

# 9 Constitutional interpretation under the new Fundamental Law of Hungary

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## 9.1 Introduction

Hungary is categorized as a Member State of the European Union that is ruled by a populist Government.<sup>1</sup> The Hungarian Government is qualified as populist because according to the scholarship of political science, many elements of the definition of populism fit with the Hungarian political system. Furthermore, the Government has a two thirds constitution-making majority in the Parliament; therefore, the constitutionalism in Hungary since 2010 has been formed and transformed by the ruling political majority. As political goals can easily be transformed into constitutional changes and the constitutional environment adapts to the ruling political agenda immediately, the scholarly criteria of so-called populist constitutionalism can be clearly observed and studied in Hungary.

Zoltán Szente, in the introductory chapter of this book, identifies the elements of populist constitutionalism in the negative and in the positive sense, based upon a wide review of the literature in law and in political science. He describes how these elements can be found to different extents in different countries, but in the legal and political science scholarship, these characteristics appear to be basic elements of the concept of populist constitutionalism. The elements are the following: (1) a criticism of the separation of law and politics, stating that populists reject the restriction of political power by legal norms, and they reject the politically neutral conception of law in liberal democracy because it undermines the representation of the national interest; and (2) anti-elitism, the juxtaposition of the virtuous people and the corrupt elite and reference to a united people (nation, community) as opposed to a privileged cosmopolitan elite (with international organizations or EU institutions, NGOs included) that protects the rights of LGBTQ communities or immigrants, alternative churches or other minorities that do not represent

1 For example, Andrew Arato, 'How We Got Here? Transition Failures, Their Causes and the Populist Interest in the Constitution' (2019) 45 *Philosophy and Social Criticism* 1108; Bojan Bugarič, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism' (2019) 20 *German Law Journal* 392, 393; Bojan Bugarič, Alenka Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?' (2018) 10 *Hague Journal on the Rule of Law* 22; Manuel Anselmi, *Populism. An Introduction* (Routledge 2018) 87.

the majority interest.<sup>2</sup> Anti-institutionalism, anti-pluralism, and anti-liberalism are the next components that Szente identifies in the literature,<sup>3</sup> together with the logic that public interest and the general will of the people should take precedence over individual and particular interests.

Among the positive criteria of populist constitutionalism, Szente identifies popular sovereignty first. The populist interpretation of constituent power puts the rule of the people above the rule of law, a ‘collective subject’ moulded by tradition, common suffering and destiny receives greater competence in direct decision making. Populist constitutionalism can be characterized by the absolutization of the majority principle, as long as the populist parties have won the election. This majoritarian conception of democracy regards electoral empowerment as an expression of the will of the people and, on that basis, rejects the constitutional restriction of power.<sup>4</sup> The instrumentalization of the law means, in regimes like Hungary, that the constitution can provide an effective toolbox for preserving power and breaking down checks and balances while the formalities of the rule of law are observed; therefore, these populist regimes are characterized by active constitution-making, as far as this is possible for them.<sup>5</sup>

My examination is based on this scholarly observation which has been explained in detail in the introduction to this book, and I presume here the very convincing results of the previous examinations claiming that in Hungary, most of these attributes of populism are typical of the exercise of power.<sup>6</sup> Without, therefore, making any further contribution to this discussion on populism and constitutionalism in Hungary, I accept that Hungary is classified by an overwhelming majority of populism scholars as a populist country governed by a populist government with all those constitutional aspirations.<sup>7</sup> Furthermore, given that in Hungary, the Fidesz-KDNP party coalition led by Viktor Orbán won the two thirds constitution-making majority in the Parliament in the 2010, 2014 and 2018 general parliamentary elections, the Government majority in Parliament can therefore change the Constitution, and so Hungary is a litmus paper to examine the operation of populist constitutionalism.

I will thus examine in this chapter whether this new populist constitutional system which has developed in Hungary since 2010 gives a different role or rule to constitutional interpretation, i.e. to the procedure that gives final

2 See Szente, Chapter 1 in this volume.

3 Ibid.

4 Ibid.

5 Ibid.

6 For example, Paul Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15 *European Constitutional Law Review* 519, 543; David Landau, ‘Abusive Constitutionalism’ (2013) 47 *UC Davis Law Review* 213.

7 For example, Gábor Attila Tóth, ‘Constitutional Markers of Authoritarianism’ (2019) 11 *Hague Journal on the Rule of Law* 37–61; Gábor Halmai, ‘Populism, Authoritarianism and Constitutionalism’ (2019) 20 *German Law Journal* 296–313. Tímea Drinóczi and Agnieszka Bień-Kacała, ‘Illiberal Constitutionalism: The Case of Hungary and Poland’ (2019) 20 *German Law Journal* 1141, 1148.

meaning to the words of the constitution. My next question is, if I answer the previous question in the positive, whether the new methods of interpretation are relevant or not in general in the jurisprudence of the Constitutional Court (hereinafter Court or CC) and especially in the argumentation of those judicial decisions that are favourable to the aforementioned populist agenda.

The first part of this chapter describes the constitutional context relevant to our topic. I will argue that although there are new constitutional requirements of interpretation prescribed in the constitutional text, these are rather neutral with regard to the populist constitutional agenda. If they are not neutral, for example, the reference to the achievements of the historical constitution or to the Preamble, the so-called National Avowal, they have not had a significant impact on the general constitutional interpretation so far. On the other hand, non-usual use of the classical interpretative methods or substantive new concepts have appeared in the case law of the Hungarian Constitutional Court independently of the constitutional interpretative requirements, to serve the basis of a *ratio decidendi* that favours the aforementioned populist elements of the new constitutional agenda.

My conclusion will focus on the role of the prescribed compulsory interpretative methods in the substantive constitutional change in populist constitutionalism. The change proposed by the two thirds populist political majority in Parliament in the form of a new Fundamental Law and several constitutional amendments is advanced by the decisions of the Constitutional Court, but the cause of this new deferential approach cannot be reduced to the usage of the partly new text and the new methods of interpretation introduced by the Fundamental Law. Although in some cases the new methods appear in the constitutional jurisprudence, there is no close connection between the introduction of the new interpretative requirements into the constitutional text and the constitutional jurisprudence favourable in many cases to the populist agenda, as I will explain here.

## 9.2 The new methods of constitutional interpretation

### 9.2.1 *The Constitutional Court*

‘*Clientelism, state capture, and the “Gleichschaltung” of certain social systems (putting them under direct political control), which are also characteristic of populist governments, require the use of legal instruments*’ – observes Szente in the introductory chapter, describing one characteristic of populist constitutionalism identified by the populism literature. Hungarian legal scholarship often argues that the Constitutional Court was captured after 2010, because legal and constitutional changes had a great effect on the Constitutional Court after 2010.<sup>8</sup>

8 Fruzsina Gárdos-Orosz, ‘Challenges to Constitutional Adjudication in Hungary since 2010’ in Martin Belov (ed.), *The Role of Courts in Contemporary Legal Orders* (Eleven Publishing 2019) 321.

The Hungarian Constitutional Court was established on 1 January 1990, right after the democratic transition of 1989–1990. In the period after 1990, and in the years following the democratic change of regime, the Constitutional Court, perhaps justifiably open to criticism for its activism,<sup>9</sup> took on a significant role in forming the new constitutional democracy in Hungary after communism.<sup>10</sup> The new constitution of Hungary – the Fundamental Law – entered into force on 1 January 2012 and replaced the previous Constitution<sup>11</sup> that had been revised completely in 1989–1990. The Fidesz-KDNP party coalition, having gained a two-thirds constitution-making majority at the 2010 general elections, envisaged a new role for the Constitutional Court. The new regulation had been adopted in several steps, starting as early as in 2010 with the increase in the number of judges from 11 to 15 (the new members being elected by the new Government majority in Parliament) and the restriction on the competence to review legislation on public finance (occurring well after the 2008 financial crisis). The aim of the transformation, according to the official reasoning of the Act on the Constitutional Court, was to give more emphasis to the protection of fundamental rights in individual judicial cases by the introduction of the German-type constitutional complaint and, on the other hand, to abolish the possibility of *actio popularis*, by which procedure anyone could turn to the Constitutional Court without any particular interest in order to initiate the annulment of a piece of legislation deemed unconstitutional. There were significant scholarly concerns that by these changes the constitution-making majority was reconsidering the central role of this institution in maintaining the rule of law and liberal democracy in Hungary by effectively reviewing the legislative and the government branches.<sup>12</sup> Although the Constitutional Court, which is structurally separated from the Judiciary, still has the power to annul laws, some of its decisions were overridden by constitutional amendments in the 2010–2013 period, and the number of constitutional review procedures has significantly decreased following the new regulation, because, pursuant to Article 24 of the Fundamental Law, although the Constitutional Court is the principal organ for the protection of the Fundamental Law, it only reviews laws following a proposal by the Government, one-fourth of the Members of the National Assembly, the President of the *Kúria* (the supreme court), the Prosecutor General or the Commissioner for Fundamental Rights, and according to Article 37 Section (4) of the Fundamental Law, it generally cannot review public finance legislation.

9 Zoltán Szente, ‘The Interpretative Practice of the Hungarian Constitutional Court: A Critical View’ (2013) 14 *German Law Journal* 186.

10 Attila Vincze, Péter Csuhány, Pál Sonnevend, András Jakab, ‘Az Alkotmánybíróság’ in András Jakab (ed.), *Az alkotmány kommentárja* (Századvéd 2009) 239–264.

11 Act XX of 1949 on the Constitution.

12 Gábor Halmai, ‘Dismantling Constitutional Review in Hungary’ (2019) *Rivista de diritto comparati* 18.

### ***9.2.2 The collection of the principles and methods of constitutional interpretation laid down in the Fundamental Law***

Unlike the old Constitution (of 1949/1989), the Fundamental Law of 2011 defines the major methods of constitutional interpretation. The relevant guidance is scattered around the constitutional text without any hierarchy of the different interpretive principles to be used.<sup>13</sup>

Article N Section (1) declares that Hungary enforces ‘the principle of balanced, transparent and sustainable budget management’, while Section (3) makes respect for this principle the duty of – among others – the Constitutional Court.

According to Article R Section (3), the provisions of the Fundamental Law must be interpreted (a) ‘in accordance with their purposes’, (b) ‘with the Avowal of National Faith’, and (c) ‘with the achievements of our historical constitution’. Section (4) of the same Article states that ‘the protection of the constitutional identity and the Christian culture of Hungary shall be an obligation of every organ of the State’.

In Article I (3), the Fundamental Law further codified the basic rule of interpretation for conflicts involving fundamental rights:

The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.

It was not only the imposition of binding interpretative principles and methods which emerged as a constitutional means to influence the jurisdiction of the Constitutional Court, but also the provision of the Fourth Amendment to the Fundamental Law in March 2013, repealing (loosening the legal effect of) all Constitutional Court rulings made prior to the entry into force of the new Fundamental Law in 2012. The goal of this amendment was clearly to compel the Constitutional Court to change its jurisprudence, adapting it to the values of the Fundamental Law.

Furthermore, according to Article 28 of the Fundamental Law:

In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purposes and with the Fundamental Law. The purposes of the laws should be defined primarily in accordance with the preamble of the law and the official reasoning given to the law in the procedure of adaptation or the amendments. When interpreting the Fundamental Law or laws, it shall be presumed that

13 Tímea Drinóczi, Nóra Chronowski, and Miklós Kocsis, ‘What Questions of Interpretation May Be Raised by the New Hungarian Constitution?’ (2012) 1 *Vienna Journal on International Constitutional Law* 41–64.

they serve moral and economic purposes which are in accordance with common sense and the public good.

In other words, in the course of the constitutional review of judicial decisions, the Constitutional Court checks whether the court properly considered the objective purpose of the legal norms it had to apply in the specific case. This ‘objective purpose’ was first understood by the Constitutional Court as the social aim that the lawmaker wanted to achieve by the legal act, rather than the subjective and original intent of those who took part in the lawmaking process; but later, by the Seventh Amendment to the Fundamental Law in 2018, the text changed, and the constitution-making majority made it clear that this purpose is understood according to the legislator’s intention.

Due to the fact that there are a variety of different methods of constitutional interpretation in theory, the Fundamental Law cannot give a closed list of the methods. It contains only a list of the preferred interpretative methods that must be taken into consideration for the decision.

### **9.3 A new populist set of the methods of interpretation, or the reformulation of the classical methods?**

In this part, I will briefly list the methods that became important and recognizable in the jurisprudence of the Hungarian Constitutional Court following the democratic transition.<sup>14</sup> I will match these methods with the new regulations listed earlier from the Fundamental Law in order to understand the nature of the new constitutional requirements. Then, I will assess whether the methods prescribed in the Fundamental Law are theoretically favourable for a regime that builds populist constitutionalism or are fairly neutral as regards these goals.

(a) Pure textualism is often referred to as the plain meaning method. The plain meaning rule is not an explicit requirement of the constitutional text, but this method is favourable for the present constitutional order in Hungary as the text of the Fundamental Law was formulated in 2011 by the same political majority as the ruling one in 2020 and has already been amended eight times. It is the leading method of interpretation in the Hungarian constitutional jurisprudence, and the plain meaning of the constitutional text is always referred to in the decisions of the Constitutional Court as a starting point of the argumentation.

(b) The originalist interpretation seeks to find the original intent of the constitution makers reflected by the text.

Article R refers to the achievements of the historical constitution as a compulsory reference point for interpretation. As it does in the United States,

<sup>14</sup> András Jakab, *Comparative Constitutional Reasoning* (Cambridge University Press 2017); Szente (n. 9) 186.

originalism leads the court back to the constitutional values of the past, and the reference to the achievements of the historical constitution could play a similar role in Hungarian jurisprudence through the requirement to adjust the present text to historical constitutional achievements. It emphasizes the long history of constitutional values in Hungary, and this approach is present in Hungary through the mention made of the achievements of the historical constitution. This approach to constitutional interpretation is favourable for populists for two reasons. One is mentioned by Graber, who notes in this book that the old values and understandings of constitutionalism are always more conservative and traditionalist than a progressive understanding of the text that is not bound by the past. Second, traditionalism, by emphasizing common values and traditions, is always a nation-building element in populist constitutionalism, as I mentioned earlier. Accepting that the achievements of the historical constitution are constitutional values which are regarded in the light of certain theories and non-positivist legal approaches as the roots of the present legal order, this view serves the goals of populist constitutional politics by leading judges towards meanings based on a common, traditional, naturally less open, less progressive and less inclusive understanding of the law.

(c) The teleological (purposive) interpretation wishes to discover the goal, the aim of the rule, the *ratio legis*. This emerges in Article R of the Fundamental Law, when the requirement is that constitutional provisions should be interpreted in accordance with their purposes. We would think that this provision alone would give a wide margin of appreciation to the Constitutional Court, but the next sentence in Section (4) about the protection of constitutional identity and Christian culture restricts this freedom to define the purpose of the rule.

(d) A pragmatic interpretation occurs when the judge takes into consideration the social, economic, technological, political, etc., effects of the decision. Article N of the Fundamental Law requires all state organs to act with respect for the financial goals of the state, although this provision does not have a great relevance, as according to Article 37 Section (4), the Constitutional Court cannot review controversies related to public finance legislation. Still, if the Constitutional Court must observe the financial goals of the state, the necessity of the pragmatic approach to the constitutional interpretation becomes a requirement, which might lead to judicial deference towards the populist political majority in specific cases.

(e) Contextual interpretation is when the constitutional text is understood in the entire context of the constitution, taking into consideration the other related provisions of the text. The integrity of the constitutional text is a keyword in this method. Article R of the Fundamental Law requires the broad contextual interpretation explicitly, in the strict sense, and implicitly, in the broad sense. In the strict sense, it requires that the Preamble of the Fundamental Law, should be considered when interpreting the other provisions of the text. This is a requirement of the coherent interpretation of the constitutional

text which includes the preamble, i.e. the long National Avowal with the values of the political majority contained within it. In the broad sense, I argue that when a contextual analysis is carried out on the Fundamental Law, it is not restricted to the Constitution itself but the historical constitution and Christian culture should be taken into account as the entire context of the Fundamental Law. This understanding of the requirement of contextual interpretation is favourable for the populist agenda that I summarized in the introduction, because it helps to create an interpretation which is in line with the values of populist constitutionalism: the uniform values of the family, common tradition, a work-based society, Christian values, etc.

(f) The moral interpretation is based on the assumption that there is a political philosophy behind the constitutional text which is able to lead the judge to the right understanding of the norm. This political philosophy is based on the morals of the community in constitutional populism. The necessity of the moral understanding is also present in the text of the Fundamental Law, when, for example, in Article R, the Fundamental Law requires respect for constitutional identity. Respect for constitutional identity, as the notion is not previously defined in the constitutional text or elsewhere, does not have a legal (although it does have a political) meaning at the moment of the adoption; therefore, there is a textual window to allow the political philosophy of the constitution-making majority to become one of the tools of interpretation.

In sum, my assumption is that although these methods of interpretation certainly differ with regard to the room they leave for judicial discretion, all these alterations to or specifications of the classical interpretative methods, as codified in the text of the Fundamental Law, can be used in a favourable way for populism, to back up changes in the constitutional rules and principles. I argue that what is new is not only the fact that certain compulsory methods of interpretation are defined in the constitutional text, but that this collection of interpretations is a populist toolkit designed by the constitution-making two-thirds majority to help the transformation of the constitutional values, not only through the constitutional text but also through new interpretation.

My next question is whether these methods do, in fact, have a significant relevance in the jurisprudence of the Constitutional Court, or whether the changes in the constitutional jurisprudence that have been indicated in several scholarly works since 2010 can rather be attributed to substantive innovations or weak argumentations in the jurisprudence.

## **9.4 The use of binding interpretative methods in constitutional jurisprudence**

### ***9.4.1 The application of the new methods of interpretation***

My first question is whether the new methods of interpretation have been used at all by the Constitutional Court, and if so, how often and in which cases they were used. Although the constitution makers tried to impose



limits on the freedom of the Constitutional Court to interpret the Fundamental Law independently from the majority will, at first this was not clearly successful. After the new constitution entered into effect, the Constitutional Court declared in 2012 that the Court may continue to use arguments in its decisions which had also been made before the entry into force of the Fundamental Law, if the Fundamental Law contains the same or similar provisions for the case compared to those of the previous Constitution.<sup>15</sup> When in 2013 the Fourth Amendment *expressis verbis* declared the repeal of all Constitutional Court rulings made before 2012, the Court appeared to maintain its earlier position, saying that the Court must hereto justify in more detail if it wishes to use arguments contained in its pre-2012 decisions. This means that the Constitutional Court simply refused openly to ignore its earlier decisions, and practice also shows that it refers to its previous judgments in many cases, or it refers to a new judgment that has confirmed the previous jurisprudence.

As to the use of the specific interpretative method, its significant impact on the Constitutional Court's jurisprudence cannot be demonstrated or proved. At first sight, as I described earlier, the constitutional command to respect the achievements of the historical constitution has had the greatest impact on constitutional interpretation, because it appears in a significant number of cases in the jurisprudence, unlike the other requirements.<sup>16</sup> However, in fact, the Constitutional Court often used merely formal statements referring to the historical constitution when reasoning its decisions.<sup>17</sup> The Court has not yet developed a doctrinally sound method or theory of how to take into account the achievements of the historical constitution.<sup>18</sup> Its interpretative practice is consistent only in the sense that a legal norm may not be invalidated solely on the basis of Article R (3); however, in reality, the references to the historical constitution are usually merely decorations of the reasoning of the Court's rulings.<sup>19</sup> Although the constitutional provision for respecting the achievements of the historical constitution is certainly flexible enough to be used in almost any reasoning, it is less useful when it comes to provide compelling arguments for definite interpretation results.

The content of the unwritten, historical constitution was inherently ever-changing, and there is no guidance to determine which period or state of the historical constitution the new constitution should take as its reference point. The Fundamental Law only records that the self-determination of the Hungarian state was lost on 19 March 1944, when Nazi Germany occupied

15 Decision 22/2012. (V. 11.) of the Constitutional Court.

16 Zoltán Szente, 'A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza' (2019) *Közjogi Szemle* 1–8.

17 Szente (n 9); Gábor Attila Tóth 'Historicism or Art Nouveau: A Comment on Zoltán Szente, The Interpretative practice of the Hungarian Constitutional Court, a Critical View' (2013) *German Law Journal* 615–626.

18 Imre Vörös, 'A történeti alkotmány az Alkotmánybíróság gyakorlatában' (2016) *Közjogi Szemle* 46. Ádám Rixer, 'Hungary's Fundamental Law and the Concept of the Historical Constitution' (2013) 4 *European Journal of European History of Law* 8.

19 Szente (n 15) 5.

the country. Presumably, this date is the endpoint of the historical constitution. However, because of the wartime regulations or the anti-Jewish laws that were in force in 1944, this state of the historical constitution can hardly be assumed or followed. In reality, the Constitutional Court occasionally selects certain rules or customs of historical Hungarian public law, i.e. it considers the historical constitution as a sort of menu.<sup>20</sup>

As in Hungarian legal traditions, the preambles of legal norms, such as the National Avowal, did not have normative power, making the constitutional preamble a sub-principle of interpretation represents a real innovation. Given that this preamble contains very abstract values, solemn phrases and historical references, its real effect on the case law is fairly limited.

Furthermore, although the Fundamental Law has certainly assigned a preeminent role to the purposive interpretation in Article R when exploring the meaning of the constitutional text, this intention hardly prevails in practice. The Constitutional Court only rarely uses this reasoning, and hardly ever refers to this guidance of the Fundamental Law. The intention of revealing the purpose can be concluded, at most, from the fact that in certain cases the Court asks for the lawmaker's position. However, this is a contingent rather than a well-founded practice, as the role and methodology of using purposive interpretation is completely unclear in Hungarian constitutional jurisprudence.<sup>21</sup>

As to Article N imposing the obligation on the Court to take into account budgetary considerations, this suffers from some deficiencies. Not only is its content unclear and obscure, but it is questionable which constitutional requirements should be preferred if the issue of constitutionality is confronted with economic rationality (such as a balanced budget). However, it would be an extremely difficult task to use this interpretative guideline, anyway, as the scope for constitutional review of public finance legislation is grievously restricted. Since 2011, the Constitutional Court has been able to review and annul laws relating to public finance only if they violate the right to life and human dignity; the right to the protection of personal data; freedom of thought, conscience and religion; and the rights related to Hungarian citizenship. In effect, the Court may not review any budgetary law, so, in the absence of the relevant power, it would hardly be able to enforce budgetary considerations in the course of constitutional interpretation, and it has not yet done so in jurisprudence.

In sum, although the new methods certainly aimed at changing the jurisprudence of the Constitutional Court, these requirements appeared to be quite weak and uncertain when they come to creating substantive changes in the interpretative mindset. However, substantive changes can be detected, as I will highlight in the next section. The notion of human dignity and the notion of constitutional identity, for example, have become substantive interpretative tool concepts that have influenced the jurisprudence of the

20 Szente (n 15) 6.

21 Szente (n 9).

Constitutional Court in some cases, and a doctrinally confused interpretation, a mix of the classical methods of interpretation, has also led to deferential decisions that favour the populist constitutional agenda.

#### 9.4.2 *Cases advancing populist constitutionalism (favouring the populist agenda) and the use of the new methods of interpretation in these specific cases*

In the introductory chapter to this book, Sente identifies secondary characteristics of constitutional populism, following the populism literature. These secondary characteristics that follow from the primary goals of political constitutionalism have a recognizable legal nature besides from the political one. The following can be highlighted: the development of *constitutional identity (a)*, *legal borrowings (b)* to appear to be similar to liberal constitutional democracies to increase legitimacy and adopting a defensive stance in relation to international and EU law, *reference to crisis management (c)* as a source of legitimacy to implement new measures which differ from the former rule of law requirements, *restriction of certain fundamental rights (d)*, as well as the *intolerance of or discrimination against certain minorities (e)*. This usually affects political rights, especially freedom of expression.

I will discuss five cases in this section, one for each characteristic, and examine whether the favourable decision for the political agenda produces new approaches to the interpretation of the constitution.<sup>22</sup>

(a) In Decision 22/2016 (XII. 5.) the interpretation of the Fundamental Law had been requested from the Court by the ombudsman. As explained in the motion, the concrete constitutional issue was related to the European Union Council Decision (EU) 2015/1601 of 22 September 2015 on migration, but the ombudsman initiated the authoritative interpretation of Article E of the Fundamental Law related to the accession to and cooperation with the EU. In this decision, the Constitutional Court developed the notion of constitutional identity which was not present in any domestic legal text at that time. The case was decided at a moment when the Government had already failed to get through a constitutional amendment with similar content, because in those months it did not have the two-thirds majority in Parliament, and an attempt to incorporate such a rule by a referendum had also failed.<sup>23</sup> National populism aims at protecting national approaches to sensitive questions such as migration, and these countries are against the EU

22 We discuss these cases and other related issues in greater detail in Eszter Bodnár-Fruzsina Gárdos-Orosz and Zoltán Pozsár-Szentmiklósy, *Hungary*, in Richard Albert, David Landau, Pietro Faraguna, and Simon Drugda (eds.), *2019 Global Review of Constitutional Law* (ICONnect-Clough Center 2020) 166–171, (2019) 138–142, (2018) 231–258, (2017) 77–81. Some case summaries here are based on these texts.

23 Zoltán Sente, 'The Controversial Anti-Migrant Referendum in Hungary, Invalid' *Vervassungsblog* <https://constitutional-change.com/tag/invalid-referendum/>.

elites if the protection of the people demands; furthermore, anti-pluralism in society and therefore an anti-migrant policy is also typical of the Hungarian regime, therefore the legal and constitutional reflection of this approach can best be concentrated in the notion of constitutional identity.

The Constitutional Court stated that the EU provides adequate protection for fundamental rights. The Constitutional Court, however, cannot set aside the protection of domestic fundamental rights, and it must grant that the joint exercise of competences with the EU would not result in a violation of human dignity as protected by the Hungarian Fundamental Law, or the essential content of other fundamental rights. The Court set two main limitations in the context of the question regarding the legal acts of the Union that extend beyond the jointly exercised competences. Firstly, the joint exercise of a competence cannot violate Hungary's sovereignty; secondly, it cannot lead to the violation of its constitutional identity. The Constitutional Court emphasized that the protection of constitutional identity should take the form of a constitutional dialogue based on the principles of equality and collegiality, implemented with mutual respect for each other.

I argue that this new substantive concept of constitutional identity was developed in line with national populist political goals,<sup>24</sup> because it serves as a basis for a protective national constitutionalism against the EU or international legislation, which is considered to be elitist, internationalist, pluralist, liberal and pro-migration, according to existing political communications. A proof of this argument is that as soon as the Government in Parliament regained its two-thirds constitution-amending majority, Parliament added the notion of constitutional identity to the text of the Fundamental Law in Article R, with the Seventh Amendment to the Fundamental Law.

Within the reasoning of the Court, the reference to the National Avowal is solely decorative, and the historical constitution is also not part of the specific argumentation:

The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R (3) of the Fundamental Law.

Instead of a convincing reasoning of this decision the Court opens up an uncertain, case-by-case interpretation of a central substantive concept related to the interpretation of all the other provisions of the Fundamental Law.

24 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) *Review of Central and East European Law*; Nóra Chronowski and Attila Vincze, 'Önazonosság és európai integráció' (2017) *Jogtudományi Közlöny* 117–131.

The new substantive concepts of possibly transformative value in this decision do not have identifiable legal content, which might logically lead to a deferential judicial approach, not just in this but in future decisions.

(b) Constitutional borrowings can be demonstrated by the so-called CEU and NGO cases.<sup>25</sup> In Hungary, some NGOs and the Central European University are acknowledged as elements of the elite of the 1989 democratic transition, observing the values of liberal constitutionalism based on individualism, internationalism and pluralism. The legislative amendments that were to be reviewed by the Court in constitutional complaint and ex post constitutional review procedures were voted by the Government majority in Parliament to implement unfavourable measures to stop or obstruct the activity of these institutions in Hungary.

The Constitutional Court did not decide on the sensitive cases. The Court could not initiate a preliminary ruling procedure before the European Court of Justice because the case was primarily national, but with reference to the necessity of dialogue, it suspended both procedures until the decision of the ECJ was completed, in which Hungary was sued by the Commission in an infringement procedure for the same rules.

The Venice Commission related to the NGO regulation amendment criticized several points of the regulation because, while on paper certain provisions requiring transparency of foreign funding may appear to be in line with European standards, the context surrounding the adoption of the relevant law, and specifically a virulent campaign by some state authorities against civil society organizations receiving foreign funding, portraying them as acting against the interests of Hungarian society, may render such provisions problematic.<sup>26</sup> The Amendment of the National Tertiary Education Act was also criticized not only in Hungary, but by the Council of Europe Parliamentary Assembly and the Venice Commission.<sup>27</sup>

In the Constitutional Court decisions on the suspensions, the dissenting opinions warned of the implausible argumentation of basing a domestic decision on EU law grounds with reference to the ‘dialogue’ – a borrowed approach from the jurisprudence of other European constitutional courts. The problem here is that the Hungarian case was very different in nature from other cases in which preliminary reference appeared to be a good tool and the reasoning of the decision was developed using the borrowed concept to exempt the legislative majority from an unavoidable, unfavourable constitutional decision.

25 Decisions 3198/2018. (VI. 21.) and 3199/2018. (VI. 21.) of the Constitutional Court.

26 Hungary – Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e).

27 Hungary – Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)022-e).

(c) Good examples of the reference to the crisis situation to strengthen populist intentions with constitutional argumentation are the decisions of the Constitutional Court related to credit crisis jurisprudence. The decisions conformed to government policy and accepted the constitutionality of the extraordinary measures that were introduced to interfere with contractual relationships to help debtors in foreign currency loan related cases. The legislative decision and its communication were extremely anti-elitist, against financial institutions and foreign elites and at the same time very protective of the people: the only true representative of the people – the Government majority – helped in this troubling situation, according to the reasoning of the legislative acts introduced.

The Act that the Parliament adopted to put an end to the deepest credit crunch crisis in Hungary in 2011 regulated two areas: the declaration that exchange rate margins are null and void in contracts and that unilateral amendments to contracts are unfair. For financial institutions to rebut the presumption of unfairness, the Act created a very specific and rigorous order of procedure.<sup>28</sup> In its relevant ruling,<sup>29</sup> the Court created unconventional and unusual standards with regard to retroactive effect, fair trial rights and the right to property in Hungarian constitutional law as a reaction to the Government's crisis argument, but did not refer to its duty to apply the new methods of interpretation and so come to a new interpretative result regarding certain constitutional provisions.<sup>30</sup> In another decision on the same issue,<sup>31</sup> the Constitutional Court highlighted, for example, that the global financial crisis of 2008–2009 rendered the debtor's right to freedom of action and self-determination meaningless, which

undermined their right to human dignity as well ... This is unacceptable, because human dignity shall be inviolable (Article 2 of the Fundamental Law), and shall be the primary obligation of the State to protect these rights (Article 1 (1) of the Fundamental Law).

This surprising interpretation of the material basis of the general freedom of action understood as human dignity in order to back up the invasive legislative provisions with a conclusive argument, was challenged by many within the Constitutional Court in concurring or dissenting opinions. The unconventional interpretation which made human dignity a trump card, however,

28 See, on the detailed analyses of the law and this decision, Fruzsina Gárdos-Orosz, 'Constitutional Justice in Credit Crisis' 66 *Südosteuropa* (2018) 94–118.

29 Decision 34/2014 (XII. 4) of the Constitutional Court.

30 Gárdos-Orosz (n 25) 101.

31 Decision 2/2015 (II. 2.) of the Constitutional Court.

has had a precedent effect,<sup>32</sup> not necessarily in line with the former concept of human dignity,<sup>33</sup> but rather as a substantive concept of the interpretation of the other constitutional provisions. It seems that in a ‘crisis situation’ (when large numbers of people face a challenging situation), the constitutional limits of the state’s intervention by way of legislation changes due to this ultimate duty to respect and protect human dignity, as Article 2 of the Fundamental Law was understood this way. In this case there was no reference to new methods of interpretation, but still the Court arrived at a new substantive understanding of human dignity in relation to Article M on consumer protection. In the decision, there is one sole reference to Article R as a tool for interpretation to back up this meaning of Article M, where the Court states that according to the National Avowal, ‘We hold that we have a general duty to help the vulnerable and the poor’.

(d) The new balance of fundamental rights can also be seen in other decisions. This approach to freedom of expression expressly stated in Article IX of the Fundamental Law in relation to the protection of human dignity was further reinforced by the Constitutional Court jurisprudence in a significant case of freedom of assembly. Freedom of expression is the basis of freedom of assembly, and human dignity is the basis of the protection of privacy and the home in human rights doctrine. In the case that I refer to in order to demonstrate the judicial change in freedom of assembly rights, these rights were restricted in order that the protection of privacy and home would prevail in certain situations. This approach is in line with the textual change in the position of freedom of expression.

Freedom of assembly was regulated in Hungary by an act adopted in 1989 as a huge step in the democratic transition process. According to the very liberal regulation, the previously existing ban on assembly is possible in only two cases: if, according to the police, it seriously endangers the proper functioning of the representative state institutions or courts, or if the circulation of the traffic cannot be secured by another route. In its decision, however, the Court established a different balance between these rights.<sup>34</sup> It held that the police acted lawfully and constitutionally when it used a new, non-codified reason for the prior interdiction in relation to a demonstration in front of the home of the prime minister (the reason was the assumed violation of the privacy of the inhabitants of the neighbouring district). The CC also

32 Kinga Zakariás, *Az emberi méltóság* (Pázmány Press 2019) especially 68–97; Gergely Deli and István Kukorelli, ‘Az emberi méltóság alapjoga Magyarországon’ (2015) 70 *Jogtudományi Közlöny* 337–347; Kinga Zkariás, Márk Várszegi, Existenzminimum und würdiges Leben – die Menschenwürde als Grundlage des Sozialstaates: Eine ungarisch-deutsche Rechtsvergleichung, in Christian Schubel, Stephan Kirste, Peter-Christian Müller-Graff, Oliver Diggelmann, and Ulrich Hufeld (eds.), *Jahrbuch für Vergleichende Staats- und Rechtswissenschaften – 2018/2019* (Nomos 2020) 57–99.

33 Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015) 82–112.

34 Decision 13/2016 (VII. 18.) of the Constitutional Court.

argued that there was an unconstitutional omission, meaning that the Parliament should amend the act on the freedom of assembly in order to regulate cases in which freedom of assembly and the right to privacy embedded in human dignity are in conflict. In this case human dignity served also as a substantive tool of interpretation to give a changed meaning to the right to privacy against the right to assembly.

I argue that this reinterpretation of human dignity is becoming a substantive tool concept in interpretation in order to strengthen the new approach of the Fundamental Law to human rights protection. We have the impression that in this new approach included in the Fundamental Law by the populist majority, a human being is protected together with his/her dignity, in that this dignity is defined in constitutional jurisprudence by attributing certain specific qualities to a human being, which qualities should be protected as the inviolable human dignity (very strongly against other conflicting rights) in jurisprudence: these qualities are the home, the privacy of the family, a certain degree of welfare, exemption from hate speech, qualities that appear in the aforementioned cases and also in populist political communication, the textual emphasis on Christian culture and the illiberal goals of populist constitutionalism as described in the introduction. There was no reference to the new methods of interpretation in this case, although the meaning changed, despite the unchanged text.

(e) The decision 2/2019. (III. 5.) of the Constitutional Court is related to the anti-migration, anti-pluralism, anti-diversity policy of the state that attempts to create a homogeneous society. The Seventh Amendment implemented a new condition for granting asylum: those persons shall not be entitled to asylum who arrived in the territory of Hungary through any country where they were not persecuted or directly threatened with persecution.

The Government requested the abstract interpretation of this provision of the Fundamental Law – especially that of the new provision related to asylum – in the light of the Seventh Amendment. The motive behind this was the dispute between the Government and the European Commission on the compliance of the new Hungarian regulation on asylum (including the Seventh Amendment) with EU Law.

The Constitutional Court declared here (going completely against its own earlier standpoint in the CEU case) that the interpretation of the Fundamental Law cannot be derogated by any interpretation by another organ – addressing this implicitly to the institutions of the EU. Regarding the new provision of the Fundamental Law on the right to asylum, the Constitutional Court reached a controversial conclusion with a completely eclectic interpretation. According to this, the contextual interpretation of this provision against the textual interpretation means that in these cases, the right to asylum does not function as a fundamental subjective right, but respecting the principle of non-refoulement the asylum seeker should be subject to regulation by the statutes of the Hungarian state. The reasoning of this case was striking because it is quite rare – especially in the case of a very new amendment – that the Constitutional Court does not



interpret it according to the plain meaning method, and in this case the reasoning clearly served the Government's interest to take a step back in order to try to conform with EU requirements in response to a conflict which was not desired at that moment.

## **9.5 Conclusions**

In spite of the fact that the Constitutional Court is the authentic interpreter of the constitutional text, and it is bound by the methods defined in the Fundamental Law, the body has, in principle, considerable room for manoeuvre, since the constitution maker did not establish a hierarchy of the different interpretative methods, which are very different in their (legal) nature and did not lay down an exclusive list.

Some scholars argue that the jurisprudence of the Constitutional Court has significantly changed in the last few years and these changes have been favourable to the Government populist majority. I have proved in this chapter that there certainly are Constitutional Court decisions that favour the political agenda which is qualified as populist, but in these decisions the new methods of interpretation prescribed in the text of the Fundamental Law do not have much relevance. Although each of these methods of interpretation could help to develop a new philosophy of argumentation, this has not happened yet. When the Constitutional Court refers to these new methods, the reference is usually an ornament to the decision, and in those cases favourable to the Government, the new interpretative methods do not acquire a significant role, either. Decisions favourable to populism use an eclectic method of interpretation and an eclectic set of classical methods and new substantive concepts, such as constitutional identity or human dignity.

If the substantive change of the jurisprudence and of the attitude of the Constitutional Court are not due primarily to the new text of the Fundamental Law, and furthermore, to the different set of methods of interpretation, even if this latter might be favourably used to support the realization of the populist constitutional goals, the judicial behaviour can rather be attributed to the voluntary engagement in the creative process of building populist constitutionalism.