constitutional identity can be considered as an expression of collective autonomy. Constitutional identity might serve as a ground for overturning the expressions of democratic will, and it often does not refer to the moral pre-commitments articulated in the constitution as a more fundamental exercise of collective autonomy, but to a host of constitutional practices that transcend any particular expression of public will. This is particularly problematic when constitutional values cannot be meaningfully traced back to the current commitments of the constitutional community, or if the argument from the continuing acceptance of a constitution does not allow us to draw conclusions about its legitimacy. But – despite these weaknesses – the argument from collective autonomy has some relative force, especially when the alternative is unrestricted supremacy of EU law: in that context, it seems that the claim that the core evaluative attitudes from constitutional practices in the Member States are expressive of collective autonomy compares favorably to a similar claim that could be made in relation to (at least some parts) of EU law.

The final point that needs to be taken into account in a normative analysis of the value of particular constitutional identity builds on the remarks I made in relation to the inescapability of identity. Deep and authentic evaluative attitudes can only be renounced and replaced with some other

values which already obtain in a community, and this process is most often incremental.[52] If such core evaluative commitments are abandoned, they would leave the constitutional community without the very basis that enables it to make normative judgments in the first place. The point is that there are no constitutional systems without some baseline agreement – however thin – on fundamental values, and the critics of constitutional identity are demanding that constitutional systems give up on such a baseline agreement that makes them possible. It then seems plausible that, if they are asked to forsake their fundamental evaluative attitudes pertaining to constitutional identity, the Member States are owed a stronger justification than the one which is based on legal certainty or possibility of abuse. This is not to say that a case for creative alignment of constitutional identities with the requirements of EU law cannot be made, or that EU law must accept any claim based on constitutional identity, but that a thorough consideration of this issue needs to take the point of view of the domestic constitutional system seriously.

However – despite of the predominant focus on particular constitutional identity – it is the general dimension of constitutional identity that actually allows us to make progress in understanding the meaning and value of constitutional identity. Unlike particular constitutional identity, which refers to the specific understanding of values in a constitutional community, general constitutional identity refers to the moral and political authority of constitutions stated in abstract. It is thus relatively independent from the substance of local evaluative commitments, but takes as the starting point the fact that the community is bound by a constitution. This dimension of constitutional identity is shaped by the idea of the purpose of a constitution and is equally applicable to any constitutional system that contains safeguards against domination and shares the basic commitment to the government limited by law. In other words, if an identity is to be constitutional, it not only needs to refer to the values of the specific constitution but also to the value of having a constitution in general.

There are empirical reasons to consider general constitutional identity an integral part of the notion of constitutional identity. General constitutional identity is often the most important dimension of constitutional identity claims. For example, in *Solange I* case, the FCC argued that the transfer of powers to the EU must not amend the 'basic structure of the constitution, which forms the basis of its identity', including the fundamental rights which are its 'inalienable essential feature'.[53] The point

[52] To clarify: even if the change is not incremental, that does not mean that the new values have not gained foothold and normative weight in the community over time. This, of course, applies only to situations where constitutions in fact express and are responsive to fundamental values of the community.
[53] *Internationale Handelsgesellschaft* (n 3) paras 22 and 23.

of its intervention was not the protection of German constitutional specificities, but the idea that constitutional supremacy must be grounded in general features of legitimate constitutional authority. Because the European Community lacked 'a democratically elected parliament' and 'a codified catalogue of fundamental rights', the FCC contended that its supremacy claims were undermined.[54] The FCC aimed to protect the features of general constitutional identity which had been, in its view, satisfied at the domestic level. And the *Solange II* case validates this reading, as the FCC confirmed there that it would not review community legislation as long as it secures fundamental rights in a 'substantively similar' manner.[55] The FCC therefore did not demand deference to its particular understanding of fundamental rights. Instead, it argued that there are certain general principles that are capable of establishing constitutional authority which need not fully replicate its domestic constitutional commitments, but nonetheless ought to be applied in any constitutional framework that deserves to be respected and obeyed.[56]

This is by no means an unusual use of the concept of constitutional identity; it would, in fact, be difficult to find almost any instance of its use which does not incorporate this general, constitutionalist dimension. Even in cases where constitutional identity is abused, there is at least a reference to the principles pertaining to general constitutional identity. For example, the Hungarian Constitutional Court in its already mentioned decision of 2016 established that the exercise of constitutional authority 'must not be in violation of human dignity or the essential content of fundamental rights';[57] it also found that the main components of constitutional identity of Hungary – such as protection of freedoms, separation of powers, parliamentarianism, equality of rights, and protection of minorities – were 'identical with the constitutional values generally accepted today'.[58] This is not to say that such proclamations are genuine or that they should be taken at face value, but

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[54] Ibid para 23.
[55] *Re Wünsche Handelsgesellschaft* (n 3) para 48.
[56] There are many examples of the same line of reasoning in non-European constitutional systems. In *Marbury vs Madison*, the US supreme court – by virtue of general principles that ought to apply to any constitutional framework – came to a conclusion that the rule of law, and constitution as supreme expression of the will of the people which poses limits to government, require judicial protection of rights. This conclusion followed from a reflection upon the fundamental value of constitutional form of government that purportedly applies in any constitutional system. See *Marbury v Madison* 5 US 137 (1803). Similarly, in *Makwanyane*, the South African constitutional court reflected upon the meaning of the commitments established by the constitution as supreme law. Justice Ackermann for example used the notion of 'constitutional state' to argue that it implies a commitment to equality, protection of minorities and the demand of rational justification to any limit to constitutional rights. See *v Makwanyane and Another* 1995 (3) SA 391.
[57] Hungarian Constitutional Court (n 21) paras 47 and 56 (as translated in Halmai (n 21) 33).
[58] Hungarian Constitutional Court (n 21) paras 65 (as translated in Halmai (n 21) 34).

that – even in the instances of abuse – it is impossible for courts to neglect the general dimension of constitutional identity, and that this opens the space to hold them accountable for its protection.

There are also ample conceptual and normative reasons to include general constitutional identity into the range of claims based on constitutional identity. Recall that constitutional identity consists of evaluative commitments that exist in virtue of the fact that a society has a constitution. It thus requires not only investigation of the key features and values that obtain in constitutional practices, which might be particular to a certain constitutional system, but also a reflection upon the more fundamental commitment to establish a constitutional form of authority and community. This commitment, of course, can be thin and open to different interpretations, but the requirements of general constitutional identity are embedded in the shared experience of being subject to constitutional authority as much as (if not more than) the requirements of particular constitutional identity. While it is true that constitutions – because they are grounded in the lived experience of the people – establish the kind of rationality which may be particular to a specific community, they also require adherence to certain central and shared features of the constitutional mode of governance. And this is even more true in contexts where the constitutionalist commitments have acquired a deeper layer of meaning over time, as is the case in the European Union.

But the inseparability of particular and general constitutional identity does not only follow from the reflection on the commitments that arise in virtue of the existence of constitutional form of authority; it is also a requirement that determines the plausibility of any constitutional identity claim. The principles that underpin general constitutional identity – such as the rule of law, protection of minorities, and safeguards for fundamental rights – must be observed if an assertion that some evaluative attitudes pertain to the constitutional community as a whole is to be credible. If such principles are violated, then there are no grounds upon which the content of particular constitutional identity can be ascertained: the collective selfhood of a constitutional community cannot be imagined without constitutionalist values that ensure that the alleged identity is indeed expressive of common evaluative commitments. There is, in other words, no constitutional identity which predates the constitutional form of authority.[59]

[59] See H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in M Loughlin and N Walker, The Paradox of Constitutionalism (Oxford University Press 2007) 22. For an important argument along these lines in the context of EU, see Scholtes (n 9) 25.

The advantage of this understanding is that it does not impose a false dichotomy between particular *constitutional* values and general *constitutionalist* values: general aspects of constitutional identity, such as the rule of law, political and legal checks and balances, and safeguards against the domination over minorities, are internal requirements of the notion of constitutional identity. They cannot be simply renounced for the sake of constitutional specificities, but form an equal – and, arguably, more important – ground of constitutional identity claims. If this is the case, the states then cannot pick and choose which dimension of their constitutional identity they would like to protect: they can only use constitutional identity to pursue their constitutional specificities as long as such specificities adhere to the precepts of legitimate constitutional authority pertaining to the general constitutional identity. Such understanding of constitutional identity, which includes this general dimension, also gives the tools to competing constitutional orders to evaluate any constitutional identity claims against the backdrop of a shared commitment to the constitutional form of legitimation. The abuse of constitutional identity is often a consequence of disregarding the general dimension of constitutional identity or confusing the particular constitutional identity for general. Let us turn to that question.

4. Abuse of Constitutional Identity

Against this background, we can also understand and recognize the abuse of constitutional identity. The abuse of constitutional identity comes in at least three forms: first, it can pertain to the misuse of the identity aspect of constitutional identity; second, it can relate to the misinterpretation of the constitutional aspect of constitutional identity; and third, it can come about as a consequence of the unravelling of the identity aspect from the constitutional aspect of constitutional identity. Of course, such distinctions can be made for heuristic purposes only; the three forms of abuse overlap and may obtain within a single instance of the misappropriation of the concept.

Misuse of the identity dimension is probably the most common form of abuse. As the critics of constitutional identity rightly point out, the connection with identity opens up the possibility of abuse whereby constitutional identity claims are not grounded in deeply embedded normative attitudes of a constitutional community but are invented to support political goals of the majority that is currently in the position to make such claims. Because such false identity claims cannot be ascribed to a constitutional community as a whole, it is likely that minorities will be silenced in the process and that their perspective will not be included. Consider again the example of Hungary. As mentioned,

constitutional identity exception to the supremacy of EU law was introduced by the Hungarian Constitutional Court to provide support for Orbán's government attempts to avoid European refugee settlement scheme. The decision came as a consequence of persistent failures of the government to introduce the exception to this EU policy through other means: via a failed referendum which was meant to reject the resettlement quotas but did not reach the required turnout, and via a failed constitutional amendment which would entrench the constitutional identity-based objection to EU refugee quotas but fell short of the required two-thirds majority in the parliament.[60] Such identity claims thus clearly lack the conditions of authenticity and depth. They are not authentic, because they do not actually reflect the prevailing attitudes: the basis of such claims has been rejected by the majority of the Hungarian electorate and a significant portion of its members of parliament, even if we suppose that the referendum and parliamentary elections in Hungary could be described as free and fair.[61] By implication, they lack depth: if attitudes are not widely shared, they cannot be self-definitional. These kinds of claims of constitutional identity should then be recognized for what they are – poorly concealed attempts to present current government's nativist policies as deeply entrenched evaluative attitudes of a constitutional community.

The second form of abuse violates the constitutional dimension of constitutional identity. Again, the critics of constitutional identity are correct to point out that some constitutional identity claims can contravene the fundamental constitutionalist principles such as the rule of law or respect for fundamental rights. However, what they do not recognize is that such constitutional identity claims can be rejected not only on the basis of other values (or EU's own constitutional identity), but also because they are not plausible constitutional identity claims at all. Consider the already mentioned example of Poland. The Polish government relied on constitutional identity claims to justify its autonomy to introduce the reforms of the judicial system which effectively made the judiciary subject to the executive's fiat. While entrenching certain policies in the constitution may be a signal that they do belong to country's constitutional identity, it is certainly not true that all constitutional provisions are a part of such identity; it is thus telling of the gravity of constitutional identity abuse in this case that such reforms were introduced by ordinary legislation and not by constitutional amendment.[62] But

[60] Halmai (n 21) 28-29; T Drinoczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) *German Law Journal* 105, 109-110.
[61] See on propaganda by the government in the wake of the referendum in Halmai (n 21) 26 and Drinoczi (n 60) 109.
[62] Kelemen and Pech (n 11) 72.

more importantly, while the principle of state's autonomy in regulating the judiciary may need to be respected within the confines of the respect for the rule of law, the reforms introduced by the Polish government were in clear violation of the domestic constitution and could thus not possibly be seen as part of Poland's particular constitutional identity.[63] Finally – even if we were to accept that the reforms were a part of Poland's particular constitutional identity, although I cannot see what the reason for that might be – undermining the independence of the judiciary in such a deep and structural way cannot be consistent with general constitutional identity which requires respect for the rule of law. Similar to the case of Hungary, these kinds of constitutional identity claims are bogus and ought to be rejected.

Another form of misuse of the constitutional dimension of constitutional identity may come from mistaking the particular for general constitutional identity. While particular constitutional identity may have a plausible claim for respect as long as it moves within the confines imposed upon it by general constitutionalist values, the local interpretation of such general constitutionalist values should not be taken as an absolute measure of their meaning. This seems to be one of the mistakes the FCC made in relation to the CJEU's judgment in *Weiss*.[64] The FCC refused to follow *Weiss* because this judgment allegedly 'manifestly disregard[ed] the principle of proportionality'[65] and was 'simply not comprehensible and thus objectively arbitrary'.[66] The gist of the complaint was that the CJEU did not conduct the balancing exercise as a part of proportionality analysis in the way a German court might do it. As pointed out by Marzal, '[s]uch criticism assumes, rather parochially, that the German understanding of proportionality is universal'.[67] In other words, if we assume that some form of proportionality analysis or rationality review is a general constitutional principle, it does not follow that the concrete manner in which it is conducted must be uniform: the German court simply assumed that its own particular constitutional identity determined the contours of the principle that belongs to general (or European) constitutional identity. In the same way that the CJEU ought to respect the diversity of approaches to fundamental constitutional values and principles of the Member States as

[63] Ibid 70-71.
[64] Case C-493/17 *Weiss* ECLI:EU:C:2018:1000; BVerfG, Judgment of 5 May 2020, 2 BvR 859/15.
[65] BVerfG (n 64) headnotes, paragraph 6.
[66] Ibid, para 118.
[67] T Marzal, 'Is the BVerfG PSPP decision "simply not comprehensible"? A critique of the judgment's reasoning on proportionality' *VerfBlog,* 9/5/2020, https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/.

long as they do not transgress the boundaries of such values and principles, the Member States ought to respect the specific interpretation of these values and principles in EU law.

The third – and possibly the most important – form of abuse of constitutional identity comes from the disentanglement of its identity dimension from its constitutional dimension. A mere claim that certain evaluative attitudes belong to an identity of a community need not command the same sort of respect as a claim that they are a part of constitutional identity. Constitutional identity claims need to be grounded in the specifically constitutional experience of the community in question, which must respect the principles of general constitutional identity and thus ought to arise in a genuinely accommodating and inclusive process where different perspectives are given equal concern, respect, and voice. An example of such transgression is the claim of the Hungarian Constitutional Court that constitutional identity is 'a fundamental value not created' but 'merely acknowledged' by the Hungarian constitution.[68] This is a category mistake. As I have explained, there is no constitutional identity prior or unrelated to the constitution: the constitution does not owe its existence to some primordial form of identity, but the distinctly constitutional identity owes its existence to the constitution.[69]

It is not a coincidence that this form of abuse is particularly appealing to populist leaders. Populists present themselves as an authentic voice of fixed and homogeneous communities: it is in the nature of populist rule to move from the actual heterogeneity to an imagined homogeneity of political communities, and to present such imagined homogeneities as being fixed rather than in flux.[70] But, despite their anti-institutional rhetoric, populists also aim to seize the control of constitutional forms, rob them of their constitutionalist substance, and instrumentalize them for their own political ends.[71] The abuse of constitutional identity occurs against this background, and involves the fabrication of some form of fixed homogeneity and an attempt to present it as constitutional identity, which purportedly stands in sharp contrast to other (similarly imagined) identities. Such homogeneity is often treated as valuable in itself, and its alleged constitutional form is but a manufactured cloak that is instrumentalized to shield it from external influences. A deeper understanding of constitutional identity – which recognizes the importance but also the contingency and fluidity of evaluative attitudes

[68] Hungarian Constitutional Court (n 21) para 67 (as translated in Halmai (n 21) 34).
[69] Lindahl (n 59).
[70] See e.g. M-S Kuo, Against Instantaneous Democracy (2019) 17 *International Journal of Constitutional Law* 554, 556-560.
[71] N Walker, 'Populism and Constitutional Tension' (2019) 17 *International Journal of Constitutional Law* 515, 519-522; see also D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davies Law Review* 189.

constituting identity, and the substantive and normative dimension of constitutional rule and authority – allows us to reject such false populist claims as inimical to the very notion of constitutional identity.

There are of course other possibilities for abuse of constitutional identity, but I hope that it is clear that there are resources internal to the concept of constitutional identity to recognize them. This is not the occasion to discuss the institutional means and processes through which such abuses of constitutional identity should be precluded or rejected. But – to the extent that the preceding analysis is persuasive – this is exactly the issue which ought to generate more interest. For it might be that the so-called problem of constitutional identity is not a problem for constitutional identity at all: it is at least partly a consequence of the failure of European institutions and political leadership to deal with authoritarianism and populism effectively, and the solution to it probably rests in devising and using institutional means that would enable recognition and rejection of false constitutional identity (and similar) claims. Despite some positive signals, an effective control has not transpired so far.[72] Let us focus our attention and imagination on that problem.

5. Conclusion

I have argued that there are conceptual and normative reasons to rethink the recent suggestions to eliminate the concept of constitutional identity from European constitutional space. The critiques of constitutional identity neglect the material conditions that have brought it about, fail to recognize its conceptual features, pay insufficient attention to the distinction between its use and abuse, do not engage with the question of its normative value, and suggest unrealistic and unjustified solutions to the problem. They are, however, right to urge us to reflect upon the concept of constitutional identity and to think harder about the dangers related to its abuse.

[72] See e.g., in the context of CJEU effective judicial protection in Poland and Article 19 TEU, Case C-619/18 *European Commission v Republic of Poland* EU:C:2019:531. For some proposals how to use the infringement proceedings under Article 258 TFEU in cases of human rights violations by the Member States, see KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2016). While the CJEU has an important role to play in delimiting the acceptable scope of constitutional identity claims, and while it has not previously restrained from dismissing the claims of constitutional identity when they have not been found to be proportionate (see e.g. Case C-202/11 *Anton Las v PSA Antwerp NV* ECLI:EU:C:2013:239), the primary responsibility in this domain should probably not rest with the CJEU, notwithstanding the procedural hurdles in relation to Article 7 TEU.

In this article, I have attempted to do that. The account of constitutional identity I have put forward allows us to recognize its conceptual features, normative value, and instances of abuse. The identity dimension of constitutional identity narrows the scope of the concept to authentic and deep evaluative attitudes that obtain in the constitutional community; its constitutional dimension attaches the idea of identity to both particular constitutional practices and the general features of constitutionalist mode of governance. The attitudes that properly belong to constitutional identity are thus deep and authentic evaluative attitudes that obtain in local constitutional practices which respect the general principles of constitutionalism. Their normative value is explained in terms of several notions: inescapability, consistency, collective autonomy, and – above all – constitutionalist principles such as the rule of law, protection and representation of minority views, and guarantees of fundamental rights. There can be no constitutional identity that does not respect the basic commitment to constitutional form of legitimation and authority.

The abuse of constitutional identity occurs along several lines. It pertains to the falsification of identity by incorporating attitudes which are neither deeply entrenched nor authentic, distortion of the constitutional dimension by violating fundamental constitutionalist values, or disentanglement of the idea of identity from the notion of constitution. Such misuses of constitutional identity ought to be rejected, and there is further work to be done on devising institutional means and generating political will which would make this possible. I did not say much about this problem, except that we should recognize it as the key problem. Instead, my aim was to provide the groundwork for the analysis of this issue: to render the concept of constitutional identity more intelligible, its value more explicit, and the forms of its abuse more identifiable.

While the upshot of the argument is that there is a normatively attractive way to understand the concept of constitutional identity, this does not mean that constitutional identity should play a more prominent role in European constitutional order, or that it should be understood more extensively. In fact – if the argument is sound – we have every reason to think that it would reduce the range of plausible constitutional identity claims. As I have argued throughout, the scope of justified uses of constitutional identity is limited by the structural features of the concept: the agreement on deep and authentic values which arise in virtue of constitutional practices which are respectful of constitutionalist principles is likely to be either thin or common to many constitutional systems in Europe. This article has thus been an attempt to defend constitutional identity from unjustified critiques, as much as it has been an effort to put it in its proper place.