Constitutional interpretation and populism: A comparison between Italy and Hungary

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ABSTRACT

This essay aims to compare the constitutional interpretation techniques used by the Italian Constitutional Court and the Hungarian one, facing the advancing of populist claims in Europe. After introducing the differences between the exercise of sovereignty in constitutional legal systems towards populistic regimes, the authors analyse some paradigmatic cases in which Constitutional Courts reacted to populistic waves. Through comparing the different legal instruments adopted to interpret the Constitution, this paper will therefore test the Italian and Hungarian legal system’s concrete democratic evolution.

KEYWORDS

constitutional court, constitutional interpretation, populism, constitutionalism, Italy, Hungary

1. TWO IRRECONCILABLE LOGICS: THE ROLE OF CONSTITUTIONAL INTERPRETATION

Over the past two decades, several contemporary legal systems have faced the gradual escalation of movements and claims variously referable to the dogmatic category of 'populism'.

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European level, this phenomenon has affected both Western constitutional orders that display a historically consolidated liberal tradition and normative systems that emerged since the collapse of the so-called ‘Soviet bloc’ and have only recently started a complete process of democratisation. Over the years, therefore, the term ‘populism’ has been used with increasing frequency by many political actors intent on overcoming traditional theoretical divisions. To sum up, the related concept has gradually been seen as a ‘general approach’ or as a kind of ‘political style’, which ideologically contrasts ‘the people’, always associated with positive values, with corrupt and incompetent elites. Populism has lent itself rather easily to being adopted in the most diverse frameworks by a variety of different groups.2

From this standpoint, a comparison between Italy and Hungary allows us to clarify the meaning that populism has assumed in different legal systems. Conventionally, the Italian case epitomises a stable and durable democratic model, in which populism takes on less radical connotations, whereas the Hungarian model represents the paradigm of a legal system still in transition, called upon to face authoritarian and illiberal forms of populism.3 Therefore, two alternative approaches to the Constitution face each other, in both these contexts: a ‘protectionist’ one, mainly adopted by the Constitutional Courts; and a more ‘opportunistic’ one, typical of populist parties. In other words, in Italy and Hungary the legal and cultural contrast that structurally opposes constitutionalism and populism is first and foremost played out in the field of legal interpretation. This is the reason why it becomes decisive to question what specific roles Constitutional Courts play in the face of drifts of popular sovereignty.4

Such a comparison will make it possible to analyse by way of comparison and, above all, based on practice—i.e. by examining the most significant events in which the different approaches to the constitutional text emerged to see how Italian and Hungarian guarantor bodies have reacted to the rising waves of populism, not only because of the political and institutional context of reference, but also with regard to interpretations in terms of ‘soft populism’ or ‘hard populism’, which the phenomenon has respectively been called in these two legal frameworks.5

Generally speaking, constitutionalism addresses the issue of political power and its related legitimacy, by setting mandatory limits to the (arbitrary) exercise of popular sovereignty. According to this logic, Constitutions identify a system of ‘checks and balances’, delimiting the aspirations of the majority in order to maintain a fair confrontation between opposite visions and ensure citizens’ freedoms.6 In this same vein, Constitutions are an organic system of provisions designed in their essence to contain possible deviations on the part of political power, even when government actions enjoy significant popular consensus and thus wide democratic legitimacy.7 Constitutionalism does not uncritically elevate ‘the people’ as an indistinct political

3Biancalana (2020); Di Tella (1997) 195–96; Barr (2009).
entity transcending any kind of division, but it rather undertakes the peaceful coexistence of multiple social groups, all equally endowed with rights and duties, claiming their own protection within a common framework. Consequently, the view that there are elements that must necessarily be removed from the ‘volonté générale’ finds here its confirmation. These factors—which respond to rationalities diverging from the mere majority principle—are non-negotiable and, for this reason, stand at the top of the legal system as a pluralistic counterweight to the action of the democratically elected majority.

On the contrary, populist theories assume that the ‘will of the people’, in itself, naturally exceeds the limits set by the Constitution: if it receives direct support from the electorate, the government cannot—and must not—be influenced in any way. The people are the sole repository of positive values in society, and the movements or the charismatic leaders—who represent their demands through a non-intermediate and non-traditional relationship—must not encounter therefore any constraints that could thwart the rapid and timely realisation of social expectations. In other words, populism integrates a steady and programmatic degeneration of the democratic-constitutional rules, not only because it excludes at the root the existence of qualified minorities, endowed with rights and able to oppose the aims set by ‘the people’; but also because it firmly rejects the existence of principles axiologically superior to the will expressed by the electoral body, delegitimising the counter-majoritarian action given to the guarantee institutions. Accordingly, while constitutionalism accepts as a premise for democracy the coexistence of different political and ideological positions, populism is based on a monolithic societal view, which levels out differences and sacrifices individual rights in the name of a supposedly unifying interest to favour the construction of a ‘weak’ rule of law, where governing becomes possible with any constraints. It is precisely to face this kind of distortions that the 20th century Constitutions provide for the necessary legal arrangement to neutralise the dangerous oscillations of sovereignty that populism contains, giving constitutional judges a role of absolute importance inside the system.

Within this scheme, the reading of the Constitution is asked to clarify the rules that regulate democratic legal systems, by reaffirming the conditions so that democracy does not turn into the discretion of the majority and does not result in a violation of fundamental rights or harm the position of minorities. Understood in these specific terms, constitutional interpretation takes on a mainly defensive character: when faced with two different readings of the Constitution, the hermeneutic option that best protects the principles characterising that given legal

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12Thus passim Urbinati (2020a).
order must be preferred, so as to oppose the prevarications possibly carried in the name of a supposed ‘volonté générale’.\textsuperscript{15} In these cases, the interpretation takes the form of an intervention aimed at constantly emphasising the limits that the Constitution has placed on any form of established power, regardless of the nature and the degree of legitimacy it enjoys.\textsuperscript{16} Thus, constitutional interpretation always implies a repositioning or—rectius—a comprehensive reconsideration of the concept of popular sovereignty. Even political decisions taken with the support of an overwhelming majority and even measures taken unanimously must be subject to axiological-legal limits and may even be sanctioned in Courts if they affect the ultimate basis that underlies the legal system.\textsuperscript{17}

The primary hermeneutical consequence following from these premises is a configuration of constitutional norms as binding rules, capable of constraining the majority also for the future. From a reading of the Constitution, its logical function as a \textit{lex legum}, delimiting the sovereignty assigned to the people, must continually emerge. In the same way, the obvious preference for democratic values can never turn the Constitution into a kind of ‘loi politique’, whose implementation is completely left to parliamentary bargaining or party dialectics.\textsuperscript{18} Secondly, the systematic search for the rules to be applied to individual cases here becomes the result of a choice capable of conditioning the action of all democratically elected bodies, since it is still up to the Constitutional Courts to assess the ways and means by which the representatives of the ‘people’ have reconciled the relevant interests in the concrete case.\textsuperscript{19} If this balancing unreasonably sacrifices the rights of individuals or certain social groups, it will be the Court that will reinterpret the law to make it compatible with the fundamental principles of the legal system, by integrating political decisions with the meaning of the general clauses contained in the Constitution, by soliciting the action of Parliament or even by directly supplanting the inertia of legislative power.\textsuperscript{20}

\section*{2. THE ITALIAN CONSTITUTION VERSUS POPULISM: A BRIEF JURISPRUDENTIAL REVIEW}

Considering the specificities of the Italian case, it appears quite clearly how in its more than 60 years long activity the interpretative role of the Constitutional Court has consistently grown along a main guideline, aimed at regulating as much as possible the exercise of popular sovereignty in conformity with the rules of liberal constitutionalism. Since its first decision the Italian

\textsuperscript{16}The idea of a \textit{wertfrei} constitutional right is at issue here. For a refutation see, Guastini (2006); Bockenforde (2006); Ruggeri (1997).
\textsuperscript{19}In this way, the Constitutional Charter will operate as a kind of ‘safe’ which holds certain counter-majority values, that must remain out of the hands of the ordinary legislator. See Ferrajoli (2007).
\textsuperscript{20}On this subject, see \textit{ex plurimis} Ruotolo (2006); Crisafulli (1958); Sorrenti (2006); Giannini (1956); Lavagna (1984).
Constitutional Court has assigned the legitimation of political power to the Constitution itself rather than to 'the people', and, once it established its counter-majoritarian function, the Court has sharpened its legal tools according to the needs set, from time to time, by the political system in an anti-populist perspective.21

In the early stages of Italian republican history, the 1948 Constitution underwent a sort of interpretive devaluation. The most significant doubts focused on the value and meaning to be given to the constitutional principle.22 An assumption that gradually spread. This amounted to the belief that the use of indeterminate provisions could bypass positive law, to the point of supporting a constitutional interpretation alternative to the majority political option.23 This approach was the most evident result of the traditional respect that a judiciary culturally formed in the fascist-era still paid to political power, considering it legitimate to operate with no limits as supported by the ‘will of the people’.24 Such assessment created a clear dividing line between the political-constitutional field and the legal-legislative domain, by leading judges to solve any possible conflict between the Constitution and the law prior to its enactment in terms of mere abrogation.25 This choice, while providing a clear doctrinal reference for jurisprudence also marked a notable regression in terms of upholding constitutional value. In so doing, indeed, the legitimacy of the Constituent Assembly was de facto assimilated to that of an ordinary legislator, and the Constitution was downgraded to the rank of a primary rule only called upon to regulate concrete situations, thus losing its characteristic function as a limit to the exercise of political power.26

The interpretative turning point came with the historic Judgment No. 1 of 1956, when the Italian Court definitively overcame the theoretical division between 'preceptive norms' and 'programmatic norms', stating that the illegitimacy of an ordinary law may arise also from incompatibility with constitutional principle.27 According to the Court, constitutional illegitimacy must refer as much to post-constitutional laws as to pre-constitutional laws both because, textually, Article 134 of the Constitution and Article 1 of constitutional law No. 1 of 1948 make no distinction in this respect, and because, logically, the rank held by primary sources of law in relation to constitutional rules does not change at all. By its own true nature—it is explained—a rigid Constitution has always to prevail over ordinary law, so there is no need to analyse whether and in which cases the conflict with earlier legislative provisions may lead to an abrogation.28

The overruling could not have been more clear with regard to previous interpretative options: whereas ordinary judges had denied normative value to a very large part of the Constitution, the

25 Italian Court of Cassation, Joint Sittings of all Divisions, Judgment of 7th February 1948, and Italian Council of State, Judgment of 26th May 1948, with note by Bignami (1997).
27 Constitutional Court of Italy, Judgment no. 1/1956, para. 5, conclusions on points of law.
28 Constitutional Court of Italy, Judgment no. 1/1956, para. 5, conclusions on points of law.
Court granted the Constitution *a sui generis* perceptiveness, as a directly and fully mandatory legal document, prescriptive and effective in all its elements.\(^{29}\)

In line with this approach, the established case-law that culminated in the famous Judgment No. 1146 of 1988 began to identify certain supreme principles, to be meant as identifying and inalienable elements of the constitutional legal order, which could not be overturned or altered in their content, not even by a law amending the Constitution or other constitutional laws.\(^{30}\) This reading turned out to be useful in identifying a set of prescriptions—all ontologically derived from the majority rule—the identification of which would be essential to limiting the direct appeal to popular sovereignty as the only source of legitimisation of power, and thus to prevent an upsetting of the structure of the legal system even when the widest possible agreement between the political forces had been shown.\(^{31}\)

This strengthening of the Constitution and its ‘supreme principles’ has also manifested itself with regard to supranational Institutions. In Judgment No. 183 of 1973, for example, the Court stated that

> according to Article 11 of the Constitution, limitations of sovereignty have been permitted only in order to achieve the purposes set out in it and it has therefore to be excluded that such limitations […] might involve a violation of the fundamental principles of the legal system or the inalienable rights of the human person. It is, of course, self-evident that if such an outrageous interpretation were ever to be made […] the guarantee of judicial review by this Court on the enduring compatibility of the Treaty with fundamental principles would always be granted.\(^{32}\)

In similar terms, in Judgment No. 238 of 2014, the Constitutional Court stated that the international rules to be introduced and applied in the Italian legal system—including generally recognised provisions of international law—ought to fit with the defining principles of the domestic constitutional order, that are required to oversee the defence of fundamental rights.\(^{33}\)

More recently, Order No. 24 of 2017 and Judgment No. 115 of 2018—both concerning the well-known ‘Taricco saga’—reaffirmed that the entry into force in the Italian legal system of a rule coming from the European Union is subject to a test of compatibility by the competent national judicial authority, regarding its accordance with the principles defining the constitutional identity of the Member State. Hence, it is exclusively up to the Constitutional Court to establish


\(^{30}\)Constitutional Court of Italy, Judgment no. 1146/1988, para. 2.1, conclusions on points of law.

\(^{31}\)By way of example, Constitutional Court of Italy, Judgments nos. 30/1971, 12/1972, 175/1973, 1/1977, 18/1982. For a general comment, see Scaccia (2002) and Dogliani (1995), according to which, even when a total revision of the Constitution is planned, the distinction between constituent power and constitutional revision power would not be broken.


\(^{33}\)Constitutional Court of Italy, Judgment no. 238/2014, para. 3.1. conclusions on point of law. See also Constitutional Court of Italy, Judgments nos. 48/1979 and 73/2001.
whether the EU law is in conflict with the supreme principles of the domestic legal order, and particularly with the inviolable rights of the person.34

By emphasising the delicate balance between the expression of popular sovereignty and the inviolable content of the Constitution, the Italian Court has given itself the role of identifying the principles that guarantee the stability of the domestic legal system, by opposing populist claims and the arbitrary exercise of legislative discretion, and by protecting the values that define the deepest constitutional identity: the supreme principles—articulated as a result of the Court’s interpretation, and not of the contingent exercise of the vote—determine the ‘core’ of the Italian political community.35 Emblematic from this point of view are, on the one hand, the cases concerning the immunities of public officials, the exercise of the right to vote, and the protection of the free parliamentary mandate; and, on the other hand, the not insignificant number of cases concerning the treatment of prisoners, and the management of migration flows.

Concerning the first aspect, at the beginning of the 2000s, the issue of the procedural suspension for the so-called ‘High Offices of the State’ had fuelled a heated legal debate in Italy, which was only partially settled by Constitutional Court Judgment No. 262 of 2009. In the reconstruction given by the then governing majority, the need to shield their leaders from attacks by a part of the judiciary allegedly hostile to the executive power echoed for some time. The basic reasoning used to censure the activities of the investigative bodies relied on the idea that the leading exponent of a governing coalition—especially if strongly legitimised by popular vote—should exercise his functions ‘with serenity’ that is without facing legal proceedings, which could hamper his political action.

However, it is evident from the Court’s jurisprudence that the serenity in the exercise of public duties—although representing a constitutionally significant interest—cannot in itself lead to formulas of extensive immunity, which removes elected public officials from their legal responsibilities.36 It has no bearing on the fact that those responsible for the munus publicum enjoy general popular legitimacy; since, in any case, sovereignty itself has to be exercised in the forms and within the limits of the Constitution.37 Consequently, the action of public authorities can never avoid more or less severe forms of institutional control, since popular support does not relieve governors of their duties and does not automatically justify their actions.38

In the same perspective, the considerable constitutional case-law on abrogative referendum is also relevant. In fact, the Court has interpretatively extended the content of Article 75 of the Constitution, eventually removing some matters from the operations of direct democracy, since

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34Constitutional Court of Italy, Judgment no. 115/2018, para. 8 conclusions on point of law. Similarly, but with strict reference to the ECHR legal system, see Constitutional Court of Italy, Judgments nos. 232/1989; 73/2001; 1/2013; 219/2008 and 49/2015.

35By way of example, Constitutional Court of Italy, Judgment no. 18/1982, para. 5 conclusions on point of law, as well as Constitutional Court of Italy, Judgments nos. 170/1984; 120/2014; 238/2014. Among the scholars, see Gallo (2013) 463–74.

36Cf. Constitutional Court of Italy, Judgment no. 262/2009, para. 7 conclusions on point of law.

37Constitutional Court of Italy, Judgment no. 262/2009, para. 7 conclusions on point of law.

38More generally, Constitutional Court of Italy, Judgment no. 24/2004.
sometimes the electoral body acts without considering the needs of minority groups or without ensuring an adequate balancing of interests, all of which require a minimum level of protection.\textsuperscript{39} The interventions by the Italian Court have therefore significantly reduced the chance to appeal to the electorate, thus recognising the existence of structural restrictions on the pronouncement of the electoral body.\textsuperscript{40}

Since the first years of the implementation of the referendum, the Court has granted itself the power and duty of evaluating the admissibility of the related questions, by verifying case-by-case that the direct appeal to the ‘will of the people’ did not compromise the fundamental values that the overall framework of the legal system is built upon. By doing so, the Constitutional Court highlighted its function of guarantee, avoiding that the use of the vote would affect the normative core of the Constitution or would deprive of effectiveness principles whose existence are expressly wanted and guaranteed by the Constitution, meaning—once again—that the vote does not represent an absolute value.\textsuperscript{41} Accordingly, the Court intervened to ensure that the suffrage is shown authentically, that is free from manipulation or alteration. A deadlocked vote on a variety of issues, which cannot be unified, conflicts with the democratic principle, because it affects the very freedom to vote.\textsuperscript{42} It is self-evident that the purpose here is to avoid possible twists in democracy, by preventing suffrage from turning into a sort of popular vote of confidence against political choices or—even worse—against parties, organised groups, and leaders who have taken the referendum initiative.\textsuperscript{43}

The Court’s most recent review of electoral law can also be read in continuity with this approach, as it has strongly emphasised the systemic scope of consensus, intensifying judicial control over the mechanisms by which votes are converted into parliamentary seats.\textsuperscript{44}

Within populist theories, in fact, voting is basically ‘divinised’, as if it was the manifestation of an absolute truth, and in the name of that truth it becomes legitimate to pursue any goal.\textsuperscript{45} Yet there is more, because the supremacy accorded by populism to the consensus expressed by the citizens is only apparent—or rather—it aims to turn into a kind of plebiscitary mechanism, checked by those who actually hold power in order to maintain their leadership, influencing the final outcome of votes.\textsuperscript{46} That is why populist parties try to waive—more or less clearly—the


\textsuperscript{40}In this respect, Constitutional Court of Italy, Judgment no. 16/1978. In doctrine, see Pertici (2010) 131–33; Ruini (1953); Di Giovine (2005) 1214–21.

\textsuperscript{41}Constitutional Court of Italy, Judgment no. 26/1981, as well as Constitutional Court of Italy, Judgments nos. 27/1987; 17/1997 and 35/1997.

\textsuperscript{42}Although this kind of indications could be found explicitly in Constitutional Court of Italy, Judgment no. 16/1978, para. 5, conclusions on point of law, where an explicit and non-contradictory wording of the referendum question was foreseen, the recall here goes to Constitutional Court of Italy, Judgments nos. 27/1982; 47/1991; 16/1997; 23/1997; 28/1997; 39/2000; 40/2000; 50/2000; 42/2003 and 45/2003. See as well Constitutional Court of Italy, Judgments nos. 29/1987 and 47/1991.

\textsuperscript{43}Constitutional Court of Italy, Judgment no. 29/1993. Among the scholars, Luciani (1998); Denquin (1976) 42–44; and Vizioli (1998).

\textsuperscript{44}Similarly, see, Constitutional Court of Italy, Judgments nos. 15/2008 and 16/2008.


\textsuperscript{46}More generally, Taggart (2000).
freedom and the secrecy of the vote, by using instruments that, behind their deceivingly sterile nature, artificially manipulate popular consensus, in order to make appear the opinion expressed by a minority as ‘the general will of the people’. To populists, the guarantee procedures established by representative democracies to vote invalidate the ultimate meaning of suffrage, both because they slow down decision-making processes and because they relativize the importance of elections, by weighting their incidence in terms of representativeness and even granting representatives the power to diverge from the indications received by the electorate or by the party they belong to.47

The Constitutional Court in its Judgment No. 14 of 1964 expressly recognised that, by virtue of the ban on binding mandate, the Member of Parliament is free to vote according to the guidelines of his party, but he is also free to evade them; no rule could legitimately provide that consequences should follow against the MP merely because he voted against party instructions.48 The only previous case affected by the direct application of Article 67 of the Constitution, therefore, calls for a review of the guarantees placed by the Constitution to protect the duties of parliamentarians, by safeguarding the decision-making autonomy of deputies and senators within a democratic-representative legal system.49 When considered in these terms, the Constitution expressly protects the autonomy of the members of the Chambers and restates the centrality of Parliament, even with respect to the indications received from citizens through the ballot box. In other words, the ban on binding mandate acts as a coherent limit to the dissolution of principle of representation, giving elected assemblies a typical and non-fungible special character, aimed at settling structurally conflicting interests.50 From this point of view, the required lack of mandatory instructions also highlights the mediating function assigned to the parties, which—released by pressure from fractional instances—remain free to spread their own vision of the general interest.51

Openly opposing the populist logic, aimed at diminishing the role of the Chambers to support the immediate expression of the will of the people, the interpretation provided by the Court rebuilds the relationship that binds elected representatives and voters in non-organic terms, and then reasserts the representative component of democracy as a barrier to any possible plebiscitary drift. This constitutional jurisprudence underlines with no doubts that the only institutional framework intended for the formation of the popular will is representative body, since only in Parliament is it possible to fully reflect the divisions naturally present in civil society and achieve an agreement that respects the rights of minorities.52

Actually, the downgrading of the non-binding mandate arises just from an implicit refusal of social and institutional pluralism, which is itself based on an assumed equivalence between the

49 In this respect, Ciaurro (2006); Zanon (2001); Curreri (2004); De Flores (2017); Grasso (2012a, b).
50 Cf. Constitutional Court of Italy, Order no. 17/2019.
51 Constitutional Court of Italy, Judgment no. 106/2002; Constitutional Court of Italy, Order no. 79/2006; Constitutional Court of Italy, Judgment no. 13/2012.
will of the party and the demands of the electorate. Populist movements continuously submit the decisions to be taken to previous popular consultations—typically online—by advocating a replacement of traditional representative mechanisms with direct forms of participation that, however, only force citizens to express themselves through a poor alternative on options, already made up by the ruling minority. On the contrary, the ban on the binding mandate—as the Italian Court has reconstructed it—guarantees the ‘opening’ of the process of forming the ‘will of the people’, preserving the decision-making autonomy of MPs and subtracting from any external approval the compromise reached in Parliament. In this way, elected representatives remain the cornerstone of a triangular system in which all citizens are involved in the determination of national politics inside the parties and which, through the parties, entrusts the representatives with the task of recomposing shared demands with other visions, equally deserving of legal protection.

Constitutional case-law, in short, has always rejected a complete replacement of representation in Parliament with alternative populist-based mechanisms, both because the democratic functions of intermediation and control can only be performed by an institution that includes a majority and an opposition in a stable form, and also because the electorate’s opinions cannot be structurally restricted to that supposed omniscience, opposing the ‘people’ as such to the will of the governors. From this point of view, even the famous decisions No. 1 of 2014 and No. 35 of 2017 restated the essential and practical conditions for the will of the people to be free from distortion and thus be able to express itself as fully and genuinely as possible. As a result, the Court has come to scrutinise any distortion of suffrage that—by manipulating preferences unreasonably—harms the freedom and equality of the vote. This thoughtful contextualisation of the suffrage and the correlative relationship between elected representatives and voters has helped to strengthen the theoretical tools necessary to fight the most obvious populist drifts, embracing an interpretation of constitutional principles as the main operative limit to be opposed to political actions, undertaken on the basis of occasional demagogical instances.

Consider, for instance, all the decisions concerning the treatment of convicts and immigrants in which the Constitutional Court, reaffirming the necessity of reaching a reasonable balance between the needs of social defence and the protection of fundamental human rights, has absolutely excluded that the ‘essential core’ of individual freedoms can be affected by the majority’s choices.

In the system of relations between the state and its citizens imagined by populist movements, the belief prevails that the serving of sentences, especially when imposed for serious crimes, has to be almost exclusively inspired by punitive criteria so strong that the re-education of the offender is relegated to second place. Quite frequently, therefore, indignation at the granting of bonus benefits to prison inmates runs through part of public opinion, introducing the idea that the harsh conditions in which one serves his or her sentence is capable of deploying an
additional discouraging effect compared to the detention measure considered.\textsuperscript{58} The Constitutional Court, for its part, has repeatedly rejected this thesis, reaffirming, in various ways, the preceptive meaning of Article 27(3) of the Constitution and stating that the treatment to which detained persons are subjected must not be such as to offend ‘the dignity of the human person.’\textsuperscript{59} The freedoms accorded to prisoners can clearly be restricted, but those restrictions have to be merely aimed at fulfilling the requirements of security connected with prison custody, which is why any further compression of fundamental rights would \textit{ipso facto} acquire an afflicutive character incompatible with the dictate of the Constitution.\textsuperscript{60}

In this regard, mention can be made first of all of Judgment No. 341 of 2006 that recognised the right of prisoners to assert their claims arising from the performance of their work within the framework of judicial proceedings, held in accordance with the principles of cross-examination and marked by the respect of a ‘hard core of procedural guarantees, aimed at ensuring the full effect of the rules laid down in Articles 24 and 111 of the Constitution’.\textsuperscript{61} In similar terms, the rulings included in Judgment No. 135 of 2013, which, starting from the existence of a ‘prisoner’s subjective right to information’, ruled on the need to ensure ‘effective judicial protection against acts of the prison administration, considered harmful to their rights’.\textsuperscript{62}

Similarly, the Court ruled on the prohibition to submit prisoners to inhuman and degrading conditions, showing here a significant convergence with the previous decision of the European Court of Human Rights in the case Torregiani v. Italy.\textsuperscript{63} In Judgment no. 279 of 2013, the Constitutional Court described the Italian prison reality as ‘structurally marked by intolerable conditions of overcrowding’, that, by affecting the ‘irreducible residual of the detainee’s personal freedom’, end up undermining the mandatory connotations of criminal judgment, forcing the detained persons—considering the endemic nature of this phenomenon—in conditions ‘that are against the sense of humanity’. Within this context, the recent Judgment no. 253 of 2019 concerning life sentence without parole also stands out. Here the Court had the chance to make it clear that a prisoner convicted of a mafia association offence is entitled to be rewarded if he decides to co-operate with justice, but cannot be further punished by being denied the benefits granted to all other prisoners if, instead, he choose not to co-operate.\textsuperscript{64} In this scenario, the Court goes on to say

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the presumption of dangerousness remains, but it doesn’t acquire an absolute character, since it can always be overcome when the supervisory magistrate acquires elements useful to exclude that the detained person still has links with the criminal association or can otherwise restore relations of this kind.\textsuperscript{65}
\end{quote}


\textsuperscript{60} See Constitutional Court of Italy, Judgment no. 212/1997, para. 3 conclusions on point of law.

\textsuperscript{61} Constitutional Court of Italy, Judgment no. 341/2006, para. 3.1 conclusions on point of law.

\textsuperscript{62} Constitutional Court of Italy, Judgment no. 135/2013, para. 4.1 conclusions on point of law. See as well Constitutional Court of Italy, Judgments nos. 26/1999 and 526/2000.

\textsuperscript{63} Cf. Torregiani and others v. Italy App No 43517/09 (ECrtHR, 8 January 2013).

\textsuperscript{64} Constitutional Court of Italy, Judgment no. 253/2019, para. 8.1 conclusions on point of law.

\textsuperscript{65} Constitutional Court of Italy, Judgment no. 253/2019, para. 8.1 conclusions on point of law.
Another key topic employed by populism to build consensus is the massive influx of migrants into the national territory. According to this narrative, the migrant—whether regular or irregular—represents a danger to security and public order. Sometimes, such concern has even led to consider the granting of some basic social protection measures to foreigners intrinsically unfair. These attempts at discrimination have occurred in both direct terms—i.e. through explicit prohibitions—and indirectly—i.e. through the imposition of very onerous or even impossible requirements for immigrants to fulfil—but from the perspective of constitutional legitimacy the result has always been perfectly equivalent. The Court, in fact, found in conflict with Articles 2 and 3 of the Constitution any extra conditions imposed on foreigners that were not properly justified by any objective requirements related to the nature of the service to be provided.

Jurisprudence on this subject is very rich and concerns mainly regional legislation. Yet, a quick overview seems sufficient to gain full knowledge of the overall attitude held by the Court. First of all, the Italian Court clarified that a foreigner staying in the national territory, even if irregularly, has the right to access all health care services that are unavoidable and urgent. Likewise, there is a ‘hard core’ of the right to health protected by the Constitution as an inalienable area of human dignity that has to be recognised for foreigners, whatever their position is with respect to the rules regulating entry and residence into State territory. Furthermore, it has to be considered against the Constitution to attempt to subordinate the granting of a social assistance measure to the possession of residency for a significant period of time, ‘since there is no reasonable connection between the duration of permanence in the national territory and the situations of need or hardship, directly related to the person, which the measure is meant to alleviate’. Similarly, the Constitutional Court found unlawful the non-inclusion of foreigners ‘among those entitled to free use of public scheduled transport services’, which is granted to disabled people for civil causes.

It also seemed unreasonable to discriminate against non-citizens by imposing special limitations on their exercise of fundamental human rights when support measures are granted, the requirements of which are total disability for work, inability to walk independently or inability to perform the daily acts of life. In conclusion, therefore, the provisions aimed at supporting people in need and distress do not accept distinctions based on citizenship or residency, which is why the protection of personal dignity is in any case an insurmountable barrier to the political options of the majority.

66. Among the most recent contributions, Spataro (2016); Risicato (2019); and Ruotolo (2012a).
67. Constitutional Court of Italy, Judgment no. 252/2001, para. 5 conclusions on point of law.
68. Constitutional Court of Italy, Judgment no. 269/2010, para. 4.1 conclusions on point of law.
69. Constitutional Court of Italy, Judgment no. 22/2015, para. 3 conclusions on point of law. Cf. also Constitutional Court of Italy, Judgment no. 2/2013. Similarly see Constitutional Court of Italy, Judgment no. 106/2018, para. 3.4 conclusions on point of law and Constitutional Court of Italy, Judgment no. 40/2011.
70. Constitutional Court of Italy, Judgment no. 432/2005.
71. Constitutional Court of Italy, Judgment no. 306/2008, para. 10, conclusions on point of law.
72. Constitutional Court of Italy, Judgment no. 40/2011.
3. THE INTERPRETATIVE CLAUSE ‘UT RES MAGIS VALEAT QUAM PEREAT’

In the light of this brief jurisprudential review, the hermeneutic criterion, which has firmly governed the activity of the Italian Constitutional Court regarding the more or less periodic reiteration of populist claims, is rather eloquent. With ever increasing frequency, the Court has interpreted the Constitution ‘magis ut valeat’, that is to say, granting the Constitution its maximum expansive force because of its nature and function as a normative act, aimed at compulsorily regulating most public and private actions.\(^\text{73}\)

In a nutshell, the Italian Court has progressively oriented its exegetical activity to give the Constitution an immediate and direct perceptiveness in order to reinforce the historical, political, and juridical bonds arising from the stipulation of the original social pact: if the constitutional rule of law is the result of an agreement meant to last over time and aimed at peaceful coexistence among the citizens, the majority principle reviewed in a populist key cannot be assumed as the only source of legitimisation for democracy\(^\text{74}\).

Starting from the idea of compromise, rooted in the work of the Constituent Assembly, and invoking the protection of fundamental rights in every area of social life, the systematic recourse to general principles allowed the Court to avoid the contingent and necessarily relative will expressed by the electorate from overwhelming the meta-democratic values, which modern constitutional systems are built upon. This interpretative rule has thus become intimately linked to the normative structure of the Constitution, and it has rebalanced the populist thrusts minimising the constitutionally unregulated areas.\(^\text{75}\)

In this perspective, the constitutional rules have been interpreted in a dynamic-evolutionary key, and they have spread to the point of almost wiping out the areas reserved entirely for the arithmetical logic of the vote and the exclusive domain of the majority forces, in this way establishing a kind of gap between the suffrage expressed by the citizens and the actions effectively carried out by the public authorities. The literal reading, the \textit{intentio legislatoris}, the originalism, the terminological constancy, the historical interpretation and, more generally, the traditional techniques used to interpret the law have thus been gradually replaced by a new hermeneutic criterion which has given the Constitution its very character and allowed the fundamental principles to fully permeate the legal system, by balancing and concretising the norms concerned. The Constitution thus came to redetermine all normative meanings, directing the activity of legal practitioners, to such an extent that the law itself now has to be re-interpreted in accordance with the values laid down in the Fundamental Charter.\(^\text{76}\)

From this point of view, the extensive interpretation of the Constitution has also emphasised the two antithetical aspects characterising any form of contemporary democracy: the political component, meant to resolve itself in majority rule, and the constitutional element, which also submits the people’s vote to severe limits.\(^\text{77}\) Following this line, the implementation of the


principles written into the Constitution inevitably reduces political discretion, since the legislator, even when enjoying a very broad popular consensus, is called upon to enact the programmes contained in the Constitution by making choices, which respect all the interests involved in the concrete case.\textsuperscript{78}

Over the long term, therefore, the interpretative clause ‘\textit{magis ut valeat}’ introduced a kind of hierarchisation between constitutional provisions: popular sovereignty is not in itself legitimate but it becomes so if—and only if—it complies with the ‘hard core’ of the Constitution. This expansive reading of constitutional rights and values, while highlighting the liberal elements of democracy, has consequently contrasted any instrumental use of the majority principle. It has ruled out those opportunistic approaches to the Constitution—typical of populist movements—which, when in opposition, repetitively appeal to constitutional prerogatives, though, when in government, seek to reform the Constitution by marginalising the defensive role of the guarantee institutions and by reducing minority rights.\textsuperscript{79}

While the suffrage always remains one of the cornerstones of the democratic system, it is reinterpreted in the light of the ‘supreme principles’, and the very notion of democracy acquires a new and different meaning, such that the interventions of the political majority are not automatically justified, but they become legitimate in so far as they stand as a guarantee of individual rights and balance the claims of minorities. In conclusion, for the constitutional system to work, it is not only an obvious popular consensus that is needed, yet it is necessary that the choices made by the electorate find a counterbalance or—if preferred—their own structural limitation, because of all the other demands enshrined in the Constitution.\textsuperscript{80}

4. THE HUNGARIAN CASE: CONSTITUTIONAL INTERPRETATION BETWEEN RIGIDITY AND FLEXIBILITY

Turning to analyse the Hungarian model, a study of the Constitutional Court’s interpretative techniques in Hungary gives us two different historical periods: one dating back to the process of democratisation of the 1949 Constitution, following the fall of the communist regime; the other, still in progress, following the 2011 reform, which instead led to the approval of the new Fundamental Law, and caused an illiberal torsion into the form of the State.\textsuperscript{81}

This bi-partition, especially when compared with the Italian experience, is very useful in order to appreciate in practice which systemic elements are able to affect the hermeneutic approach of the Courts with respect to populist claims. Despite some distinctions among scholars who are far from being unified in their approach to the subject, in fact, the Hungarian system embodies a populist system that can be ascribed within the taxonomic class of

\textsuperscript{78}On the relationship between constitutional interpretation and legislator’s discretionary power, Corso (2014) 457–58; Luciani (2007b); Armingeon and Guthmann (2014) 431–32.

\textsuperscript{79}See Blokker (2020).

\textsuperscript{80}Spadaro (2006b) 2369–84.

Authoritarian populism. A mystifying, or rather opportunistic, version of populism, which counters the canons of democratic constitutionalism with anti-elitist rhetoric, seeking in many different ways to undo its liberal component ‘using, or rather misusing or abusing populism in its rhetoric as an instrument for the pursuit of authoritarian goals’. Form this point of view, we can observe the sublimation of a purely formal approach to democracy, which artificially claims its founding principles and, at the same time, undermines its foundations, according to patterns functional to ensuring the (self)preservation of power, almost annihilating its characterising features, such as the separation of powers, the exercise of fundamental rights and freedoms or the ability to act of institutional countervailing powers. Correspondingly, we can also explain the original Orbán project aimed first at overcoming, on an institutional level and then on a social level, the traditional organisation of power, thereby laying the foundations for a long-lasting cultural supremacy, marked by the setting up of a ‘nationalistic, homogeneous and self-referential society’.

In this complex framework, the Constitution appears as an essentially flexible document, lacking any material limitations, either express or implied, to the power of amendment. The normative feedback of what is being argued here arise with clarity if we consider the content of Art. S), par. 2 FL, addressed to the amendment procedure of the Fundamental Law. The procedural aggravations are given exclusively by the achievement of the qualified majority of two-thirds of the members of the National Assembly. The result is the lack of a clear distinction between ‘constituent power’ and ‘constituted power’, bringing the amendment and the legislative function together in the exercise of parliamentary action.

This purely formalistic approach to the Fundamental Law plainly shows an instrumental reading of the Constitution, in which the appeal to popular sovereignty becomes primarily aimed at the self-preservation of power. From this point of view, the invoking of democratic principles appears entirely artificial, as in fact populist movements, through careful use of the legislative source and, not least, the adoption of specific amendments to the Fundamental Law, seek to empty the Constitution of its counter-majoritarian elements, especially through reform processes endowed with the broadest popular consensus. According to this reading ‘the

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85 A nationalist and specifically identitarian prototype doomed not to settle down within Hungary’s borders, but rather to serve as an avant-garde emulative archetype for other countries in the wake of a common fate marked by a shared rejection of the liberal matrix of Western culture. Di Gregorio (2019a) 1467–68 and Bottoni (2011) 1011 as well as Rogers (2020) 112; D’Ignazio (2020) 3865–66 and Congiu (2020) 5.
86 Hungarian Constitutional Court, Decision no. 45/2012. (XII. 29.) para. 3.2. Extensively see, Doyle (2019) 162–63.
sovereign ruler is not a constitution but a political nation; the outcome is pressure being exerted on the political constitution and a ‘dejuridisation’ of the public domain.\textsuperscript{89}

The absence of constraints on the possibility of amending the Fundamental Law impinges the room to manoeuvre of the Constitutional Court, curtailing his role of institutional control.\textsuperscript{90} Except for any potential procedural breaches, the Court

can’t annul […] any provision of the Constitution. If a provision had been adopted by the two-thirds majority vote of the members of Parliament, then it has become part of the Constitution and it is therefore theoretically impossible to establish its unconstitutionality […] as it is theoretically impossible to examine the constitutionality of the Constitution, the Constitutional Court is not competent to resolve any real or alleged conflict between the provisions of the Constitution.\textsuperscript{91}

However, this did not prevent the Court from declaring – in Judgment No. 45/2012. (XII. 29) – the illegitimacy of certain transitional provisions that, by contravening the Fundamental Law, undermined the unity of the Constitution, putting themselves in an ambiguous position in the hierarchy of sources.\textsuperscript{92} Following the reasoning of the constitutional judges, the Fundamental Law is a unitary text, destined by its nature to last over time and cannot be subjected to a repeated process of amendment, which would undermine its stability. For this reason, any amendment must comply with an order of incorporation that, while rejecting any possible antinomy, ensures that ‘the constituent power may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law’.\textsuperscript{93}

\textit{Ex adverso}, the aforementioned Transitional Provisions realized a parallel Constitution, which did not respect the procedural guarantees provided by the Fundamental Law and, therefore, were liable to alter the structure of the system. According to the Court, ‘it would be irreconcilable with the idea of a democratic State under the rule of law if the contents of the Fundamental Law were becoming constantly disputable, thus making the contents of the Fundamental Law, as the Constitutional Court’s standard, uncertain’.\textsuperscript{94}

Although, even in this circumstance, the Court did not seem to depart from its jurisprudence – refusing to review the content of constitutional provisions – one \textit{obiter dictum} is particularly interesting.\textsuperscript{95} Indeed, the Hungarian Court proposed – for the first time in this context – the idea that constitutional lawfulness does not depend only on compliance with purely formal requirements, but rather reflects a substantive factor: it is the Court’s task to review the content of


\textsuperscript{90}Gárdos-Orosz (2019) 1529.

\textsuperscript{91}Hungarian Constitutional Court, Decisions nos 45/2012. (XII. 29.) para. 2.1; 23/1994 (IV. 29.) AB, 293/B/1994. AB; 1260/B/1997. AB.

\textsuperscript{92}On this point, Pistan (2015) 249.

\textsuperscript{93}Hungarian Constitutional Court, Decision no. 45/2012. (XII. 29.) para. 6.

\textsuperscript{94}Hungarian Constitutional Court, Decision no. 45/2012. (XII. 29.) para. 7.

amendments, adopted in violation of the Fundamental Law.96 Not every provision that amends the Constitution is legitimate in itself, but

the constitutional criteria of a democratic State under the rule of law are at the same time constituc-
tional values [...] in a constitutional legal system [...] it would be impossible to prevent the Constitutional Court in performing effectively its duty of protecting the Fundamental Law by implementing the formal and substantial review of the legal regulations.97

The Hungarian Constitutional Court’s attempt to expand the perimeter of its control became clear. Not surprisingly, the Court expressly referred to the principles of the rule of law in order to identify a set of values that would bind the legislature, including the constitutional one.98

In other words, in the absence of explicit limits, there was an implicit conceptual overhaul, which identified certain features of the rule of law – particularly the principle of legality and legal certainty – as guidelines for delimiting majority policies.99 Despite an attempt to strengthen the guarantor role of the Fundamental Law, the Hungarian court’s anti-majoritarian efforts were thwarted on March 25, 2013, with the approval of the 4th Amendment to the Fundamental Law. The latter constitutionalized most of the Transitional Provisions previously declared unlawful, establishing a dies a quo from which constitutionality review under Art. 24) FL would be limited to procedural breaches only.100

Triggered by the Commissioner for Fundamental Rights on the legitimacy of the fourth amendment, in judgment no. 12 of 2013 (V. 24.) AB the Court inevitably took a step back.101 While the formal review of the amendment process ensures respect for the rule of law,102 verifying an antinomy between the content of the Fundamental Law as a unitary system and an amendment falls beyond the jurisdiction of the Constitutional Tribunal. The Court has the task of adjudicating the conformity of legislative provisions with the Fundamental Law: a limited power, to be exercised in strict compliance with the principle of the separation of powers. The powers of the Court can never turn into a surreptitious nomogenetic activity, especially at the constitutional level.103 Consequently, once the procedural guarantees required for the entry into

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96According to Simonelli (2019) 1570, by referring to the hierarchical principle, the Court would have implicitly noted the existence, within the Fundamental Law, of a significant differentiation between rules, which is justified in the recognition of a fundamental difference between constituent power and constituted power.

97Hungarian Constitutional Court, Decision no. 45/2012 (XII. 29.) para. 4.

98Hungarian Constitutional Court, Decision no. 45/2012 (XII. 29.) para. 5 ‘the Fundamental Law obliges the Constitutional Court to examine all those laws that break up the internal unity of the legal system, the ones that violate the unity of the Fundamental Law itself’.


100Pursuant to Art. 12, para. 3.2 of the Sixth Amendment ‘the Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation’. Orlandi (2019) 182; Chronowski and Varju (2016) 281. On the findings of the Venice Commission, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, 720/2013, 17 June 2013. On the response of EU Institutions Casolari (2016) 135–72. For an overall view on the abuse of constitutional amendment by populist forces, see Faraguna (2020) 97–117.


102Among others, Hungarian Constitutional Court, Decision no. 6/2013. (III. 1.) AB paras. 63–72.

103Hungarian Constitutional Court, Decision no. 12/2013. (V. 24.) AB para. 37.
force of a constitutional amendment have been ensured, the Court cannot judge its compliance with the Fundamental Law, since this is not a neutral check, but rather includes a political overview of the legislative power.  

In the final part of the reasoning, however, the Court seemed to address a warning to Parliament, claiming its function as guarantor of the Fundamental Law, which it will continue to interpret as a unitary and coherent system, binding for the conditor iuris. This exegetical activity must take into account the fundamental principles and values stemming from the European Union, from international treaties, from the European Convention on Human Rights and from the general rules of international law. The Hungarian Constitutional Court, therefore, being no longer able to identify in the Constitution the (endogenous) parameters of his own control of constitutionality, seemed to look for them outside, in the obligatory sources for the constitutional order pursuant to articles E) and Q) FL, which form a ‘comprehensive system (a value order) which cannot be ignored during either the constitutionalization, or the legislator or the exercise of constitutional review by the Constitutional Court’.  

Even if this interpretation seemed capable of avoiding possible prevarications by the government majority, its practical strength immediately appeared recessive. In fact, far from recalling the theory of the ‘Invisible Constitution’, the new approach adopted by the Hungarian Constitutional Court, according to the rationale of the rewritten art. 24) FL, excludes the scrutiny of the intrinsic consistency of the constitutional amendments. In this perspective, even the reference to supranational commitments has been restricted, through a reference to the concept of ‘national sovereignty’ and to the notion of ‘constitutional identity’, a deeper echo of the dualist approach that has always been embraced by the Hungarian legal system.  

Like the Fundamental Law, the previous Constitution also followed a pronounced dualist approach. This, however, did not prevent the Constitutional Court from using the jurisprudence of the European Court of Justice and the European Court of Human Rights as a sort of guiding parameter to supplement its own rulings, fostering the alignment of domestic law with supranational order, as provided for in Article 7(1) of the Constitution. In this sense, international law was set as the minimum threshold for the protection of fundamental rights and, therefore, also as the action of the majority: the legislator could not derogate from European standards, but could act in a more favourable sense.  

This approach was kept even during the early stages of the new Fundamental Law. While reaffirming its purely declaratory effect, the constitutional judge nevertheless considered that the decisions issued by the Strasbourg Court

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104 Hungarian Constitutional Court, Decision no.12/2013. (V. 24.) AB para. 42.  
106 Hungarian Constitutional Court, Decision no. 23/1990 concurring opinion of Judge Sólyom.  
107 Above all, see Sólyom (2003) 152.  
110 Hungarian Constitutional Court, Decision no. 61/2011. (VI. 17.) AB.
in practice could give help to the interpretation of constitutional rights – secured in the Fundamental law and international convention – and to the definition of their content and their field of application the observance of the Convention and the practice of ECHR cannot lead to the limitation of the protection of fundamental rights secured by the Fundamental law and to the definition of a lower level of protection of fundamental rights that all contracting parties have to assure but the national law may establish a different and namely a higher order of requirements in order to promote human rights.111

Following the same pattern, judgment no. 4 of 2013. (II. 21.) AB went so far as to consider a Hungarian sentence for the infringement of Article 10 ECHR as a new element of the constitutionality judgement.112 Thus, despite the fact that the Court had already dealt with the case, rejecting it, the use of principles inferable from the European Convention on Human Rights led the Hungarian court to a subsequent declaration of unconstitutionality of the criminal law sanctioning the public use of the five-pointed red star as a symbol of communist totalitarianism.113 While the Court has always held itself incompetent to declare the unconstitutionality of a national rule in conflict with a supranational provision, on the other hand, European law has nevertheless led to ‘a supportive effect in those cases whereby the reference to international legal instruments is to strengthen a decision based on domestic law’.114

This assumption is expressly confirmed in Judgment No. 1 of 2013 (I. 7.) AB, which declared unconstitutional certain provisions of the electoral reform law, which forced the individual elector to go through a registration procedure in order to vote.115 In this case, the Constitutional Court made extensive use of the Venice Commission’s Code of Good Electoral Practices and also referred extensively to the jurisprudence of the European Court of Human Rights, holding that

in accordance with the Amending Protocol 1 Article 3 of the European Convention on Human Rights, linking the exercising of the right to vote to an active registration would restrict the right to free elections. Such a restriction can only be justified for the purpose of reaching a legitimate aim. Only a justification of due weight can legitimize the restriction. If there is a functioning and operational electoral register […] there is no legitimate justification of due weight for the introduction of an active registration. The Constitutional Court considered all the above factors when it examined the question whether the legal institution of the request of registration in the electoral register, as regulated in the Act, restricts the right to vote in compliance with the Fundamental Law.116

Beyond the individual case, the Hungarian Court, precisely through its reference to international law as part of a broader normative system capable of establishing certain fundamental principles aimed at protecting individual rights, was able to play, at least initially, a decisive role vis-à-vis the political decision-maker, preventing the surreptitious introduction of mechanisms distorting

111Hungarian Constitutional Court, Decision no. 4/2013. (II. 21.) AB para. 19.
115See Kelemen (2013).
116Hungarian Constitutional Court, Decision no. 1/2013. (I. 7.) AB para. 3.5.
popular suffrage. Already in decision no. 63/B/1995. AB, the Budapest courts held that, under Article 70 of the Constitution, the principle of equality of the vote precluded any arbitrary interference by the legislature aimed at undermining the equal access of citizens to electoral competition. Nevertheless, if these conditions were met, Parliament was still granted broad discretion in determining the electoral system, the rules for the presentation of candidates and the mechanisms for transforming votes into seats.\textsuperscript{117} The equality of the vote envisaged by the Constitution was traced first and foremost to the exercise of suffrage – incoming – but not to the conversion of votes into seats – outgoing – because of the distorting effect of any electoral formula. According to the Court,

the equality of voting rights does not and should not mean the precisely equal enforcement of the political will expressed through the election. Although the Constitution provides for the equality of the voting rights, the expression of citizens’ political will through representatives, i.e. indirectly, inevitably results in disproportionality.\textsuperscript{118}

The principle of equality of the vote requires compliance with two essential requirements: ‘on the one hand, voting rights must be of equal value from the point of view of voting citizens, and on the other hand the votes must preferably be of equal weight in respect of electing each of the Members of Parliament’.\textsuperscript{119} Either way, ‘any restriction on the equality or generality of [voting] right can be only accepted as constitutional on the basis of a significant reason of principle’.\textsuperscript{120} The latter assumption allowed the Court to identify certain positive obligations towards the parliamentary majority so as to curb its actions within precise constitutional constraints. Thus, for example, the legislature was instructed to ensure the representation of ethnic minorities, and Judgment No. 22 of 2005. (VI. 17.) AB, referring once again to the practices of the Venice Commission, condemned the executive for the gerrymandering implemented.

Over time, however, the constitutional judges has lost this power of influence, showing a remarkable self-restraint, in contrast to the trajectory of its Italian counterpart. The turning point came with the entry into force of the new Fundamental Law. Currently, the Hungarian Court recognises a wide margin of appreciation for the legislature in determining the electoral formula, finding no constitutional provision that constrains its power of choice \textit{a priori}. This is the case, \textit{ex multis}, of decision no. 3141 of 2014. (V. 9.) AB, concerning vote recovery mechanisms. While in the past the transfer of votes had only concerned candidates who lost in the uninominal constituencies, the 2011 amendments to the electoral law extended the same automation to the elected, with a strongly distorting effect, in favour of the governing party. Once again, on this issue, the Court retraced its steps, holding that the new compensatory system was also perfectly compatible with the principle of equality of the vote, once again on the basis of the wide discretion in the matter granted to the legislature. Like the previous Constitution, the Fundamental Law does not lay down binding rules for the legislature, but mere principles, which

\textsuperscript{117} Hungarian Constitutional Court, Decision no. 63/B/1995. AB para. 2.

\textsuperscript{118} Hungarian Constitutional Court, Decision no. 3/1991. (II. 7.) AB para. 3.

\textsuperscript{119} Hungarian Constitutional Court, Decision no. 31/2000. (X. 20.) AB para. 2.

\textsuperscript{120} Hungarian Constitutional Court, Decision no. 6/1991. (II. AB) AB.
are not violated in the present case, since the legislation in question does not create any discrimination, which undermines the right of every candidate to participate in the electoral contest.121

This new hermeneutic approach, which is less inclined to setting binding limits to the exercise of popular sovereignty, is mostly based on an interpretation that, by taking to extremes certain aspects traceable to the ‘theory of the counter-limits’, attempts to limit the entry of supranational norms into the legal system, sometimes rather drastically. In this perspective, the reference to supranational sources by the Hungarian court is today subject to two very stringent and difficult to understand requirements: respect for ‘national sovereignty’ and the protection of ‘constitutional identity’.122

The first form of resistance by the Constitutional Court to the entrance of principles deducible from supranational law concerned, eminently, the vexata quaestio of the distribution of migratory flows between EU countries. The case originates from the Council’s decision to order the transfer of 1294 asylum seekers from the territories of Italy and Greece to Hungary.123 In the controversial judgment no. 22 of 2016 (XII. 5.) AB, the Budapest Court made it clear that, although European law provides, in most cases, an adequate level of protection of fundamental freedoms, it is the Court’s task to verify that the application of EU law does not infringe the inalienable rights provided by the Fundamental Law.124 It follows that since by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercising of certain competences, the maintenance of Hungary’s sovereignty should be presumed when judging upon the joint exercising of further competences additional to the rights and obligations provided in the Founding Treaties of the European Union. Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore, the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercising of public power.125

If Hungary is an independent and sovereign state, whose power originates from the ‘will of the people’ enshrined in the Constitution, these values cannot be stripped of meaning by an alternative reading of Art. E) FL that would automatically transfer any act or decision taken at the European level into the national legal framework.126

121 On this regard it is worth noting the dissenting opinion of Judge Lévay, who, in addition to strongly criticising the formalist approach followed by the Court, states that if the electoral formula excessively distorts consensus, the uniformity of the suffrage at the time of the vote is by no means a guarantee of democracy. Within a democratic state under rule of law, in fact, equality of the vote cannot be just incoming but has to be reverberated going as well, because without true competition there can be no true democracy. In this regard, Delledonne (2019) 1158–59.


123 Mohay and Tóth (2017) 468–75; Halmai (2017a) and Drinócz (2017) 139–51.

124 Hungarian Constitutional Court, Decision no. 22/2016. (XII. 5.) AB para. 53.

125 Hungarian Constitutional Court, Decision no. 22/2016. (XII. 5.) AB para. 60.

126 Pursuant to Art. E) FL, ‘in order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity (1). With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties (2) […] The authorisation to recognise the binding nature of an international agreement […] shall require a two-thirds majority of the votes of the Members of Parliament’.
Really, the allusion to national sovereignty as an extensive limitation to the transfer of competences to the EU sphere is nothing new. Already in Judgment No. 22 of 2012 (V. 11.) AB, concerning the ‘Fiscal Compact’, the Hungarian Constitutional Court had ruled that an authorization given by two-thirds of the Members of the Parliament is necessary for every treaty that leads to transferring further competences of Hungary, specified in the Fundamental Law, through the joint exercising of competences by way of the institutions of the European Union. It means that Article E) paras (2) and (4) apply not only to the accession treaty and to the founding treaties and their amendments but to all treaties [...] in the preparation of which Hungary has participated as a Member State.¹²⁷

In the most recent judgment No 22 of 2016 (XII. 5.) AB, however, the reference to sovereignty takes on a more pronounced meaning: it is not a mere procedural burden of a choice that is in any case left to parliamentary discretion but becomes an ontological ‘barrier’ to the process of European integration.¹²⁸

In close connection with the need to protect national sovereignty, therefore, the Hungarian courts recall the constraints arising from the concept of ‘constitutional identity’. Pursuant to Art. R) (3) FL, in fact, the Court has a duty to systematically interpret the provisions of the Fundamental Law according to their purpose and in accordance with the so-called ‘National Avowal’, i.e. by referring to the achievements of the historical Constitution.¹²⁹ Far from taking on a stable dogmatic value¹³⁰ constitutional identity is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.¹³¹

Therefore, as proposed by the Court, this new hermeneutic criterion, especially when considered in its relationship with the concept of sovereignty, does not endorse democratic-constitutional values, but rather openly contradicts the principle of ‘loyal cooperation’ among the Union and

¹²⁷ Hungarian Constitutional Court, Decision no. 22/2012. (V. 11) AB paras. 50–51.
¹²⁸ Accordingly, Hungarian Constitutional Court, Decision no. 9/2018 (VII. 9.) AB. Among scholarship, Kelemen (2018).
¹²⁹ Hungarian Constitutional Court, Decision no. 22/2016. (XII. 5.) AB para. 64.
¹³⁰ Halmai (2017b) 152–53
¹³¹ Hungarian Constitutional Court, Decision no. 22/2016. (XII. 5.) AB para. 65.
Member States.132 As appropriately observed, in fact, the ‘wall’ raised by the constitutional judge through the use of the identity canon, goes beyond the ‘counter-limits’, because, by expressing sovereignties values pre-existing to the Fundamental Charter itself, it hinders at the root the process of integration and the consequent implementation of the common values demanded by Article 2 TEU, whenever national historical, linguistic and cultural traditions are at stake.133

The establishment of these meta-values, moreover, instead of representing a certain constraint for the legislature, is twisted in populist and anti-liberal terms.134 One only has to think, once again, of Judgment No. 22 of 2016 (XII. 5.) AB, where the protection of fundamental rights, claimed as a qualifying element of Hungarian national identity, instead of being used to support mutual cooperation between EU countries on the relocation of asylum seekers, was used as a constitutional reason in support of the political will not to follow up on the Council’s decision on redistribution.135 In other words, the concept of ‘national identity’ risks becoming a kind of ‘Trojan horse’, which can lead to conjunctural readings of the Fundamental Law.136 Indeed, by virtue of the 7th amendment approved by the Fidesz-KDNP coalition on 20 June 2018, the protection of national identity was expressly included in the ‘National Avowal’ as an obligation of the Hungarian state, according to which ‘we hold that the protection of our identity rooted in our historic Constitution is a fundamental obligation of the State’. In this way, national identity is definitively elevated to the rank of a binding interpretative canon, by virtue of which ‘the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State’.137

Concerns are also increased by the further uncertainty generated by the Fourth Amendment, insofar as it states that ‘rulings given prior the entry into force of the Fundamental Law are hereby repealed […] without prejudice to the legal effect produced by those rulings’.138 This limitation not only weakens the Court’s role, suddenly depriving the constitutional court of much of its jurisprudence, but also signals a clear populist approach of political power towards

132Moreover, the constitutional judges reached this interpretation by moving – in this case also with some opportunism and instrumentality – from the content of art. 4, para. 2TUE. As it can be read, according to Article 4 (2) TEU, ‘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. The protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States’ constitutional courts and supreme judicial bodies performing similar functions’.


135Halmai (2017a).

136A thesis that can find support in the thoughts by Bozóki (2011) 660.

137On this point, it should be recalled that the Preamble to the Fundamental Law is by no means a mere programmatic statement, but rather integrates a true interpretative parameter of the Constitution, pursuant to Art. R), parr. 3 and 4 FL.

138An amendment introduced, although the Court had already affirmed the possibility of relying on its own jurisprudence in order to interpret the provisions of the Fundamental Law if they had identical or similar content to those of the previous Constitution. Compare Hungarian Constitutional Court, Decision no. 22/2012. (V. 11.) AB paras. 40–41.
the European institutions. This not only raises obvious problems of legal certainty, but also presents a serious doubt about the state of liberal constitutionalism in Hungary and Hungary’s compliance with its international commitments under Treaties of the European Union and the European Convention on Human Rights.139

The Court’s different reference to identity roots a few years later confirms this ongoing process. Firstly, the achievements of the historical Constitution allowed the Constitutional Court to declare illegitimate the law that had provided for the early retirement of judges between the ages of 65 and 70.140 In judgment no. 33 of 2012. (VII. 17) AB, the Constitutional Court made it clear that when the Fundamental Law

opens a window on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions.141

From this point of view, the independence and immovability of judges was considered a historical achievement, belonging to the Hungarian legal tradition.142

On the contrary, in the most recent decision No. 2 of 2019. (III. 5.) AB, the reference to tradition appeared to be strongly influenced by the renewed identity-exclusionary spirit that pervades the Fundamental Law. Although in the context of a decision in which the Court nevertheless sought to balance European standards and the provisions of Art. XIV, para. XIV, para. 4 FL, which states that a foreigner is not entitled to apply for the protection granted by the right of asylum if he or she arrived on Hungarian territory through a country where he or she was not persecuted or subject to a direct threat of persecution,143 the Constitutional Court emphasised Hungary’s national specificity, stating that

the formation of the State of Hungary had been the first act by which the Hungarian nation expressed its European identity and throughout the historical events experienced by the country this has matured to become a solid national conviction. As it is expressed in our National Avowal of the Fundamental Law: we are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. It is also a part of our national values that our nation has over the centuries defended Europe in a series of struggles and enriched Europe’s common values with its talent and diligence, and we also believe that our national culture is a rich contribution to the diversity of European unity.144

Lastly, it is useful to refer to Constitutional Court ruling no. 32 of 2021. (XII. 20.) AB concerning the implementation of European asylum law, to further clarify the picture of Hungary-EU relations. On 21 December 2018, the European Commission started an infringement action

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139Halmai (2019a) 36.
141Hungarian Constitutional Court, Decision no. 33/2012. (VII. 17.) AB, para. 75.
143Hungarian Constitutional Court, Decision no. 2/2019. (III. 5.) AB para. 43.
144Hungarian Constitutional Court, Decision no. 2/2019. (III. 5.) AB para. 16.
under Article 258 TFEU against Hungary, accusing it of violating supranational discipline by creating a fence at the border with Serbia and legislation that made it extremely difficult to process applications for international protection.

On 17 December 2020, the Court of Justice upheld the Commission’s action by condemning Hungary for violation of the relevant European law. The following 25 February 2021, the Hungarian Minister of Justice applied to the Constitutional Court by seeking an abstract interpretation of the Fundamental Law in light of the aforementioned decision of the Court of Justice. Specifically, asking whether the implementation of European obligations can allow, in the absence of full effet utile of EU law, a situation where a foreign national illegally staying in Hungary continues to stay in the territory of the Member State for an indefinite period of time and, thus, de facto becomes a part of the country’s population? According to the appellant minister, in fact, the combined provisions of Article E par. (2) and Article XIV par. (4) of the Fundamental Law do not authorize the European Union, in the exercise of its powers, to restrict the inalienable right of the Hungarian state to determine its borders.

From the point of view of the relations between Hungary and the European Union, the Constitutional Court’s ruling represents a kind of chiaroscuro effect since, while adhering to and embracing the Budapest government’s intention against the implementation of the Court of Justice’s decision, as reflected in the appeal filed by the Minister of Justice, it did not go so far as to create an irremediable caesura between the two legal systems. As some scholars have pointed out, albeit in the form of an abstract review of constitutionality, the question addressed to the Constitutional Court implicitly contained a kind of invitation to conduct an ultra vires review of the judgment of the European Court, inter alia by virtue of the principles of national sovereignty and constitutional identity well known to its jurisprudence.

The arguments used within the explanatory statement made it very difficult to establish a dialogue between the Courts of Budapest and Luxembourg; nevertheless, it did not lead to a more pronounced attack on the latter’s actions—such a procedure was possible—as has happened recently in other contexts akin to Hungary’s, such as in Poland and Romania.

Nevertheless, as partly to be expected, there is ample reference to the aforementioned values of Hungarian constitutional identity and sovereignty. With respect to the former, according to the Constitutional Court, the protection of the inalienable right of Hungary to determine its

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145 European Commission v. Hungary Case C-808/18 (CJUE 17 December 2020).

146 It is worth mentioning that this decision is subsequent to the entry into force of the Seventh Amendment to the Fundamental Law, which amended Article XIV. Currently, Paragraph (4) of the said provision states that ‘Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum upon request to non-Hungarian citizens who, in their native country or the country of their usual place of residence, are subject to persecution on the basis of race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to direct persecution is well founded. A non-Hungarian citizen who reached the territory of Hungary through a country where he or she did not face persecution or the immediate risk of persecution shall not have the right to seek asylum’.


148 Among others, see the decision of the Polish Constitutional Tribunal No. K 3/21, 7 October 2021.

149 In this regard, see Romanian Constitutional Court, Decision no. 390/2021, 8 June 2021.
terриториальный, население, форма правления и структура государства будут частью его конституционной идентичности.150

Поэтому, если, как результат недостаточного выполнения совместной деятельности полномочий, как определено в статье E (2) Основного закона, иностранное население постоянно и массово останется на территории Венгрии без демократического согласия, это может нарушить право идентичности и самоопределения населения проживающего в Венгрии. Причина этого в том, что недостаточное выполнение полномочий может вызвать процесс, выходящий за пределы контроля извне, который может привести к принудительному изменению традиционного социального окружения человека. В связи с обязанностью государства институциональной защиты, предотвращение этого — обязанность государства по статье I Основного закона.151

В отношении терминов конституционной суверенности, однако, существует предположение о резервации суверенитета, охраняемого той же статьей E параграфа (2) Основного закона для всех тех дел и полномочий, не переданных Европейскому пространству. Этот принцип, следовательно, действует исключительно не только в случае совместного выполнения полномочий, но и в тех случаях, когда недостаточное выполнение этих полномочий может нарушить гарантии конституционных прав, предоставленных через конкретное выполнение этих полномочий или нарушить выполнение собственных обязанностей государства.152 Где это имеет место, его обязанность, как государства, в отношении того, чтобы самостоятельно исполнить совместные полномочия, пока не будут учтены условия и созданы гарантии, необходимые для эффективного выполнения полномочий Европейского союза.153

В противном случае, как отмечено ранее, Конституционный суд прослеживает резервацию суверенитета, принадлежащего Венгрии, в недостаточное выполнение полномочий Европейского союза, а не в конфликт с самого начала между необходимым защитным конституционным идентити и требованиями, установленными последними, рождения ‘защитного’ потенциала, который может возникнуть из их совместного обращения, остается очевидным. Здесь достаточно вспомнить, как

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150 У судей, в основном, как результат интерпретации статьи 4(2) ТЕУ, определение национальной идентичности страны является наиболее фундаментальным и неотъемлемым правом страны и ее политической общины, которое отражается в основном, но не исключительно, в ее конституции. Поэтому оно подходит для политической общины страны, чтобы обеспечить в конституции, через законодательную власть, определенные элементы национальной идентичности страны. Венгерский Конституционный Суд, Решение 32/2021. (XI. 20.) AB абзац 95


152 Венгерский Конституционный Суд, Решение 32/2021. (XI. 20.) AB абзац 79.

153 Таким образом, как повторить термин Конституционного Суда, ‘на основании интерпретации статьи E (2) Основного закона, Конституционный Суд найдет, что, где совместное выполнение полномочий не выполнено, Венгрия имеет право, в соответствии с предположением о резервации суверенитета, использовать соответствующие полномочия, пока не будут учтены условия и созданы гарантии, необходимые для эффективного выполнения совместных полномочий’. Венгерский Конституционный Суд, Решение 32/2021. (XI. 20.) AB абзац 85.
constitutional identity and sovereignty are not complementary concepts, but are interrelated in several respects. On the one hand, the safeguarding of Hungary’s constitutional identity, also as a Member State within the European Union, is fundamentally made possible by its sovereignty (the safeguarding thereof). On the other hand, constitutional identity manifests itself primarily through a sovereign act, adopting the constitution.154

The open-endedness with which the Court itself has settled the defining perimeter of constitutional identity leaves it with a wide margin for future application of the instrument with the obvious consequences that may follow in the relations between themselves and the Court of Justice of the European Union.

5. THE HUNGARIAN CONSTITUTIONAL COURT BETWEEN TWO (OPPOSITE) TRANSITIONS

As can be seen, the interpretative paths followed by the Hungarian Constitutional Court gradually diverged from the entry of the Fundamental Law. From this point onwards, in fact, the Constitutional Court gradually departed from the guarantist reading of the Constitution that had marked the early stages of its case law, in order to adopt an exegesis of the Fundamental Charter as a political instrument functional to the legitimisation of power.155

If we consider the period from 1989 to 2011, the Hungarian Court too, albeit with the inevitable differences arising from its historical legacy, adopted a substantially expansive reading of the Constitution, which, through reference to international law and the rule of law, developed a series of ‘supreme principles’, guaranteeing fundamental freedoms and the position of minorities as a limit to the exercise of power. Within this framework, the Court gradually assumed a central role in the transition process after the socialist experience. This activism was also based on the early instability of the contemporary political framework, which threatened to weaken the support mechanisms and structures of the emerging liberal-democratic model.156

It was precisely in those years that the Constitutional Court consistently introduced and applied the theory of the ‘revolution under the rule of law’, as if to testify to the need for the new legal framework to function, first and foremost, according to the principles of the rule of law. The consolidation of the legal system could only take place in compliance with the contents of the Constitution, which unfolded all their preceptive value towards the political decision-maker, who was entrusted with the task of guiding the democratic transformation.157

This interpretative paradigm soon proved to be instrumental in stemming populist tendencies, claiming, inter alia, the priority of a substantive representation of justice towards those accountable for crimes committed during the years of the communist regime. At this stage, the

154 Hungarian Constitutional Court, Decision no. 32/2021. (XII. 20) AB para. 99.
156 About the process of consolidation of the party-political system in the Eastern European countries in transition, with a glance at Hungary, see Olson (1998) 432–57.
Court was able to make full use of its prerogatives, going beyond textual interpretation and settling on the notion of the ‘invisible Constitution’, which conceives the Fundamental Charter as a set of closely interconnected principles to be inferred hermeneutically, taking into account the whole system.158

However, the dramatic paradigm shift explained above began to take place precisely with the entry into force of the 2011 Fundamental Law, which, as is well known, also changed the internal organisation of the Court, limited its powers and at the same time reduced the routes of access to constitutional justice.159 In fact, the Constitution had also undergone changes in the past, which, however, left its core values unchanged, allowing judges continuity in interpretation.160 More than anything else, therefore, the substantial change in jurisprudence that has gradually marked the Hungarian court against growing populist claims is due to exogenous causes. The very idea of the constitution as ‘superior law’ has been widely questioned, and there has also been an attempt by the political power to promote a different view of popular sovereignty, thus making it increasingly difficult to identify regulatory areas outside the discretion of the majority forces.161

In truth, the Hungarian Court did not immediately give up that expansive reading of the Fundamental Law that had characterised the early stages of its interpretative magisterium. At least in the beginning, the Court sought to reaffirm the consistent preceptivity of the constitutional text and opposed surreptitious attempts to make the Charter more flexible. The conjunction of the Fourth and Seventh Amendments, however, thwarted all such efforts. On the one hand, because by it the Constitutional Court was prevented from reviewing the substantive content of the amendments, while also depriving the Court of almost all of its precedents. On the other, because the Constitutional Court was bound to a historical interpretation, forcing it to reconstruct the will of the legislature and to align itself with the interpretation of the Constitution, promoted from time to time by the political forces responsible for these changes.162

In other words, the Hungarian Constitutional Court also adopted an instrumental approach to the Constitution, giving support to the majority forces, as happened with the development of the concepts of national sovereignty and constitutional identity (22/2016. (XII. 5.) AB) after the initial failure to pass the 7th Amendment. Thus, in recent years, even following the planned replacement of its members, the Hungarian Court has shown a fair degree of favor towards the policies adopted by the governing forces, adopting markedly populist shades and advocating

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158 As can be read within the lines of Judge Sólyom’s concurring opinion in Hungarian Constitutional Court, Decision no. 23/1990, ‘the Constitutional court must confine its effort to explain the theoretical bases of the Constitution and the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality […] beyond the Constitution, which is often amended nowadays by current political interests, and because of this “invisible constitution’ probably will not conflict with the new Constitution to be established or with future Constitution. The Constitutional Court enjoys freedom in this process as long as remain within the framework of the concept of constitutionality’.


161 Halmai (2019b) 306.

162 Halmai (2017b) 151–54.
interpretations of the Constitution, enjoying public approval, perhaps at the price of denying even established judicial precedents.\textsuperscript{163}

In this regard, the hermeneutical criteria of constitutional identity and national sovereignty highlight a quasi-originalist approach, which almost always fosters majority wishes and reduces the possibility of creatively extending the scope of the provisions contained in the Fundamental Law to protect individual rights.\textsuperscript{164} The role of the Constitutional Court has also been structurally altered, since in the absence of unmodifiable content, the final choice on the fate of the Constitution is put back into the hands of the constitutional legislature, with no opportunity to challenge its final decision. This kind of self-legitimization of popular sovereignty is unhindered in its expressions, in line with populist rhetoric that ‘neutralizes’ the Fundamental Law, by relegating it to the role of a mere instrument of the legitimation of political power.\textsuperscript{165}

6. POPULISM AND CONSTITUTIONAL INTERPRETATION BETWEEN FLEXIBLE RULES AND HARD PRINCIPLES

From this necessarily rhapsodic comparison between some of the most iconic cases of the most practical kinds of populism, it emerges how behind the interpretative techniques employed by the Italian Constitutional Court and its Hungarian counterpart lie two different conceptions of the Constitution, which in turn have been - and still are - affected by the institutional, cultural and politico-legal context in which they work.

As can be seen, after an initial period in which both Courts moved towards a substantial – similar – extensive interpretation, aimed at reaffirming the distinctive values of Western liberal constitutionalism in their own systems, their respective exegetical paths gradually split, in the wake of a differing conception of sovereignty and its limits.

From the very beginning of its activity, the Italian Constitutional Court has always emphasized the preceptive nature of the Constitution, through an expansive and principle-based interpretation, able to fill gaps in the legal system. The Italian court, therefore, alongside the textual element, has consistently brought out a set of binding values, capable of characterizing the founding structure of the legal system, protecting individual rights, as well as the needs of minorities. Thus, an axiological reading of the constitutional text became widespread, which, through careful balancing operations, to be carried out on a case-by-case basis, narrowed the scope of the majority principle to protect the interests involved in specific cases and effectively contained populist drifts, reconceptualizing sovereignty itself. In other words, the \textit{magis ut valeat} exegesis has brought out a set of unchangeable elements, effectively establishing a hierarchy of values in the Constitution itself, which has gradually spread throughout the legal system and inherently limited the effectiveness of majority rule. This hermeneutic key has remained, for the most part, unchanged, both because of the substantial rigidity of the Constitution and because of

\textsuperscript{163}Corso (2019b) 224–25.


a fundamentally stable institutional setting, and the overall role of the organs of guarantee has been strengthened by casting the Constitutional Court as the ‘guardian’ of the legitimate exercise of popular sovereignty.

In contrast, the Hungarian Constitutional court has radically changed its interpretive approach. In an early phase, developed mostly under the post-socialist Constitution, the Constitutional Court seemed to adopt some hermeneutical criteria, which, through its recourse to the parameters of rule of law and supranational law, had derived some mandatory principles, to be set against the will of the majority. Nonetheless, with the enactment of the Fundamental Law we saw an unequivocal requirement, which refrained from any expansive reading of the constitution. This divergent jurisprudential direction can be ascribed to a different structure of the Constitution rather than to the adoption of alternative techniques on the hermeneutic field: under the populist impulses pandered by the constitutional legislature, the Fundamental Law has turned into a mere instrument of legitimation, losing its intrinsic nature as a counter-majoritarian limit. In this way, the Constitutional Charter has been demeaned within the system of sources, becoming more flexible, both by reason of a progressive assimilation between constituent power and constituted power, as well as by the effect of certain interpretive stylistic features – above all, national identity, and constitutional sovereignty – which have assigned to political power the unconditional power to interfere with constitutional guarantees.

As a result, while the Italian Court was able to operate according to a hermeneutics of principles, which progressively recognized the effectiveness of the Constitution as a binding body of law in all its elements from a political and legal perspective, the Hungarian Constitutional Court found itself forced to build its exegesis mostly on rules hetero-determined by the governing majority, interpreting the Constitution as a mere political document. The result has been a real reversal of perspective, whereby instead of the Court limiting the action of the sovereign power, it has been the legislature changing the parameters of the constitutional court and directing its action according to its own needs. Such interpretative approaches and the different understandings of the Constitutional Charter they underlie have also had implications for the democratic evolution of the two systems. In fact, while in Italy the protection of constitutional rigidity has sheltered the system from the intrusion of populist instances, safeguarding the standards of liberal democracy, the same cannot be said for Hungary where the normative and values-based flexibility of the Constitution has prevented the Court from engaging interpretive tools suitable for stemming populist afflatus, in practice allowing the system to lean toward patterns alien to democratic constitutionalism.

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