Special Issue: *Constitutional Reasoning*

The Interpretive Practice of the Hungarian Constitutional Court: A Critical View

By Zoltán Szente[*]

In this study, I examine the interpretive practice of the Hungarian Constitutional Court. The two-decade history of the Court gives sufficient experience to survey the methods of constitutional review employed by the Court.[1] My analysis will concentrate on the period of 1990-2010, because the general elections of 2010 brought about essential changes not only in Hungarian constitutionalism, but in the Court's life too. The Constitutional Court, losing its independence and a substantial part of its earlier powers, will presumably not be the same anymore.

My basic assumption is that the Court has not elaborated a principled interpretive practice since its establishment. It applies different interpretive methodologies even to cases of the same or similar nature, without any coherent legal philosophy or consistent judicial policy. In addition, the Court's jurisprudence can rightly be criticized both for its ever-changing, eclectic interpretive practice, and for the use of non-legal sources of constitutional interpretation. The latter phenomenon is not unique in the history of judicial review, as not only text-based theories and practices of judicial adjudication are known. But my assertion goes further: I think that a great bulk of the Court's judgments, including its most landmark decisions, cannot be connected to any well-established judicial approach, but were guided by political and other non-legal considerations. In other words, they cannot be defended solely with legal arguments; rather, many elements of constitutional jurisprudence can be explained and understood only by non-legal variables, like political affiliation, moral beliefs of the justices, and institutional interests.

There is no doubt that neither the Constitution of 1949 nor the Fundamental Law of 2011 determines any authoritative method of constitutional interpretation.[2] It may be impossible or meaningless to define any particular interpretive approach as authoritative at all. Nevertheless, this does not mean that judges should necessarily have an unlimited

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[1] The Court began its work on Jan. 1, 1990.

[2] Nevertheless, the Fundamental Law contains some guidelines for interpretation. Thus, it refers to the so-called necessity-proportionality test developed by the jurisprudence of the Constitutional Court. *See* 2011 Magyarország Alaptörvénye (Art. I, para. 3 of the Fundamental Law of 2011) (Hung.).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

freedom to choose which method of constitutional interpretation they apply to the particular cases. On the contrary, just because their power is not limited directly by any other constitutional institution, the legal justification and the internal coherence of the Court's decisions have a high importance.

In Part A, after a short characterization of the old Hungarian constitution, which was interpreted by the Court between 1990 and 2010, I examine the Court's own conception on constitutional interpretation, as far as the Court has given any guidance about it at all. Part B describes the ways and instruments of interpretation applied by the Court. We will see that almost all the well-known interpretive approaches emerge in the practice of the Constitutional Court. Supposedly, every court uses different reasoning for different cases. However, the Hungarian Constitutional Court frequently uses different interpretive methods for similar cases, and, what is more problematic, there is no clear guidance as to the application of these ways of adjudication. In Part C, I am going to describe some paradoxes of the Hungarian constitutional review, and the independent variables that explain the interpretive eclecticism of the Court.

A. The Framework of Constitutional Interpretation

I. The Basic Features of the Constitution

Hungary was the only post-communist country in Central and East Europe where, after the defeat of communist rule, no new constitution was adopted. The transition to democracy, or, as it is commonly called, the "regime change" in 1989–1990, was prepared by a peaceful negotiating process reaching an agreement between the ruling communist party (MSZMP) and the democratic opposition parties and movements. The so-called "National Roundtable Talks" shaped a comprehensive political compromise not only on the time schedule of the democratic transition from a Soviet-type, one-party authoritarian regime to a Western-like parliamentary democracy, but also on the actual rules of the game, i.e. the basic institutions and features of the new constitutional system.[3] The results of this compromise were codified by the last one-party, communist National Assembly (Parliament) as a basic revision of the existing constitution of 1949, which brought about fundamental changes in Hungarian constitutional law. In reality, the general revision of the constitution in 1989[4] changed almost all the important parts of the basic law to such a degree that many refer to it as "an actually new constitution."[5] The constitutional text of

[3] *See* J. W. SCHIEMANN, THE POLITICS OF PACT-MAKING: HUNGARY'S NEGOTIATED TRANSITION TO DEMOCRACY IN COMPARATIVE PERSPECTIVE 37–84 (2005).

[4] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Act No. XXXI (as amended 1989).

[5] Jakab András, *The Republic of Hungary: Commentary*, *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 8 (R. Wolfrum & R. Grote eds., 2008).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

the general revision of 1989 reflected the signs of the circumstances of its birth. For example, the wording of many provisions contained general terms like "democratic constitutional state," "market economy," or "right to human dignity." Furthermore, both the level of abstraction and the quality of the regulation were distinctive inside the text; while, for instance, certain rights are mentioned only in general terms, the text specifies the manner of limitation of some other basic rights. The text contained some remnants of its original version of 1949, like the "right to work," or the reference to Parliament as "the supreme body of state power," which caused some difficulties for the Court to interpret them under the new social and political conditions. But not only the words of the old Constitution led to problems, but some mysterious provisions of the general revision of 1989 as well. Thus, Art. 8 Para. (2) of the Constitution declared that "the basic meaning and contents of fundamental rights" may not be restricted even by law, which left open the question of how to decide a case in which these contents of two different basic rights conflict with each other.

The institutional arrangement of the Constitution reflected the political motives and attitudes of the constitution-makers of 1989, which later caused some hardly manageable situations. For example, the mutual distrust between the political parties and the fear of the revival of the dictatorship resulted in the requirement of a number of laws to be adopted only by two-thirds majority, which made effective government difficult.

The Constitution did not contain any principles or guidance for interpretation. So the Constitutional Court, with the general empowerment for constitutional review, could improve, by itself, the standards and guidelines of constitutional interpretation. Therefore, many may think that the Court's mandate extends to adjusting the constitutional norms to the social needs, even if the whole Constitution was modernized between 1989 and 1990. But this argument fails; the constitutional revision of 1989 envisaged a flexible basic law, which can be modified, with two-thirds majority, by the Parliament.

II. The Self-Determination of the Court

Before 1990, constitutional review had no traditions in Hungary. Although a so-called Council of Constitutional Law was set up in 1983, it had no power to annul unconstitutional statutes. The Constitutional Court was one of the new institutions established by the constitutional amendment of 1989. During the roundtable negotiations, both sides saw it as a guarantee for democracy, and, since then, the nomination has always been a complicate political bargaining process.[6]

[6] *See* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 77 (2000); ANDRÁS KÖRÖSÉNYI ET AL., THE HUNGARIAN POLITICAL SYSTEM 119, 122–23 (2009).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

The distrust of the judges of the communist party-state and the political mistrust between the negotiating parties during the transition period led to the establishment of an independent constitutional court with wide-ranging responsibilities. Basically, the Court was established on the pattern of the German *Bundesverfassungsgericht*,[7] establishing a "European" or "Kelsenian" model of constitutional review, which embodies a centralized system of it: the Constitutional Court has exclusionary power to examine the constitutionality of legal acts, through abstract judicial review. [8]

The main task of the Constitutional Court was the ex post judicial review of legal rules. Since everybody could submit any statutory act to the court for review (*actio popularis*), virtually all important laws landed before the body. In certain areas, *ex ante* examination of the constitutionality of legal acts—e.g. the international treaties—also fell within the competence of the Court, which was also empowered to investigate conflicts between international treaties and the national law. The Court decided on individual constitutional complaints too, but in fact, it was an indirect judicial review of the statutes on which the individual judicial decisions were based.

The Court was established as a quasi-judicial organ; though it bore some characteristics of judicial tribunals—like the structural independence or the irremovable status of the judges—other classical judicial principles and guarantees were missing in its procedure—there is no contradictory procedure, for example.[9] The body consisted of eleven members, who were elected by a qualified majority of MPs. Parliament elected members of the Constitutional Court from among learned theoretical jurists (university professors or scholars having a doctor degree from the Hungarian Academy of Sciences) and lawyers with at least twenty years of professional experience. They were elected for nine years, and could be re-elected once. Although there were strict incompatibility rules, the objective of which was to keep party politics separate from the Court,[10] the way of selecting its members (i.e. parliamentary nomination and election) brought the body close to the party politics; actually, during its existence, only two or three judges were all-party candidates, while most justices were nominated by the government or the opposition parties.

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[7] *See generally* Halmai Gábor, *Grundlagen und Grundzüge staatlichen Verfassungsrecht: Ungarn*, *in* 1 HANDBUCH IUS PUBLICUM EUROPAEUM 693 (Armin von Bogdandy, Pedro Cruz Villalón & Peter M. Huber eds., 2007).

[8] On the major characteristic of this model, see LOUIS FAVOREU, LES COURS CONSTITUTIONNELLES 16–31 (1986).

[9] *See* LÁSZLÓ SÓLYOM, AZ ALKOTMÁNYBÍRÁSKODÁS KEZDETEI MAGYARORSZÁGON [THE BEGINNINGS OF CONSTITUTIONAL REVIEW IN HUNGARY] 114–15 (2001). *See generally* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (2000).

[10] E.g. the members of the Constitutional Court may not pursue political activities or make political statements, and only those who have not filled leading political or governmental positions in the former four years can be elected.

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From 1990 on, the Constitutional Court established a rich and extensive jurisprudence; it has virtually dealt with almost all classical issues as is usual in western countries that have much longer constitutional traditions. Undoubtedly, the Court reached a pre-eminent position in the Hungarian constitutional system, and has had much success in elaborating and standardizing the living constitutional law. It is a commonly shared view among scholars that the Court, in the first nine years of its operation—this period is generally called the Sólyom Court after its first president—followed a strongly "activist" practice,[11] relating both to its jurisdiction and to its interpretive practice.[12] Many think that while the Court developed an activist practice in the area of basic rights, it was quite self-restraining in separation of powers cases. Beyond any doubt, the Court interpreted some abstract articles of the Constitution as jurisdictional rules, providing wide-ranging discretionary power for the Constitutional Court. But it was not less activist in the sense of using non-textual sources of constitutional meaning in the field of the issues of state power too; it put its jurisdiction, for instance, on the theoretical basis of the principle of the separation of powers, which was discovered by contextual interpretation of the Constitution.

There is good reason to think that this activism was, to a degree, unavoidable; just as every attempt between 1990 and 2011 to make a new constitution proved to be unsuccessful, the legislature was not able to fill its gaps, and it failed also to correct or modernize those basic institutions whose regulation demanded a qualified majority in Parliament. Thus, the Court was the only institution to have enough power to solve the great constitutional—and often political—conflicts at a time when the institutional setting was paralyzed.[13] The Court did not hesitate to play this role; since the very beginning of its existence, the Court has made it clear that the general and abstract concepts of the Constitution are not dead letters, but real and living rules, and it is the primary task of the Court to determine and set out the exact content of these provisions. Although the body was frequently criticized for its jurisdictional and interpretive activism, this approach soon became widely accepted, at least for two reasons. Firstly, all political actors believed that even the considerably revised

[11] *See* Gábor Halmai, *The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court*, *in* CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 189, 189–211 (Wojciech Sadurski ed., 2002); SCHWARTZ, *supra* note 6, at 87–108.

[12] In Hungarian literature, the term, "jurisdictional activism," refers to the efforts of the Court to extend its powers, while "interpretive activism" means its practice of relying on extra-constitutional sources in its reasoning.

[13] It is certain, however, that the Court acted as a sovereign, quasi-lawmaker also in legal areas where it could have been grounded on a well-established and crystallized body of law. Its conceptual innovations have extended, for example, to criminal procedure and private law, stressing that the constitutional concepts of property or the guarantees of criminal law are independent of their traditional approaches. *See generally*, e.g., Balogh Zsolt, *Alapjogi tesztek az Alkotmánybíróság gyakorlatában [Tests of Fundamental Rights Protection in the Jurisprudence of the Constitutional Court] in* A MEGTALÁLT ALKOTMÁNY? A MAGYAR ALAPJOGI BÍRÁSKODÁS ELSŐ KILENC ÉVE [THE CONSTITUTION FOUND? THE FIRST NINE YEARS OF HUNGARIAN CONSTITUTIONAL REVIEW ON FUNDAMENTAL RIGHTS] 123 (Gábor Halmai ed., 2000).

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constitution would only be a transitional one, as its preamble said, "in order to facilitate a peaceful political transition to a constitutional state," the Parliament established the new text of the basic law, "until the country's new constitution is adopted." Secondly, due to the growing hostility between the rightist and leftist parties, there was no real chance for putting the issue of the new constitution on the political agenda, neither was it seen as an exigent political question; the most important modifications—which were necessary for Hungary's accession to the NATO in 1997 or the European Union in 2004—were adopted, and the activist jurisprudence of the Constitutional Court filled the gaps of the old constitution.

Finally, the behavior of the Court was basically influenced by the dispute resolution approach of the constitutional review, shared by the majority of the first Court. According to this view, the Court should decide all constitutional controversies, which were submitted to it, rather than escape from the responsibility of the ultimate decision. This view prevailed in the Court from the beginning of its work, when the majority struck down the provisions of the criminal code allowing the death penalty, even if the Court could have refused the decision, saying that the constitutional question cannot be replied on the basis of the text.[14] Although exceptions have occurred,[15] the Court tenaciously persisted in this view throughout its working. The refusal of *non liquet*, imported presumably from the U.S. Supreme Court and the German Federal Constitutional Court, was not self-evident at all, because the primary function of the Court was the protection of the integrity and non-violation of the constitution, rather than the adjudication of individual legal disputes. The Court actually followed the German approach, which regards the *Grundgesetz* "as a logical-teleological entity," based on Rudolf Smend's integration theory of the constitution.[16] The Hungarian Constitutional Court also regarded the Constitution as a holistic unity of principles and rules. This approach paved the way for the concept of the "invisible constitution," even if it emerged firstly in a dissenting opinion of the first president of the Court, László Sólyom.[17] According to this theory, the invisible constitution embraces all the background or underlying principles that are necessary to understand the written constitution, and makes a coherent body of constitutional law.

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[14] As the minority opinion argued in the Alkotmánybíróság (AB) [Constitutional Court] 23/1990 X. 31 (Hung.) [hereinafter known as Death Penalty Case].

[15] For example, in the first abortion decision, the Court did not undertake the decision about the constitutional status of the *fetus*, and declared that this issue is a "legislative question" to be determined by the Parliament. Alkotmánybíróság (AB) [Constitutional Court] 64/1991 XII. 17 (Hung.).

[16] *See generally* Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 178 (Jeffrey Goldsworthy ed., 2007).

[17] *See* András Sajó, *Reading the Invisible Constitution: Judicial Review in Hungary,* 15 OXFORD J. LEGAL STUD. 253*,* 253–67 (1995). *See generally* Death Penalty Case, *supra* note 14.

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It is to be noted that in the post-Sólyom era, the Court began to change its earlier activism, moving in a more self-restrained direction. This image of the moderate judicial behavior was strengthened as the landmark decisions have run out, and the Court frequently sought middle-way solutions in the remaining hard cases. But the body, even if in a quiet way, continued its eclectic interpretive practice, and largely based its jurisprudence on its earlier decisions. And even when the Court changed its practice, for example, when it abandoned its former liberal course in freedom of expression cases,[18] the body made its new position in a no less non-interpretivist way, as beforehand.

B. Interpretive Methods in the Jurisprudence of the Hungarian Constitutional Court

The jurisprudence of the Hungarian Constitutional Court, in particular during the first half of its existence—from 1990–2000—can be described and characterized by using the dichotomy of interpretivism–non-interpretivism. Although these categories cannot be clearly separated from each other, in this conceptual framework, by interpretivism I mean the text-based methods of constitutional adjudication, and by non-interpretivism I mean an approach that allows, or, in its more extreme version, requires the constitutional tribunals to use sources outside or behind the text to determine the meaning of the constitution.[19]

I. Non-interpretivism and "Invisible Constitution" in the Case-Law of the Early 1990s

1. Purposive (Teleological) Interpretation

The interpretive base of this early jurisprudence seems to be closest to *purposive* or *teleological interpretation*. Normally, this kind of interpretation is not necessarily a text-free methodology, because the courts seek the function or purpose of the particular institutions or values enshrined in the text. But the Hungarian Constitutional Court, especially in the early 1990s, applied this technique to the very general principles as well, and systematically extracted the whole structure of the basic constitutional principles, like the rule of law, or the human dignity, and added more and more requirements to the very fundamental principles, establishing a multi-layered structure of them. The real problem was the great distance between the textual provisions and the value judgments the Court attributed to them. This practice was highly controversial; for example in those cases where the general language of the Constitution allowed leeway for several different interpretations, but the Court chose only one of them as the only constitutional arrangement.

[18] *See* cases cited *infra* notes 51–52.

[19] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1–41 (1980); Dennis J. Goldford, *The Political Character of Constitutional Interpretation*, 23 POLITY 255, 255–81 (1990).

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Certainly, at the beginning, the Court could not build its jurisprudence upon a solid foundation, because constitutional review did not have any tradition in Hungary. Therefore, the Court had to establish it itself. In this situation, one option to give meaning to the provisions of the Constitution was really to examine their purpose. But the Court usually did not examine the original purpose of the constitutional provisions, although this could have added some objective measure for exploring their goals. Rather, the Court manifested itself as being empowered to determine the purpose of the constitutional values, without referring to the source or criteria of its decisions. This was the guiding principle in determining the requirements of the principle of rule of law declaring that it means that public authorities should work between the organizational and procedural frameworks established by law, in a way predictable for the citizens.[20] In another decision, the Court said that the legal certainty is a substantial component of the rule of law.[21] These peculiarities excluded an originalist version of the purposive interpretation. It means that when the Court examined the purpose of the various provisions, it did not explore what effect the constitution-maker had wanted to reach when it ratified that particular rule or principle, but took the current conditions into account.

The purposive interpretation was used in separation of power cases as well, as the Court frequently referred to the objectives of the parliamentary government, the effectiveness of the legislative decision-making process, or the stable and effective government.[22] Another example of this way of constitutional interpretation was the creation of the constitutional requirements of the two-thirds majority clause. The constitutional revision of 1989 introduced the category of constitutional laws to the legal system, requiring two-thirds majority vote for their adoption. The Court, realizing the incompatibility of the principles of parliamentary government and the compulsory consensus-building, tried to weaken the qualified majority requirement, declaring that only the most important rules must be regulated by laws of two-thirds, while the detailed rules—if they were left out of the relevant two-thirds law—can also be entrenched in other statutory acts. In doing so, the Court referred to the function of the discussed constitutional provision, arguing that the political consensus between the government and opposition parties has to extend only to the major issues.[23] The purposive interpretation provides wide range discretion for the Court in this case too, since the Court has reserved the right to decide in each case

[20] *See* Alkotmánybíróság (AB) [Constitutional Court] 56/1991 XI.8. (Hung.).

[21] *See* Alkotmánybíróság (AB) [Constitutional Court] 9/1992 I.30. (Hung.).

[22] *See*, *e.g.*, Alkotmánybíróság (AB) [Constitutional Court] 3/1991 II. 7. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 31/2001 VII. 11. (Hung.).

[23] *See* Alkotmánybíróság (AB) [Constitutional Court] 4/1993 II. 12. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 1/1999 II. 24. (Hung.).

whether the particular regulatory issues belong to the scope of two-thirds majority requirement, or not.[24]

Thus, the major problem with the use of purposive interpretation was that, by refusing the relevance of the original purpose of the particular provisions, it was not clear what standards would be used to determine the purpose of these rules.

2. Natural Law and Moral Reasoning

Just like the German *Bundesverfassungsgericht* in its very first phase,[25] the Hungarian Constitutional Court was also tempted by *natural law* justice in the first years after its establishment. The most famous decision was the *Death Penalty* case in 1990 where the Court based its argumentation on moral values and beliefs. The reasoning was particularly interesting because the Court undertook an openly non-textual justification when it declared the death penalty unconstitutional. Although the Constitution prohibited only the arbitrary deprivation of life,[26] requiring due process of law to make such a sentence, the Court ignored this provision. Instead, it invoked a traditional—but non-written—canon of statutory interpretation, the principle of *lex posteriori derogat legi priori*, emphasizing that Art. 8, Para. (2) of the Constitution, prohibiting the violation of the "basic meaning and content of fundamental rights" was adopted at a later time than the Art. 54, Para. (1), allowing death penalty after a due process of law.[27] It is worth noting that the Court never again used this way to strike down any statute, but it is more important for constitutional interpretation that the Court expressed the moral conception of the indivisible unity of the right to life and human dignity, which cannot be restricted by law at all. The interpretation of the right to human dignity was also based on *moral reasoning*, even if the whole conception was imported from the jurisprudence of the German FCC.[28] Thus, the Court exposed very early its conviction that the inherent value of human dignity, the personal autonomy has a core which is exempt from any intervention of law.[29] On the other hand,

[24] *See* Alkotmánybíróság (AB) [Constitutional Court] 31/2001 VII. 11. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 95/B/2001 (Hung.).

[25] *See generally* Taylor Cole, *Three Constitutional Courts: A Comparison*, *in* POLITICS IN EUROPE: COMPARISONS AND INTERPRETATIONS 246 (Arend Lijphart ed., 1969).

[26] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 54, para. 1.

[27] *See* Alkotmánybíróság (AB) [Constitutional Court] 23/1990 X. 31. (Hung.).

[28] Some commentators suppose that Catholic theology had an influence on the Court's discovering the principle of the indivisibility of the right to life and human dignity. *See generally* TÓTH Gábor Attila, *Az emberi méltósághoz való jog és az élethez való jog [The right to life and the right to human dignity]*, *in* EMBERI JOGOK [HUMAN RIGHTS] 310 (Gábor Halmai & Tóth Gábor Attila eds., 2003).

[29] Death Penalty Case, *supra* note 14. The Court has never clarified what is the "unrestrictable" content of the right to human dignity, when all unenumerated rights, derived from it, can be limited by law.

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human dignity is an expression of the "general right of personality," which "is a »mother right«, that is a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, enumerated fundamental rights is applicable for a particular set of facts."[30] In the next years, the Court derived a whole series of unenumerated rights, like the right to know the blood origin,[31] certain litigation rights,[32] the right to a personal name,[33] the freedom of marriage,[34] and some others. This practice, and its background theory of the "invisible constitution" was heavily criticized by many scholars, who argued that the Court actually vindicated itself an unlimited power to discover unenumerated rights from the abstract categories of the Constitution in a way that cannot be controlled or foreseen by anybody else.

Conservative moral values were read into the text when the Court allowed the ordinary court to restrain young people from joining homosexual organizations,[35] and when it upheld the law prohibiting the same-sex marriage,[36] and even in its two abortion decisions, tightening the conditions of the termination of pregnancy.[37] The Court's jurisprudence always preferred the interests of the historic churches, confirming the compensation law that allowed privatization of the nationalized property during the Communist rule only for churches,[38] or upholding the Government decree on army religious services, fulfilled only by some historic churches.[39] The Court referred to the moral value order of the Constitution in its decision on the Head of State's power to donate state awards. Accordingly, the President, exercising this power, has to guard over the values derived from the basic law.[40] However, moral reasoning played a defining role only in the

[30] Alkotmánybíróság (AB) [Constitutional Court] 8/1990 IV. 23. (Hung.).

[31] *See* Alkotmánybíróság (AB) [Constitutional Court] 57/1991 XI. 8. (Hung.).

[32] *See* Alkotmánybíróság (AB) [Constitutional Court] 19/1992 I. 30. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 1/1994 I. 7. (Hung.).

[33] *See* Alkotmánybíróság (AB) [Constitutional Court] 58/2001 XII. 7. (Hung.).

[34] *See* Alkotmánybíróság (AB) [Constitutional Court] 22/1992 IV. 10. (Hung.).

[35] *See* Alkotmánybíróság (AB) [Constitutional Court] 21/1996 V. 17. (Hung.).

[36] *See* Alkotmánybíróság (AB) [Constitutional Court] 14/1995 III. 13. (Hung.). The Court consistently insisted on protecting the traditional view of marriage as the union of a man and a woman. *See* Alkotmánybíróság (AB) [Constitutional Court] 154/2008 XII. 17. (Hung.).

[37] *See* Alkotmánybíróság (AB) [Constitutional Court] 64/1991 XII. 17.; Alkotmánybíróság (AB) [Constitutional Court] 48/1998 XI. 23. (Hung.).

[38] *See* Alkotmánybíróság (AB) [Constitutional Court] 4/1993 II. 12. (Hung.).

[39] *See* Alkotmánybíróság (AB) [Constitutional Court] 970/B/1994 (Hung.).

[40] *See* Alkotmánybíróság (AB) [Constitutional Court] 47/2007 VII. 3. (Hung.).

protection of basic rights, while in other cases, the Court preferred to use an alternative method of interpretation.

3. Comparative Constitutional Law

In the first period of its operation, the Hungarian Constitutional Court, both in its self-determination and jurisprudence, heavily relied on the practice of the German Federal Constitutional Court, and, to a much lesser extent, of the U.S. Supreme Court. It is not surprising for a country that had only recently become a democratic state, and where constitutional review did not have history. Yet, it is striking how the Court followed and adopted these foreign patterns. The Hungarian Constitutional Court, from the outset vindicated the right to apply the constitutional provisions to all disputes coming to it. This behavior cannot be objected to in the case of an ordinary court, like the U.S. Supreme Court, or of a quasi-judicial body, as it is the case when the German Federal Constitutional Court acts in the procedures of constitutional complaints, because they have a primary judicial function to apply the general rules to the particular cases. But it is not self-evident in constitutional review cases where the task of the Court is to decide whether a statute violates the constitution or not, and where the constitution is flexible enough to be adjusted to the changing social conditions.

In addition, the Court borrowed whole interpretive constructions from abroad, like the doctrine of the "living law" from Italy, the concept of the "general personal right," and the "mother right" from Germany, and the construction of the "equal respect of human dignity" and "positive discrimination" taken from Ronald Dworkin's theory.[41] This "law importation" was extended not only to interpretive ways and doctrines, but also to the material scope of law, as it happened in the case of human dignity.[42] But as the jurisprudence of the Court gradually developed, the complete adoption of foreign judicial constructions began to decline. In the period of 1999–2008, no such complete adaptation occurred.

[41] This is the most famous case, since the first president of the Court, László Sólyom confirmed it himself in an interview: "A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez [In 'hard cases,' the judge's moral perception plays a role]." Interview with László Sólyom, President of the Constitutional Court, in 1 FUNDAMENTUM (1997). Sólyom also acknowledged that the Court's concept of the rule of law reflects the German and the Anglo-Saxon approach of this concept. *See* SÓLYOM, *supra* note 9, at 142.

[42] *See* Catherine Dupré, *Importing Human Dignity from German Constitutional Case Law*, *in* THE CONSTITUTION FOUND? THE FIRST NINE YEARS OF THE HUNGARIAN CONSTITUTIONAL REVIEW ON FUNDAMENTAL RIGHTS 215, 215–21 (Gabor Halmai ed., 2000).

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The Hungarian Court used comparative constitutional law for various reasons and aims.[43] In most cases the citation of foreign judicial precedents took place only in a very formal way, in order to demonstrate that the Court's view is in harmony with international standards.[44] Another objective can be to seek legitimacy by using foreign judicial precedents; usually, the lesser ground is found by the Court to justify its final decision, the more often the judges use proper foreign judicial precedents and practices for this aim. It was discernible in the euthanasia-case,[45] or when the Court sustained the resolution of the National Election Board refusing the referendum on same-sex marriage.[46] Sometimes, comparative constitutional law is used to support a particular view. This judicial behavior exploits the significant argumentative force of foreign courts, particularly that of the European Court of Human Rights, or the European Court of Justice. In these cases the selectivity of the citation method was observable, since the Constitutional Court referred only to foreign examples that confirmed its own view. Finally, foreign patterns may be used also as sources of new ideas or arguments, in particular in cases raised only recently—e.g. the European arrest warrant.[47]

4. Pragmatism

In a great part of the Court's jurisprudence, the decision was not based on any recognizable interpretive method. Presumably, the Court considered the possible consequences of the various decision alternatives, instead of insisting on a definite way of adjudication. Having regard for the very general wording of the constitution, this pragmatism was probably unavoidable for the Court, once it intended to decide the merits of all constitutional controversies.[48] The *pragmatism* of the Hungarian Constitutional Court, as I use this term, shows some resemblance with Richard Posner's utilitarian interpretive strategy, according to which the judges, in the process of legal interpretation,

[43] For more details see Zoltán Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law: The Use of Foreign Judicial Precedents in the Jurisdprudence of the Constitutional Court, 1999–2010*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 253, 266–69 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

[44] Many times, the Court refers not only to the respective foreign judicial cases, but also describes the relevant legal regime of some countries, like Germany, France, or Britain.

[45] *See* Alkotmánybíróság (AB) [Constitutional Court] 22/2003 IV. 28. (Hung.).

[46] *See* Alkotmánybíróság (AB) [Constitutional Court] 65/2007 X. 18. (Hung.).

[47] *See* Alkotmánybíróság (AB) [Constitutional Court] 32/2008 III. 12. (Hung.).

[48] Nevertheless, in some politically hard cases, the Court long delayed its decision, like in case of the Police Act of 1994, Alkotmánybíróság (AB) [Constitutional Court] 47/2003 X. 27. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 905/B/2003 (Hung.); Media Law of 1996, Alkotmánybíróság (AB) [Constitutional Court] 46/2007 VI. 27. (Hung.).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

should take the social consequences of their decisions into account.[49] In the Hungarian context, pragmatism has at least two different varieties. This approach firstly emerged in the 1990s, when the Court declared that the special circumstances of the regime change, or the transition period to democracy, can have relevance in constitutional interpretation. In the so-called *Compensation Cases,* the Court said that historic situation had produced special conditions calling for unusual or extraordinary solutions. Such a situation came from the legacy of the Communist past, for example, the great bulk of state property, which justified, among others, the free asset allocation among the members of state-owned cooperatives.[50] The references to the special historic circumstances occurred also in the 2000s for pragmatic reasons, for example, to uphold the law punishing the public use of totalitarian symbols.[51] This decision, following the changes of political attitudes, introduced a more permissive practice for the restriction of freedom of expression, compared to the jurisdiction of the early 1990s.[52]

It is another form of pragmatism when the Court weighs the direct and practical consequences of its decisions. In 1997, for example, the body declared that certain procedural errors of the legislative process can make a law unconstitutional.[53] However, the Court shortly realized that quashing the whole statute because of a minor procedural mistake would be a too serious sanction, therefore, it maintained the right to decide on a case-by-case basis whether the procedural error committed is bad enough to declare the whole legal act unconstitutional.[54] Thus, the Court struck down the so-called hospital law in 2003, because the Parliament re-voted it without any real discussion, after the original version of the law had been sent back by the head of state to the legislature.[55] Nevertheless, the omission of the prior regulatory impact assessment of a bill, even if law had prescribed it, did not prove to be serious enough to make the law unconstitutional.[56]

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[49] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 71–123 (1990); SUSAN J. BRISON & WALTER SINNOTT-ARMSTRONG, CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION 20 (1993).

[50] *See* Alkotmánybíróság (AB) [Constitutional Court] 16/1991 IV. 20. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 28/1991 VI. 3. (Hung.).

[51] *See* Alkotmánybíróság (AB) [Constitutional Court] 14/2000 V.12. (Hung.).

[52] Another decision, approving the penalization of the breach of national symbols, is also an example of the changing practice, see Alkotmánybíróság (AB) [Constitutional Court] 13/2000 V. 12. (Hung.).

[53] *See* Alkotmánybíróság (AB) [Constitutional Court]29/1997 IV. 29. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 52/1997 X. 14. (Hung.).

[54] *See* Alkotmánybíróság (AB) [Constitutional Court] 30/2000 X. 11. (Hung.).

[55] *See* Alkotmánybíróság (AB) [Constitutional Court] 63/2003 XII. 15. (Hung.).

[56] *See* Alkotmánybíróság (AB) [Constitutional Court] 38/2000 X. 31. (Hung.). Similarly, the Court declared that not all violations of the Standing Orders of Parliament result in the annulment of the law. *See* Alkotmánybíróság (AB) [Constitutional Court] 109/2008 IX. 26. (Hung.).

This concerning practice of the Court remained diffuse, as it never defined the standard for unconstitutionality of procedural errors of the law-making process. For practical reasons too, the Court flexibly used its discretionary power to determine when the effect of annulment came to effect, applying *ex nunc*, *ex tunc* or *pro futuro* effects.[57]

Notably, the Court has some room for maneuver to attenuate the possible negative consequences of its judgments, specifying, for instance, when the nullification of an unconstitutional act will come into effect.

II. Text-Based Interpretive Methods

1. Grammatical and Logical Interpretation (Textualism)

In statutory interpretation, owing to the civil law traditions, legal positivism has a decisive role. Although not so strictly as the ordinary courts, the Constitutional Court usually tried to seek a textual basis for its decisions. In doing so, the Court concentrated on the grammatical and logical meaning of the text. More precisely, it relates to the non-originalist textualism, which prefers the plain meaning of a text, in a sense that a constitutional provision means what it says today, rather than what the framers wanted to say, what the words meant when they were enacted when they ratified the constitution or what effects the framers attributed to it. In certain cases, the Court, beyond the meaning of ordinary language, used the legal understanding of the words of the Constitution, but this practice was based on wide consensus. By this way, certain terms were given special legal meaning; thus, when the Constitution said that the members of Parliament carry out "their duties in the public interest," it expressed the principle of free mandate of parliamentarians, as the separation of the sate and the church was understood as the maxim of the ideological neutrality of the state. [58]

In spite of this, the majority of the Sólyom Court was quite suspicious about what was written in the constitutional text. As its first president, László Sólyom said with surprising candor, the Constitutional Court "interpreting the Constitution, formulates the theoretical bases and the limits of the Constitution and the implied rights, it establishes a coherent system with its judgments, which is above the Constitution, as amended and interpreted on account of daily political interest, as an 'invisible constitution' is a yardstick of constitutionalism."[59] In this situation, the Court's task is not only to discover the meaning of the Constitution, but rather, to establish its doctrine. Certainly, in this view, the invisible

[57] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Act No. XXXII, art. 43, para. 4 (as amended 1989).

[58] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 20, para. 2.

[59] Alkotmánybíróság (AB) [Constitutional Court] 23/1990 X. 31. (Hung.) (Sólyom, J., dissenting).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

constitution is not a collection of personal moral values of the justices, but a coherent system of basic principles of constitutional democracy.

In the traditional approach, there is a strong connection between the grammatical and the logical interpretation, since even the determination of the pure meaning of the text, as a rational inquiry, is based on the laws of logic. Besides that, logical interpretation was understood as a separate method, as legal logic, using specific techniques of legal argumentation, like *contradictio in adjecto*, analogy, *a maiore ad minus* and many others. As we could see, sometimes these methods were given crucial importance, as in case of the *Death Penalty Case*,[60] but the rules of the application of these secondary interpretive principles have never been set.

2. Originalism

Originalism, except for its version of intentionalism,[61] is usually classified as a legitimate, text-bound method of constitutional interpretation. By this way, the original meaning of the constitutional text has a decisive role. "The critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification. The primary source of those understandings is the text of the Constitution itself, including both its wording and structure."[62] In other words, the theory of original intent is text-based if the constitutional text is taken as its primary evidence.

The Hungarian Constitutional Court has never adopted an originalist stance. Actually, original intent was not an option when the provisions, originating from the text of 1949,[63] had to be interpreted. But the Court always had been distrustful of the original intent of the framers, including the actors of the National Roundtable of 1989, because their motives and beliefs were tied to the political circumstances of the transition period to democracy. Thus, the Court referred to these intentions only rarely, when the presumed original intent was parallel with its own.

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[60] *See* Cole, *supra* note 25.

[61] The intentionalist judge always seeks the original intent of the framers, examining what effects they wanted to reach with wording. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 209, 209–16 (1980). ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) ("It is the law that governs, not the intent of the lawgiver.").

[62] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999).

[63] Like the "right to work" clause. *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 70/B, para. 1.

Even when the Court alluded to historic perceptions,[64] as in the case of the same-sex marriage or in the lustration cases, these references did not relate to the original intent of the framers, but only to the relevance of the historic past or the special circumstances of the individual constitutional disputes. While the doctrine of original intent has a long tradition in Hungarian statutory interpretation, it was in contrast with both the jurisdictional and interpretive activism of the Court, in particular in the 1990s.

3. Contextual or Systematic Interpretation

This way of constitutional interpretation draws conclusions from the location of the particular provisions and their relationships with other clauses. The theory encourages the judges not to interpret the relevant provision in itself, but with connection to the basic constitutional principles, or to other particular rules relevant in the case. Still, the interpretation of the constitution as a whole gives some margin of appreciation for the Court, not only because the relationship between the various constitutional clauses are frequently far from clarity, but also because a lot of provisions can easily be compared and explained by principles behind the constitutional text. The Court enthusiastically supported the supposition of the idea that the meaning of the whole text is more than the sum of its parts. In this spirit, the Court was highly creative in finding connections between the various provisions of the Constitution, interpreting them together, and reaching decisive conclusions. This way of thinking resulted, for example, in the concept of "communication rights," linking several freedoms and liberties. According to this doctrine, the freedom of expression has a privileged position in the basic rights, and it is the "mother right" of so-called "communication rights," like the freedom of the press and the speech, the liberty of religion or the right to assembly.[65] It is not the same as the balancing of basic rights, because in contextual interpretation the various rights reinforce each other, rather than remain in conflict.

The systematic interpretation was efficiently used also for constitutional disputes concerning public power, for example, for strengthening judicial independence,[66] or declaring that "the Hungarian Constitution is based on the principle of separation of powers."[67]

Sometimes, this sort of constitutional adjudication can hardly be distinguished from the text-based purposive interpretation, which has also some examples in the jurisprudence of the Court. Thus, when the Court frequently emphasized the positive character, or the

[64] *See* sources cited *supra* notes 48–49.

[65] *See* Alkotmánybíróság (AB) [Constitutional Court] 30/1992 V.26. (Hung.).

[66] *See* Alkotmánybíróság (AB) [Constitutional Court] 38/1993 VI. 11. (Hung.).

[67] Alkotmánybíróság (AB) [Constitutional Court] 55/1994 XI. 10. (Hung.).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

"objective" side of rights protection, it could rely on a textual base, since the old Constitution declared that the "respect and protection of [the basic] rights is a primary obligation of the State."[68] This provision overtly referred to the state's duty to establish the conditions necessary for the effective exercise of the fundamental rights.

III. Judicial Tests and Constructions

During the first decade of its existence, the Court, as many other constitutional courts, developed some judicial tests and constructions for making its jurisprudence more consistent and predictable. It did so mostly in a non-interpretive way, since the old constitution did not contain such standards, except the nationalization process. When the Court improved these standards and tests, it followed foreign patterns, mainly the practice of the German Federal Constitutional Court.[69] Moreover, it relied on practical considerations and on its own conceptual framework, even if it was inconsistent with the constitutional text. For example, when the Court declared that the level of the protection of certain rights will be guided by different judicial tests compared to other rights, this differentiation was built on the Court's own theoretical conception on the hierarchy of the fundamental rights.[70] The body attributed diverse inherent values to the basic rights, putting the right to life and human dignity at the top of the hierarchy of basic rights. Later, it declared the rights of criminal justice[71] and the right to fair procedure[72] unrestrictable rights as well.[73]

The Court's ambitions for widening the scope of fundamental rights inspired the application of extra-constitutional considerations when the Court extended the effect of the antidiscrimination principle to the entire legal system—while the constitutional text referred only to the equality in basic rights—after which the body began to use diverse tests for equality cases, depending on whether they affect basic rights, or other legal relationships. To the first cases, allegedly, it applied a stricter standard than to the other cases.[74] Both the extension of the antidiscrimination principle, and the application of

[68] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 8, para. 2.

[69] *See* Szente, *supra* note 43, at 262–64.

[70] *See* SÓLYOM, *supra* note 9, at 154, 219, 226, 417–18, 442, 474; Gábor Halmai & Tóth Gábor Attila, *Az emberi jogok általános kérdései [The general questions of human rights]*, in EMBERI JOGOK [HUMAN RIGHTS] 113, 113–14 (Gábor Halmai & Tóth Gábor Attila eds., 2003).

[71] *See* Alkotmánybíróság (AB) [Constitutional Court] 11/1992 III. 5. (Hung.).

[72] *See* Alkotmánybíróság (AB) [Constitutional Court] 6/1998 III.11. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 14/2004 V.7. (Hung.).

[73] From the mid-1990s the Court declined to further elaborate upon the hierarchy of basic rights.

[74] *See* Alkotmánybíróság (AB) [Constitutional Court] 61/1992 XI. 20. (Hung).

various judicial tests were theoretical innovations of the Court, having only poor textual bases. The most usual method of the Court to balance between conflicting basic rights was the necessity/proportionality test, imported from German constitutional law. According to this standard method of balancing, any restriction of basic rights should comply with three conjunctive conditions: the limitation needs a legitimate objective, and the restriction has to be necessary as well as proportional to achieve this aim.[75] The Court improved alternative tests, too, like the standard of public interest for property right cases, or the pure rationality test for deciding non-discrimination disputes, when no basic rights were affected. The body used these tests quite freely; in 1995, for example, the requirements of the constitutional protection of property rights were extended to the so-called "purchased rights," that is, to those social services for which the customers have paid social security contributions.[76]

Paradoxically, these standards did not help the predictability of the constitutional review, because they provided only loose, flexible criteria for the Court, reserving the freedom of the Court to weigh the particular circumstances in each case.

C. Characterizing and Explaining Hungarian Constitutional Adjudication

I. Paradoxes of Constitutional Interpretation

Characterizing the constitutional review of Hungary, as it evolved between 1990 and 2010, the discrepancy between the flexible constitution and the judicial activism is striking. The old constitution was easily amendable: the Parliament, with the two-thirds majority votes of MPs, was itself the constitution-making power. Between the general revision of the 1949 constitution in 1989 and the general elections of 2010, the Constitution was modified more than twenty times. Under such circumstances, even if the political hostilities between the parties often prevented some important and necessary constitutional amendments, both the jurisdictional and interpretive judicial activism seems unreasonable. Despite the Parliament's failure to adopt a completely new constitution, the legislature was, at least in theory, able to modernize the constitutional text, and to adjust

[75] *See* Alkotmánybíróság (AB) [Constitutional Court] 20/1990 X.4. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 7/1991 II.28. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 11/1992 III.5. (Hung.); see also Alkotmánybíróság (AB) [Constitutional Court] 30/1992 V. 26. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 11/1993 II.27. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 56/1994 XI. 10. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 6/1998 III. 11. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 18/2000 VI. 6. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 13/2001 V. 14. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 27/2002 VI. 28. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 13/2003 IV. 9. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 20/2005 V. 26. (Hung.); see also Alkotmánybíróság (AB) [Constitutional Court] 11/2007 III. 7. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 144/2008 XI. 26. (Hung.).

[76] *See* Alkotmánybíróság (AB) [Constitutional Court] 43/1995 VI.30 (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 45/1995 VI. 30. (Hung.).

it to the changing conditions. Thus, any reference to the activist stance of other constitutional tribunals, like the U.S. Supreme Court, which work under a more rigid constitution, is not justified.

Although Hungary has a codified legal system, based on civil law traditions, that does not recognize the principle of *stare decisis*, the Constitutional Court developed it into its case law from the very beginning of its operation. This practice inevitably has increased the role of judge-made law in the constitutional system. In spite of the lack of recognition of the formal role of precedents, the Court frequently referred to its own earlier decisions as a source of justification of its adjudication. In this way, some of the basic decisions of the Court in the early 1990s gradually increased to a quasi-constitutional rank, or even superseded the textual provisions of the Constitution. Thereby, the poorly justified and non-interpretive early decisions got cemented into the constitutional jurisprudence, generating heavy scholarly criticism.

Further problems come from the instability of this case law, which was based—in some areas—on an ever-changing practice, and on the eclectic use of the various methods of constitutional interpretation, as I tried to prove in Chapter B.

Virtually, since the constitution of 1949/1989 did not contain an authoritative method of constitutional interpretation, or any instruction of how to read the text of the Constitution, the Court was not bound to use a definite way of adjudication, and, it had to invent how to apply the general rules and principles of the Constitution to the particular cases. Nevertheless, the Court had jurisdiction only to defend the Constitution against the statutory rules that violate it, and was bound to explain its decisions. The importance of this justification requirement was increased by the fact that the Court's power of constitutional review is not controlled by any other branch or institution of government.

Finally, the Court's declared mission to establish a coherent body of constitutional law proved to be incompatible with the interpretive eclecticism, which was the most distinguishing characteristic of the Court's jurisprudence. Though the "legal certainty" was one of the mostly emphasized values, it was less typical for the Court's own practice.

II. Variables Influencing Constitutional Interpretation

1. Political Context

In Hungary, no research has been conducted and no theories have been established about the judicial attitudes and behavior of constitutional judges yet. However, certain variables can be supposed to explain the dominant patterns of their role-interpretation and work.

No doubt, the political circumstances of the constitution-making in 1989 may have elucidated the self-determination of the Court. The judges reasonably thought that this

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process had been abandoned halfway, and their function is to improve and complete it. Having an imperfect constitutional text, and in the absence of living traditions of effective human rights protection, the Court had no other choice but to undertake an activist role to provide a remedy for basic rights against state intervention.[77]

In all likelihood, this was an outspoken belief of the judges, mainly in the first years, even though the evaluation of their efforts is controversial. Although the Court really achieved a great deal for the protection of rights, its activism was not always used for extending basic rights. While the body took a liberal position in cases of the classical political rights, it represented more conservative and traditional views in morally controversial issues, like abortion, euthanasia, or homosexual rights.[78]

Besides that, the Court's activism was not confined only to rights protection, but it appeared also in separation of power cases.

The jurisprudence of the Hungarian Constitutional Court was always deeply influenced by the constitutional and political legacy of the regime change in other ways too. The political circumstances and power relationships of the transition period in 1989 and 1990 had some long-term effects, because the political hostilities between the parliamentary parties cemented the institutional settings of this early period. This peaceful transition produced an extremely strong constitutional court, because of the mutual distrust of the negotiating parties, as we saw it above. The institutional arrangement of the government branches froze soon after the first democratic elections of 1990, which ensured an even stronger position for the Constitutional Court, as no other constitutional body was able to counterbalance its increasing power. The Court skillfully took advantage of this situation, undertaking even the charge of usurping the functions of the legislative and executive power.

2. Political and Moral Attitudes of the Justices

As in many other countries, some judgments of the Court were vehemently criticized as "political" decisions. Although most candidates were not front-liner political partisans until 2010, and they were elected by qualified majority of the members of Parliament, both the government and the opposition parties always insisted on the parity of nomination, and on the political balance inside the Court. In the history of the Court, only a few justices were all-party candidates. The overwhelming majority of the judges were nominated either by a governing or an opposition party of the day.

[77] *See* SÓLYOM, *supra* note 9, at 117.

[78] *See* JÁNOS KIS, CONSTITUTIONAL DEMOCRACY 278–84 (2003).

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The Hungarian Constitutional Court usually did not hesitate to use its power in primarily political questions that sharply divided the political parties and public opinion. Together with the frequently used non-interpretive methods of jurisprudence, this judicial attitude often raised the accusation of political bias of the Court. The Court, in its formative years, bravely undertook the role of arbitrator in political disputes, like the jurisdictional conflicts between the head of state and the Government, the way of compensation for illegal nationalizations after the Second World War, the retroactive punishment of crimes committed during the Communist rule, or the lustration cases.

Self-evidently, the political motives of the individual judges, or the entire Court, cannot be clearly proved. Nevertheless, the non-textual decisions taken in political conflicts, or the unjustified changes of jurisprudence may plausibly refer to unrevealed political motives or ambitions of the judges. Between 1990 and 1994, for example, the majority of the Sólyom Court supported the right-wing government against the liberal President Árpád Göncz in all political conflicts between them, from the question of responsibilities for army control to the appointments of leaders of public mediums.

In 1992, the Court unanimously struck down a law that suspended and re-commenced the statute limitations for some serious crimes—like treason and voluntary manslaughter—which had been committed under the communist rule, in those cases where the state had failed to prosecute them for "political reasons." The law, submitted to Parliament as a private bill, wanted to open the way for punishing the communist crimes. The Court categorically prohibited any retroactive criminal legislation.[79] Barely a year later, when the Government attempted the same but on different legal base, the Constitutional Court spectacularly changed its mind when it upheld the new law allowing the re-evaluation of these crimes to be punished as war crimes and crimes against humanity.[80] Between 1994 and 1998, when the Socialist-Liberal coalition had a two-thirds majority in Parliament, the conservative majority of the Court tried noticeably to counterbalance the power of government parties, becoming a quasi second chamber of legislature. This ambition can well be illuminated by the sharp turn of the Court's practice invalidating a series of laws of the so-called Bokros-package, the economic austerity program of the leftist-liberal government, when the Court changed its earlier approach to social and welfare rights.[81] In 1998, the Court repealed the provisions of the standing orders of Parliament relating to the conditions of the forming of parliamentary factions, declaring that every political party that gained parliamentary seats from its own national list on general elections has the right to form a faction, regardless of the number of its MPs. This highly controversial decision broke the principles of the equal and free mandate of the parliamentarians, and referred

[79] *See* Alkotmánybíróság (AB) [Constitutional Court] 11/1992 III. 5. (Hung.).

[80] *See* Alkotmánybíróság (AB) [Constitutional Court] 53/1993 X. 13. (Hung.).

[81] *See* KIS, *supra* note 78, at 285–97.

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to the necessity of "positive discrimination" in favor of those parties that had considerable electoral support.[82] Probably, this judgment can properly be understood only if we take the political context into account, namely the political interest of the rightist governing coalition to divide its opposition by supporting a small extreme right party to found a separate parliamentary faction. It is also meaningful what reactions were triggered when two justices, who have been classified as Left-oriented, approved of the referendum initiative of the major opposition party Fidesz in 2007,[83] blocking some comprehensive reforms of the Left-Liberal government coalition.[84]

Naturally, not only their political affiliations, but their moral values and beliefs may influence how justices how vote. Virtually all of the final decisions on the morally hard cases from abortion to euthanasia were results of internal compromises between the judges. It was also the case even when the Court did not use moral reasoning, but rather, tried to find other sorts of arguments, concealing the deep moral cleavages inside the Court.

3. Institutional Interests

Exercising its power, the Constitutional Court, as any other political institution, always kept in mind its own institutional interests. These motives can clearly be demonstrated by the jurisdictional conflicts with the Supreme Court, after that the Constitutional Court tried to extend its power to assess the constitutionality of the jurisprudence of the ordinary courts in concrete cases,[85] to provide real remedy in the procedure of constitutional complaint,[86] and to exercise constitutional review of the Supreme Court's normative decisions.[87] Although the Court had some ambitions also to get rid of some responsibilities, these efforts affected the constitutional adjudication only to a lesser extent. It means that the body refrained from exercising some powers (like the constitutional review of parliamentary bills or the abstract interpretation of the Constitution) from political and practical reasons, rather than using a self-restraining interpretive strategy.

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[82] *See* Alkotmánybíróság (AB) [Constitutional Court] 27/1998 VI. 16. (Hung.).

[83] *See* Alkotmánybíróság (AB) [Constitutional Court] 59/2007 X. 17. (Hung.).

[84] The Socialist Party prevented their re-election, and, against custom, after their retirement, they did not receive the Order of Merit of the Republic of Hungary [Magyar Köztársasági Érdemrend].

[85] *See* Alkotmánybíróság (AB) [Constitutional Court] 7/1991 XI. 8. (Hung) (repealing the final judgment of an ordinary court because it had been based on an unconstitutional law, although the Constitutional Court obviously did not have such a power).

[86] *See* Alkotmánybíróság (AB) [Constitutional Court] 23/1998 VI. 9. (Hung.) (declaring that the Parliament is bound to make proper procedural rules of constitutional remedies for individual judicial cases).

[87] *See* Alkotmánybíróság (AB) [Constitutional Court] 42/2005 XI. 14. (Hung.); Alkotmánybíróság (AB) [Constitutional Court] 70/2006 XII. 13. (Hung.).

The Court carefully defended its own power to determine what the Constitution says. In 1993, interpreting *in abstracto* some provisions of the Constitution, it declared that a national referendum cannot modify implicitly the Constitution,[88] and the Court always insisted on this tenet, even after this became obviously inconsistent with the constitutional text.[89]

The Court, in particular in the post-Sólyom period, often tried to balance between contradictory interests and pressures; in many cases it was reluctant to make a clear decision and make a commitment in a politically tense situation. At these times, the judges frequently postponed particular decisions for years, or attempted to find a middle-way solution, taking an ambiguous decision as the ancient oracle of Dodona. Another preferred technique was to declare only a formal unconstitutionality, refusing a deeper analysis of the disputed statutes.[90] In these ways, all interested parties could more easily accept the judgment.

4. Judicial Attitudes and Professional Background

The judicial ideology and the professional beliefs and values inevitably influence every judge's behavior on the bench. From this point of view, the judges' personal commitments to certain constitutional values and theories did presumably not play such a decisive role in behavioral patterns as in the countries where constitutional review has had a longer tradition. It is shown by the decline of legal positivism in constitutional review, because the positivist thinking, preferring the statutory law against the judge-made law, had strong traditions in the Hungarian legal system. Additionally, owing to the legacy of the socialist legal thinking, besides the well-admitted interpretive canons,[91] no rival theories of legal interpretation have been established. Even when the judges used moral reasoning or

[88] *See* Alkotmánybíróság (AB) [Constitutional Court] 2/1993 I. 22. (Hung.) (stating that a national referendum cannot be held about the dissolution of parliament because the Constitution exhaustively enumerates the cases for dissolution, and so this new method would be an "implicit constitutional amendment").

[89] The Act No. LIX. of 1997 on the amendment of the Constitution excluded explicitly only "the provisions of the Constitution on national referenda and popular initiatives" from the possible subjects of a national referendum. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 28/C, para. 5, pt. c.

[90] *See e.g.,* Alkotmánybíróság (AB) [Constitutional Court] 7/2004 III.24. (Hung.) (invalidating the law on the reorganization of the Hungarian Financial Supervisory Authority because the statute failed to ensure the continuous work of this public authority).

[91] The interpretive doctrine of socialist legal theory was based, more or less, on the classical categorization of Savigny, distinguishing (a) the grammatical, (b) the logical, and (c) the historic methods of interpretation, sometimes completed by (d) the systematic method. *See* FRIEDRICH CARL VON SAVIGNY, VORLESUNGEN ÜBER JURISTISCHE METHODOLOGIE 1802–42 91–95, 215–46 (2004). On the reception of these methods, see generally SZABÓ IMRE, A JOGSZABÁLYOK ÉRTELMEZÉSE [THE INTERPRETATION OF LEGAL RULES] (1960).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press

constitutional comparison, they followed foreign patterns rather than well-established constitutional theories.

The possible classification of the judges according to their different practical or theoretical attitudes, is not significant either, since the overwhelming majority of the constitutional judges came from universities not from court houses. Another grouping of judges can be built on the various judicial attitudes coming from the specialties of their fields of interest. One possible cleavage is between the so-called "civilists"—dealing with private law—and the public lawyers, but there are no convincing arguments for the relevance of this categorization. The professional past and the judges' links to the various legal areas seem to be more important variables, at least for those members of the Court, who proved to be "prisoners of their legal branch," trying to use their specific legal methods for constitutional interpretation.[92]

As a matter of fact, the most important judicial attitudes, like the commitment to the dispute resolution model, the interpretive activism or the deep faith in the Court's freedom to choose the proper interpretive method case-by-case, cannot be sufficiently explained by these attitudinal models.

I think that pragmatism, and, by this way, a special kind of judicial utilitarianism contributed mostly to the eclectic, multifaceted interpretive practice of the Court[93] that proved to be, more often than not, sufficiently inventive to use a wide range of methods and open-ended instruments of constitutional interpretation to accomplish its actual purposes.

[92] Szente, *supra* note 43, at 270.

[93] Just like mainstream American legal scholars, most members of the Hungarian Constitutional Court have never believed that there could be an authoritative method of constitutional interpretation that would lead to the proper choice in each constitutional dispute. *See generally* Vicki C. Jackson & Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?, in* COMPARATIVE CONSTITUTIONAL LAW 604 (Tim Ginsburg & Rosalind Dixon eds., 2011).

https://doi.org/10.1017/S2071832200002418 Published online by Cambridge University Press