

POST-SOVIET TRANSFORMATION

DOI: 10.19266/1829-4286-2017-01-45-80

‘Constitutional Identity’ in the Context of Post-Soviet Transformation, Europeanization and Regional Integration Processes: the case of Armenia*

ANNA KHVOROSTIANKINA

*National University of “Kyiv-Mohyla Academy”, Ukraine
Brusov State University of Languages and Social Sciences, Armenia*

The purpose of this paper is to explore the existing scholarly approaches to the notion of constitutional identity and examine the potential applicability of this concept for the analysis of the processes of post-Soviet transformation, Europeanization and regional integration. Drawing upon the multiple definitions proposed in international academic literature, the author views ‘constitutional identity’ as a combination of four interrelated meanings: (1) as identity of a constitution; (2) as identity of the people, or imagined political community; (3) as constitutional identity of a society, or an actual political community and (4) as identity of a national constitutional order in its interrelations with other legal orders. It is argued that the concept of ‘constitutional identity’ taken in these four dimensions can serve as an effective analytical tool to characterize the transformation processes in the countries in transition – both those that run internally (e.g. transformation of constitutional culture) and those that have external relevance (e.g. regional integration). The paper reflects the initial stage of the research project; thus, the author does not have an ambition to cover the issue comprehensively, but introduces theoretical framework and poses the questions for further investigation.

Keywords

Constitutional identity, constitutional culture, post-Soviet transformation, constitutional values, constitutional reforms, regional integration, Europeanization

* This is the revised and expanded text of a paper given at the international conference, entitled “25 Years of Post-Soviet Transformation: Result and Prospects” (28-29 October 2016, Yerevan, Armenia). It is based on the research project in progress, preliminary findings of which were presented within the course “Constitutional Cultures in Transition: Constitutional Identities and Values in the Post-Soviet Space” (March-June 2017, Center for Russian, East European and Eurasian Studies, Stanford University, USA).

Introduction

This paper reflects the initial stage of the research project aiming at discovering and explaining the particularities of post-Soviet transformation, ‘Europeanization’ and regional integration in Armenia through the prism of the processes of evolution of Armenian ‘constitutional identity’.

Although the concept of ‘constitutional identity’ is frequently applied in the contemporary legal (first of all, judicial¹) and political discourse, in the international scholarship, there is no uniform understanding of ‘constitutional identity’ and its meaning still remains unclear². Moreover, some authors doubt this concept “is indeed a distinctive phenomenon worthy of its own conceptual class” underlining that it “remains underspecified and difficult to distinguish from related phenomena”³.

¹ Anna Śledzińska-Simon identifies three main areas of application of ‘constitutional identity’ concept in judicial argumentation: “(i) in decisions concerning the legitimacy of constitutional amendments; (ii) in decisions concerning the legitimacy of constitutional migration and engaging in a dialogue between various courts; and (iii) in decisions concerning integration within a supranational organization” (Śledzińska-Simon A., Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland, *International Journal of Constitutional Law*, 2015, 13, 1, 124–155).

² Michel Rosenfeld opens his chapter ‘Constitutional Identity’ in Oxford Handbook on Comparative Constitutional Law with the statement that “‘Constitutional identity’ is an essentially contested concept as there is no agreement over what it means or refers to” (Rosenfeld M., Constitutional Identity, Oxford Handbook on Comparative Constitutional Law (eds.), OUP, 2012, p. 756; Saiz Arnaiz A., Alcobarro Llivina C., Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and Decline of Sovereignty, Saiz Arnaiz A., Alcobarro Llivina C. (eds.), National Constitutional Identity and European Integration, Intersentia, 2013, pp. 1-3; Marti J. L., Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People, Saiz Arnaiz A., Alcobarro Llivina C. (eds.), National Constitutional Identity and European Integration, Intersentia, 2013, p. 18; Sledzinska-Simon A., Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland, *International Journal of Constitutional Law*, 2015, 13, 1, 124–155, <https://doi.org/10.1093/icon/mov007> (01.08. 2016).

³ Pavone T., Constitutional Identity: An Overview and Some Conceptual Concerns (4/23/2014), https://scholar.princeton.edu/sites/default/files/tpavone/files/jacobsohn-_constitutional_identity_critical_review.pdf (30.06.2017).

In the context of relations between the European Union (EU) and its Members, *national* constitutional identity of the Member States is often viewed as a limit of possible ‘Europeanization’⁴ (or the limit of *EU’s, or European, constitutional identity*)⁵. In my research I pose the question whether the concept of ‘constitutional identity’ can help to explain the dynamics of ‘Europeanization’ and integration processes beyond the borders of the EU in the post-Soviet space. The study focuses on the case of Armenia. Regardless its ‘U-turn’⁶ towards the membership in the Russia-led Eurasian Economic Union (EAEU), Armenia, as one of the participants of the Eastern Partnership (EaP) initiative, still aims to preserve the active dialog with the EU, in particular by concluding the new EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA)⁷. Being urged to make difficult geopolitical choices, this post-Soviet country can serve as a unique laboratory to observe and study the intertwined processes of post-Soviet transformation, internationalization, Europeanization and regional integration of different levels and vectors⁸. The proposed study investigates the interrelated processes of post-Soviet transformation and Europeanization in Armenia through the prism of evolution of national constitutional identity. For the purposes of comparative analysis, the parallels are drawn between Armenia, other

⁴ For the purposes of this research, I define ‘Europeanization’ as a domestic response to the transformative power of the EU which results in the transposition of the European norms, values and practices into domestic legal order.

⁵ In this meaning, the term “national constitutional identity” is applied, in particular, by German, French, Polish and Lithuanian bodies of constitutional justice.

⁶ EU Officials Warn Yerevan over ‘U-Turn’, Radio Free Europe Radio Liberty (4 September, 2013), <http://www.rferl.org/a/armenia-eu-customs-union/25095145.html> (30.11.2016).

⁷ Joint Press Release by the European Union and Republic of Armenia on the Initialling of the EU-Armenia Comprehensive and Enhanced Partnership Agreement (Yerevan, 21 March 2017), https://eeas.europa.eu/headquarters/headquarters-homepage/23120/joint-press-release-european-union-and-republic-armenia-initialling-eu-armenia-comprehensive_en (30.06.2017).

⁸ At the same time, as Delcour and Wolczuk observe, “[i]n the rich literature on the EU’s influence in its eastern neighbourhood, Armenia is one of the least studied countries” (**Delcour L., Wolczuk K.**, The EU’s Unexpected ‘Ideal Neighbour’? The Perplexing Case of Armenia’s Europeanisation, *Journal of European Integration*, 2015, **37**, 4, 491-507).

post-Soviet countries (in particular, Moldova and Ukraine⁹), and the post-socialist countries – EU Member States.

Armenia, as well as other post-Soviet countries under the scrutiny, declares adherence to the so called common European values¹⁰ (that are today considered as being of global, or universal, importance). In fact, such values as the Rule of Law, Human Rights and democracy are fully recognized and reflected in the texts of many post-Soviet constitutions. However, the understanding, perception and mechanisms and practice of implementation of these values differ – sometimes significantly – from what is declared. In other words, assuming that the effectiveness of Europeanization can be evaluated on the levels of norm selection, norm adoption and norm implementation¹¹, it is the last level which is the most problematic in case of the European values implementation in post-Soviet countries. The main question is why it is so. Can it be that there are specific characteristics of Armenian constitutional identity, - presumably rooted in Armenians' political and legal mentality, Armenia's Soviet and pre-Soviet past, - that can facilitate or hinder the effective transposition of European norms and values and/or their proper implementation into Armenian legal system? Do the specific features of the national constitutional identity influence the orientation towards this or another integration project (EU or EAEU)? In what way does constitutional identity determine the level of adaptability of the country to the standards and requirements of such integration projects? These are the questions to be answered in the research project.

⁹ All three countries are the participants of the EU Eastern Partnership (EaP) initiative. Within the EaP, each of them, however, represents a unique case of 'Europeanization' and a unique case of relations with the EU. Moldova's way to the association relations with the EU was relatively smooth. Ukraine, although being among the 'best performers' in the process of implementation of political, legal and economic reforms, at the end came to the conclusion of the Association Agreement through revolutionary process. Armenia, having made a 'U-turn', chose the orientation towards the Russia-led Eurasian Economic Union but aims to preserve the relations with the EU, in particular, in the field of political dialog.

¹⁰ Art. 1, 2 and 3 of the Constitution of RA.

¹¹ **Lavenex S., Schimmelfenning F.**, EU Rules beyond EU borders: Theorizing External Governance in European Politics, *Journal of European Public Policy*, 2009, **16**, 6, 791-812.

The purpose of the present paper is rather modest. It aims to introduce the complex construct of ‘constitutional identity’ as a theoretical framework for further analysis of the post-Soviet transformation and Europeanization processes in the country under the scrutiny. This approach is built upon the so called ‘analytical eclecticism’¹² which allows studying multiple interconnected social relations, mechanisms and phenomena of different nature “maintaining a rigorous approach in deploying distinct theoretical traditions in order to capture the complex reality of the real world”¹³.

Integrating the definitions proposed in the international academic literature, I view the constitutional identity as a complex phenomenon¹⁴ – a combination of four interrelated meanings:

¹² **Sil R., Katzenstein P.**, Analytical Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions, *Perspectives on Politics*, 2010, 8, 2, 411-431.

¹³ **Bache I., Bulmer S. and Gunay D.**, Metatheory and Europeanization research: let’s get critical!, p. 13, <https://ecpr.eu/Filestore/PaperProposal/8473aa39-998d-4d04-a792-033c237f69c7.pdf> (20.01.2017).

¹⁴ Viewing ‘constitutional identity’ as a complex, multi-layered phenomenon is not a new approach. In her study on the particularities of constitutional identity of Poland, A. Śledzińska-Simon proposes a three-dimensional (3D) model of the identity of constitutional subject (which, in authors view, equals to a nation-state) (**Śledzińska-Simon A.**, Op. cit., p. 138). The model is built upon the adaptation of the concept of ‘tripartite self’ of an individual which “presupposes that persons aim to achieve self-definition and self-interpretation (i) in terms of their uniqueness (intrapersonal, individual level), (ii) in terms of their relationships with others (interpersonal, relational level), and (iii) in terms of group membership (group, collective level)” (*Ibid.*, p. 137). Correspondently, she identifies individual, relational and collective dimensions of identity. Understanding the constitutional identity as ‘a particular regime of rights’, Śledzińska-Simon differentiates between (i) individual identity (particularistic self-understanding of a constitutional self which may overlap with national identity; in author’s opinion, only this dimension “reflects a traditional culture- and nation-based type of identity”); (ii) the relative dimension of constitutional identity which “describes the relations between the constitutional self and other external selves, such as other nation-states and intergovernmental organizations”; and (iii) collective dimension that explains “the relation between member states, on the one hand, and the European Union as a separate constitutional entity” (*Ibid.*, p. 138-139). The four-dimensional analytical model of constitutional identity proposed in this paper differs from this approach in an assumption that ‘constitutional identity’ existing in a particular state (or other entity, e.g EU) is composed with the interrelated identities of at least four different bearers (constitution, constitutional subject – the people (or imagined political community),

(1) *identity of a constitution*, i.e. the fundamental principles and values enshrined in the constitution that define its specific nature and constitute its core, as well as its specific features;

(2) the dialogically and consciously constructed *identity of the people (or imagined political community)*;

(3) *constitutional identity of an actual political community*, which is characterized by the harmony/disharmony between what is written in the constitutional text, identity of the people and the societal constitutional practice. It shows whether society is a political community identifying itself with the declared constitutional foundations or exists separately in the “parallel” world of its own values and practices.

(4) *identity of a constitutional order* that determines its [order’s] relations with other orders (international, supranational, subnational) and its openness towards external influences (e.g. the openness to the processes of legislative harmonization, openness to the influences of the normative power of global actors, interest in legal transplants, following the ‘best practices’ etc.).

The ‘constitutional identity’ is clearly an interdisciplinary concept; it covers the legislative settings and the real-life constitutional practice, as well as the extra-legal factors that influence constitutional reality in a given community.

Having characterized the phenomenon of ‘constitutional identity’, I then integrate this theoretical construct with the analytical model of ‘Europeanization’ elaborated by Lavenex, Schimmelfenning and Sedelmeier. This model is based on the combination of three main mechanisms of transfer of the European norms into the legal system of a third country: external incentives, social learning and lessons drawing¹⁵. By such combination, I show which elements (dimensions) of national

actual political community, and constitutional order), which are constructed by different actors.

¹⁵ **Lavenex S., Schimmelfenning F.**, EU Rules Beyond EU borders: Theorizing External Governance in European Politics, *Journal of European Public Policy*, 2009, **16**, 6, 791-812; **Schimmelfenning F., Sedelmeier U.**, Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe, *Journal of European Public Policy*, 2004, **11**, 4, 661-679; **Schimmelfenning F., Sedelmeier U.**, Candidate Countries and Conditionality, *Graziano P., Vink M.P. (eds), Europeanization. New Research Agendas*, Palgrave Macmillan UK, pp. 88-101.

constitutional identity can potentially be facilitating and hindering factors influencing the effectiveness of Europeanization.

I make the preliminary conclusion that there are certain characteristics of national constitutional identity that determine or potentially can influence the effectiveness of Europeanization (sharing the European values; influence of the Soviet legacies on legal mentality and constitutional culture; openness towards the external influences, international standards and best practices; and the tendency to ‘instrumentalize’ the Europeanization processes). Importantly, these characteristics are, at first sight, mutually contradicting. The contradictions can be explained with the belonging of the identified characteristics to different dimensions of ‘constitutional identity’ and different dynamics of transitional change within each of these dimensions.

The concept of ‘constitutional identity’: constitutional identity as the identity of a constitution

As it was stated above, there is no uniform understanding of what ‘constitutional identity’ is. Analysing the multiplicity of scholarly definitions, J.L. Marti proposes differentiating between two possible meanings of ‘constitutional identity’: (1) “the identity of the constitution” and the (2) “the identity of the people or political community ruled by such constitution”¹⁶. In the first meaning, “constitutional identity is what makes of that constitution *that* constitution”; in other words, it is “constitutive, or essential, or definitional core” of the constitution¹⁷. This core, in its turn, is not limited to the constitutional text, but comprises the fundamental “values, principles and rules” which may be identified through constitutional interpretation based not only on legal, but also on political and moral arguments. Textually, the “core” may be reflected in the unamendable provisions of the constitution or provisions which are more difficult to amend in comparison with other provisions (although

¹⁶ **Marti J. L.**, Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People, *Saiz Arnaiz A., Alcobarro Llivina C (eds.), National Constitutional Identity and European Integration*, Intersentia, 2013, p. 19.

¹⁷ **Marti J. L.**, Op. cit., p. 22.

quite often this is not the decisive argument¹⁸). Substantially, if such norms are changed, the changes are much more significant than ‘regular’ constitutional amendments – they reflect the shifts of revolutionary importance¹⁹.

This approach is not absolutely new: the ‘constitutional identity’ as an essence of a constitution reflected in its unamendable core is discussed, in particular, in Carl Schmitt’s *Constitutional Theory* (1928). Analysing the boundaries of ‘authority to amend the constitution’, he states that constitutional provisions may be changed only “under the presupposition that *the identity and continuity of the constitution* as an entirety is preserved. This means the authority for constitutional amendments contains only the grant of authority to undertake such changes [...] in constitutional provisions that preserve the *constitution itself*”²⁰ (*italics added – A.Kh.*).

Discussing ‘constitutional identity’ as an ‘identity of the constitution’ reflected in the core values, principles and rules, J.L. Marti reaches the “puzzling” – in his own words – conclusion: since the ‘core’ in many [European] constitutions is often more or less the same, the constitutional identities of these countries should also be the same²¹. On the one hand, this statement seems to be true – the European countries share the same ‘core’ constitutional values and principles which, in fact, create the so called “common constitutional traditions” of the EU Member States as one of the sources of the EU law. On the other hand,

¹⁸ Illustrative in this regard in the case of Latvia, where the text of the Constitution (*Satversme*) formally allows amending the provisions enshrining the fundamentals of the constitutional order; however, as the Constitutional Law Commission of the President of the State has concluded, “an unwritten core of the *Satversme* exists, which defines the constitutional identity of the State of Latvia, i.e., the identity of the state in state law and the identity of the state order. Essentially the core of the *Satversme* is inviolable, i.e., the constitutional legislator has the right to amend the *Satversme* in accordance with the [established] procedure only in a way that does not make the amendments incompatible with the core of the *Satversme*”. On the basis of its findings, the Commission proposed to introduce the ‘eternity clause’ to the constitutional text (**Rodiņa A., Pleps J.**, *Constitutionalism in Latvia: Reality and Developments*, *New Millennium Constitutionalism: Paradigms of Reality and Challenges*, Yerevan, Njhar, 2013, p. 443).

¹⁹ **Marti J. L.**, *Op. cit.*, p. 24.

²⁰ **Schmitt C.**, *Constitutional Theory*, Duke University Press, 2008, p. 150.

²¹ **Marti, J. L.**, *Op. cit.*, p. 30.

this may mean that ‘constitutional identity’ is not limited to these basic values and principles. P. Faraguna goes further by making the distinction between “constitutional identity as a reference to those characters that are not subject to modification, either by constitutional amendments or by interpretative transformations, and therefore “eternally” characterize a given constitution (“constitutional identity despite difference”)” i.e. ‘constitutional identity’ close to Marti’s definition and “those characters that make one constitution different from another constitution (“constitutional identity as difference”)”²².

Applying this approach to the case of Constitution of the Republic of Armenia (RA), one may conclude that “constitutional identity despite difference” is embodied in the unamendable provisions of Articles 1²³, 2²⁴ and 3²⁵ (and the provisions related to them, in particular, those establishing the specific features of the human rights regime and the openness towards the international human rights standards); while “constitutional identity as difference” may be found, for example, in Preamble²⁶, Articles 18²⁷ and 19²⁸ of the Constitution of the Republic of

²² **Faraguna P.**, Constitutional Identity — A Shield or a Sword? The Dilemma of Constitutional Identities in the EU (June 30, 2017), <https://ssrn.com/abstract=2995416> (15.02.2017).

²³ **Article 1.** The Republic of Armenia is a sovereign, democratic, social state governed by the rule of law.

²⁴ **Article 2.** In the Republic of Armenia, the power belongs to the people. The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution.

Usurpation of power by any organisation or individual shall be a crime.

²⁵ **Article 3.** The Human Being, His or Her Dignity, Basic Rights and Freedoms.

1. The human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms.

2. The respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of the public power.

3. The public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law.

²⁶ The Armenian People, recognizing as a basis the fundamental principles of the Armenian statehood and national aspirations engraved in the Declaration of Independence of Armenia, having fulfilled the sacred message of its freedom loving ancestors for the restoration of the sovereign state, committed to the strengthening and prosperity of the fatherland, to ensure the freedom, general well-being and civic

Armenia²⁹. Notably, the unamendable core of the Armenian Constitution enshrines the system of values (such as the rule of law, democracy, respect to human dignity and fundamental rights) which the Republic of Armenia ‘shares’ with the European Union³⁰.

The results of the research show that, in contrast with the bodies of constitutional jurisdiction of other post-Soviet and post-socialist countries (Lithuania, Latvia, Moldova, Poland, Czech Republic), the Constitutional Court of RA does not employ the notion of ‘constitutional identity’ in its decisions. At the same time, the Court refers to the very close concepts of the ‘spirit’ of Constitution³¹ (which, from my point of

harmony of future generations, declaring their faithfulness to universal values, hereby adopts the Constitution of the Republic of Armenia.

²⁷ **Article 18.** The Armenian Apostolic Holy Church

1. The Republic of Armenia shall recognise the exclusive mission of the Armenian Apostolic Holy Church, as a national church, in the spiritual life of the Armenian people, in the development of their national culture and preservation of their national identity.

2. The relations between the Republic of Armenia and the Armenian Apostolic Holy Church may be regulated by law.

²⁸ **Article 19.** Ties with the Armenian Diaspora

1. The Republic of Armenia shall, together with the Armenian Diaspora, implement a policy targeted at the development of comprehensive ties and preservation of the Armenian identity, promote repatriation.

2. The Republic of Armenia shall, based on international law, contribute to the preservation of the Armenian language, Armenian historical and cultural values and to the development of Armenian educational and cultural life in other states.

²⁹ The Constitution of the Republic of Armenia of 5 July 1995, with the amendments of 2005 and 2015,

<http://www.parliament.am/legislation.php?sel=show&ID=5805&lang=eng>

(30.06.2017).

³⁰ Preamble of the draft Comprehensive and Enhanced Partnership Agreement Between the European Union and European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Armenia, of the Other Part (hereinafter – CEPA), Annex to the Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part and the Republic of Armenia, of the other part, JOIN (2017) 37 final of 25.09.2017. According to Art. 2 of Draft CEPA, the respect to these values belongs to the general principles of the Agreement and constitute the ‘essential element’ of it.

³¹ Decision of the Constitutional Court of RA DCC-350 of 22 February 2002 on the case of conformity of obligations stated in the Convention for the Protection of

view, correlates with the ‘identity of the constitution’ as ‘whole’ and ‘part’ respectively) and ‘axiology of the Constitution’³² covering the values and fundamental principles of the constitutional order which do not necessarily have the literal textual expression in the constitutional text. The latter can be considered as an equivalent of the notion of ‘identity of the constitution’.

Constitutional identity of the people (or imagined political community)

The second understanding of the ‘constitutional identity’ in Marti’s classification is ‘the constitutional identity of the people’ (or ‘political community’). He proposes identifying at least three possible approaches to this version of ‘constitutional identity’: (1) national identity reflected in the constitution, (2) identity of the people constituted by the constitution (constitutional subject) and (3) the identity of the people as both the author (constitutive authority) and the subject of a constitution³³.

Despite the different accents of meaning, all three approaches, in my view, indicate that two understandings – identity of the constitution and identity of the political community – are not only closely intertwined, but are different dimensions of the same complex phenomenon of ‘constitutional identity’, which is not a static object or a state of affairs, but a dynamic system of social relations. Rosenfeld and Jacobsohn agree that “constitutional identity furnishes essential links between the constitution, its environment, and those who launched it as well as those for whom it was intended.”³⁴ As Peter Häberle observes “[a] constitution

human Rights and Fundamental Freedoms [...] with the Constitution of RA, <http://concourt.am/english/decisions/common/doc/sdv-350e.htm>.

³² Decision DCC-1175 of 14 November 2014 in Case on Conformity of the Obligations Stipulated in the “Treaty on the Accession to the Treaty of 29 May, 2014 On The Eurasian Economic Union Signed by the Republic of Armenia” Signed on 10 October, 2014 in Minsk with the Constitution of the Republic of Armenia, <http://concourt.am/english/decisions/common/pdf/1175.pdf> (15.10.2017).

³³ Marti J. L., Op. cit., pp. 32-33.

³⁴ Rosenfeld M., Constitutional Identity, Rosenfeld M, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 760-761.

is not merely a juridical text or a normative set of rules, but also [...] a mirror of cultural heritage and the foundation of its expectations”³⁵.

In his fundamental study, Jacobsohn stresses that “a constitution acquires an identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered”.³⁶ He then continues stating that:

Identity emerges dialogically and represents a mix of political aspirations and commitments that is 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.³⁷

It should be noted that ‘the people’ in this understanding of constitutional identity is not an actual community consisting of real individuals and social groups. In Rosenfeld’s words, it is an ‘imagined’ community which is an evolving one and “does not correspond to any set of persons crisply delimited in time and space”³⁸, although “it must channel its manifestations and iterations through persons assembled in plausible even if not actual configurations”³⁹. As Rosenfeld underlines,

“Constitutional identity originates as a lack that must be filled in an ongoing dynamic process of imagination through recombination and reconstruction of certain available relevant materials. Moreover, how the lack of constitutional identity is sought to be filled not only changes over time, but it also generates disputes and rifts within the relevant polity at every moment within its trajectory”⁴⁰.

³⁵ **Häberle P.**, The Constitutional State and Its Reform Requirements, *Ratio Juris*, 2000, **13**, 1, pp. 77-79, cited in: *Roznai Y., Towards a Theory of Constitutional Unamendability, Jus Politicum* 18, Juillet 2017, Cours constitutionnelles et révisions de la Constitution, http://juspolicum.com/uploads/jp18-t01_roznai.pdf (01.11.2017).

³⁶ **Jacobsohn G. J.**, Constitutional Identity, *The Review of Politics*, 2006, **68**, 361–397.

³⁷ **Jacobsohn G. J.**, Op. cit., p. 361.

³⁸ **Rosenfeld M.**, The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics (March 13, 2012), *Cardozo Legal Studies Research Paper*, 358, p. 13, <https://ssrn.com/abstract=2021356> (15.09.2016).

³⁹ **Rosenfeld M.**, Op. cit., p. 9.

⁴⁰ Ibid.

It can be argued that in the realities of post-Soviet transition, one of the most active ‘constructors’ of national constitutional identity are the constitutional courts. As David Robertson shows, in contemporary realities “constitutional judges often come near to being applied political theorists, carrying out a quite new type of political function” of “transforming societies” through “spreading the values set out in the constitution throughout their state and society”⁴¹. Even more, they not only “spread”, but also define or shape the meaning of the constitutional values. As a result, the so-called *acquis constitutionnelle* (by analogy with *acquis communautaire* of the EU) – “the continuity of jurisprudential lines [of constitutional courts] and accumulation of constitutional experience”⁴² become an integral part of what can be named the constitutional identity of the people. This, in its turn, may have an impact on the constitutional identity of the *actual* (not imagined) society or political community. To provide an example, one could refer to the case of Poland, where, according to Sledzinska-Simon, the activism of Constitutional Tribunal in the transition period contributed to “juristocracy rather than to democratization through civic society and citizens’ impact on policy- and law-making”⁴³.

Being actively and consciously constructed, the constitutional identity of the ‘imagined’ community can include (or even be built upon) historical legacies. For example, in case of Armenia, these may be “the democratic traditions of the independent Republic of Armenia established on May 28, 1918”⁴⁴ or earlier constitutional traditions which resonate

⁴¹ **Robertson D.**, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton University Press, 2010, p. 1.

⁴² **Safjan M.**, *Political and Constitutional Courts. A Judge’s Personal perspective*, *EUI Working Paper Law*, 2008, 10, <http://cadmus.eui.eu/handle/1814/8101> (30.10.2017). According to M. Safjan, the notion ‘*acquis constitutionnelle*’ was applied for the first time by the Constitutional Tribunal of Poland in its Decision of 20 November 2002, case No K 41/02 concerning the tax abolition and the patrimonial declarations (**Safjan M.**, *Op. cit.*, p. 20).

⁴³ **Sledzinska-Simon A.**, *Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland*, *International Journal of Constitutional Law*, 2015, **13**, 1, 124–155.

⁴⁴ Preamble of the Declaration of Independence of RA of 23 August 1990.

with the contemporary understanding of constitutional values⁴⁵. At the same time, the ‘imagined community’ may negate and ‘seek to transcend’ the Soviet legacy, for example, by revision of the nature of relations between the state and an individual and rethinking the approaches to the nature of law (departing from purely positivistic theory, adopting new approaches of interpretation of constitutional provisions and increasing the openness towards the international law and international legal standards). However, when it comes to the implementation of these new approaches in everyday practice, the problems arise: the Soviet legacy, which can easily be negated consciously, is still affecting the legal mentality and constitutional culture of the actual (real) society and thus causes the discrepancies between the constitutional identity of ‘the people’ and that of the actual political community.

Constitutional identity of an actual society (actual political community)

Remarkably, one of the central concepts in Jacobsohn’s theory of constitutional identity is the concept of ‘*disharmony*’ – a discrepancy between the ideas embodied in the constitution and the social reality. This phenomenon becomes especially relevant in cases of societies in transition, as those of the post-Soviet space. In Jacobsohn’s words, “[c]onstitutional disharmony creates a need for adaptation and coping with conflict and dissonance, and constitutional identity must be shaped dialogically with a view to overcoming the causes of such disharmony”⁴⁶. On the basis of comparative analysis of several constitutional documents, Jacobsohn differentiates between “militant constitutions” and “acquiescent constitutions”. These two polar ideal models characterize two different types of interrelation between a constitution and a social reality it operates in⁴⁷. While “militant constitutions” create a ground for transformation of social reality, the “acquiescent constitutions” tend to

⁴⁵ For in-depth historical account of Armenian constitutional culture see: **Harutyunyan G.**, *Constitutional Culture: The Lessons of History and the Challenges of Time*, Revised English Edition, Yerevan, “Njar”, 2017.

⁴⁶ **Rosenfeld M.**, *Constitutional Identity...*, p. 761.

⁴⁷ **Jacobsohn G. J.**, *Constitutional Identity*, Harvard University Press, 2010, p. 213.

preserve the existing social values⁴⁸. Thus, the level of disharmony between the constitutional ideas and the social reality is higher in the first case and lower in the second. Which model is used, or the proportion in which the characteristics of both models are combined, depends on the social context in time the constitution is elaborated and adopted.

It can be assumed that in societies in transition (such as post-Soviet societies) constitutional identities are still in the process of development. For such “evolving constitutional identities” typical is “the disharmonic tension between preservation and transformation”⁴⁹.

Classifying the situations which result in the adoption of new constitutions, Rosenfeld identifies six types of social contexts of constitution-making⁵⁰. Adoption of constitutions in post-communist Central and Eastern Europe (CEE), according to Rosenfeld, can be explained with the “pacted transition model”⁵¹. The distinguishing features of this model⁵² are: (1) pacted negotiations between the weakened old regime and the opposition, which lead to the establishment of the new constitutional order; (2) no interruption of legality; and (3) significant influence of internal and external factors⁵³. With some reservations⁵⁴, this model may be applied to some of the post-Soviet countries as well. In addition to these characteristics, however, one should mention one more particularity of the post-Soviet constitution-making context - the necessity to create an independent state. In contrast with the CEE, the transition in post-Soviet space covered not only the

⁴⁸ **Jacobsohn G. J.**, Op. cit., p. 214; **Rosenfeld M.**, *Constitutional Identity...*, p. 761; **Klug H.**, *Constitutional Identity and Change*, *Tulsa Law Review*, 2013, **47**, 41-49.

⁴⁹ **Jacobsohn G. J.**, Op. cit., p. 214.

⁵⁰ These are “(1) the revolution-based model; (2) the invisible British model; (3) the war-based model; (4) the pacted transition model; (5) the transnational model; and (6) the internationally grounded model” (**Rosenfeld M.**, *Constitutional Identity...*, p. 766).

⁵¹ **Rosenfeld M.**, *The Identity of Constitutional Subject: Selfhood, Citizenship, Culture and Community*, Routledge, 2009, pp. 197-198.

⁵² Rosenfeld exemplifies this model with the case of constitution-making processes in Spain in 1978 and applies it to the cases of constitution-making in post-communist Poland and Hungary and South Africa in 90s.

⁵³ **Rosenfeld M.**, *The Identity of Constitutional Subject...*, pp. 198-200.

⁵⁴ On the particularities of ‘pacted transition’ in the post-Soviet countries see: **McFaul M.**, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World*, *World Politics*, 2002, **54**, 212–244.

regime change, but also the processes of state-building. It can be concluded that this type of social context is a favorable environment for conflicting relations of preservation and transformation and stimulates disharmony between the social reality, a new constitutional text and the constitutional identity of ‘the people’.

Understanding constitutional identity as a dynamic interrelation between a constitution and an actual political community is a fruitful interdisciplinary (socio-legal) approach that allows evaluating to what extent the values embodied in the text of a constitution are supported and shared by the society. In the context of post-Soviet transformation, it helps to reveal to what extent transition to democratic values that occurs in formal-legal dimension (i.e. in constitutional text and legislation), often under the influence of various external factors/actors, is harmonized with the transition to the same values in social reality. It is obvious that, in order to strengthen the rule of law, democracy and respect to human rights, it is not enough to declare these values as fundamental in the text of a constitution. Proper implementation in practice is what matters, since it is the only way to give them life⁵⁵. Interestingly, as Ginsburg and Versteeg show comparing more than hundred constitutions, the countries that explicitly protect such values as the rule of law in their constitutions tend to have lower level of respect to the rule of law in practice than those that do not include the rule of law guaranties in the constitutional texts⁵⁶.

Proper implementation of the constitutional values that a particular political community aspires to achieve, is possible only when these values are internalized by the society⁵⁷ and not perceived as

⁵⁵ See, for example, the analysis of constitutional reforms in the light of the rule of law principle in Ukraine: **Khvorostiankina A.**, Constitutional Reforms and Post-Soviet Transformation in Ukraine: Challenges on the Way to the Rule of Law, *Armenian Journal of Political Science*, 2015, 1, 101-116.

⁵⁶ **Ginsburg T., Versteeg M.**, Constitutional Correlates and the Rule of Law. *Adams M., Meuwese A. and Hirsch Ballin E. (eds.), Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, 2017, p. 507, 517.

⁵⁷ According to Vorländer, “Constitutions can only do justice to their central tasks of legitimising and integrating political communities and their institutions if their normative rules and offered meanings are accepted and practiced in the social reality, if communication about fundamental values and patterns of behaviour takes

something imposed from outside. This means that the phenomenon of constitutional identity of an actual political community is closely intertwined with the phenomena of constitutional culture⁵⁸ (or – broader – political or legal culture⁵⁹) and the two interrelate as part (constitutional identity) and whole (constitutional culture). As Siegel observes, “‘Constitutional culture’ is the black box through which the Constitution’s words are transformed into concrete consequences. It is an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes”.⁶⁰

place between the rulers and the ruled” (**Vorländer H.**, “Gründung und Geltung: Die Konstitution der Ordnung und die Legitimität der Konstitution,” *Melville G., Vorländer H. (eds.), Geltungsgeschichten: Über die Stabilisierung und Legitimierung institutioneller Ordnungen*, Cologne/Weimar/Vienna: Böhlau, 2002, p. 256 as cited in: *Hensel S., Bock U., Dirksen K., and Thamer H. (eds.), Constitutional Cultures: On the Concept and Representation of Constitutions in the Atlantic World*, Cambridge Scholars Publishing, 2012, p. 5).

⁵⁸ As J. Mazzone defines, “[c]onstitutional culture [...] can be said to include such things as the disposition of regular citizens to recognize and accept that they are governed by a written document, one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them. *Constitutional culture also includes the understanding that a constitution unifies a population beyond those in one’s immediate sphere of acquaintance such that other people in other places are likewise governed by this written document and that, whatever our other differences, this is something we have in common*” (*italics added*) (**Mazzone J.**, The Creation of a Constitutional Culture, *Tulsa Law Review*, 2004, **40**, 4, Art. 7, p. 672). The last element in conjunction with the internalization of constitutional values, in my view, compose the constitutional identity of an actual political community.

⁵⁹ In his ‘Law and Society: An Introduction’, L.M. Friedman states that legal culture “determines when, why, and where people use law, legal institutions, or legal process; and when they use other institutions or do nothing”; it “sets everything in motion” and “is an essential variable in explaining the working of law” (**Cotterrell R.**, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Ashgate, 2006, p. 86).

⁶⁰ **Siegel A. M.**, Constitutional Theory, Constitutional Culture, *Journal of Constitutional Law*, 2016, **18**, 4, p. 1107.

Regardless the certain developments over the last decades, in Armenia the disharmony between the values and principles enshrined in the Constitution, their practical implementation and perception by the Armenian society is still significant. According to S. Payaslian, Armenian political culture is deeply influenced by authoritarian Soviet experiences and its fundamental transformation and cultivation of democratically oriented norms in foreseeable future is unlikely, in particular, due to the lack of socioeconomic development⁶¹. He notes:

People living in underdeveloped, substandard socioeconomic conditions [...] cannot emphasize objectives at variance with the imperatives of daily livelihood. Human rights values under such conditions become closely associated with pressing economic considerations rather than matters pertaining to civil and political liberties⁶².

Taking into account the social realities, the processes of democratic transformation in Armenia entail the “dissolving of the oligarchic economic and political structures” and “reconfiguration of relations” between the state, individuals and civil society⁶³. Payaslian expresses the hope in transgenerational change – the development of political culture brought by the post-Soviet generations. The preliminary findings of the present research project show that this hope is not groundless: today, the young Armenian people more and more often define the constitutional core values as a part of Armenian constitutional culture and declare the sharing of these values (although skeptical attitudes are also significantly strong)⁶⁴.

Constitutional Identity as the Identity of a Constitutional Order

The notion of ‘constitutional identity’ can be also viewed through the prism of the fourth possible meaning – as an identity of a national

⁶¹ **Payaslian S.**, *The Political Economy of Human Rights in Armenia: Authoritarianism and Democracy in a Former Soviet Republic*, I.B. Tauris, 2011, pp. 290-293.

⁶² **Payaslian S.**, *Op. cit.*, p. 291.

⁶³ *Ibid.*

⁶⁴ Based on the results of the focus groups discussions with the students of Brusov State University of Languages and Social Sciences in the period from 2013 to 2017.

constitutional order in its interrelations with other legal orders. In today's reality, national constitutional orders cannot exist in isolation; they are in dialogs with international, supranational, subnational, and foreign legal orders⁶⁵. These dialogs result in mutual [although usually asymmetric] transformative influence. The concept of constitutional identity in this case helps to characterize the limits of these possible influences. It indicates the degree of openness of a constitutional order towards other legal orders and its adaptability to the external standards and requirements⁶⁶.

This understanding of the constitutional identity was specifically elaborated and actively employed in the case-law of the European constitutional courts in cases addressing the interrelations between the domestic and EU legal orders. In the context of EU, the national constitutional identity is viewed as a limit of possible 'Europeanization' of the legal systems of the EU Member States (or a limit of European constitutional identity, i.e. the constitutional identity of the EU) and is linked to the concept of state sovereignty⁶⁷. In the academic literature, the two basic approaches to the application of 'constitutional identity' argument by the European constitutional courts are metaphorically defined as 'a shield' and 'a sword'⁶⁸: in first instance, the 'constitutional

⁶⁵ Speaking about the contemporary notion of legal pluralism and interaction of legal orders, Armin von Bogdandy notes: "any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*" (Von Bogdandy A., Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law, *International Journal of Constitutional Law* (I*CON), 2008, 6, 3-4, 397-413).

⁶⁶ It may be assumed – in a form of working hypothesis, at this stage, - that the less consolidated and 'mature' the constitutional identity is, the less resistant constitutional order is to external influences.

⁶⁷ In this meaning, the term "national constitutional identity" is applied, in particular, by European bodies of constitutional justice (the recent examples from Germany, Hungary, Czech Republic, Denmark are analyzed, in particular, in Faraguna P., Constitutional Identity — A Shield or a Sword? The Dilemma of Constitutional Identities in the EU (June 30, 2017), <https://ssrn.com/abstract=2995416>). See also the case studies in.; Saiz Arnaiz A., Alcoberro Llivina C. (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013.

⁶⁸ Faraguna P., Op. cit.; Konstadinides Th., Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement (December 1, 2011), *Cambridge Yearbook of European Legal Studies*, 2010-2011, 13.

identity' (reflected in the constitutional text) is used to protect national legal systems from "further and future integration"; in the second, - as an "operative clause" to resolve a conflict between the national constitutional law and EU law⁶⁹. Having analyzed the case-law of the Polish Constitutional Tribunal, Sledzinska-Simon and Ziółkowski show that this court understands constitutional identity of Poland "as the axiological equivalence or convergence with the EU legal order, or conversely, as divergence from common constitutional standards"⁷⁰.

In the EU law, the legal grounds for the judicial argumentation based on the 'national constitutional identity' argument are derived from the Treaty on the European Union. Art. 4(2) TEU states that:

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*, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (*Italics added – A. Kh.*).

The argumentative approaches of the European constitutional courts in the cases addressing the problem of national constitutional identities in the context of European integration are quite controversial and complex and deserves more detailed examination than can be afforded within this paper. In addition, it is linked to the very specific context – the context of membership in the EU and the 'shared', 'transferred' or 'limited' sovereignty.

My understanding of 'constitutional identity' as the 'identity of a national constitutional order' is much broader and covers various types of external influences. These influences may be of different nature (formal or informal) and may be realized through different 'channels' –through the formal legal tools provided by national legislation⁷¹ and/or indirectly

⁶⁹ Faraguna P., Op. cit., p. 1.

⁷⁰ Sledzinska-Simon A., Ziółkowski M., Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty? (July 5, 2017), <https://ssrn.com/abstract=2997407> (15.09.2017).

⁷¹ To provide some examples, one can refer to Art. 5(3) of Constitution of RA setting out the hierarchy of legal norms and providing that "In case of conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties shall apply"; Art. 81 of Constitution

through socialization of domestic actors involved in law-making and law-applying (specifically, judicial) activities. In the same manner, the obstacles for the effective interplay of the national constitutional order with other legal orders may be created either directly by a constitution or legislation or indirectly by domestic actors, in particular, due to the still significant impact of Soviet legacies on their legal mentality⁷².

of RA stating that “The practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution. Restrictions on basic rights and freedoms may not exceed the restrictions prescribed by international treaties of the Republic of Armenia”; Art. 15 of the Judicial Code of RA of 2007 recognizing the case-law of the ECtHR as an official source of law in Armenia. Art. 43 of the Constitution in its version of 1995 stated that the rights and freedoms guaranteed by the Constitution are not exhaustive and a person can have other rights, in particular those guaranteed by the international treaties. The Constitutional Court used this constitutional provision as a ground for its arguments confirming the compliance of the obligations deriving from the ECHR with Armenian Constitution thus confirming the openness of Armenian constitutional order towards the international human rights standards (see para. 13 of Decision DCC-350 of 22 February 2002). Another ‘channel’ of external influence on Armenian legal system is the process of legislative approximation based on the [already outdated] EU-Armenia Partnership and Cooperation Agreements, legal-political EU-Armenia Action Plan and relevant domestic legislative framework (for the information on the state of approximation processes as of 2014 see: **Ghazaryan N., Hakobyan A.**, Legislative Approximation and Application of EU Law in Armenia, *Van Elsuwege P., Petrov R. (eds.), Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* Routledge, 2014, pp. 191-214). The new developments in this field are expected with coming into force of the new EU-Armenia Comprehensive and Enhanced Cooperation Agreement (the draft CEPA contains much more precise and elaborated approximation clauses in comparison with general and legally non-binding formulation of approximation clause in Art. 43 of PCA).

⁷² Let us consider the practice of application of the case-law of the ECtHR by domestic courts. Although, as shown *supra* in note 72, the ECtHR case-law is recognized as an official source of domestic law, the judges still face methodological problems while applying it due to the long-lasting domination of legal positivism during the Soviet era (**Ghazaryan, N., Hakobyan**, Op. cit., p. 205). These problems are not unique, however: to a certain degree they are typical for the post-communist countries (**Kühn Z.**, The Application of European Law in the New Member States: Several (Early) Predictions, *German Law Journal*, 2005, **6**, 3, 563- 582; **Meleshevych A., Khvorostyankina A.**, ‘Ukraine’, *L. Hammer and F. Emmert (eds), The European Convention on Human Rights and fundamental freedoms in*

Discussing the external influences on the practice of the constitutional courts in Eastern Europe, Robertson observes that “one of the most marked aspects of their jurisprudence is the widespread use of arguments and decisions from other constitutional courts”.⁷³ Referring to the foreign legal sources and case-law is also a tendency in the development of the practice of Armenian Constitutional Court⁷⁴. The process of constitutional adjudication in the majority of cases includes the stage of studying of the international and foreign legal materials which influence the formation of the legal positions of the Court, although sometimes the arguments based on foreign legal materials and comparative legal analysis do not appear in the final text of the decisions and the Court just briefly states that the relevant practices has been examined⁷⁵.

The openness of a constitutional order towards the external influences (specifically, through participation in the international integration projects) is linked to the understanding of the concept of sovereignty in this constitutional order. The issue of sovereignty in the context of integration processes was highlighted by the Constitutional Court of RA in several cases. In its Decision DCC-350 of 22 February 2002 on the case of conformity of obligations stated in the Convention for the Protection of human Rights and Fundamental Freedoms [...] with the Constitution of RA⁷⁶. Deciding on the issue of the jurisdiction of the

Central and Eastern Europe, The Hague, Eleven International Publishing, 2012, pp. 557-596).

⁷³ **Robertson D.**, Op. cit., p. 96.

⁷⁴ As one of the most recent examples, one can mention the Decision DCC-1384 of 10 November 2017 on the Case of conformity of Parts 3 and 4 of Article 64, Part 1 of Article 69 of the Law on Local Self-Government of the Republic of Armenia with the decisions N2-n, 7-n, 8-n, 9-n of Vanadzor community council dated 31 march, 2017 with the Constitution of the Republic of Armenia on the basis of the application of the deputies of the National Assembly, where the Court refers to the relevant legislative practice of several European countries (the text in Armenian is available at: <http://concourt.am/armenian/decisions/common/2017/pdf/sdv-1384.pdf> (14.11.2017)).

⁷⁵ Based on the expert interview with Dr. S. Arakelyan, Head of the Legal-Advisory Service of the Constitutional Court of RA.

⁷⁶ Decision of the Constitutional Court of RA DCC-350 of 22 February 2002 on the case of conformity of obligations stated in the Convention for the Protection of human Rights and Fundamental Freedoms [...] with the Constitution of RA, English

ECtHR and the binding force of its judgements for the Republic of Armenia, the Court stated that, although the Constitution does not directly provide the right to apply to the international courts to protect one's rights, "taking as a ground the authorizing nature of Article 43 of the Constitution of the Republic of Armenia and the *sovereign right* of the Republic of Armenia *voluntary and on the base of mutual concordance to accept such an obligation in the name of the effectiveness of the international co-operation*, it can be noted that the obligations set forth by Articles 36 and 43 of the issued Convention do not contradict the *spirit of the Constitution* of the Republic of Armenia" (para. 14 of the Decision) (*italics added – A. Kh.*).

In its Decision DCC-1175 of 14 November 2014 in Case on Conformity of the Obligations Stipulated in the "Treaty on the Accession to the Treaty of 29 May, 2014 On The Eurasian Economic Union Signed by the Republic of Armenia" Signed on 10 October, 2014 in Minsk with the Constitution of the Republic of Armenia,⁷⁷ the Constitutional Court assessed, among other issues, "the concordance of the axiological approaches of the obligations undertaken [...] under the Treaty" with the fundamental principles forming the foundations of the constitutional order of RA according to the Constitution and "concordance of the forms and mechanisms of international cooperation with the principles of sovereignty, equality and mutually beneficial cooperation of member states"⁷⁸. Having defined the nature of the Eurasian Economic Union as, in fact, supranational, the Court employed the argument of "voluntary character of participation" in the supranational organization, underlined that such participation is based on an international treaty which is to be duly ratified by the Parliament, referred to the link of the "will of national participation" with the "mandate [to participate] deriving from national interests", thus following the 'trend' of contemporary understanding of

version available at: <http://concourt.am/english/decisions/common/doc/sdv-350e.htm>.

⁷⁷ Decision DCC-1175 of 14 November 2014 in Case on Conformity of the Obligations Stipulated in the "Treaty on the Accession to the Treaty of 29 May, 2014 On The Eurasian Economic Union Signed by the Republic of Armenia" Signed on 10 October, 2014 in Minsk with the Constitution of the Republic of Armenia, <http://concourt.am/english/decisions/common/pdf/1175.pdf> (15.10.2017).

⁷⁸ Para. 4 (a) and (b) of the Decision.

sovereignty as not unlimited phenomenon and recognizing the recent regional and international integration processes as, in principle, compatible with the this constitutional principle⁷⁹. The Courts stressed that the Constitution of RA does not stipulate any restriction in the issues of international or regional cooperation; at the same time, it pointed out to the existence of specific constitutional requirements in Armenian legal order. In addition to the principles of sovereignty, legal equality and mutual expediency of international cooperation, the Court (1) highlighted that the restrictions on human rights [possibly resulting from participation in a supranational organization] should be in accordance with the norms and principles of international law and (2) recognized that operation of the decisions of supranational bodies in Armenia is possible only within the scope of accordance with the Constitution of RA.⁸⁰ The Court formulated the legal position of general applicability holding that “any decision adopted by any supranational body with the participation of the Republic of Armenia which is not in conformity with these requirements in not applicable in the Republic of Armenia. In the case of following these requirements, cooperation of RA with any international or regional organization will not raise the issue of constitutionality”⁸¹.

In the recent Decision DCC-1381 of 10 October 2017 on the conformity of the obligations stipulated by the Agreement on the Customs Code of the Eurasian Economic Union signed on April 11, 2017, with the Constitution of RA⁸², the Constitutional Court differentiated between the legal acts of international and supranational nature. While the acts of the first category, in the Court’s view, regulate ‘horizontal’ relations between the subjects of international legal relations, the acts of the second category regulate vertical relations between the state and the subjects within the state, thus directly affecting the individuals. As a consequence, the supranational acts in the process of their implementation can potentially violate the constitutional rights; however, the possibility of such potential violations cannot be assessed in

⁷⁹ The argumentation in para.7 of the Decision.

⁸⁰ Para. 7 of the Decision.

⁸¹ Ibid.

⁸² <http://concourt.am/armenian/decisions/common/2017/pdf/sdv-1381.pdf> (13.11.2017).

frames of preventive and abstract constitutional control. Such evaluation is possible only when there is a practice of application of a supranational act⁸³. This, in turn, means that even if the Constitutional Court within preventive constitutional control finds a specific supranational act generally in accordance with the Constitution, the provisions of these can be challenged *a posteriori* when the practice of their application is available.

It can be preliminary concluded that the constitutional order of Armenia is open to the external influences through both formal and informal ‘channels’ under the condition of securing the supremacy of national Constitution and complying with its ‘axiology’, or value core, or – in other words – its identity. Since Armenian constitutional identity is in the process of development and transcending the Soviet past, the openness of the constitutional order has some specific ‘transitional’ characteristics. On one hand, there is a tendency to orient towards international legal standards, follow the foreign ‘best practices’ and ‘borrow’ the external experience. On the other hand, these processes are not free from the methodological problems caused by the particularities of legal mentality affected by Soviet positivistic tradition.

The role of constitutional identity in the processes of regional integration in the post-Soviet space

Does the constitutional identity *determine* the orientation towards specific integration project? On the one hand, it is obvious that the choice of a particular integration project can be influenced by variety of factors – geopolitical, political, economic. On the other hand, however, in some cases the geopolitical orientation may become an element of the constitutional identity enshrined by the constitution or the documents of constituting character (such as the declarations of independence) and having the status of a constitutional value. Here one can speak about the interplay of the second and first dimensions of ‘constitutional identity’: the people (due to historical or cultural particularities) view a specific

⁸³ Argumentation in para. 5 of the Decision.

geopolitical orientation as preferable (or the only possible); and the constitutional text reflects and protects this (particularistic) value.

To give an example, one can refer to the case of the Republic of Moldova. In its Judgement of 9 October 2014 in case regarding the constitutionality of the EU-Moldova Association Agreement, the Constitutional Court of Moldova found that “within the meaning of the Declaration of Independence of the Republic of Moldova and of Article 1 of the Constitution, orientation towards the European area of democratic values is an *element of constitutional identity* of the Republic of Moldova” (*italics added – A. Kh.*)⁸⁴. Furthermore, this element is a “defining” one; “thus, the process of European integration [...] not only complies with the constitutional identity of the country, any other adverse orientation is unconstitutional *a priori*”⁸⁵.

Another example is the case of Lithuania, where the Constitutional Act of 8 June 1992 “On the Non-Alignment of the Republic of Lithuania with Post-Soviet Eastern Alliances” constitutes the integral part of the Constitution⁸⁶ prohibiting “to join in any form any new political, military, economic or other unions or commonwealths of states formed on the basis of the former USSR”⁸⁷. As President of the Constitutional Court of Lithuania Žalimas observed, this principle of geopolitical orientation, “based on historical experience”, is a specific feature of the Lithuanian constitutional identity⁸⁸.

⁸⁴ Judgment on the constitutionality of the Association Agreement between the Republic of Moldova, on the one hand, and the European Union and the European Atomic Energy Community and its Member States, on the other hand, and of the Law No. 112 of 2 July 2014 on its ratification, <http://www.constcourt.md/libview.php?l=en&idc=7&id=583&t=/Overview/Press-Service/News/The-Association-Agreement-between-the-Republic-of-Moldova-and-the-European-Union-constitutional> (01.11.2017).

⁸⁵ *Ibid.*

⁸⁶ Art. 150 of the Constitution of the Republic of Lithuania, <https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.206072/> (30.06.2017).

⁸⁷ Para. 1 of the Constitutional Act of 8 June 1992 “On the Non-Alignment of the Republic of Lithuania with Post-Soviet Eastern Alliances”, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21154?jfwid=1clcwot6i3>.

⁸⁸ **Žalimas D.**, Eternity Clauses: a Safeguard of Democratic Order and Constitutional Identity, Speech of the President of the Constitutional Court of Lithuania, p. 2, <http://www.gjk->

Other post-Soviet constitutions, while not indicating directly the specific integration orientations, enshrine the core values that, in their turn, - if shared by the actual political community - can potentially influence such orientation. As the Constitutional Court of RA indicated in the EAEU Treaty case cited above, the Constitution of Armenia does not stipule any restriction on the issues of international or regional cooperation⁸⁹; it neither indicates the specific integration priorities or preferences. The analysis of the circumstances of Armenia's accession to the EAEU allows stating that this orientation is based rather on pragmatic economic interests and security considerations than value-oriented 'civilizational choice'⁹⁰. Although the Constitutional Court of Armenia, having applied the 'axiology' test, did not find the discrepancies between the core values of Armenian constitutional order and EAEU Treaty, participation in the EAEU will hardly contribute to the strengthening of these values⁹¹. The EU-Armenia draft CEPA, to the contrary, views the strengthening and proper implementation of the 'common' values of democracy, human rights and the rule of law as an essential element of

ks.org/repository/docs/Speech_of_the_President_of_the_Constitutional_Court_of_Lithuania_Prof.Dr._Dainius_alimas.pdf (01.11.2017).

⁸⁹ It should be noted, however, that, according to the amendments to the Constitution introduced in 2015 (not yet in force), "the issues related to the accession to supranational international organisations shall be resolved through referenda" (Art. 205 of the Constitution).

⁹⁰ **Bendavid N., Laurence N.**, EU Stunned by Armenia U-Turn, *The Wall Street Journal*, 4 September 2013, <http://blogs.wsj.com/brussels/2013/09/04/eu-stunned-by-armenia-u-turn/> (30.10.2016).

⁹¹ Being the organization of economic cooperation, the EAEU does not aim at promoting such values as the rule of law, democracy and respect to human rights; instead, among the principles of its functioning, the EAEU Treaty lists the respect to the universally recognized principles of international law including the principle of sovereign equality of the member states and 'respect to particularities of political order of the member states' (Art. 3 of the EAEU Treaty). Formally, the EAEU Member States recognize the 'European' (or universal) values in their constitutions (see Art. 1 and Art. 2 of the Constitution of the Republic of Belarus; Art. 1 of the Constitution of the Republic of Kazakhstan; Art. 1 of the Constitution of Kyrgyz Republic; Art. 1 and Art. 2 of the Constitution of Russian Federation). The implementation of these values, however, is extremely problematic issue: all of the listed states are either consolidated authoritarian or semi-authoritarian regimes, not free or partly free (based on the data of Freedom House 2016, <https://freedomhouse.org/report/freedom-world/freedom-world-2016>, (30.10.2017)).

the Agreement⁹². Thus, while cooperation within EAEU may be considered as pragmatically motivated, orientation towards enhanced cooperation with EU is definitely in compliance with the identity of Armenian Constitution. Furthermore, in long perspective, it will be beneficial for further dialogical development of constitutional identity of the Armenian people and evolution of the constitutional identity of actual political community.

If the *orientation* towards specific integration project may, in some cases, be encompassed by the identity of a constitution and that of the political community, the *adaptability* of the national constitutional order to the requirements of an integration project, in my view, depends on all four dimensions of constitutional identity: while identity of the constitution, constitutional identity of the people and the actual political community influence the ‘substance’ of adaptation processes, the identity of the constitutional order and its openness towards the external influences determine the mechanisms and tools of the adaptation.

Constitutional identity and the Europeanization processes

The concept of ‘Europeanization’ covers a set of complex processes and is not limited to the transposition of the rules of EU into the domestic legal system. These processes of change under the influence of the EU (or European structures generally, according to some of the approaches) transform not only the legislation system of a country, but also influence political culture, legal mentality and judicial reasoning, empower civil society and transform the relations between a state and an individual. According to the definition given by C. Radaelli, Europeanization comprises

[the] processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, “ways of doing things” and shared beliefs and norms which are first defined and consolidated in the making of EU decisions

⁹² Art. 2 of draft CEPA.

and then incorporated in the logic of domestic discourse, identities, political and public policies⁹³.

Originally, the definition was elaborated in the context of the internal relations within the EU (i.e. between EU and the Member States); however, it remains true if applied to describe the influences of the EU beyond its borders. Europeanization as a ‘complex adaptation patterns and interaction logic’⁹⁴ can become one of the possible ways of post-communist transformation; for some of the countries that underwent the processes of transition (CEEC including post-Soviet Latvia, Lithuania and Estonia), it was the principal way of transformation.

Vink and Graziano define Europeanization as “the domestic adaptation to European regional integration”, where ‘regional integration’ means “the formation of closer economic and/or political linkages among countries that are geographically near each other”⁹⁵. This definition thus covers various formats of European integration projects (cooperation within Council of Europe, OSCE, the advanced forms of relations with the EU – association relations or other cases of ‘integration without membership’). In this paper, I focus mainly on the transformative influence of the EU. Although the role of CoE in promoting the democratic values in post-Soviet space is significant (first of all, due to the availability of binding instruments such as the European Convention on Human Rights and the judgments of the ECtHR), today one can speak about the joint actions of the EU and CoE in strengthening the rule of law, democracy and good governance, as well as respect to human rights. Furthermore, the values and standards of the CoE, being a part of the common constitutional traditions of the EU Member States, are the integral part of the European constitutional order. The focus on the EU’s influence is also determined by the research question concerning the role of the constitutional identity in the integration processes in Armenia,

⁹³ **Radaelli C.**, Whither Europeanization? Concept Stretching and Substantive Change, *European Integration Online Papers* (EIoP), 2000, **4**, p. 3.

⁹⁴ **Radaelli C.**, Europeanisation: Solution or Problem? *European Integration online Papers* (EIoP), 2004, **8**, 16, p. 4, <http://www.eiop.or.at/eiop/pdf/2004-016.pdf> (15.10.2016).

⁹⁵ **Vink M. P., Graziano P.**, Challenges of a New Research Agenda, *Graziano P., Vink M. P. (eds), Europeanization: New Research Agendas?* Basingstoke, Palgrave Macmillan, 2007, pp. 3–20, pp. 7-8.

taking into consideration the specific geopolitical situation of this country and its attempts to balance between EU and EAEU.

According to one of the possible explanations of the mechanisms of Europeanization beyond the EU borders offered by Schimmelfennig, Sedelmeier and Lavenex, EU transfers its norms and rules to the third countries' legal orders using three modes of external governance: hierarchical governance, network governance and market governance. Each of the modes employs specific tools (external incentives, social-learning and lessons drawing, respectively). The effectiveness of application of these tools depends on the so called 'mediating factors'. The table below summarizes the proposed theoretical framework.

Table 1. Forms and mechanisms of the EU norms transfer, proposed by Lavenex, Schimmelfennig and Sedelmeier⁹⁶

Mode of governance	Tools	Conditions and mediating factors
<p>Hierarchical governance (it is reflected in traditional 'Community method' and is not present as such in external relations (where only 'quasi-hierarchy' may be found in a limited number of cases))</p>	<p>Some elements of this mode are used in the conditionality mechanism (external incentive model) including market-based and value-based conditionality. The "dominant logic is a bargaining strategy of reinforcement by reward"⁹⁷</p>	<p>"[A] state adopts EU rules if the benefits of EU rewards exceed the domestic adoption costs." The cost-benefit balance depends on: (i) the determinacy of conditions, (ii) the size and speed of rewards, (iii) the credibility of threats and</p>

⁹⁶ **Schimmelfennig F., Sedelmeier U.**, Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe, *Journal of European Public Policy*, 2004, **11**, 4, 661-679; **Lavenex S., Schimmelfennig F.**, EU Rules Beyond EU borders: Theorizing External Governance in European Politics. *Journal of European Public Policy*, 2009, **16**, 6, 791-812; **Lavenex S.**, A governance perspective on the European neighbourhood policy: integration beyond conditionality? *Journal of European Public Policy*, 2008, **15**, 6, 938-955.

⁹⁷ **Schimmelfennig F., Sedelmeier U.**, Op. cit., p. 662.

		<p>promises, and (iv) the size of adoption costs”⁹⁸</p>
<p>Network governance (it is characterized by formal equality of the involved actors and is based on consent regarding the application of specific measures).</p>	<p>Socialization, social-learning and communication</p>	<p>“[T]he actors involved are motivated by internalized identities, values, and norms”.</p> <p>Mediating factors:</p> <p>i) legitimacy (“the likelihood of rule adoption, increase if rules are formal, member states are subject to them as well, the process of rule transfer fulfils basic standards of deliberation, and EU rules are shared by other international organizations”)</p> <p>ii) identity (“the likelihood of rule adoption is expected to increase with the identification of the target state and society with the EU community”)</p> <p>tiii) resonance (“rule adoption will be facilitated if conflicting domestic rules are absent or delegitimated and if EU rules tie in with existing or traditional domestic rules”)⁹⁹</p>

⁹⁸ Schimmelfenning F, Sedelmeier U., Op. cit., pp. 664-667.

⁹⁹ Schimmelfenning F, Sedelmeier U., Op. cit., pp. 667-668.

<p>Market governance ("the EU as such as well as its processes and policies may also provide a model for other regions, states, and societal actors who may come to see them as appropriate solutions to their own problems.)</p>	<p>Lessons drawing ("a state adopts EU rules, if it expects these rules to solve domestic policy problems effectively"¹⁰⁰)</p>	<p>"A state has to:</p> <p>(i) start searching for rules abroad;</p> <p>(ii) direct its search at the political system of the EU;</p> <p>(iii) evaluate EU rules as suitable for domestic circumstances. These conditions depend on four sets of factors: policy dissatisfaction; EU-centered epistemic communities; rule transferability; and veto players"¹⁰¹</p>
--	---	---

The analysis of this three-modes model of the EU norms transfer allows making an assumption regarding the role of 'constitutional identity' (in all four understandings discussed in this paper) in the Europeanization processes.

As it is shown in the table, in case of applying the conditionality mechanism, the effectiveness of norms transfer depends on the cost-benefit balance: the reward the EU promises for the introduction of specific reforms should be more significant than the adaptation costs. In case of the value-based conditionality (which has been widely criticized in the academic literature), the application of this mode of governance is especially problematic. It is obvious that it is not enough to formally recognize the values promoted by the EU (furthermore, in case of Armenia these values have already been formally recognized on the constitutional level and declared as 'shared' or 'common' in the EU-Armenia legal and political documents). What is required is the effective

¹⁰⁰ Schimmelfenning F, Sedelmeier U., Op. cit., p. 669.

¹⁰¹ Ibid.

implementation of such norms which, in turn, depends on their internalization by the domestic actors¹⁰².

At the same time, when there is a significant disharmony between the core values enshrined by the national constitution and the constitutional identity of the society, it may be possible that the target government would be more interested in preserving this state of disharmony rather than in getting the reword for the effective reform implementation. According to Schimmelfenning and Sedelmeier, in case of value transfer to the authoritarian states, “the domestic political costs of complying with EU conditionality proved prohibitively high. Democratic rules would have required these governments to give up the very instruments on which their political power rested”¹⁰³. In addition, it is also likely that, without proper internalization of the promoted values, the Europeanization reforms will be instrumentalized by domestic actors and empower the authoritarian incumbent governments against their political opponents, thus resulting in the so called ‘Europeanization pathology’¹⁰⁴.

The internalization of the norms by the domestic actors may be reached, in particular, through socialization, social-learning and communication within the network governance. In the area of values promotion, this seems to be the most appropriate mode of governance, since it targets the mentality stimulating the change in legal and political culture. Two of the mediating factors listed in the table are specifically relevant to the issue of constitutional identity. According to the authors, “the likelihood of rule adoption is expected to increase with the

¹⁰² **Gstöl S.**, The Contestation of Values in the European Neighbourhood Policy: Challenges of Capacity, Consistency and Competition, *Poli S. (eds), The European Neighbourhood Policy – Values and Principles*, Routledge, 2016. Importantly, the necessity to properly implement (not only declare and recognize) these values is underlined in the new EU-Armenia CEPA.

¹⁰³ **Schimmelfenning F., Sedelmeier U.**, Op. cit., p. 670.

¹⁰⁴ **Börzel T., Pamuk Y.**, Pathologies of Europeanization: Fighting Corruption in the Southern Caucasus, *West European Politics*, 2011, **35**, 1, pp. 79-97; **Börzel, T., Pamuk, Y.** Europeanization Subverted? The European Union’s Promotion of Good Governance and the Fight Against Corruption in the South Caucasus, KFG Working Paper No 26, April 2011, http://userpage.fu-berlin.de/kfgeu/kfgwp/wpsseries/WorkingPaperKFG_26.pdf (30.08.2017).

identification of the target state and society with the EU community”¹⁰⁵ (*italics added – A.Kh.*). In other words, in case of such identification the society perceives the core European values as its own (and not forcefully imposed from the outside), even if they are not fully implemented in practice. The ‘resonance’ with the domestic rules can facilitate the processes of norm transfer: the European norms will more likely be adopted if they are in harmony with the domestic norms, in particular, with the provisions of Constitution embodying its identity.

In case of market mode of governance, the EU serves just as one of the possible examples to follow. The effectiveness of ‘lessons drawing’ as a tool in this case will depend on the potential openness of a domestic constitutional order towards external influences and the readiness to absorb the new norms.

Conclusion

Summarizing the approaches discussed in this paper, the complex phenomenon of ‘constitutional identity’ can be represented as a combination of several interrelated meanings:

(1) identity of a constitution, i.e. the fundamental principles and values enshrined in the constitution that define its specific nature;

(2) constitutional identity of the people (or imagined political community) which, according to Jacobsohn, develops dialogically and represents “a mix of political aspirations and commitments that is 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 actively and consciously constructed (in particular, by the judges of constitutional courts);

(3) constitutional identity of an actual political community, or society, which is a part of this society’s constitutional culture and shows whether it identifies itself with the constitutional foundations or exists separately in the “parallel world” of its own values and practices. In other words, the constitutional identity of the actual political community determines the harmony/disharmony between what is written in the

¹⁰⁵ Schimmelfenning F., Sedelmeier U., Op. cit., pp. 667-668.

constitutional text and reflected in the constitutional identity of the people and the actual societal constitutional practice;

(4) identity of a constitutional order that determines its relations with other orders (international, supranational) and its openness towards various external influences.

As it was demonstrated in the paper, in case of post-socialist states, the concept of ‘constitutional identity’ can serve as a useful tool not only to characterize the particularities of the transformation processes in these countries (the evolution of constitutional identities in all four understandings of this concept), but also to explain the dynamics of the regional integration processes. The orientation towards specific integration project may, in some cases, be an integral part of the identity of a constitution and that of the political community; the adaptability of the national constitutional order to the requirements of an integration project, in its turn, depends on all four dimensions of constitutional identity. While identity of the constitution, constitutional identity of the people and the actual political community influence the ‘substance’ of adaptation processes, the identity of the constitutional order and its openness towards the external influences determine the mechanisms and tools of the adaptation.

The integration of these four-dimensional understanding of constitutional identity with one of the possible models explaining the processes of Europeanization beyond the EU borders allows making preliminary conclusions that in Armenia, where the national constitutional identity is in the process of transitional development, the effectiveness of Europeanization depends on several [sometimes, mutually contradicting] factors. The contradictions among these factors can be explained with their relevance to different dimensions of ‘constitutional identity’ and different dynamics of transitional change within each of these dimensions.

Thus, on the one hand, Armenia declares its belonging to the European family and sharing the European values (which are reflected in the constitutional text and constitute the core of identity of Armenian Constitution), but, on the other hand, the constitutional identity of the actual political community, its legal mentality and constitutional culture are still significantly affected with the Soviet legacies. The openness of

Armenian constitutional order towards external influences contributes to further development of the constitutional identity of the ‘imagined’ political community through recognition of international standards and absorbing of Western best practices. However, this not always translates into the constitutional practices of the actual political community; moreover, this openness may even lead to ‘pathologies’ of Europeanization when it appears to be instrumentalized by the ruling elites to promote their own interests.