3 An 'Instrument of Government' or 'Instrument of Courts'?

The impact of political systems on constitutional interpretation and the case of populism

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3.1 Introduction

Lately, the Janus face of populism has been addressed in the illuminating opening address of the cantonal governor of the Swiss canton Appenzell Inner Rhodes delivered at the Landsgemeinde on 28 April 2019, the annual gathering of cantonal voters:[1]

> Recently, the term 'populism' … has become used to an almost inflationary degree, particularly with a view to accuse the other side of a lack of real arguments. It is sometimes overlooked that politics is always guided by the sentiment of the people. This is, per se, neither condemnable nor dangerous, but democratic as long as the people has the actual say. Understood in this sense, populism is not the end of democracy, but, on the contrary, a request to defend democracy against demagogy and dramatization, with self-assertiveness and the willingness to reform and consensus. For even democracies can die.[2]

Liberal constitutions should not and do not want democracies to die. Rather, their task is to help democracies – and, thus, the rule of the *demos* (the Greek synonym for the Latin *populus*) – survive. But can they themselves survive in a populist environment?

1 Cantonal voters directly elect their representatives as well as vote on cantonal laws in these gatherings that have a medieval origin. Even though direct democracy is sometimes associated with populism, populists derive their power essentially from elections and their claim to represent the people. See, also, on the frequency of liberal outcomes of referenda, Robert Howse, 'Epilogue: In Defense of Disruptive Democracy – A Critique of Anti-populism' (2019) International Journal of Constitutional Law 641, 648.

2 Opening address by Landammann Daniel Fässler, http://www.ai.ch/politik/landsgemeinde/archiv-landsgemeinden/28-april-2019/ftw-simplelayout-filelistingblock/landsgemeindeansprache-landammann-daniel-fassler.pdf accessed 14 October 2019, 2–3.

Although legal resentment is considered to be a prominent dimension of populism,[3] constitutional law is regarded as an important matter by populists – even if from a different lens than that of liberal democracy.[4] This has induced scholars to speak of 'constitutional populism'[5] or 'populist constitutionalism'.[6] By and large, populists engage with constitutions either because they use them, where necessary, as their own protective shields or because they criticize them or because they interfere with them, e.g. by a constitutional amendment.

Their engagement with constitutions necessarily implies that constitutional interpretation, too, is an important matter for populist governments in Europe and elsewhere. Most often, it is the constitutional interpretation by constitutional or other courts that collides with populist attitudes. This may prompt a populist government to counteract either with or without the means of constitutional law. Conversely, courts may also critically respond to populist measures by counteracting even constitutional amendments.

In this chapter, I will first attempt to sketch a general framework of how the nature of a political system corresponds to constitutional interpretation, based on three hypotheses: (i) political systems – that are, for the purposes of this study, classed as liberal democracies, illiberal democracies and non-democracies[7] – require constitutional interpretation that implements and furthers their aims, (ii) both liberal and illiberal democracies seek for formal legitimacy of constitutional interpretation and (iii) illiberal democracies are – despite or perhaps exactly because of this notion of formal legitimacy – more disposed to amend the constitution for interpretive purposes if necessary. In order to test these hypotheses, I undertake to examine written constitutions worldwide

3 Paul Blokker, 'Populism as a Constitutional Project' (2019) 17 International Journal of Constitutional Law 535, 548–551; Paul Blokker, 'Populist Constitutionalism' (Blog of the International Journal of Constitutional Law, 4 May 2017) www.iconnectblog.com/2017/05/populist-constitutionalism accessed 14 October 2019; Paul Blokker, 'Populist Constitutionalism' in Carlos de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2018) 113, 115, 120–123.

4 Blokker, 'Constitutionalism' (n 3); Jan-Werner Müller, 'Populist Constitutions' (Blog of the International Journal of Constitutional Law, 23 April 2017) www.iconnectblog.com/2017/04/populist-constitutions-a-contradiction-in-terms accessed 14 October 2019; Neil Walker, 'Populism and Constitutional Tension' (2019) 17 International Journal of Constitutional Law 515, 519–522; Blokker, 'Constitutionalism' (n 3) 115; Blokker, 'Populism' (n 3) 535–553; Luigi Corrias, 'Populism in a Constitutional Key' (2016) 12 European Constitutional Law Review 6, 9–10.

5 Ana Micaela Alterio, 'Reactive vs Structural Approach' (2019) 8 Global Constitutionalism 270, 273.

6 Blokker, 'Constitutionalism' (n 3); Müller (n 4); Walker (n 4) 519; Blokker, 'Constitutionalism' (n 3); Paul Blokker, 'Varieties of populist constitutionalism' [2019] 20 German Law Journal 332.

7 While both liberal and illiberal democracies are based on constitutions that provide a democratic form of government, the constitutions of non-democracies lack a democratic design or only pretend a kind of 'semantic' democracy. The constitutional difference between liberal and illiberal democracies may often be less striking than in political terms but focuses on the hierarchical position and constitutional resilience of fundamental rights.

(again categorizing between those of liberal democracies, illiberal democracies and non-democracies) as to whether they contain explicit rules on the methods and standards of constitutional interpretation. Do these rules correspond to the political character of the respective system? Are they enacted originally with a view to establish a political system? Or are they enacted in order to counteract a previous constitutional interpretation by courts?

Secondly, the relation between political systems and constitutional interpretation will be examined in the specific case of populism. Do populist systems generate their own constitutional interpretation, either by the entrenchment of rules on constitutional interpretation or by other, organizational or procedural measures that may at least indirectly influence constitutional interpretation? Have populist systems invented new instruments to safeguard the constitutional interpretation they desire, or do they just play the usual constitutional repertoire? Lastly, the article will examine the possible approaches of constitutional and other apex courts regarding constitutional interpretation, namely as to whether they serve to escalate or de-escalate populism. The pending question is whether the constitutional lawmaker or constitutional courts have the final say on constitutional interpretation.

3.2 Do political systems generate their own rules of constitutional interpretation?

3.2.1 Hypotheses

Constitutional interpretation is an inexhaustible topic that has been explored under innumerable aspects. A large part of the recent literature on constitutional interpretation takes a court perspective, e.g. which kind of interpretation methods and style of reasoning courts use, whether they lead an interpretive dialogue with other courts or even governments and legislatures, whether they exercise strong- or weak-form review, etc.[8] The question of if and how the nature of a political system and constitutional interpretation correlate, however, goes much beyond the perspective of courts – or of governments, either.

My first hypothesis is that a political system requires constitutional interpretation that implements and furthers its own aims. Whether this is done in accordance with the constitution or not, depends, though. Non-democracies do not even formally seek to be guided by the constitution when it comes to constitutional interpretation. In some non-democracies a semi-liberal

8 See, e.g., most recently: Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008); Karen J Alter, 'National Perspectives on International Constitutional Review' in Erin F. Delaney and Rosalind Dixon (eds.), *Comparative Judicial Review* (Edward Elgar Publishing 2018) 244, 269; András Jakab, Arthur Dyevre, and Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017); Tania Groppi and Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013).

constitution may formally be in place but is nevertheless not respected in practice: whatever rule on interpretive methods, independent courts or other related issues may formally be provided, it will still not be obeyed. In both cases, therefore, the political system seeks to maintain its non-democratic character, either within the semantic framework of the constitution or outside.

In liberal and illiberal democracies, instead, the constitution as such will be heeded since in both types of democracies the commitment to popular sovereignty as the source of the constituent power vests the constitution with a status that cannot be overthrown easily. However, this does not exclude that constitutions are amended as long as this is done in accordance with the amendment rules provided by the constitution. My second hypothesis is, therefore, that democracies of both types are characterized by a commitment to make constitutional interpretation formally legitimate – either in terms of organization, procedures, methods or even constitutional amendment if needed for a change in constitutional interpretation.

My third hypothesis, however, is that fewer attempts to amend constitutions with the view to alter prevailing constitutional interpretation will be made in liberal democracies, whereas illiberal democracies show a greater preference for amendments that directly or indirectly bring about changes in constitutional interpretation. Liberal democracies and their constitutions might be more liberal also with regard to constitutional interpretation, at least with regard to methods which are largely entrusted to the discretion of courts. Illiberal democracies, however, might be more restrictive with regard to desired constitutional interpretation and may thus be more likely to seek constitutional amendments in order to change undesired constitutional interpretation. However, whether this possibility can be used at all will also depend on a variety of other factors examined later in this chapter.[9]

3.2.2 Written rules on constitutional interpretation – in the liberal world and beyond

In order to test these hypotheses empirically, written rules on constitutional interpretation which are explicitly entrenched in constitutions around the globe shall be examined as to if and how they reflect a political system. While constitutional interpretation often occurs without or perhaps even despite such rules in practice, the worldwide comparison of written interpretive rules nevertheless delivers a very interesting sample of how constitutional interpretation may be shaped constitutionally.[10]

The rules considered to be relevant in this context are rules that guide the interpretive organs with regard to method and yardstick of constitutional

9 See Section 3.3.

10 See the more exhaustive survey in Anna Gamper, *Regeln der Verfassungsinterpretation* (Springer 2012); Anna Gamper, 'Explicit' Interpretation in Comparative Constitutional Law' in Luigi Melica, Luca Mezzetti, and Valeria Piergigli (eds.), *Studi in onore di Giuseppe De Vergottini* (Wolters Kluwer 2015) 417.

interpretation. According to this understanding, they neither comprise constitutional rules targeted at the interpretation of subconstitutional[11] law nor rules on constitutional interpretation entrenched in subconstitutional law nor rules concerned with the organizational or procedural aspects of constitutional interpretation, such as, e.g., the establishment of organs that are explicitly authorized to interpret the constitution. Constitutions of countries with a British legal tradition, in particular, often contain a final chapter or schedule titled 'interpretation' which, however, does not normally include abstract rules of constitutional interpretation but concretized definitions of terms used by the constitution. Such definitions operate like 'crystallized' interpretation rules inasmuch as a certain content which is suggested as the meaning of a constitutional term is already determined by the constitution itself and not left to the discretion of courts or other interpretive bodies.[12] Similarly, many constitutions provide that a certain term or content must or must not be 'deemed' in such and such manner; in particular, this concerns cases where a *lex generalis* regulates a constitutional matter, with exceptions provided by a *lex specialis*. In truth, however, this is less an issue of constitutional interpretation than a regulatory technique. In many constitutions, the positive or negative definition of a constitutional term is accompanied by a clause such as 'unless the context otherwise requires' or 'unless the contrary intention appears' which requires a systematic or teleological interpretation method that takes precedence over the definition where applicable.

Even the limited range of rules considered to be relevant here, however, comprises a relatively large set of provisions that either positively stipulate or prohibit the use of a certain method or methods for interpreting constitutional law or the parameters which may or must be used as a yardstick for such interpretation.

Perhaps the most striking empirical observation is that the constitutions of consolidated liberal democracies within Europe, North America and Australia hardly contain such written rules. Rare examples are Sec 27 Canadian Constitution Act 1982 according to which the Canadian Charter of Rights and Freedoms shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians – a provision which was inserted only in 1982 and is limited to the interpretation of rights; or Sec 10 para 2 Constitution of Spain 1978, which was the first liberal and democratic Spanish constitution after the Franco regime, which stipulates that provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain. A special case is constituted by the UK's unwritten constitution as, indeed, several Acts that are considered to be constitutional in nature include interpretive rules ranging from the Human

11 Some Islamic constitutions include rules on the interpretation of the Sharia, such as the preamble to the Constitution of Egypt, similarly Art 4 constitutional draft for Yemen or Art 8 Constitutional Draft for Libya.

12 Gamper, *Regeln* (n 10) 35–43.

Rights Act's provision on the requirement to consistent interpretation[13] to the various rules[14] of interpreting devolved competences.

On the whole, however, neither the original nor amended constitutions of mature Western democracies entrench rules on constitutional interpretation in the sense explained here. The fact that constitutional amendments in these states have generally not been made with a view to shape constitutional interpretation in a politically desired way suggests that liberal democracies of this type see no need to directly determine constitutional interpretation.

Admittedly, a majority of mature liberal democracies underlies, apart from other international treaties, the European Convention on Human Rights as well as the EU Charter of Fundamental Freedoms and, thus, both liberal and unifying interpretation by the European Court of Human Rights and the European Court of Justice. This does not sufficiently explain, however, why these constitutions lack interpretation rules also with regard to other constitutional issues than fundamental rights. It rather seems that democracies governed by the rule of law regard constitutional interpretation as an essential domain of independent courts – their constitutions are, in fact, not really silent on this issue but decide to let the courts decide on constitutional interpretation.[15]

Other constitutions, however, include interpretation rules in great number and diversity. Among these, we find mostly younger Western-style constitutions that, in contrast to the aforementioned category, were enacted in environments lacking a mature liberal tradition. In these cases, the obvious intention of entrenched interpretation rules was mostly to guarantee the existence, maintenance and promotion of liberal democracy. Newly established constitutional courts or other interpretive organs should be guided by these rules in order to interpret the constitution in accordance with liberal values, to avoid interpretive uncertainty or even open misuse.

In most of these cases, interpretation rules are targeted not at the interpretation of the constitution as a whole, but at that of fundamental rights as a specific constitutional segment.[16] A number of – particularly, Eastern European and African – constitutions include explicit rules on the interpretation of fundamental rights that are quite similar to the aforementioned Spanish example, namely, to interpret fundamental rights in line with certain or all international covenants on human rights[17] or in line with the respective

13 Sec 3 para 1 HRA 1998.

14 Sec 29 para 3 and 101 Scotland Act 1998, Sec 94 para 7 in conjunction with Sec 154 para 2 Government of Wales Act 2006, Sec 83 Northern Ireland Act 1998.

15 Martin Loughlin, 'The Silences of Constitutions' (2018) 16 International Journal of Constitutional Law 930.

16 See, for a survey Gamper, *Regeln* (n 10) 7–28.

17 See, e.g., Art 26 para 2 Constitution of Angola, Art 13 para IV Constitution of Bolivia, Art 17 para 3 Constitution of Cape Verde, Art 93 Constitution of Colombia, Art 13 para 2 Constitution of Ethiopia, Art 29 no 2 Constitution of Guinea-Bissau, Art 68 Constitution of Maldives, Art 4 para 1 Constitution of Moldova, Art 43 Constitution of Mozambique, Fourth Final and Transitory Provision Constitution of Peru, Art 16 para 2 Constitution of Portugal, Art 20 para 1 Constitution of Romania, Art 48 Constitution of Seychelles, Sec 10 subsection 2 Constitution of Spain, Art 23 Constitution of Timor-Leste.

international case law[18] which seeks to both maximize and internationalize fundamental rights as far as possible.

A similar type of such rules can be found in those rare cases where a constitution demands or at least allows for an interpretation that is guided by foreign law: the most prominent of these rules is Sec 39 para 1 subpara c Constitution of South Africa, but other examples can also be found in Art 46 para 1 subpara e Constitution of Zimbabwe ('relevant foreign law') as well as – even with regard to the general interpretation of the constitution – Sec 11 para 2 subpara c Constitution of Malawi ('comparable foreign case law') and Art 3 para 1 Constitution of the Marshall Islands ('decisions of the courts of other countries having [similar] constitutions').[19] Moreover, Art 1 subpara d Schedule 2.3 to the Constitution of Papua New Guinea demands that, *inter alia*, judges have to regard the 'legislation of, and … relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that of Papua New Guinea'.

Other rules on the interpretation of fundamental rights often demand a liberal interpretation by entrenching certain values such as an open and free society, freedom, human dignity, etc., as interpretive standards, by requesting a systematic and purposive interpretation in line with the liberal spirit of the bill of rights or by prohibiting a restrictive interpretation of human rights or an extensive interpretation of limitation or derogation clauses respectively.[20]

A number of constitutions include more general interpretive rules that concern the interpretation not only of fundamental rights but of the constitution as a whole. European constitutions hardly contain such rules, but one important, although not particularly liberal and certainly not 'cosmopolitan-friendly' or evolutive example is constituted by Art R para 3 Constitution of Hungary, according to which the provisions of the Constitution shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of the 'historic constitution'; also the preamble to the Hungarian Constitution, with its strong references to history and Christianity, has thus to be taken into consideration. Further to that, Art 28 of the same Constitution stipulates that courts, when interpreting the Constitution, shall presume that it serves moral and economic purposes which are in accordance with common sense and the public good – all standards oriented rather at collective interests than individual rights. However, most of the non-European constitutions that include general guidelines on constitutional interpretation positively combine an interpretation method with a liberal yardstick, i.e. they demand an interpretation that conforms to all or certain aims and values or even the whole spirit of a liberal constitution which implies both a teleological and systematic interpretation.[21] Art 259 para 1 Constitution of Kenya is an illustrative example, as it entrenches

18 See, e.g., Art 53 Constitution of Kosovo.

19 See, with more detail, Gamper, *Regeln* (n 10) 12–21.

20 See, e.g., Art 20 para 4 Constitution of Kenya, Sec 7 Constitution of Fiji, Sec 36 and 39 Constitution of South Africa.

21 See details in Fruzsina Gárdos-Orosz, Chapter 9 in this volume.

several standards (purposes, values and principles of the Constitution [subpara a]; the rule of law, human rights and fundamental freedoms in the Bill of Rights [subpara b]) which shall be promoted and advanced when the constitution is interpreted. Further, constitutional interpretation shall contribute to good governance (subpara d), which is another standard. Remarkably, constitutional interpretation shall permit the development of the law (subpara c) which is in line with Art 259 para 3 according to which every provision of the constitution shall be construed according to the doctrine of interpretation that the law is always speaking. While the first category of standards immanently suggests a systematic and teleological interpretation, the latter category refers to a dynamic 'living tree' instead of an originalist interpretation. However, the standards within the first category are partly overlapping, since some are 'principles' that have to be promoted, while 'purposes' may themselves be related to (all or some) 'values' and 'principles', without forming a substantive content themselves. A very similar though slightly shorter provision can be found in Art 267 para 1 and 3 Constitution of Zambia. Art 3 Constitution of Fiji requires an interpretation that promotes the spirit, purpose and objects of the constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom, which, again, combines methods with substantive standards. Sec 4 para 3 Constitution of Tuvalu requires that the Constitution shall be interpreted and applied in such a way as to achieve the aims of fair and democratic government, in the light of reason and experience and of Tuvaluan values as well as consistently with the principles set out in the preamble. Among these principles, Tuvaluan values, culture and tradition are emphasized as well as human dignity and the need for the constitution not to hamper a gradual change of these principles in a changing world. Again, this is an example of how substantive standards – in this case oriented at both autochthonous traditions and liberal democracy – are combined with a systematic and teleological interpretation method. By referring to its preamble the Constitution also clarifies that the preamble has binding force, at least for interpretive purposes.

In all of these cases, the respective rules were part of the original constitution and not inserted at a later stage. However, none of these constitutions were enacted prior to, and most of them even later than, the 1980s. Generally speaking, older constitutions contain interpretation rules to a much lesser extent than younger constitutions. Looking at the concrete states that entrenched such rules in their constitutions, this was obviously done with a view to overcoming former constitutional crises caused by revolutions, civil war, authoritarian regimes, economic troubles or other tensions. Far from governing mature liberal democracies, these constitutions and their interpretation rules rather seek to pave the way for establishing liberal democracies.

All of them seek legal clarity, and certainty inasmuch as the interpretive bodies are explicitly bound to obey certain standards and/or methods when they interpret the constitution. This resembles the aim of many legal definitions referred to earlier, namely to leave as little doubt as possible on the construction

of constitutional terms and provisions in general – which is also token of a certain fear or mistrust that interpretive bodies might interpret the constitution in an undesired manner. In all of the referred cases, moreover, these rules seek to implement substantive goals that are liberal in nature. This is not only the case in the particularly rich field of fundamental rights interpretation, but also where general rules on constitutional interpretation apply. Interpretive bodies such as courts and (ordinary) legislatures should be motivated to consolidate these overall values when they enact judgments or ordinary legislation; but should also be deterred from undermining liberal democracy by attributing to the constitution any other meaning, or, in the case of courts, be protected from external pressure in this regard. Moreover, the referral to abstract principles, international or foreign law or 'an' open and democratic society seeks to guarantee a uniform liberal understanding of principles beyond the nation state – that is, shared by liberal democracies globally.[22]

It is quite another question, however, whether these aims can be truly realized in the desired manner. Firstly, even the most sophisticated interpretation rules cannot avoid the fact that they themselves need to be interpreted. Where these rules are self-applicable – provided that they generally apply to the respective constitution as a whole and, accordingly, also to themselves – this problem can at least theoretically be resolved by interpreting them in exactly the way which is prescribed by them. This resolves the problem only formally, though; the vaguer the wording is, the more complex or even contradictory the standards are, the more difficult will it be to discern their exact meaning. Secondly, moreover, constitutional practice may turn out very differently from what is formally prescribed by a constitutional text. Where the constitution is not really effective, also the interpretive rules entrenched therein will have little or no effect. Still, however, even though this possibility exists, it does not argue against the entrenchment of interpretation rules as such – in other words, it will not be their fault if they are not heeded.

Even though the majority of interpretation rules form part of the respective original version of the constitution, there are cases where constitutions were amended exactly with a view to change prevailing constitutional interpretation. Such an example is the Constitution of Bangladesh which, until 2011, had stipulated that, *inter alia*, the 'principles of absolute trust and faith in the Almighty Allah' should guide constitutional interpretation.[23] Since its 15th amendment, however, which introduced secularism among the fundamental principles of state policy, constitutional interpretation has had to be guided by secularism, among other principles.

A further category of constitutions contains 'neutral' interpretive rules that do not positively demand a liberal (or any) yardstick but restrict themselves

22 Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 571, 574.

23 Similarly, Art 8 Constitutional Draft for Libya stipulates that the Constitution shall be interpreted and bound in accordance with the Sharia.

to determining the interpretive method. Some Latin American constitutions, for example, require an originalist interpretation of the constitution in line with the will of the constitution's framers. The most impressive of these is Art 268 Constitution of El Salvador that reads as follows:

> Trustworthy documents for the interpretation of this Constitution will be, in addition to the proceedings of the plenary session of the Constituent Assembly, the audio and video recordings which contain the incidents and participation of the Constituent Deputies in its discussion and approval, as well as similar documents elaborated by the Editing Commission of the proposed Constitution. The Managing Board of the Legislative Assembly must dictate the pertinent dispositions to guarantee the authenticity and conversation of said documents.

A similar, though less concrete provision is Art 196 para II Constitution of Bolivia which stipulates that the Pluri-National Constitutional Court shall give preference to the intent of the constituent assembly as demonstrated in its documents, acts and resolutions, as well as the literal tenor of the text. Also Art 427 Constitution of Ecuador requires an originalist understanding of the constitution, even though only among other interpretive methods and subsidiarily:

> Constitutional provisions shall be interpreted by the literal meaning of its wording that is most closely in line with the Constitution as a whole. In the event of any doubt, it is the most favorable interpretation of the full and effective force of rights and that best respects the will of the constituent, in accordance with the general principles of constitutional interpretation, that shall prevail.

Art 24 Constitution of Papua New Guinea mentions 'the official records of debates and of votes and proceedings', enumerating them in some detail, as materials that can be used as aids to constitutional interpretation. Another example within this method-restricted category, namely of a required systematic and consistent interpretation, is Art 146 Constitution of Tunisia which stipulates that the Constitution's provisions shall be understood and interpreted in harmony, as in indissoluble whole.

In the latter category of cases, the respective interpretive rule lacks any reference to a substantive standard and limits itself to determine the interpretive method. Indirectly, however, the method has impact on the substance, because either the will of the framers or a consistent interpretation of the constitution implies a yardstick – which, in turn, may have a more or less liberal character. A consistent interpretation of the Tunisian Constitution, for example, which shows a strong preference for Islam, being also the state religion,[24] while at the same time guaranteeing religious freedom and stressing

24 This status is also protected by the eternity clause under Art 1 Constitution of Tunisia.

Islam's aims as 'characterized by openness and moderation',[25] cannot follow the same liberal yardstick as if a secular interpretation of the constitution is explicitly stipulated.[26] As a result, mere references to interpretive methodology suggest formal neutrality, but if the method determines an immanent yardstick, such as in the case of considering the 'context of the whole constitution' or the 'will of the constituent', the method indirectly demands interpretive orientation by a certain content.

Another type of prima facie neutrality with a 'hidden' content dimension can be found in Art 239 Constitution of Poland and Sec 5 of the Closing and Miscellaneous Provisions of the Constitution of Hungary. These rules do not positively request an interpretive method but just negate past constitutional interpretation. Without directly determining the interpretive method or yardstick, they indirectly invalidate the interpretive force of judgments made under the respective former constitution by the respective constitutional court. Whilst the individual decision taken by a judgment does not lose its legal effect, its remaining content – and this is, more or less, the applied authoritative interpretation of the constitution which, apart from the parties to the case, addresses a general legal audience – does. Art 239 Constitution of Poland refers, however, to the interpretation of statutes and not specifically to the interpretation of the constitution, and only to a limited period of time;[27] while para 1 deals with judgments of the Constitutional Court regarding the nonconformity to the Constitution of statutes adopted before its coming into force which are to be considered by the Parliament's first chamber, para 2 and 3 are concerned with the same court's resolutions regarding the universally binding interpretation of statutes which lose their universally binding force or shall, in case of pending proceedings, not be passed at all.

In the Hungarian case, however, Sec 5 of the Closing and Miscellaneous Provisions stipulates that decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed, but that this shall be without prejudice to the legal effects produced by those decisions. This provision, unlike the aforementioned positive interpretive rules, formed no part of the original Hungarian Constitution of 2011, but was inserted in 2013 by the Fourth Amendment and severely criticized by the Venice Commission.[28] Here, it is not the repeal of judgments with regard to the universally binding interpretation of statutes, but it is the repeal of the decisions as such, apart from the individual legal effects produced by those decisions. The prescribed repeal does not, however, prevent the Constitutional Court

25 Preamble to the Constitution of Tunisia.

26 Similarly, on this ambiguity Hanna Lerner, 'Interpreting Constitutions in Divided Societies' in Erin F. Delaney and Rosalind Dixon (eds.), *Comparative Judicial Review* (Edward Elgar Publishing 2018) 99, 112–113.

27 Venice Commission, 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary' CDL-AD(2013)012, 22.

28 Ibid.

from applying a certain interpretation that was applied already in those former decisions.[29]

In terms of constitutional interpretation, Sec 5 is a formally neutral provision inasmuch as it does not positively prescribe an interpretive method or standard. Negatively, however, it invalidates any kind of legal bondage to former constitutional interpretation of whatever content. Taken together with organizational measures, such as, e.g., the retirement of old and appointment of new judges or the appointment of additional judges, such an invalidation may indeed create different constitutional interpretation – because a 'new' court, unlike perhaps an 'old' court, will not necessarily feel disposed to interpret the constitution in the same manner as before – and is at any rate not required to do so. This dilemma is obviously alluded to by the Venice Commission that spoke of 'a systematic limitation of the position of the Constitutional Court' by constitutional amendments 'in reaction to decisions of the Constitutional Court'.[30] Nevertheless, the provision as such does not force the Constitutional Court either to apply its former interpretation or to disapply it, and in fact the Constitutional Court has not even abandoned using its former case law when appropriate.[31] The provision only prohibits the Constitutional Court from regarding former case law and, thus, constitutional interpretation as binding. That constitutional courts are not constitutionally bound to stick to their former interpretation, however, is nothing *per se* that established civil-law liberal democracies would be unfamiliar with.[32] On the contrary, we often find constitutional courts that develop their case law in unexpected ways, deviating from their former interpretation, because of 'societal changes' or other 'factual developments'. As long as these changes are explained in a reasoned way and targeted at promoting liberal values, an evolutive or 'living tree' interpretation is much less criticized.[33] In truth, the pathology of the Hungarian provision lies in its nexus with the aforementioned substantive rules on constitutional interpretation which are indeed binding also to the Constitutional Court.

There is not much to add on non-democratic constitutions in this context, since they regularly do not include any written rules on constitutional interpretation. Nor do they provide any independent interpretive organs in charge of constitutional interpretation. The North Korean Constitution, e.g., entrusts the Presidium of the Supreme People's Assembly (not even the Supreme People's Assembly itself) with the task of constitutional interpretation[34] – instead of courts, apart from the fact that the Central Court is not

29 See also ibid. 21.

30 Ibid. 22.

31 András Jakab and Johanna Fröhlich, 'The Constitutional Court of Hungary' in András Jakab, Arthur Dyevre, and Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 433.

32 Venice Commission (n 27) 21.

33 Anna Gamper, 'Legal Certainty' in Werner Schroeder (ed.), *Strengthening the Rule of Law in Europe* (Hart Publishing 2016) 80, 88–95.

34 Art 116 para 4 Constitution of North Korea.

independent, but accountable to the Supreme People's Assembly.[35] These constitutions have a merely semantic value which is set aside whenever occasion arises; they do certainly not provide possibilities to overrule the political will of the governing power by the means of constitutional interpretation.

3.3 Populist constitutionalism and constitutional interpretation – instruments and limits

Not all populist systems are illiberal democracies,[36] and not all liberal democracies are free of populism. Populist emphasis on popular sovereignty and democracy even includes a commitment to voting and plebiscitarian rights.[37] Indeed, the engagement of populists with constitutional interpretation often has a fundamental rights background, either because they want to be more restrictive with regard to certain rights, related, for example, to the media, private life or asylum, or because they even want to extend some of them, e.g. with regard to rights relating to direct democracy.

Remarkably, the most direct instrument to influence constitutional interpretation, namely the entrenchment of an interpretive rule in the respective constitution, has so far been used only in the case of Hungary. In Turkey, the original interpretation rule embedded in Art 174, 'No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws … which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic', as well as the liberal principles mentioned in the preamble as guidelines of interpretation, are still in force despite the constitutional amendment of 2017.

Another, more indirect instrument used by populist systems in the context of constitutional interpretation concerns the change of the organizational and procedural rules relating to (constitutional or other) courts, such as experienced, e.g., in the recent Polish, Hungarian and Turkish cases. They, *inter alia*, include: the early retirement of judges; to increase the number of judges; to appoint new judges (and chief justices) in accordance with the government's political wishes as well as to enact new political appointment procedures and terms of office; to curtail the staff and finances of courts; to bind certain judgments to qualified majorities in judges' commissions which will be difficult to be reached; to establish certain time limits for courts to decide cases; to establish new courts and channels of instances in which some courts are eclipsed and others not; to use even emergency powers for

35 Art 168 Constitution of North Korea.

36 Howse (n 1) 645. See also, on the relationship between illiberalism and populism, Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48, 49.

37 Andrew Arato, 'Populism and the Courts' (Blog of the International Journal of Constitutional Law, 25 April 2017) www.iconnectblog.com/2017/04/populism-and-the-courts accessed 14 October 2019.

implementing these measures.[38] While these measures cannot directly influence constitutional interpretation, the desired result, namely that judges interpret the constitution due to the government's wishes, may be exactly the same.

The use of these instruments, however, will be difficult for a government if they require a constitutional amendment.[39] All written constitutions include rules on constitutional amendments which regularly stipulate a qualified quorum and majority, but in many cases also additional elements, such as a referendum, parliamentary elections, approval by constituent states (in federal systems), repeated approval by parliament (parliamentary chambers), etc.[40] Populist governments may or may not meet these requirements, either because they do not have a constitutional majority in Parliament or one of its chambers or in the constituent states, or because a referendum will not turn out in accordance with their wishes. The aforementioned constitutional reform in Hungary, however, encountered no legal obstacles because the government commanded a constitutional majority in the Parliament.[41] The Turkish constitutional reform of 2017, too, could be enacted after a successful, if controversial referendum.[42] Provided that constitutions are at all amendable, the constitutional lawmaker, at any rate, proves to be the strongest – and always political (populist or not) – power. Inasmuch as the bodies of which the constitutional lawmaker is composed (primarily an elected parliament, but perhaps also an elected head of state that signs the bill or other elected bodies

38 On these possibilities, as actually exercised in populist systems, such as Hungary, Poland or Turkey, Müller (n 4); Konrad Lachmayer, 'Counter-Developments to Global Constitutionalism' in Martin Belov (ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Hart Publishing 2018) 81, 98; Emilio Peluso Neder Meyer and Thomas da Rosa de Bustamante, 'The Chief Justice of the Brazilian Supreme Court' (Blog of the International Journal of Constitutional Law, 24 August 2019) www.iconnectblog.com/2019/08/the-chief-justice-of-the-brazilian-supreme-court-institutional-and-constitutional-self-destruction accessed 15 October 2019; Bertil Emrah Oder, 'Populism and the Turkish Constitutional Court' (Verfassungsblog, 2 May 2017) verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular accessed 15 October, 2019; Bojan Bugarič, 'Central Europe's Descent into Autocracy' (2019) 17 International Journal of Constitutional Law 597, 602–608; Castillo-Ortiz (n 36) 49. On general contents of populist constitutional amendments see Alterio (n 5) 278–279.

39 Alterio (n 5) 277–278. Constitutional instrumentalism – as supposedly expressed by the frequency of amendments (Blokker, 'Populism' [n 3] 545–548) – is, moreover, no exclusive characteristic of populist systems, but mainly depends on the amendability rules. The Austrian Federal Constitutional Act, e.g., has been amended 129 times since its re-enactment in 1945, due to its flexible amendment rule (Art 44 B-VG), but not for specifically populist, even though sometimes controversial purposes. See also Xenophon Contiades and Alkmene Fotiadou, 'Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 219.

40 Anna Gamper, 'Hierarchiefragen der Verfassungsänderung' in Clemens Jabloner and others (eds.), *Scharfsinn im Recht* (Jan Sramek Verlag 2019) 161, 166–169.

41 Bugarič (n 38) 605; Castillo-Ortiz (n 36) 56–57.

42 Oder (n 38).

that participate in the lawmaking process) represent the people, democracy indeed prevails over all other constitutional principles,[43] without any need even to invoke pre-constitutional concepts such as popular sovereignty or the constituent power of the people.[44] The 'will of the people', as represented by the constitutional lawmaker, legitimizes any kind of constitutional amendment including those that overturn existing constitutional interpretation.

However, perhaps not even the formal hurdles of a constitutional amendment will prevent populist governments (and neither perhaps other governments with respect to their respective aims) from enacting legislation that has direct or indirect impact on constitutional interpretation. In many countries, rules on the interpretation of laws (including the constitution) are entrenched in ordinary or organic laws. Organizational issues, too, such as the appointment or retirement of judges, are not always regulated by constitutions but delegated to subconstitutional legislation, as the Polish case shows most recently; even more so, procedural rules, e.g. on required majorities of judges when they pass a judgment, are hardly ever entrenched in the constitution itself. Even though constitutional silence on the respective issues does not necessarily imply that ordinary or organic laws may regulate these issues in a constitutionally unlimited way, it will nevertheless be much easier to enact such legislation than a constitutional amendment. An ordinary or organic law on constitutional interpretation may be constitutional or not; but it will need a (constitutional) court to, if at all, decide on this question.

But there are also cases where even a constitutional amendment might be challenged and repealed by the constitutional court afterwards. This presupposes a two-layered constitutional structure that enables a court to scrutinize and repeal 'ordinary' constitutional law because a constitutional principle, such as, e.g., the rule of law or fundamental rights, was violated. Even though many constitutions do not expressly provide such a structure, constitutional courts around the world, from the Indian Supreme Court[45] to the Slovak Constitutional Court,[46] increasingly practice a 'basic structure

43 Similarly, Howse (n 1) 646.

44 On these concepts and their relationship, see Corrias (n 4) 14–21. The question here, however, is not whether populists seek to legitimize extra-constitutional action on a pre-constitutional 'will of the people' (such as shown, e.g., by the controversial establishment of the Venezuelan Constituent Assembly in 2017), but how they instrumentalize enacted constitutions.

45 The leading case was *Kesavananda Bharati* SC 23.03.2973, (1973) 4 SCC 225; see also Richard Albert, 'Amending Constitutional Amendment Rules' (2015) 13 International Journal of Constitutional Law 655, 669–670.

46 Constitutional Court of the Slovak Republic Judgment (Nález) of 30 January 2019, PL. ÚS 21/2014-96; Marek Domin, 'A Part of the Constitution Is Unconstitutional, the Slovak Constitutional Court Has Ruled' (IACL-AIDC Blog 6 February 2019) blog-iacl-aidc.org/2019-posts/2019/2/5/a-part-of-the-constitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled accessed 15 October 2019; Simon Drugda, 'Slovak Constitutional Court Strikes Down a Constitutional Amendment' (Blog of the International Journal of Constitutional Law, 25 April 2019) www.iconnectblog.com/2019/04/slovak-constitutional-court-strikes-down-a-constitutional-amendment-but-the-amendment-remains-valid accessed 15 October 2019.

doctrine' according to which constitutional amendments might be found unconstitutional and thus repealed either because certain constitutional amendments are absolutely prohibited due to an explicit or – which may be arguable in case of unrestricted amendment rules – implicit 'eternity clause' or because an entrenched qualified constitutional amendment procedure did not take place.[47]

However, even if, for whatever reason, a national court does not oppose populist measures, an inter- or supranational court, such as the ECtHR or the ECJ, may – this has been shown most recently in the Polish case, where the ECJ found the early compulsory retirement of Polish judges to be contrary to EU law.[48] The ECJ moreover ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.[49] But also national courts themselves may find refuge in inter- or supranational law, e.g. by interpreting fundamental rights consistently with inter- or supranational law. In vertical context, courts may thus support each other and prove themselves to be beyond the reach of national populist governments[50] – at least as long as these governments are inclined to heed the judgments of courts at all.

3.4 Escalating or de-escalating populism: the role of courts in constitutional interpretation

Populists claim to be the better democrats and implementers of the 'will of the people' as expressed in elections or plebiscites vis-à-vis diffuse 'elites' to which they often consider courts to belong.[51] Where constitutional or apex courts, at whatever level, oppose populist parties or governments, also by the means of constitutional interpretation,[52] populists will naturally question the independence of courts and their interpretation and invoke the counter-majoritarian

47 See also Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 International Journal of Constitutional Law 576, 589–590; Joel Colón-Ríos, 'Introduction: The Forms and Limits of Constitutional Amendments' (2015) 13 International Journal of Constitutional Law 567, 568; (2019) European Journal of Law Reform.

48 ECJ Judgment of 24 June 2019 (Grand Chamber), *European Commission v Republic of Poland*, C-619/18; ECJ Judgment of 5 November 2019 (Grand Chamber), *European Commission v Republic of Poland*, C-192/18.

49 ECJ Order of 8 April 2020, *European Commission v Republic of Poland*, Order of the Court in Case C-791/19 R.

50 Hostovsky Brandes (n 47) 576, 576 ff; Alter (n 7) 262–264 and 268–269.

51 Arato (n 37); Walker (n 4) 520; Bugarič (n 38) 605; Castillo-Ortiz (n 36).

52 See also David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245.

dilemma – that unelected judges govern over and even against the 'will of the people' as represented by the majority in Parliament.[53]

However, and quite apart from populist claims, many national and international apex courts have been confronted with similar criticism regarding their use of interpretation methods in recent years.[54] Not all such criticism is *a priori* populistic or illegitimate. In many states, constitutional interpretation has increasingly become dynamic, to a degree that it can sometimes not be distinguished from constitutional amendment but for formal reasons. This complaint has nothing to do with the kind of antidemocratic 'abusive judicial power'[55] that constitutional courts sometimes exercise – that they rather stick to the governing political power than to the opposition. Constitutional courts should not play the role of political partisans, on *whichever* side. But what is considered problematic here is rather a kind of abusive interpretation where, even despite a liberal purpose, the end cannot always justify the means.

This is the more problematic in cases where the respective constitution – and, analogously, the ECHR or primary EU law – cannot be amended easily (which at the same time stimulates courts to dynamic interpretation), so that it will be difficult to invalidate the prevailing interpretation by an amendment.[56] A spectacular case has recently been the German Federal Constitutional Court's response to a previous judgment of the ECJ[57] criticizing it as 'ultra vires' because of 'objective arbitrariness'.[58]

My final hypothesis is that it might de-escalate populism if courts neither overstretched constitutional interpretation nor their functional claim to

53 See Alexander Mordecai Bickel, *The Least Dangerous Branch* (Yale University Press 1962). The genial argument expressed by Alexander Hamilton in the *Federalist Papers* – namely that even unelected judges manifest a prime democratic quality inasmuch as they defend the constitution which expresses the 'will of the *constitutional* people' against ordinary legislation that just expresses the 'will of the people' – is not part of the populist discourse.

54 Bickel (n 53); Alter (n 7) 249–250; Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe' [2019] 20 German Law Journal 225, 235; Brian Christopher Jones, 'When Court Criticism Threatens the Rule of Law' (Blog of the International Journal of Constitutional Law, 5 September 2018) http://www.iconnectblog.com/2018/09/when-court-criticism-threatens-the-rule-of-law-a-three-part-test accessed 15 October 2019. With regard to the ECtHR Patricia Popelier, Sarah Lambrecht, and Koen Lemmens (eds.), *Criticism of the European Court of Human Rights* (Intersentia 2016). Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346, 1350; Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007) 27ff; Alon Harel and Adam Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review' (2012) 10 International Journal of Constitutional Law 950, 951ff; Paul Craig, 'Political Constitutionalism and the Judicial Role: A Response' (2011) 9 International Journal of Constitutional Law 112, 112 ff.

55 David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis Law Review 1313, 1313 ff.

56 See also Pin (n 54) 242.

57 EJC Judgment of 18 December 2018 (Grand Chamber), *Weiss and Others*, C-493/17.

58 German Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 5. Mai 2020 – 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15).

democratic legitimacy as guardians of the constitution.[59] How far legitimate constitutional interpretation reaches may be questionable from case to case, but the entrenchment of written interpretation rules, as pointed out earlier, could be helpful here. Populist complaints that courts behave like undemocratic elites could thus perhaps not be eliminated but at least given no just reason.[60] Even though the constitutional review of laws has an inherently political character that cannot be avoided completely, judges should be what they claim to be: independent, objective and law-oriented. By following the 'political question doctrine' in one way or the other,[61] they contribute to a balanced separation of powers: where one power does not overreach, another power will have less occasion for doing so. Where populist governments enact overreaching measures, however, courts will then have better authority for striking them down. In other words: Neither shall courts themselves exercise 'judicial populism'[62] nor shall they bluntly act as *political* antipodes that may interpret constitutions in whatever arbitrary way,[63] only they must oppose a populist government. This does not at all mean that they need to play a generally deferential or weak-form role towards populist governments,[64] but that they may have stronger and more persuasive authority in the long run if they do not believe their interpretive role to be that of the political – not legal – opposition.

3.5 Conclusions

Constitutional comparison shows that a vast majority of written rules on constitutional interpretation are targeted at establishing, maintaining and promoting liberal democracy – especially so in the context of fundamental rights interpretation, but not limited to it. Most of these rules can be found in young Western-style constitutions of states that are not established liberal democracies even though these constitutions strive to make them so. Established liberal democracies rarely entrench such rules in their constitutions, because they rather consider constitutional interpretation to be the domain

59 Similarly, with regard to the ECJ and ECtHR Pin (n 54). Michaela Hailbronner and David Landau, 'Introduction: Constitutional Courts and Populism' (Blog of the International Journal of Constitutional Law, 22 April 2017) www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism accessed 15 October 2019; Bilyana Petkova, 'Populism and Judicial Backlash in the United States and Europe' (Blog of the International Journal of Constitutional Law, 30 April 2017) www.iconnectblog.com/2017/04/populism-and-judicial-backlash-in-the-united-states-and-europe accessed 15 October 2019.

60 According to Howse (n 1) 647, the frequency of counter-majoritarian decisions by courts is exaggerated.

61 Loughlin (n 15) 929–930.

62 David Landau, 'Courts and Support Structures' in Erin F. Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing 2018) 226, 233; Meyer and da Rosa de Bustamante (n 38); Oder (n 38).

63 With regard to international law, see Hostovsky Brandes (n 47) 595.

64 See also Prendergast (n 52) 253f.

of independent courts; and non-democratic constitutions do not even pretend to regulate constitutional interpretation by independent courts because they do not provide such courts.

Where written interpretation rules are used in order to amend existing constitutional interpretation, this may be done with a view to disrupt liberal democracy but is not necessarily so. Likewise, the choice of interpretation method, such as originalist, purposive, systematic or dynamic interpretation, does not necessarily manifest a liberal or illiberal understanding of the constitution but primarily shows a preference either for legal clarity and national authenticity or for a more dynamic and open understanding of a living constitution; whether the method turns out in a liberal or illiberal way depends on the constitutional context to which it applies. The importance of written rules of interpretation has so far been underestimated: in my opinion, however, such rules can considerably shape the role that judges play vis-à-vis populist governments – either in a liberal or populist way. Even though constitutional silence on interpretation rules vests judges with more power to decide on constitutional interpretation, this also exposes them to uncertainty and criticism and perhaps even escalates populism in a reactive way. Written interpretive rules could, to some extent, relieve their pressure, even though they are no absolute guarantee of liberalism.

The discourse about the final and authoritative interpreter of the constitution is no specific feature of populist systems but is led also in liberal democracies.[65] While the more general discourse on populist constitutionalism seems to vacillate between the poles of authoritarian-majoritarian democracy[66] and liberal oligarchy, the discourse on constitutional interpretation first and foremost concerns the separation of powers – of powers conceived as communicating and not as isolated vessels.

In- or outside populist systems, courts should be wary to overstep the separation of powers by politicizing constitutional law and its interpretation – because this is not what their independence suggests: they shall not act independently of the constitution, but independent of other state powers and bodies. Only if courts stick faithfully to the constitutional principles on which they feed, can they deprive populist governments of their core – and perhaps only – *constitutional* argument.

65 Mark Tushnet distinguishes strong- and weak-form review by courts along this criterion. See, *inter alia*, Mark Tushnet, 'The Relation Between Political Constitutionalism and Weak-Form Judicial Review' (2013) 14 German Law Journal 2249, 2250.

66 As long as constitutions clearly build on these traditional forms of majoritarian democracy, it is highly hypothetical to supplant them by other forms of democracy some of which, moreover, are in truth not democratic but oligarchic, such as the consideration of 'private interest associations'. Enrique Peruzzotti, 'Post-liberal and Post-populist Democracy' (2019) 4 Chinese Political Science Review 221, 230.