

From Human Dignity to National Identity: The Use of Foreign Jurisprudence by the Hungarian Constitutional Court

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Abstract: *Dalla dignità umana all'identità nazionale: l'uso della giurisprudenza straniera da parte della Corte costituzionale ungherese* - This paper explores the evolving relationship between the Hungarian Constitutional Court and foreign jurisprudence from its establishment in 1990 to the present day. Adopting a thematic and partly diachronic approach, it investigates how the Court initially embraced comparative reasoning—particularly drawing from German constitutional law—to shape a robust framework for fundamental rights centered around the principle of human dignity. The study then traces a gradual shift in the Court's engagement with foreign legal sources, highlighting how political and constitutional transformations, especially after the adoption of the New Fundamental Law in 2011, fostered a more cautious and sovereignty-focused use of foreign jurisprudence. Special attention is given to key areas such as the protection of human dignity, freedom of expression, the right to a fair trial, the functioning of constitutional justice, and the articulation of constitutional identity. By analysing landmark rulings and critical turning points, the paper reveals how the Hungarian Constitutional Court's selective use of foreign jurisprudence has moved from an instrument of democratization and Europeanization to a strategic tool for reinforcing national constitutional identity. This evolution reflects broader tensions between transnational constitutional dialogue and the assertion of constitutional sovereignty, offering important insights into the challenges facing constitutional adjudication in contemporary Europe.

1051

Keywords: Hungarian Constitutional Court; Foreign jurisprudence; Constitutional identity; Human dignity; Sovereignty

1. Introduction

The analysis of the influence of foreign case law on the Hungarian Constitutional Court helps to understand how the Hungarian constitutional framework has evolved from the crucial transition year of 1989, touching upon the pivotal year 2010, which changed the way judges were elected, until nowadays.¹ Such a lecture could represent a very privileged point of

¹ See G.F. Ferrari, *Introduction: Judicial Constitutional Comparison and Its Varieties*, in G.F. Ferrari (Ed.) *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, Leiden-Boston, 2020, 1-28; C. Erdős, F. Tanács-Mandák, *Use of Foreign Law in the Practice of the Hungarian Constitutional Court – With Special Regard to the Period between 2012 and 2016*, *ivi*, 618-649; C. Dupré, *Importing the Law in Post-*

view to understand the evolution and the involution of the Hungarian constitutional framework in the last decades.

The essay will analyse the usage of the foreign jurisprudence following a thematic path and as far as it will be possible a diachronic approach toward the openness and closeness of the Court in different phases of its life. The first topic analysed in the sub-paragraph 3.1.1 is related to human dignity as it has been embraced by the Hungarian Constitutional Court since its early years; sub-paragraph 3.1.2 will scrutinise the usage of the foreign courts jurisprudence in some pivotal balancing process reasonings; sub-paragraph 3.1.3 will focus on the rulings related to the functioning of the Court, topic which is at the core of a permanent debate in the changing Hungarian constitutional scenarios; sub-paragraph 3.1.4 will scrutinise the collisions between the Constitutional Court and the EU Institution and the role of the foreign jurisprudence in this peculiar debate.

Paragraph 5 is an attempt to provide some conclusions in a crucial phase of the “visible and invisible” Hungarian Constitution.

2. The Hungarian Constitutional Court: A timeline

Before 1990, Hungary had no Constitutional Court. The so-called Council of Constitutional law, established in 1983, had none of the features of the Constitutional Court and it did not challenge the communist principle of the unity of powers.²

However, the 1983 reform, together with the 1984 Competition Act, confirmed that the s.c. *Gulash Communism* provided loopholes, through which western legal tradition was slowly being introduced.

During the constitutional transition of the 1990s, Hungary was the only country not to adopt a new constitution. Instead, a considerable number of amendments were adopted in this crucial step forward.

With a certain dose of sarcasm, it can be argued that, during the s.c. transition period, the only thing that remained the same was the disposition designating Budapest as the capital of Hungary.³

Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity, Oxford, 2003; Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 253–272; Z. Szente and F. Gárdos-Orosz, *Constant Inconsistency: The Use of Foreign Precedents in Hungarian Constitutional Jurisprudence* in T. Groppi, M. C. Ponthoreau, I. Spigno. (Eds.), *Judicial Bricolage: The Use of Foreign Precedents by Constitutional Judges in the 21st Century*, Oxford, 2025;

G. Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in M. Rosenfeld, A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1328; A. Jakab, J. Fröhlich, *The Constitutional Court of Hungary*, in A. Jakab, A. Dyevre, G. Itzcovich (Eds.), *Comparative Constitutional Reasoning*, Cambridge, 2017, 394; P. Paczolay 'Judicial Review of the Compensation Law in Hungary', 13 *Mich. J. Int. Law* 806 (1992).

² C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Portland, 2003, 6.

³ Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi,

During the 1989 Transition Round Tables, all parties regarded the Court as the potential guarantor of the ongoing democratic order. In this way, a strong Constitutional Court was also conceived as a reaction to the parliamentary activities during the Communist Regime.⁴ This partly justifies the wide spectrum of powers granted to the Court in 1989 (*amplius infra*).

The new Constitutional Court – based on the Kelsenian model – began its work on January 1st, 1990, a few months before the first free elections were held in March 1990.

Since the 1990 transition, Justices have been appointed by a two-third majority in Parliament (*see below*). Over the years, the method of appointment has been slightly modified, but Parliament maintained its prerogative of appointing all the judges of the Court, while the President has been nominated by the other judges of the Court. From a comparative perspective, Hungary is one of the leading cases that have this strong connection with the Parliament, clearly paving the way to a certain physiological politicisation of the Court.⁵

It is worth noting that prior to 2010, the judges of the Constitutional Court were being appointed through a process that began in an *ad hoc* Parliament Committee in which the parliamentary parties were equally represented. The Committee's decision was a preliminary step before a Parliament deliberation that required a two-thirds majority. This procedure guaranteed to all parties a reasonable expectation of being represented on the Constitutional Court.⁶

After the 2010 elections, the Parliament changed the way judges are elected. The actual composition of the Committee is proportional to the percentages of the Parliament. This led to a certain politicisation of the members of the Court, increased by the two-third stable majority achieved by the MTK in the 2010 election and by the possibility for the Parliament itself to appoint the President of the Court.⁷

M.-C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 254.

⁴ A. Sajo, *Reading the Invisible Constitution: Judicial Review in Hungary*, in 15 *Oxford J. Legal Stud.*, 253, 265 (1995); W. Schiemann, *The Politics of Pact-Making: Hungary's Negotiated Transition to Democracy in Comparative Perspective*, London, 2015.

⁵ W. Sadurski, *Postcommunist Constitutional Courts in Search of Political Legitimacy*, in *Cadmus EUI Law*, 2001/11, available at the following URL: cadmus.eui.eu/handle/1814/175. According to the Author: «In most Central and Eastern European countries, constitutional judges are appointed in a process which requires the participation of both the legislative and executive branches (Romania, Albania, Czech Republic, Slovakia, Russia, etc.). In some countries, the highest bodies, representing the judiciary are also involved (Bulgaria, Lithuania, and Ukraine). Two of the most active constitutional courts of the region constitute an exception. In both Hungary and Poland, constitutional justices are appointed exclusively by the parliaments», 4.

⁶ K. L. Scheppele, *A Comparative View of the Chief Justice Role, Guardians of The Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, in 154 *U. Pa. L. Rev.* 1757 (2006).

⁷ Z. Szente, *The Political Orientation of the Members of the Hungarian Constitutional Court Between 2010 and 2014*, in *Constitutional Studies*, 1.1. 2016, available at constitutionalstudies.wisc.edu/, 130: «Until the new regulation, the parliamentary

Following the art. 24, par. 4 of the New Fundamental Law, adopted in 2011, «The Constitutional Court shall be a body, composed of fifteen members, each elected for twelve years with the votes of two thirds of the Members of the National Assembly. The National Assembly shall, with the votes of two thirds of the Members of the National Assembly, elect a member of the Constitutional Court to serve as its President until the expiry of his or her term of office as the judge of the Constitutional Court. Members of the Constitutional Court may not be members of political parties or engage in political activities».

With regard to the composition of the Court, it may be useful to highlight how between 1989 and 1994, the number of judges of the Court was 15, then it became 11 until 2012, when it finally became 15 again. According to some scholars, this growth has been a useful constitutional tool for the majority to appoint all the new judges of the Court.⁸

For the purpose of this essay, it is worth noting the relevant role played by the different Presidents' approaches with respect to the foreign jurisprudence. The role and the personal background of the President have a strong influence on the Court's vision. Following this path, the first era is that of the President has been László Sólyom who has ended his presidential term in 1999, after two presidential terms⁹ in 1998.¹⁰ The second President has been János Németh (1998-2003); the third Mihály Bihari (2003-2008); then Peter Paczolay (2008-2014), Barnabás Lenkovich (from 2015 - 2016), Tamás Sulyok (from 2016 to 2024), László Salamon (acting, March 2024 – June 2024) and finally Imre Juhász (2024 – present).

Regarding the spectrum of functions, as anticipated in the previous paragraph, the Constitution amendments introduced by the Round Table Agreements in 1989 gave the Hungarian Constitutional Court a wide range of powers, making it one of the most powerful in the world.

Following this path, the former Article 32A allowed the possibility for the Constitutional Court to review laws and annul the statutes. In addition, article 32A par. 3 introduced the s.c. *action popularis*, which provides that

majority and minority had been forced to compromise on the new members of the Court, as the composition of the parliamentary committee responsible for nominating Constitutional Court judges had been based on parity between the government and opposition parties, thus each candidate had to gain the support of both sides. According to the new rules, a parliamentary committee, composed in proportion to the members of the parties represented in Parliament, propose candidates, who are elected by Parliament with a qualified majority of two-thirds. In this way, the Fidesz government, enjoying such a parliamentary majority since autumn of 2010, has been able to appoint solely its own people to the Constitutional Court».

⁸ Z. Szente, *ibidem* 879, 2016, 131.

⁹ Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999-2010*, in T. Groppi, M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 253.

¹⁰ C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, 2003, 29. As well summarised, «After some initial changes, the composition of the Court remained fairly stable during its first term of nine years, with the judges gradually leaving and being replaced by new ones towards the end of this period. The election of six last new judges in 1998 marked the end of what has been called 'the first Constitutional Court'».

everyone has the right to initiate proceedings before the Constitutional Court in the cases specified by the law.

Under the framework provided by Act XXXII/1989, the other powers of the Court were as follows: a) the *ex ante* constitutional review of Bills, Acts of Parliament - enacted and not yet promulgated - Standing Orders of Parliament and international treaties; b) the review of laws and authoritative acts for conformity with international treaties; c) the jurisdiction to rule on constitutional complaints (issued for alleged violations of constitutional rights); d) the settlement of conflicts of competence between organs (bodies) of the State, or self-governments; e) the interpretation of the Constitution; g) proceedings in all cases provided for by an Act.¹¹

In the light of the above, the Hungarian Constitutional Court, at least in its original architecture, had competence for both *ex ante* and *ex post* review.¹²

With the 2011 reforms, *ex-post* review has been significantly reduced, as only the Commissioner for Fundamental Rights and (alternatively) a quarter of the MPS had the possibility to activate it. Moreover, *actio popularis* – as reformed by the New Basic Law in 2011 – was abolished in 2013.¹³

The actual Constitutional Court functions are well summarised by Article 24, par. 2, 2011 New Basic Law, according to which the Constitutional Court shall: «a) examine adopted, but not yet published Acts for conformity with the Basic Law; b) review, on the initiative of a judge, the conformity with the Basic Law of rules of law applicable in a particular case; c) review on the basis of a constitutional complaint, the conformity with the Basic Law of the rules of law applied in a particular case; d) review, on the basis of a constitutional complaint, the conformity with the Basic Law of a judicial decision; e) review, on the initiative of the Government, of one fourth of all Members of Parliament of the Commissioner for Fundamental Rights, the conformity of rules of law with the Basic Law; f) examine whether rules of law are in conflict with international treaties; and g) perform further tasks and exercise further competences, laid down in the Basic Laws or in a cardinal Act».

In addition, the Court has the power to assess the constitutionality of acts of Parliament whether adopted or not yet promulgated, even if no dispute has risen. At the request of the Parliament or the Government, the

¹¹ See Hungarian Const. Court, ruling 4/1997 for a clear explanation of the main functions, recognized by the Court according to the Act XXXII/1989.

¹² Z. Sente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 127 «The main task of the Constitutional Court was the *ex post* judicial review of legal rules. Since anybody 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., international treaties) fell also 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, this was an indirect judicial review of the statutes on which the individual judicial decisions were based».

¹³ A. Jakab, P. Sonnevend, *Continuity with deficiencies: The new basic law of Hungary*, in *Eur. Const. L. Rev.*, 2013, 102-138.

Court may also review statutes or regulations and, at the request of the President of the Republic, the *ex ante* review of a law before its promulgation.¹⁴

It is also worth noting that those judges who disagree with the majority of the Court may deliver a dissenting opinion.

3. The systemic and oriented use of the foreign jurisprudence

Having said that, it goes without saying that during the transition period, the Court gained its authority by opening its point of view towards the western democratic legacies, in a constant and beneficial dialogue with other Courts.

As widely known, the polar star has been represented by the Human Dignity, read through the lens of the jurisprudence of the German Federal Constitutional Court. It is from here that the Hungarian Constitutional Court has made visible “the invisible Constitution”, establishing rights and freedoms even when they are not directly provided for in the 1989 Charter.

The transition of the 1990s required the Hungarian Constitutional Court and the entire new Hungarian constitutional system to acquire – in a very short time – some key legal tools and guarantees that had been developed by Western democracies over almost two centuries. According to Zsente: «Hungarian Constitutional Court borrowed some whole interpretative constructions from abroad, like the doctrine of the “living law”, the concept of “general personal right”, the “mother right” from Germany, and the construction of “equal respect of human dignity” and “positive discrimination” taken from Ronald Dworking’s theory”.¹⁵

From this perspective, the openness shown by the Hungarian Constitutional Court during the democratic transition is not in the direction of s.c. global law but rather in the direction of the German law.

This path has been made clear by the Court in one of its first decisions, 8/1990. In this the Court introduced a theoretical framework around dignity, structuring its reasoning with a clear reference to the German Federal Constitutional Court proved by the massive reference and quotation of the Bundesverfassungsgericht (*amplius infra*). Since then, Article 54 of the former Constitution has been read in conjunction with the interpretative path provided by the German Federal Constitutional Court.

Human dignity is therefore the starting point of the cross-fertilisation activity pursued by the Hungarian Constitutional Court. Many of the rights recognised by the Hungarian Court derive directly from the German Federal Constitutional Court’s interpretation of human dignity. In this respect, it is necessary to mention the field of the personality rights: definition of a human being (23/1990), abortion (64/1991, 48/1998), informational self-

¹⁴ A. Sajo, *Reading the Invisible Constitution: Judicial Review in Hungary*, in 15 *Oxford J. Legal Stud.* 255 (1995).

¹⁵ Z. Szenté, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, , 253.

determination (15/1991), freedom of religion (4/1993), self-determination (57/1991), and privacy (46/1991).¹⁶

Moreover, the need for the Hungarian system to comply with the EU principles and law is based on the horizontal dialogue between the Courts and the evaluable tools for harmonising the national constitutional and legislative framework. This extensive use of the foreign law has somehow supported the process of receiving the s.c. *acquie cominitaire* in the field of rights. In other words, the massive recourse to foreign case law has been used as an interpretative instrument to come closer to EU standards with a view to Hungary's full inclusion in the EU, as happened in 2004.¹⁷

In the first phase, the Court did not have a proper constitutional background and foreign experiences were used as a 'guiding horizon'.¹⁸ In other cases, the references played a supporting role, providing a broader overview of the issues at stake.¹⁹

As well explained by Halmai,²⁰ Hungarian approach to the use of the foreign cases can be ranked among those that do not resort to the explicit use of the foreign cases. Nevertheless, as it will be clear in the following paragraphs, there are a considerable number of cases where the Hungarian Constitutional Court has resorted to a broad comparative analysis with direct reference to the decisions of other courts.

It is noteworthy to say that in its first phase after the transition «in practically all cases, when an important matter is under consideration, a comparative review is made of the relevant regulation or the judicial practice of many foreign countries».²¹

A crucial passage could be represented by the year 1998 that is commonly identified as the end of the first era of the Hungarian Constitutional Court, terminated with the end of President Sylom's mandate.²² Since then, the Court seems to have consolidated its authority

¹⁶ For an overview of the correspondent German jurisprudence, followed by the Hungarian Court see C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, 2003, 65. The Court often recurs to the German Bundesverfassungsgericht jurisprudence. See ¹⁶ Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 262 for details.

¹⁷ C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, 2003, 54 ff.

¹⁸ T. Groppi, *Introduction The Methodology of the Research: How to Assess the Reality of Transjudicial Communication*, in T. Groppi, M. C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, cit., 8.

¹⁹ Z. Szente, *The Interpretative Practice of the Hungarian Constitutional Court: A Critical View*, in 14 *Ger. L.J.* 1602 (2013).

²⁰ G. Halmai, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague, 2014, 64.

²¹ Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 265.

²² According to the statistical analysis, conducted by Prof. Z. Szente, between 1990 and 2010, out of 1016 decisions only 19 quoted foreign cases.

with a certain reluctance towards foreign jurisprudence, preferring a stand-alone approach in its rulings.²³

The political and constitutional changes brought about by the New Fundamental Basic Law in 2011 have had a profound impact on both the main characteristics of the Constitutional Court's and its relations with other Courts. As noted above, the New Fundamental Basic Law has made it possible for the parliamentary majority both to influence the composition of the Court and to direct its vision of Government policy. Circumstances that, as it will be clear below, had a direct impact on the Courts' usage of foreign case law.

3.1 Dignity as a mother right

As partially anticipated, Hungarian Court's openness to the universal value of human dignity is still today as the main topic in which it is possible to find Court references to foreign jurisprudence.²⁴

The value of human dignity has been enshrined in the Hungarian framework by Article 54(1), introduced by the 1989 amendments, which states: 'In the Republic of Hungary, everyone has the inherent right to life and human dignity, of which no one can be arbitrarily deprived off.'

In one of its early decisions, the Court clarified the nature of the s.c. "mother right" of human dignity. In Decision 8 of 1990, the Court declared the unconstitutionality of some Labor Code provisions that provided to trade unions the right to represent employees without their authorization. In this circumstance, the reference was not only to the German Constitutional Court, but to all the modern Constitutions that recognise human dignity: «The decision of the Constitutional Court is based on the interpretation of the right to human dignity. This right at the beginning of the section about fundamental rights and obligations in Art. 54 (1) of the Constitution is declared as a natural right. The Constitutional Court regards the right to human dignity as another phrase for a "general right to personhood". In modern Constitutions and in practice of Constitutional Courts, the general rights to personhood encompasses various aspects, such as the right to free personal development, the right to free self-determination, general freedom of action or the right to privacy. The general right to personhood is a "mother right" – i.e. a foundational fundamental right which may be relied upon at any time by both Constitutional Court and other courts for the protection of an individual's autonomy when none of the concrete, named fundamental rights are applicable to a particular set of facts».

²³ G. Halmai, *Perspectives on Global Constitutionalism*, cit., 179; Z. Sente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 259.

²⁴ Z. Sente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999–2010*, in T. Groppi, M.-C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 260.

In this early stage of the Court, human dignity assumed a pivotal role in order to declare the unconstitutionality and the annulment of the death penalty. In the ruling 23/1990, moving from the parameter of Article 8 (4) of the former Constitution – according to which the right to life and human dignity are considered fundamental rights –, the Court refers to the «experience of several countries» to explain how the application and abolition of capital punishment do not influence the total number of crimes and the incidence of the commission of crimes that were formerly penalised by capital punishment.

The essence of the ruling is enshrined in the concurring opinion, provided by Sólyom P. where he offers his famous definition of an invisible constitution, which is strictly linked to the relationships among Courts, viewing it from a historical and philosophical perspective.²⁵

According to the judge, «the Constitution is deliberately subjective and tied to history: even if the Constitutional Court proclaims absolute values, it reveals their meaning in the given period; and its decision, for example, in the questions of capital punishment or abortion, should not lay claim to eternity. The Constitutional Court's image of a man, choice of philosophy, and conception of a judge's duty are all subjective features. That is why it is desirable for the Constitutional Court to consider the contemporary international approach to capital punishment as an objective criterion; the evaluation of this subject already belongs to the Constitutional Court's realm of permissible political engagement. In 1972, the United States Supreme Court proclaimed that all laws on capital punishment were unconstitutional and set an example of liberation, effective to other countries. Since 1976, however, we have witnessed the restoration of capital punishment.»²⁶ The judge also refers to the fact that the abolishment of capital punishment was a current issue in 1949 in the Grundgesetz of the Federal Republic of Germany and it could have been in the Hungarian Agenda since 1960. Following Sólyom's reasoning: «...in the 18th century, it was usual in natural law to trace back natural rights to some of the ancient rights or fundamental rights.' This marked the beginning of the right to life. Nowadays, human dignity plays a similar role in the basic norm in both constitutions and international conventions. In this capacity, it is a descendant of "natural freedom" in natural law. The right to human dignity is defined as a "material right" in German, American, and Hungarian Constitutional Court practice; to protect the freedoms of action and self-

²⁵See A. Sajo, *Reading the Invisible Constitution: Judicial Review in Hungary*, in 15 *Oxford J. Legal Stud.*, 253, 268 (1995). Following the rule on this crucial point «The Constitutional Court must continue in its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form coherent system with its decisions, which as an "invisible Constitution" provides for a reliable standard of constitutionality beyond the Constitution... The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality».

²⁶ Similarly, there are references to the abolition of capital punishment, recognized by the Council of Europe in 1983 with the attached protocol to the European Convention on Human Rights and by the International Covenant on Civil and Political Rights.

determination, the Court derives ever newer fundamental freedom therefrom».²⁷

After this milestone ruling, the Hungarian Constitutional Court used the foundation of human dignity to define and guarantee other personal rights.

In this path, it is necessary to mention the ruling 15/1991, which is connected to the right of privacy and the guarantee of personal data. The Court's openness towards comparative experiences is the starting point of the judges' reasoning. The case is about the legitimacy of the s.c. PIN (Personal Information Number), which is used as an identification code. The Court resorted to a wide spectrum of countries to go ahead with its reasoning: Belgium, Denmark, Iceland, Netherlands, Norway, Finland, Switzerland, Sweden, Portugal, and Germany. The latter, as usual, assumed a pivotal role in providing arguments, thanks to a direct reference to the German Federal Constitutional Court²⁸.

Similarly, the Hungarian Constitutional Court - moving from the value of human dignity - has defined the right to self-determination. In the

²⁷ See the ruling 23/1990 and the opinion provided by the President Latzo according to which the evaluation of contemporary international practice «is part of the allowed political activities of the Constitutional Court» See I. Vörös, *Contextuality and Universality: Constitutionalism borrowings on the global stage – The Hungarian view*, 1 *U. Pa. J. Const. L.* 651, 655 (1999).

²⁸ Following the reasoning: «The German Federal Constitutional Court declared as early as in 1969 that the 'registration and catalogue listing of citizens which affect the entire person of those citizens' are incompatible with the fundamental right of human dignity to which the State has no right to infringe, even under the anonymity of statistical data acquisition (BVerfGE 27, 1,6); the so-called population census decision, which in 1983 formulated the right to informational self-determination, considers the PIN a 'decisive step' leading to personality profiles, the avoidance of which shall be accepted even by other means of limitations on informational self-determination (BVerfGE 65, 1, 27, 53, 57). . . . The dangers of electronic data processing to the autonomy of personality became widely known in the 1970s. From then on, the PIN became a symbol of total control of European citizens, as an approach to efficiency, as well as the treatment of persons as objects... The use of PIN varies widely from country to country. In a number of countries there are de facto universal PINs as a result of the unhindered introduction and application of an identification code, originally adopted for definite purposes. The number itself was originally introduced for the purposes of the population register or as a social security number. Examples for the former one are Belgium, Denmark, Iceland, the Netherlands, and Norway, while for the latter Finland or Switzerland. The Swedish personal number, considered as a copybook example of the universal personal number, was originally a registration number in the birth certificate records. In other countries, personal numbers are forbidden or even considered unconstitutional. In Portugal, a 1973 Act of Parliament ordered the introduction of the universal PIN, starting in 1975. On the other hand, Art. 35(2) of the 1976 Constitution, issued after the downfall of the fascist regime, forbids the linkup of personal data storage systems, and according to para. (5): 'It is forbidden to assign nationally uniform personal numbers to citizens.' In France and in the Federal Republic of Germany, public opposition to the idea of a population register, using PINs, led in 1978 to the promulgation of the Law Decrees on Data Protection and to the abandonment of integrated data storage systems and PINs». See L. Sólyom, G. Brunner (Eds.), *Constitutional Judiciary in a New Democracy: the Hungarian Constitutional Court*, Ann Arbor, 2000, 147.

case of 9/1992,²⁹ the Court affirms that the protest of illegality³⁰ violates the legal certainty, the principle of the allocation of the burden of proof in a criminal prosecution and the principle of self-determination; the latter being defined as an aspect of the right to human dignity.³¹ In detail, the Court declared the unconstitutionality of the s.c. protest of illegality, lodged against convicted persons thanks to a wide comparative and historical reasoning.³²

In the following years, Human dignity is also assessed on the base of the leading euthanasia case 22/2003 in which judges, instead, use a massive direct reference to other Courts around the world, concluding at the end of its reasoning that the right to life prevails over the right to self-determination. The latter could be proportionally limited to guarantee the prominent right to life, enshrined by art. 8 of the former Constitution. The Court recalls a wide spectrum of cases with the aim to enforce its reasoning. Judges directly quote UK, US and German rulings that recognize the patient's right to refuse an intervention³³ and provide a wide overview of other countries' legislation and jurisprudence, such as the US, Netherlands, Belgium and Australia.³⁴

²⁹ 9/1992, 30 January.

³⁰ The protest of illegality has been introduced in the Hungarian framework by The Act XI of 1949 on the People's Participation in the Criminal Justice System and Simplification of Appeal, followed by the Act III of 1951 and Act 1954 rendered possible the imposition of a more severe punishment to the rendering of a final judgment.

³¹ See also ruling 57/1991, 8 according to which «the right to self-identity and self-determination is part of the “general rights of individual”» and an aspect of the right to human dignity. See G. Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in M. Rosenfeld, A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1342.

³² The Court «undertook a comparative and legal historical enquiry in order to arrive at a reasoned evaluation of the validity of the regulation of the protest of illegality. A review of the final judgments of the courts was first introduced by the French revolutionary legislation. The theoretical justification of the institution was a stricter separation of powers and the prevention of judicial excesses, and it was applied in practice to ensure that the new legal order was properly applied by the courts. The 1808 French Code of Criminal Procedure contained two forms of the institution: one made possible the vacating of an unlawful final judgement without affecting different parties, while the other served to remedy the judiciary's overstepping of its jurisdictional competence, in which the remedy also affected the parties in exceptional cases. Following France's example, other countries (Belgium, Austria, and Italy) also introduced similar legal institutions during the 19th century».

³³ Such as the e.g. *Ms B. v. NHS Hospital*, Court's of Appeal judgment of 22 March 2002 for UK and *Cruzan v. Director, Missouri Department of Health* for US 497 US 261, 1990 and *Glucksberg*, 521 US 702 (1997), *Vacco v. Quill*, 521 U.S. 793 (1997). See United Kingdom in *Re J* [199 1] Fam 33, and for Germany a 1996 Supreme Court ruling, BGHSt 42, 305.

³⁴ Z. Szente, *The Interpretative Practice of the Hungarian Constitutional Court: A Critical View*, in 14 *German L. J.* 1591, 1602 (2013); see also P. G. Carrozza, *Human Dignity in Constitutional Adjudication*, in T. Ginsburg, R. Dixon, (Eds.), *Research Handbook in Comparative Constitutional Law*, London, 2011. A similar balancing process has been used in the later case 24/2014 in which the Court addressed the constitutional validity of some provisions regulating the refusal of medical treatment, grounding its reasoning on the consolidated approach already expressed in the case 22/2003.

In the same period, it is worth mentioning the case 43/2005, in which the Court examined the constitutionality of some provisions related to artificial infertility through the lenses of the right to self-determination and human dignity, as they have been introduced by the decision 22/2003, and with strong support of a wide reference to foreign jurisprudence.³⁵

Similarly, the right to name has been linked to human dignity also thanks to a wide comparative reasoning followed in the ruling 58/2002 that covered Italy, Germany, Austria, Switzerland and Turkey as well. In the same years, some provisions of the Criminal Code that regulated sexual conduct, particularly with reference to same-sex relationships, have been declared unconstitutional (see 37/2002) also on the basis of the Austrian case³⁶ used to reinforce the anti-discrimination framework already provided by a wide usage of references toward the ECHR cases.

In several cases the Court does not directly quote ‘human dignity’, but its reasoning is clearly referred to the theoretical background of it. In this light, it is worth noting the case 11/1992, references are made to the theoretical image of a liberal and democratic that are made to support the classical principles of “*nullum crimen*” and “*nulla poena sine lege*”³⁷. Similarly, in the case 21/1996 there are no direct references to other Courts, but the link is clear with the right to self-determination and human dignity such they have been enshrined by the German Constitutional Court jurisprudence.

Indirect comparative references are clearly used also in the ruling 21/1996 where the Court affirmed that the membership of minors in associations related to homosexuality could be excluded or restricted by law or by a court decision. The Court – setting an age limit for membership of a homosexual-related association – protected the responsible and mature decision of those who would bear its consequences during their entire life. The reasoning is grounded on a wide spectrum of foreign cases which well

³⁵ The Court referenced key U.S. Supreme Court cases concerning reproductive rights, such as *Skinner v. Oklahoma* (316 U.S. 535, 1942), which recognized procreation as a fundamental right, and *Griswold v. Connecticut* (381 U.S. 479, 1965), which established the right to privacy in reproductive decision-making. *Eisenstadt v. Baird* (405 U.S. 438, 1972) was also considered, reinforcing the principle that individuals — not just married couples — have the right to make contraceptive decisions. The Court expressly refers also to the British cases *Eye v. Measday* (1986, 1 All ER 488) and *Gold v. Haringey Health Authority* (1988, QB 481), which examined liability for failed sterilization procedures and the right to compensation for unintended pregnancies. German jurisprudence (BVerfGE 96, 375, 1997) was referenced highlighting the right to bodily integrity and informed consent in sterilization cases. A direct reference has been made also towards the Spanish Constitutional Court case 215/1994 (July 14, 1994), related to the conditions under which sterilization can be performed and the legal protections surrounding personal autonomy.

³⁶ See Austrian Constitutional Court June. 21st 2002 (VfSlg. 16.565).

³⁷ Following the mentioned ruling 11/1992 «The criminal legal system of a liberal, democratic state construes principles of “*nullum crimen*” and “*nulla poena sine lege*” (prohibition of retroactivity) – pillars of classical criminal law – as a (constitutional) duty, imposed on the State: the conditions of the exercise of its punitive power must be fixed prospectively by law... In a constitutional state, the criminal law is not merely an instrument but it protects and embodies values: the principles and guarantees of the constitutional criminal law. Criminal law is the legal basis for the exercise of punitive powers as well as a guarantee of freedom for the protection of individual rights».

represent the openness of this phase: «For interpreting individual fundamental rights, there is comprehensive, comparative international case-law and theoretical opinions at hand, so there is no need to directly turn to ideological or political arguments. Constitutional interpretation of such methodology is protected from the direct enforcement of ideologies by emphasising formal guarantees, and the explication of the value content of individual rights provides protection against the abuse of positivism». Following this approach, the Court prefers to remain on a neutral path, disregarding the evaluation of public morals: «At present, the Constitutional Court does not even consider the problem of homosexuality to be a question of sexual morals – although it is generally regarded as such in the public opinion». ³⁸

3.2 Balancing rights and freedom with the foreign jurisprudence.

One of the most relevant topics in which the foreign jurisprudence supports the Court's reasoning is the freedom of expression. In this field the Court proves an unconditional openness towards the liberal right schemes. In the milestone ruling 30 of 1992³⁹, the Court moves its reasoning from the following assumption: «The criminal codes of all democratic European countries having the continental legal system, as well as England and Wales, Canada and New Zealand, which have the Anglo-Saxon legal system, prohibit incitement on a "racial" basis in criminal law statutes. The demarcation of the boundary between incitement, arousal of hatred and expression of opinion remains hotly contested, even internationally». The ruling declared the unconstitutionality of the Section 269 para (2) of the C.C. considering it disproportional in respect to the desired aim: «For the maintenance of public peace, the application of criminal sanctions for public utterances, or similar acts, offending, disparaging or denigrating the Hungarian nation, other nationalities, people, religion or race is not unavoidably necessary. This statutory definition unnecessarily and, in light of the desired objective, disproportionately restricts the right to the freedom of expression»⁴⁰.

³⁸ See also ruling 48/1991, 26 September 1991.

³⁹ Hungarian Const. Court, ruling 30/1992 January 1992.

⁴⁰ These are the words used by the Court: «Other democratic countries with continental legal systems also have specific tools of criminal law for the protection of the honour and the prestige of the State's institutions and officials. In the field of open debates on public affairs and in the relation between the freedom of expression, as a fundamental constitutional right, and the set measures, restricting this right with the general criminal law rules of protecting one's honour or with specific statutory definitions, the tendency experienced in the European democratic countries shows the decreasing significance of criminal law measures and the growing importance of the freedom of expression. This is true in particular for the practical application of statutory definitions, protecting the honour of the State and its institutions. The Constitutional Courts, reviewing the judgements of the courts in the framework of constitutional complaints, play an important role in the above process». A. Koltay, *the Application of the New York Time Rule in Hungarian Constitutional Jurisprudence - with a European overview*, June 2014, available at ssrn.com/abstract=2457885.

Likewise, it is possible to point out how in the ruling 36/1994 the Constitutional Court followed, not explicitly, the pattern initiated by the US Supreme Court with the case *New York Times v. Sullivan*, 1964. Following the same reasoning, the ruling 7/2014 widely refers to the abovementioned US Supreme Court and to *Gertz v. Welch*, *Dun & Bradstreet v. Greenmoss Builders* cases to demonstrate how the freedom of expression and the connected possibility to criticise public figures reducing are concepts commonly shared by all developed democratic countries.⁴¹

First generation rights are certainly one of the most relevant fields in which the Court demonstrated during the years a certain permanent degree of openness towards foreign Constitutional background. In this light, it is useful to underline how in the Decision 4/2013 (II.21.) the Court invoked several examples of foreign constitutional jurisprudence to contextualize and support its ruling on the unconstitutionality of Section 269/B of the 1978 Criminal Code, which criminalized the use of totalitarian symbols such as the red star. The Court made reference to decisions of the German Federal

⁴¹ According to the Court, «To find a balance between the protection of reputation and the freedom of speech, the Supreme Court elaborated a set of criteria taking into account both the status of the injured person and the public character of the challenged speech. The Constitutional Court lists the principles of this system of criteria. According to the fundamental test, developed by the Supreme Court in the *New York Times v. Sullivan* case, the payment of damages can only be constitutionally awarded because of a libelling statement, related to the official activity of a public official if the malicious intention of the libelling person can be proved, i.e. they were aware of the fact that their statement contained a false fact or they were unaware of its falseness because of showing serious negligence in the course of examining the reliability of it. This test is based on a constitutional argument, stating that public debates should be undisturbed, firm, and open. [U.S. Supreme Court, *New York Times v. Sullivan* 376 U.S. 254 (1966)]. Later, the Supreme Court extended the New York Times-standard to all statements, made in relation to candidates to public offices and all to public figures in general. As justified in the *Gertz v. Welch* case, public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and, on the other hand, they put themselves voluntarily in the public spotlight, implying a greater risk of being targeted by statements, injuring their reputation. In this respect, the Supreme Court also pointed out that under the constitution, there is no such thing as a false idea and there is no constitutional value in false statements of fact, still in a certain scope the latter are necessary elements of a free debate [U.S. Supreme Court, *Gertz v. Welch*, 418 U.S. 323 (1974)]. From the complex set of criteria, elaborated by the Supreme Court, the Constitutional Court points out the element of emphasising the public nature of the concerned statement in addition to the public figure status of the affected person, when defaming statements are assessed, thus even the cases that fall outside the scope of public appearances do not belong to the same group. The Supreme Court shall apply a different test when a private individual is offended in the context of debating public issues or when the same individual's reputation is being injured in a case, not related to public interest. As explained in the reasoning of the *Dun & Bradstreet v. Greenmoss Builders* case, speeches do not bear the same constitutional importance: debating public affairs belongs to the very essence of constitutional protection, while speeches, related exclusively to private interests bear less constitutional importance [U.S. Supreme Court, *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985)].». See A. Koltay, *the Application of the New York Time Rule in Hungarian Constitutional Jurisprudence - with a European overview*, June 2014, available at ssrn.com/abstract=245788. See also the rulings 1/2015 and 3147/2016 VII.22 that expressly recalls the 36/1994 background on freedom of expression.

Constitutional Court – including 1 BvR 680/86, 1 BvR 204/03, and 2 BvR 2202/08 – to illustrate how symbolic expressions can be regulated without adopting a blanket prohibition. Similarly, the Court also referred to Italian jurisprudence, in particular Decision n. 74/1958 of the Italian Constitutional Court, which upheld the constitutionality of criminal sanctions for the public use of fascist symbols when they support the reconstitution of banned movements (23/2014 (VII. 15.) AB). These references were used to demonstrate that constitutional democracies across Europe balance the protection of democratic values with respect for expressive freedoms, thereby reinforcing the Hungarian Court's conclusion that criminal law should be considered as an *ultima ratio* according to the principles of necessity and proportionality.

In the field of freedom of assembly, the Court drew its burdens on a wide spectrum of comparative constitutional principles. The constitutional protection of spontaneous and rapid assemblies without prior notification has been enshrined with references to the standards established by the German Federal Constitutional Court (BVerfGE 69, 344 and BVerfGE 85, 69).⁴² Furthermore, the Court has borrowed some pivotal principles from the SCOTUS since 1992. This is the case of the “clear and present danger” introduced with direct references to *Dennis v. U.S.*, 341 US 494 (1951) and *Brandenburg v. Ohio*, 395 US 444 (1969).⁴³

Furthermore, the Court embraced once again the US Supreme Court background in the case 13/2016 (VII. 18.) AB concerning the conflict between the right to privacy and the right to peaceful assembly, in cases where demonstrations were planned in residential areas. The Court directly quoted *Carey v. Brown* (447 U.S. 455, 1980) and *Frisby v. Schultz* (487 U.S. 474, 1988), underling the protection of residential privacy, noting that public roads and sidewalks, even in residential areas, are public grounds. The Court also emphasized the special nature of the home as a place of tranquillity and peace, which the state has a duty to protect. It distinguished between marches and static, venue-based demonstrations, particularly considering the “captive audience” issue where residents cannot easily avoid demonstrations taking place outside their homes.

In addition, the Constitutional Court has used the jurisprudence of foreign courts to shape the various aspects of the right to a fair trial.

The s.c. *ne bis in idem* has been argued thanks to a constant referral to the SCOTUS jurisprudence (*Blockburger v. United States* 284 U.S. 299 (1932); *Brown v. Ohio* 432 U.S. 161 (1977); *Arizona v. Washington* 434 U.S. 497 (1978); *Oregon v. Kennedy* 456 U.S. 667 (1982); *Serfass v. United States* 420 U.S. 388 (1975); *Blueford v. Arkansas* 566 U.S. (2012)) and the first amendment, as well as reference to the Constitutions of Germany (Art. 103 (3)) and Slovenia (Art. 11(1)).⁴⁴

Similarly, regarding the proportionality of the punishment, the Court expressly recalls the s.c. “Three Strike” principles and its compatibility with

⁴² See rulings 3099/2015. (V.26.) AB and 13/2016. (VII.18.) AB.

⁴³ The Constitutional Court widely uses the notion of “clear and present danger” in the balancing process related to peaceful assembly and the freedom of expression: 30/1992. (V. 26.) AB; 18/2000. (VI. 6.) AB; 18/2004. (V. 25.) AB. and 14/2016. (VII.18.) AB.

⁴⁴ See rulings 33/2012 (XI. 22.) AB and 33/2013. (XI. 22.) AB.

the VIII amendment as it has been enshrined by the SCOPUS (*Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003)).⁴⁵

3.3 Functioning of the Court

An evaluable number of rulings that are supported by the linkage of the foreign jurisprudence are strictly connected with the functioning of the Court. This topic also confirms the openness of the Hungarian Court with respect to the dialogue and models circulations among various Courts, especially during the first years of its existence.

From this perspective, it is worth mentioning the ruling n. 16/1991, related to the *ex-ante* Constitutional review, provided by art. 1(a) XXXII/1989.⁴⁶ The ruling entails the legitimacy of certain procedural timing of the *ex-ante* review and the Court reasoning provides a thorough description of the different *ex ante* reviews existing in Europe. In this light, the Court expressly refers to art. 278 of the Portuguese constitution, art. 26 of the former Irish constitution, art. 127 of the Italian constitution and art. 78 of the Spanish act on the constitutional court⁴⁷.

In a similar path, we can rank the ruling 17/1994 in which the Court scrutinises the Ombudsman powers, referring to the Swedish model as an archetype that was not followed by the Hungarian system. The latter did not confer the Ombudsman's power to control over the judiciary in respect to the separation of powers and judicial independence.⁴⁸

After the 2010, the Court changed significantly, and the first years have been characterised by a thunderous conflict between Government and

⁴⁵ See the ruling n. 23/2014. (VII. 15.) AB.

⁴⁶ V. *supra* par. 2.

⁴⁷ «The preventive norm control is exercised in this way in any system which has adopted the procedure of preventive norm control of legal texts (art. 61 of the French constitution, art. 278 of the Portuguese constitution, art. 26 of the Irish constitution before promulgation, art. 127 of the Italian constitution contains similar provisions for the control in case of violation of legislative power. For the preventive control of international treaties, art. 78 of the Spanish act on the constitutional court requires that the text of the international treaty be first finalised; similar requirements and rules were applied to the preventive norm control of statutes until 1985 when this particular power of the constitutional court was abolished because of its interference with the legislative process) ». See C. Dupré, *Importing the Law in Post-Communist Transitions*, cit., 94.

⁴⁸ According to the abstract translation of the ruling provided by the official site «The statutory provisions regulating the jurisdiction of the Ombudsman do not allow the investigation by him of the functioning of the courts. The Constitutional Court has already emphasized several times the importance of judicial independence, especially the stability and neutrality of the judiciary. The role of the Ombudsman is to guarantee, through the control of the administration, the realisation of rule of law and the protection of individual rights. There is only a limited possibility of abusing judicial power in civil law countries. The independent judiciary is constitutionally protected against any external influence. Therefore, the regulation, declining to confer on the Ombudsman any power of control over the judiciary, is in conformity with the principles of the separation of powers and judicial independence. Although in Sweden and in a few countries, following the Swedish model, the Ombudsman has certain powers to control the judiciary, most countries rejected the original Swedish solution and have implemented regulations, similar to those, existing in Hungarian law».

Constitutional Court that somehow is also connected to the use of the foreign examples by the Hungarian judges.

The IV amendment to the Hungarian Constitutional Law adopted in 2010 introduced restrictions that prevented the Constitutional Court from reviewing the constitutionality of laws related to taxation and state budgets. With the ruling 61/2011 (VII 13) AB the Court accepted certain restrictions on its review authority over fiscal laws, effectively allowing the government greater freedom in economic policy and budgetary decisions. However, it set clear boundaries by asserting that its power could not be entirely curtailed, especially when fundamental rights, like human dignity, are at stake.

The Court provided several examples of where constitutional courts have the authority to review constitutional amendments. It noted that some constitutional Courts can revise constitutional modifications based on an explicit constitutional provision (such as for example Romania, Algeria, Kyrgyzstan, and Cambodia as well as Turkey, Russia, Bosnia and Herzegovina, where the Constitutional Court can examine the formal aspects of constitutional amendments).

The Court also observed that some European constitutional courts (Austria, Cyprus, France, Germany, and Spain) allow for the review of constitutional amendment procedures based on formal reasons, even without an express constitutional provision.

The possibility of content examination was discussed by the constitutional courts of Cyprus, Germany, and Austria, although the source noted divided positions on this issue. The Austrian court made a distinction between testing technical adaptation and reviewing conceptual revision. Germany's Basic Law was also noted as implicitly limiting certain amendments.

The Court pointed out that finding a constitutional amendment unconstitutional in the examined European practice was rare, citing Turkey as an exception with a decision related to the Islamic headscarf.

The Hungarian Constitutional Court concluded from this international overview that the power to review constitutional amendments, where it exists, is typically established by the given state's constitution or directly deduced from the constitutional protection body's authorization. Constitutional courts generally refrain from establishing such review authority or the applicable standard for themselves.

Once the political and constitutional scenario changed, the Court affirmed that: «In certain cases, the Constitutional Court can examine the continuous realisation of the substantial constitutional requirements, guarantees, and values of the democratic state, governed by rule of law, and their incorporation to the Constitution» (ruling 45/2012).⁴⁹ The mentioned ruling is a kind of a U-turn ruling in the jurisprudence of the Court⁵⁰ and represents a reaction to the substantial flexible constitution that, in the meantime, has been introduced in the Hungarian framework. Following this perspective, the Court clearly affirmed the power to review the s.c.

⁴⁹ G. Halmi, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague, 2014, 78 and V. Lubello, *Flusso di modifiche alla legge fondamentale*, in *DPCE Online*, v. 14, n. 2/2013.

⁵⁰ See 23/1994 and 293/B/1994.

Distracting Act, adopted by the Government: «The Constitutional Court is competent to perform a formal review of such “Distracting Act”, taking away the Constitutional Court’s competence, “substituting the Fundamental Law”, breaking up the unity and the structure of the Fundamental Law, and opening up its regulatory field and substance». Once again, the Court refers to a generic constitutional State instead of an identified country, and this way the Court limits the possibility of introducing substantial Constitutional provisions through the adoption of transitional provisions of the Fundamental Law. The openness of the Court is in this circumstance oriented towards a wide definition of the rule of law: «In a constitutional State under the rule of law, the constituent power is required to express its will in the constitution (Fundamental Law), and present it within the text of the constitution. The amendments of the constitution incorporated into the text of the constitution also represent the will of the power creating the constitution. The will of the power, creating the constitution, can’t be manifested in a legal regulation of mixed subjects, having an uncertain place in the hierarchy of the sources of law».

3.4 Ultra Vires and National Identity

In recent years the openness of the Constitutional Court towards foreign jurisprudence has been strongly used to reaffirm the centrality of the Hungarian constitutional background with respect to some controversial relationship with the CJUE and the EU Institutions.

As known, the Hungarian Court introduced sensitive topics such as immigration and asylum with a wide spectrum of reference to comparative and international jurisprudence, affirming new controversial boundaries of national sovereignty and constitutional identity.

In its 2016 decision (22/2016. (XII. 5.) AB decision), the Court introduced a debated definition of National Identity, limiting the effects of the EU's relocation quota provided by the Council Decision (EU) 2015/1601 of 22 September 2015⁵¹.

The Court – after recalling the Costa/Enel decision and reaffirming the independency and the autonomy of the EU legal order as well as the importance of the centrality of the constitutional dialogue within the Union – underlines the limits of the joint exercise of powers, as it is enshrined by paragraph 2 of Article E) of the Basic Law, with a comprehensive survey of the approaches taken by the Constitutional and Supreme courts of numerous States.⁵² Supporting its arguments with a plethora of rulings, the

⁵¹ For a comprehensive overview of the debate see S. Penasa, G. Romeo, *Sovereignty-based Arguments and the European Asylum System: Searching for a European Constitutional Moment?*, in 22 *Eur. Jour. Mig. and L.* 11 (2020). See also K. Kelemen, *The Hungarian Constitutional Court Enters the Dialogue on National Constitutional Identity*, in *Dir. comp.*, 2018, ; K. Kelemen, *Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System*, in *Iustus*, 2017, 23 ss., www.rivistaianus.it/numero_15-16_2017/02_Kelemen_23-33.pdf; G. Halmai, *Abuse of Constitutional Identity*, *EUI Working Papers*, 2018, me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/05/Abuse_Halmai_final.pdf.

⁵² These are the cases expressly mentioned in the Court’s reasoning: «Kingdom of Denmark: The Supreme Court, April 6, 1998, I 361/1997, 9.8; Republic of Estonia: The

Constitutional Court established that «within its own jurisdiction, ... , in exceptional cases and ultima ratio nature, i.e. while respecting the constitutional dialogue between the member states, it can examine whether the exercise of powers based on paragraph 2 of Article E) of the Basic Law violates human dignity, the essential content of other fundamental rights, or the sovereignty of Hungary (including the scope of the powers transferred by it also), and its constitutional self-identity».⁵³

At the end of the day, the comparative analysis served to underpin the Court's assertion that national constitutional Courts retain the ultimate authority to review whether the exercise of delegated powers violates fundamental rights, national sovereignty, and finally constitutional identity.

The latter, following the Court's reasoning, is not created by the Basic Law but merely recognized by it and is seen as deeply rooted in Hungary's historical constitution and legal traditions, encompassing key values and achievements that cannot be alienated even through international treaties. Immigration control, particularly the determination of population composition and the right to settle in Hungary, is directly linked to this protected constitutional self-identity, an aspect the Court deems part of the state's inalienable right to determine its territorial unity, population, form of government, and state structure⁵⁴: «it is likely that human dignity, other fundamental rights, Hungary's sovereignty (including the scope of powers transferred by it) and its self-identity based on its historical constitution will be violated as a result of the exercise of powers based on paragraph (2) of Article E) of the Basic Law».⁵⁵

Supreme Court, 12 July 2012, 3-4-1-6-12, 128, 223; French Republic: Constitutional Council, Nr. 2006-540 DC July 27, 2006, 19 and Nr. 2011-631 DC June 9, 2011, 45; Conseil d'État, February 8, 2007, Nr. 287110, Arcelor Atlantique and Lorraine Company, EuR 2008, 57, 60ff; Ireland: Supreme Court of Ireland, Crotty v. An Taoiseach, 1987, I.R.; S.P.U.C. Ireland Ltd. v. Grogan, 1989, I.R. 753; Italian Republic: Corte Costituzionale, No. 98/1965, San Michele steelworks, Eur 1966, 46; No. 183/1973, Frontini, EC 1974, 255; No. 170/1984, Granital, EuGRZ 1985, 98; No. 232/1989, Fragg; No. 168/1991; No. 117/1994, Zerini; Republic of Latvia: Satversmes tiesa, April 7, 2009, 2008-35-01, 17; Republic of Poland: Trybunał Konstytucyjny, May 11, 2005, K 18/04, 4.1., 10.2.; November 24, 2010, K 32/09, 2.1. skk.; November 16, 2011, SK 45/09, 2.4., 2.5.; Kingdom of Spain: Tribunal Constitucional, 13 December 2004, DTC 1/2004, point 2, EuR 2005, 339, 343, and 13 February 2014, STC 26/2014, point 3, HRLJ 2014, 475, 477sk; Czech Republic: Ústavní Soud, March 8, 2006, Ex. ÚS 50/04, VI.B.; May 3, 2006, eg ÚS 66/04, 53; November 26, 2008, eg ÚS 19/08, 97, 113, 196; November 3, 2009, Ex. ÚS 29/09, 110skk; January 31, 2012, eg ÚS 5/12, VII.; United Kingdom: High Court, February 18, 2002, Thoburn v. Sunderland City Council, 2002, EWHC 195, 69; UK Supreme Court, January 22, 2014, R v. The Secretary of State for Transport, 2014, UKSC 3, 79, 207; March 25, 2015 Pham v. Secretary of State for the Home Department, 2015, UKSC 19, 54, 58, 72 bis 92 V. 2 BvR 2735/14».

⁵³ Hungarian Const. Court, Ruling n. 22/2016. (XII. 5.) AB.

⁵⁴ See B. Bakó, *Challenges to EU Values in Hungary: How the European Union Misunderstood the Government of Viktor Orbán*, Abingdon, 2022, www.routledge.com/Challenges-to-EU-Values-in-Hungary-How-the-European-Union-Misunderstood-the-Government-of-Viktor-Orban/Bako/p/book/9781032311173; M. Steinbeis, *Ultra Vires Control and European Democracy*, in *Verfassungsblog*, 2021, verfassungsblog.de/ultra-vires-control-and-european-democracy/.

⁵⁵ See par. 69.

These conclusions have generated a substantial echo on the Hungarian constitutional framework. Indeed, the s.c. Seventh Amendment to the Hungarian Constitution enshrined the concept of the national identity, as it has been described by the Constitutional Court, in the new text of the Article E of the Hungarian Constitution: «With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure».

On the basis of these provisions, the Court (32/2021. (XII. 20.) AB decision) further solidified the abovementioned controversial positions in the context of a specific conflict arising from a CJEU judgment (C-808/18), which found Hungary in breach of EU law regarding asylum procedures.⁵⁶

According to the Court: «One's traditional social environment, as a natural bond determined by birth, determines the development of a person's personality, the direction and framework of his or her identity, and as such, is to be assessed in the context of the quality of human life. On the one hand, the State must refrain from interfering with the formation of an individual's identity and, on the other hand, it must ensure as part of its obligation of institutional protection that, as a result of an international commitment of the State, no act of any institution other than a Hungarian State body would implement interference in a way which the State itself is obliged to refrain from».⁵⁷ Following the Court's reasoning: «The institutional protection by the State must ensure the exercise of both component rights in respect of the persons living in the State territory of Hungary. Identity (its determining elements) can be changed through individual self-determination. However, if the content of identity is artificially and undemocratically altered by the State (or any other organisation other than the State), this may infringe both the individual's identity and his or her existing self-determination to change this. The traditional social

⁵⁶ B. Kochenov, *Limiting the Use of Constitutional Identity as a Tool of EU Law Evasion*, *Eur. J. L. Stud.* 2024, link.springer.com/article/10.1007/s40803-024-00239-y; L. Kaiser, *A New Chapter in the European Rule of Law Saga?*, *Verfassungsblog*, in *Verfassungsblog*, 04-03-2023, verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/; K. Kelemen, *A Never-Ending Story? Deciphering the Elements of Hungarian Constitutional Identity*, in *Constitutional Discourse*, 30-04-2024, constitutionaldiscourse.com/a-never-ending-story-deciphering-the-elements-of-hungarian-constitutional-identity/; M. Steinbeis, *Coping Strategies of the Hungarian Constitutional Court Since 2010*, in *Verfassungsblog*, 2022, verfassungsblog.de/coping-strategies-of-the-hungarian-constitutional-court-since-2010/; M. Bánkuti, *The Hungarian Constitutional Court and the Abuse of Constitutional Identity*, in *EUI Cadmus Repository*, 2021, cadmus.eui.eu/handle/1814/69525; T. Drinóczi, *The Hungarian Constitutional Court and European Constitutional Dialogue*, *Hungarian J. L. Stud.*, vol. 63, no. 2, 2022, 79–101, akjournals.com/view/journals/2052/63/2/article-p79.xml.

⁵⁷ See Par. 37.

environment the individual is born into and which is independent of the individual shapes the self-definition of the individual, and the self-definition of the individuals who make up society creates and then shapes the collective identity, that is, the identity of the given community and the given nation».⁵⁸ The Court recalled the former 2016 decision and - *de relato* - the already mentioned foreign jurisprudence, making an express reference to the subsequent PSPP judgment adopted by the German Federal Constitutional Court on 5th May 2020.⁵⁹

With this theoretical backdrop, the Court concluded that the exercise of the joint competence may not restrict the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure is itself part of Hungary's constitutional identity.

4. Conclusion

The Hungarian Constitutional Court's trajectory in engaging with foreign jurisprudence reflects a profound and multifaceted evolution, one that mirrors the broader political, legal, and constitutional transformations Hungary has undergone since 1990.

Initially, in the immediate post-communist era, the Court positioned itself as a pioneer of constitutional democracy, actively seeking inspiration from established liberal democracies to build a robust rights-based constitutional framework.

In this phase, the Court's openness to foreign legal experiences was not merely incidental but formed a structural element of its identity. Foreign jurisprudence, especially that of the German Federal Constitutional Court, was embraced as a normative compass guiding the interpretation of fundamental rights and the articulation of the "invisible Constitution" rooted in human dignity, freedom, and the rule of law.

This formative phase, spanning roughly from 1990 to the late 1990s, was characterized by a proactive and even enthusiastic dialogue with international constitutionalism. Foreign legal materials were employed to fill interpretative gaps, to strengthen judicial reasoning, and to align

⁵⁸ See Par. 41 and 42.

⁵⁹ For an overview see: F.C. Mayer, *The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020*, in 16 *Eur. Const. L. Rev.* 733 (2020). In this *Review* see Section *Casi e Questioni*, vol. 43, n.2, 2020: O. Chessa, *Il principio di attribuzione e le corti costituzionali nazionali. Sulla pronuncia del Bundesverfassungsgericht del 5 maggio 2020*; M. Esposito, *L'Unione Europea: dal miraggio della federazione a fini perequativi al consolidamento dell'egemonia dei "più uguali"*, A. Ferrari Zumbini, *La sentenza del Bundesverfassungsgericht del 5 maggio 2020 sulla BCE: una decisione contraddittoria*; A. Guazzarotti, *"Neutralità va cercando, ch'è sì cara"!* *Il Tribunale costituzionale tedesco contro la politicità dei programmi di quantitative easing della BCE*; F. Pedrini, *Il cortocircuito dell'interpretazione ultra vires*; M.J. Roca, *La sentencia del Tribunal Constitucional Federal Alemán sobre el Programa de Compra de Bonos por el Banco Central Europeo: el control ultra vires y la primacía del Derecho Europeo*; G. Scaccia, *Nazionalismo giudiziario e diritto dell'Unione europea: prime note alla sentenza del BVerfG sui programmi di acquisto di titoli del debito pubblico della BCE*; A. Somma, *Democrazia e mercato ai tempi del coronavirus. La Corte di Karlsruhe e la difesa a senso unico dell'ortodossia neoliberale*, www.dpceonline.it/index.php/dpceonline/issue/view/43

Hungary with the evolving European constitutional tradition, paving the way for Hungary's accession to the European Union. The comparative method adopted by the Court facilitated not only the reception of Western legal doctrines but also reinforced the legitimacy of constitutional adjudication during a delicate period of democratic consolidation.

However, from the late 1990s onward, and particularly after the political changes following the 2010 elections, a significant recalibration occurred. The Court's engagement with foreign jurisprudence became increasingly cautious, selective, and oriented towards reinforcing a sovereignist narrative. This shift corresponded with the adoption of the New Fundamental Law and subsequent constitutional amendments, which recalibrated the Court's powers and introduced a new constitutional identity discourse that emphasized historical continuity, cultural specificity, and national sovereignty.

The rise of constitutional identity as a central doctrinal element marks a watershed in this evolution. The Hungarian Constitutional Court, through landmark decisions such as 22/2016 and 32/2021, articulated a vision of constitutional self-understanding that is both dynamic and resistant to external legal influences. Constitutional identity, as defined by the Court, is not a contingent construct susceptible to international legal developments but a reflection of deep-rooted historical, cultural, and legal traditions that precede and transcend international commitments, including those arising from EU membership. By framing constitutional identity as an immutable legal fact, the Court has effectively limited the scope of supranational legal integration, asserting the primacy of national constitutional values over competing international obligations.

This doctrinal turn has profound implications. On the one hand, it underscores the importance of preserving national constitutional traditions and protecting democratic self-governance against external encroachments. On the other hand, it risks isolating the Hungarian constitutional system from the broader European constitutional dialogue and weakening the foundations of mutual trust that underpin the European legal order.

In conclusion, the evolution of the Hungarian Constitutional Court's use of foreign jurisprudence highlights the dynamic and contingent nature of constitutional interpretation in transitional societies. It reveals the Court's dual role as both a bridge-builder in the international constitutional community and a guardian of national sovereignty. The challenge ahead lies in finding a sustainable equilibrium between these competing roles: preserving the distinctiveness of the Hungarian constitutional tradition while remaining engaged in the ongoing project of transnational constitutionalism.

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