Assessing Constitutional Resilience: The Performance of the 2011 Fundamental Law in Fulfilling Constitutional Functions

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Abstract This chapter examines the resilience of the 2011 Fundamental Law through a functional analysis. For this purpose, it first presents the basic functions of modern constitutions. Among these, it deals with a regulatory function, whereby the constitution contains the main rules for the exercise of public power as well as fundamental rights. However, the paper examines constitutional functions not only in a formal sense, but within the framework of modern European constitutionalism. For this reason, it also defines the requirements for constitutional regulation, such as its stability, coherence, effectiveness, and, above all, the limitation of public power and state intervention. It also identifies the representation of national identity as a further function, i.e. the social integrative function of the constitution. The Fundamental Law is a full-fledged, modern written constitution, but has fallen far short of what was expected of it: it is 'the most flexible constitution in the world', which is burdened with many internal contradictions, and many of its provisions have remained only on paper, i.e. have not been put into practice. The authoritarian transition since 2010 and the usurpation of power by the governing parties show that it has been completely unable to limit public power, which is perhaps the most important constitutional requirement of all.

1 Introduction

In the debates that accompanied the adoption of the new constitution—the 2011 Fundamental Law in Hungary, László Trócsányi, former constitutional judge and then ambassador to Paris, said that the criticisms of the new constitution were premature. For example, when it was adopted, the 1958 French Constitution also received much criticism and the opponents of President Charles de Gaulle did not

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feel it was theirs; however, it later turned out that they could live with it and all parties accepted the state organisation of the Fifth Republic.[1] In retrospect, more than 10 years later, however, it seems that the optimism regarding the Hungarian constitution was not justified and that the situation is even more serious than it was then; not only has the political and social legitimacy of the Fundamental Law not increased, but after 12 years of operation, Hungary is perceived by some European Union (EU) institutions, the international community and a large part of academic scholarship as an autocracy, or at least as an 'illiberal' regime in which the rule of law is seriously violated and which can no longer be considered a Western-style constitutional democracy.

Today, enough time has passed (12 years and 4383 days until 1 January 2024) to evaluate the functioning and performance of the Fundamental Law. A country's constitution is the foundation of its entire legal system, which defines its framework and therefore, at least in principle, has a fundamental influence on all areas of law. It is therefore difficult to imagine a high quality legal system if the constitution is dysfunctional or unenforced, or, if it is, there is a problem with the structure of the whole constitutional order, in which there is only a sham (or nominal) constitution, which by its very nature cannot guarantee the constitutional functioning of the state in the long term. In order for the constitution to fulfil its function, it needs to be sufficiently resilient to political or legal attempts to undermine constitutional values, i.e. to violate the integrity of the constitution. Constitutional resilience is therefore, in fact, the constitution's capacity for self-defence.[2]

In the following, I will examine the performance and resilience of the 2011 Fundamental Law in the most traditional way, i.e. whether it fulfils its basic functions and meets the general requirements for constitutions. The reason for this is that over the last decade, the Hungarian constitutional system has been criticised on numerous occasions,[3] including for the weak sustainability of the Fundamental Law.[4]

A functional analysis of the Constitution can provide a good framework for meaningful debate, even among those who have different political values and have been its supporters or opponents. However, it is of course no guarantee of consensus, as opinions may differ on how the Constitution has fulfilled, or even whether it has fulfilled, its most important functions. The reason why this can still be a rational analytical framework is that there is relative consensus among constitutional scholars on the functions of constitutions.

[1] Trócsányi (2011), p. 65.

[2] Jakab (2021). See also the thematic debate on constitutional resilience, https://bitly.ws/3bwwi.

[3] See infra footnotes 44–47.

[4] E.g. Grabenwater (2018).

2 The Basic Functions of Constitutions

The general functions of constitutions, or at least part of them, are often included in their definition. It is important to note that I use the term 'constitution' in the modern sense, which appeared at the end of the eighteenth century, spread from then on and gained general acceptance in the twentieth century as the main legal set of rules for the exercise of public power and fundamental rights, as opposed to the classical notion of constitution(s), which was used to describe the organised order of all political communities.[5]

One of the fundamental purposes of modern constitutions is to establish the exercise of public power through the systematic and comprehensive regulation of its institutions and their basic functions, powers and procedures.[6] This is the case even for unwritten or historical constitutions, at least in their modern form.[7] The concept of sovereignty and the establishment of a legal system are rarely included in the core definition of constitutions, because they are regarded as fundamental features of statehood which are covered by the regulation of the exercise of public power, but they are also essential subjects of modern constitutions.

Another indispensable function of modern constitutions is the recognition and guarantee of fundamental human rights as constitutional rights, often described as regulating the relationship between the state and individuals. According to most constitutional definitions, the constitution is the highest level of regulation of these two essential elements, i.e. the exercise of public power and fundamental rights.[8]

Since constitutions are conceptually the highest source of law, all public powers and the state bodies that exercise them derive their legitimacy from the constitution, just as basic rights and liberties become fundamental rights through their recognition by the constitution and thus gain constitutional protection. This function is therefore often singled out as a 'legitimating' one. Modern constitutionalism ascribes normative value to these key regulatory functions, which impose well-defined requirements on constitutions. Some of these are formal criteria, which can be logically deduced from the very concept of the constitution, while others are substantive requirements related to the content of the regulation.

Formal requirements include the stability of the constitution.[9] Modern constitutions not only have normative force, they are also the highest legal norms, from

[5] See McIlwain (1940), Mohnhaupt and Grimm (1995).

[6] Grimm (2013), p. 103.

[7] In the words of Albert Venn Dicey, a classic of the English constitution, the constitution contains 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'. Dicey (1915), pp. 22–23.

[8] The Constitution is a set of 'rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationship between these and the public'. Finer (1979), p. 15. The French *Dictionnaire de l'Académie française* (8th ed., 2000. II.2) defines a constitution as 'the set of written or customary laws which define the form of government of a country and regulate the political rights of its citizens'.

[9] Raz (1998), p. 153; Kay (2000), p. 33; Ginsburg (2020), p. 61.

which all other laws and institutions derive their legitimacy, and therefore no other law can contradict them. Therefore, a country's constitution is usually protected by special procedural safeguards to ensure that its provisions cannot be changed unilaterally by the legislative majority of the moment, i.e. in the absence of a broad political consensus. If the constitution lays down the general framework of social coexistence, the common rules of the game if you like, it would be contrary to its purpose if it could be amended by the current majority of society (practically, by the political forces of the day) to suit their own interests. The stability of the constitution is also closely linked to the normative values of the rule of law, such as legal certainty: one can hardly trust the predictability of legal relations if even their basis, the constitution, can be changed by a simple majority in parliament.

There are no precisely definable standards for the stability of constitutions, firstly because all of them, even those which follow foreign patterns, are in a sense autochthonous legal constructs, and therefore no general lifetime valid for all countries or legal cultures can be imagined, and secondly because the adaptation of social changes is an aspect of constitution-making that is contrary to, or at least nuanced by, permanence or perpetuity.[10]

It is also a formal requirement that the constitution as a norm should form a closed logical system. This is particularly important because constitutional provisions generally have the same normative force, i.e. they are legally equivalent.[11] But the internal coherence of a constitution is also essential because the state bodies established by the constitution, precisely because of the usual procedural guarantees protecting the primacy of the constitution, do not normally have constituent power, so that it can be very difficult, if not impossible, to correct contradictions within the constitution, at least by legal means.

The most important substantive constitutional function is the limitation of public power, which primarily means the protection of individuals (and their organisations) against state interference, and the separation of power. It is also central to the modern Western concept of liberal[12] constitutionalism.[13]

[10] With the exception of the eternity clauses of some constitutions, although their actual 'eternity' is questionable both logically (it cannot be verified that they will be valid in perpetuity, of course) and historically (throughout the universal constitutional history, many legal norms, originally intended to be perpetual, have been abolished). On the relationship between eternity clauses and modern constitutionalism, see Suteu (2021).

[11] With the exception of the above mentioned eternity clauses, i.e. constitutional provisions that cannot be amended, but even beyond these, some constitutions give some of their provisions greater weight than others, which makes their amendment subject to more stringent requirements. See for example Art. 168 of the Spanish Constitution, https://bitly.ws/3bwfa.

[12] The use of the adjective 'liberal' is justified because a non-liberal conception of constitutionalism is also possible, and it can also be given a formal meaning that considers as constitutional a state in which the rules of the constitution—regardless of their content—are enforced in practice. See Tushnet (2017).

[13] McIlwain (1940), p. 24; Gordon (2002), pp. 5–7; Godden and Morison (2017); Grimm (2016), p. 22; Schütze (2019).

The constitution can only fulfil its functions of regulating public power, protecting fundamental rights and—through all these—limiting power if its provisions are also enforced in practice. The constitutional functions are not solemn declarations, but are normative in nature,[14] and even represent the highest level of legal regulation,[15] and therefore, if they are not implemented, the constitution itself loses its meaning and thus its legitimacy. The performance of constitutions is therefore determined not only by their stability but also by the extent to which they are enforced.

Another fundamental function of modern constitutions is the establishment of a relationship between the state and the people (the *demos*) who create the state, and through this, the legal articulation of national identity,[16] or, in other words, the integration of society.[17] Although this is less a constitutional function than a symbolic one, it is inevitable that it should be evaluated, as it is often identified as one of the reasons for the creation of a constitution.

Constitutions also have functions that derive from the historical-political context in which they were created. The 'constitution-making moment' is often created by socio-political needs which place specific demands on the constitution and which also have a significant influence on its content. Such special functions may include, for example, a symbolic and actual, i.e. legal break with the past, the resolution of political or armed conflicts, the abolition or replacement of a previous political and constitutional system by a new one, or, more generally, a kind of social contract or its renewal in a solemn, legal form.[18]

Of course, other classifications of constitutional functions are possible,[19] depending on the specific purpose of the constitution (for example, the establishment of a public law order for a newly created state) or the normative theory on which it is assessed (such as the improvement of democracy or the general welfare). The method used below, i.e. the assessment of constitutional performance and resilience based on the values of European constitutionalism, is not without its problems: however, this is hardly objectionable in a constitution such as the 2011 Fundamental Law of Hungary. In its introduction, it boasts that the Hungarian people 'fought in defense of Europe throughout the centuries and, by means of its ability and diligence, has contributed to the enrichment of the common European heritage'; then, it enshrines Hungary's membership of the EU, and states the principle of the separation of powers and respect for fundamental rights.

[14] Grimm (2003), p. 25; Vorländer (2012), p. 23.

[15] Hofmann (2004), p. 160.

[16] 'Constitution is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of a cultural heritage and the foundation of its expectations.' Häberle (2000), p. 79.

[17] See, for example, Detjen (2009), pp. 18–19.

[18] Heringa (2016), p. 4.

[19] See, for example, Breslin (2009); Ginsburg and Huq (2016); Horsley (2022), pp. 102–103.

3 Performance of the 2011 Fundamental Law, 2012–2023

3.1 The Regulatory Functions

The 2011 Fundamental Law is a complete, full-fledged written constitution: its scope covers all constitutional matters, including the most important issues of state sovereignty, fundamental rights, and the legal status and main rules of operation and procedure of public authorities. In some respects, there has also been some progress compared to the 1949/89 Constitution, in that, for example, the new constitutional text explicitly includes the principle of separation of powers,[20] which was previously only developed in the practice of the Hungarian Constitutional Court (HCC). However, while this was in fact only a recognition of a principle that had been in constitutional practice for two decades, the exclusion of public finance from constitutional control was a very serious step backwards, since the limitation of powers introduced in 2011 deprived the HCC of the power to review public finance laws (i.e. the budget, taxes, duties, levies and other financial laws) unless they violate the right to life and human dignity, the right to the protection of personal data, the right to freedom of conscience and religion, or the right to citizenship.[21] Public finance and economic governance are thus essentially exempted from constitutional review, notwithstanding the fact that the restriction is in principle only temporary: it lasts until the public debt exceeds half of the gross national product, which has been above 70 per cent since the introduction of the curtailment. In addition, although the scope of individual constitutional complaints has been extended, the limitation of the possibility of initiating the review procedure to the supreme state organs has significantly shifted the HCC's activity from constitutional review of legislation to the control of the judiciary.[22]

The scope of fundamental rights has been partly extended to certain 'third-generation' rights (such as prohibition of human cloning), but, at the same time, it has degraded social rights into state objectives, stating that Hungary only 'shall endeavour to provide social security to all its citizens', and that '[t]he nature and extent of social measures may be determined' by law 'in accordance with the usefulness to the community of the activity performed by the person who is the beneficiary of the social measure'.[23]

However, the 2011 Fundamental Law fulfils the basic regulatory functions expected of constitutions, apart from the only uncertainty coming from its official name ('Fundamental Law') and its references to the unwritten, historical constitution

[20] Art. C para (1) of the 1949/89 Constitution states that '[t]he functioning of the Hungarian State shall be based on the principle of the separation of powers'.

[21] Art. 37, para (4) of the 2011 Fundamental Law.

[22] Gárdos-Orosz (2012).

[23] Art. XIX paras (1) and (3) of the 2011 Fundamental Law.

effective before the Second World War,[24] which are interpreted by some as meaning that the constitution of the country is the Fundamental Law and the historical constitution together.[25] In reality, however, this inherently contradictory view[26] has no practical meaning, and even the loosest link between the two alleged forms of constitution—according to which the achievements of the historical constitution should be respected in the course of constitutional interpretation—has no meaningful impact on constitutional practice.[27]

The basic rules on the exercise of public power and fundamental rights have always remained in the 2011 Fundamental Law, although in the meantime, there has been intensive legislative activity (especially the rewriting of the so-called 'cardinal laws' governing the status of state bodies).[28] Since March 2020, extensive emergency legislation has resulted in numerous and frequent changes to the detailed rules, and, when necessary, the provisions of the 2011 Fundamental Law have always been adapted to political needs. But this brings us to the question of the stability of the Constitution.

The conservative coalition government, which won a two-thirds parliamentary majority and thus constitution-making power in the 2010 general elections, began to reform the Hungarian legal system with great impetus, amending the 1949/89 Constitution a total of 12 times between May 2010 and the end of November 2011. The constitution-making process was so urgent that even after the adoption of the new Fundamental Law in April 2011, the previous constitutional rules were changed several times (because the Fundamental Law only entered into force on 1 January 2012). The constitutional fever did not stop after the entry into force of the Fundamental Law: it has been amended 12 times as of the end of 2023, which means that the text of the Fundamental Law has been changed on average every year so far.

In addition, proposals for amendments to the 2011 Fundamental Law, when tabled by the government or government party MPs, have passed through the Hungarian National Assembly (Parliament)—which has lost its importance in recent years and resembles the modern parliaments only in appearance[29]—as quickly and

[24] The preamble of the Fundamental Law declares that '[w]e honour the achievements of our historical constitution and the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the national unity. We proclaim that protecting our identity, as it is rooted in our historical constitution, is a fundamental duty of the State. We refuse to recognise the suspension of our historical constitution that occurred on the strength of foreign occupation.' Art. R para (4) declares that '[t]he provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, with the Fundamental Law's National Commitment, and with the achievements of our historical Constitution', while para (4) states that '[e]ach state body shall be obliged to protect the constitutional identity [which is rooted in the historical constitution - the author] and the Christian culture of Hungary'.

[25] See, for example, Szájer (2014), pp. 825, 845.

[26] See Szente (2019).

[27] For more details, see Szente (2023).

[28] Jakab and Szilágyi (2015).

[29] See Szente (2020b), pp. 5–19.

smoothly as ordinary laws: for example, the Parliament has spent just over 30 h on the 12 amendments to the Fundamental Law, the same time it spent on the debates on the Fundamental Law. While in most countries, the adoption of a constitutional amendment usually takes months, and often years, in Hungary the general debate on a constitutional amendment never lasted more than one sitting day (and within that five hours), and the second readings of constitutional bills lasted between 15 min and 3 h—if indeed they took place at all, since the last seven amendments to the Fundamental Law were debated by Parliament in a procedure in which the plenary session was no longer able to hold a second reading.

Among the current 166 articles of the 2011 Fundamental Law, 88 have changed in the meantime (repealed, amended or inserted as new provisions). This means that more than half of the constitutional provisions in force have been affected by previous amendments, and the content of some provisions has changed several times: for example, Article 26 on the status and appointment of judges and the election of the President of the Hungary's Supreme Court (Curia) was amended three times in the Fourth, Seventh and Eighth Amendments. All the provisions relating to the special legal order have been changed, as have all the final provisions—while the former have been modified as a result of a conceptual change, the latter have been changed following several significant additions (the final chapter of the Fundamental Law now contains a total of 29 final and mixed provisions, instead of the original four).

In fact, on the very day the 2011 Fundamental Law entered into force, its own supplement, entitled 'Transitional Provisions', was published at the same time as it was promulgated, and the new constitution was amended three times in the first year of its existence. From the beginning, the Fundamental Law has played an instrumental role, which means that it has always been modified to suit the current interests of the governing parties in order to eliminate constitutional problems. This is illustrated, for example, by the First Amendment to the Fundamental Law, which was intended to prevent the Transitional Provisions from being reviewed by the HCC (unsuccessfully), while the Fourth Amendment inserted several legal provisions into the constitutional text that had previously been deemed unconstitutional, to eliminate constitutional concerns. The Second Amendment to the Fundamental Law never entered into force, the Fifth Amendment partially amended the Fourth, the Eighth amended the Seventh, and the Tenth partially amended the Ninth. The Eleventh Amendment to the Fundamental Law was of purely symbolic importance, with the aim of bringing back into Hungarian public law some pre-World War II names of certain public authorities.

In the famous words of Prime Minister Viktor Orbán, the adoption of the Fundamental Law created a 'granite foundation',[30] whereas the reality is that the

[30] Orbán: Gránitszilárdságú az alaptörvény [Orbán: The Fundamental Law created a granite foundation]. Mandiner, 2 January 2012, https://bitly.ws/3bwk8.

2011 Fundamental Law is 'the most flexible constitution in the world',[31] with about a third of its full text having changed since its entry into force in 2012.

The 2011 Fundamental Law is often seen as Fidesz's own 'party constitution', referring to the fact that the governing parties can shape the constitutional rules as they want, and they are clearly not afraid to use their constitution-making power. Since the formation of the second Orbán government in May 2010, the Fidesz—Hungarian Civic Alliance (Fidesz) and the Christian Democratic People's Party (KDNP) coalition has adopted a completely new constitution and amended the existing constitutional rules a total of 24 times (12 times each for the 1949/89 Constitution and the 2011 Fundamental Law), which means that between May 2010 and December 2023, it introduced a constitutional act every 6 months on average. One might think that, with unlimited constituent power and a determined political will, and in the absence of consultation with the opposition parties and professional-academic circles, the constitution-makers had sufficient opportunity to create a logically closed, uniform constitution. But this is not the case with the 2011 Fundamental Law.

Internal inconsistencies are well known, yet they have not been corrected, which says a lot about the importance attached to the 2011 Fundamental Law by those who created it. Thus, the well-known, apparent logical contradiction in which while the preamble, called the National Avowal, states that '[w]e refuse to recognize the communist constitution of 1949 and hence declare it to be invalid', one of the Final Provisions states that Parliament adopted 'the Fundamental Law according to Point *a)* of Paragraph (3) of Article 19 and to Paragraph (3) of Article 24 of Act XX of 1949'. However, a valid legal norm cannot be derived from an invalid one, which does not mean that the Fundamental Law is invalid (since a norm that has been duly adopted is not invalidated by a faulty reference), but it is a very embarrassing error, especially in the case of a constitution.

The Fourth Amendment to the Fundamental Law incorporated into the constitutional text several previously existing legal provisions that had previously been annulled by the HCC for unconstitutionality, without ensuring the internal coherence of the Fundamental Law. Thus, the provisions with which the newcomers were in conflict have remained part of the constitutional text. The purpose of this modification was to override the decisions of the HCC, and several other amendments were intended to avoid a constitutional review.

In addition, the provisions referring to the historical constitution (or its achievements) have also effectively destroyed the logical unity of the Fundamental Law. In this respect, the source of indeterminacy is not only that they are too abstract (this is also the case with many traditional constitutional principles), but also that they open the door to the infiltration of norms from extra-constitutional sources. As a consequence, the HCC often refers to the achievements of the historical constitution without clarifying what they are and how their content can be determined.

[31] Based on the data from *Oxford Constitutions of the World*, https://bitly.ws/3bwjG.

Constitutional provisions require unconditional enforcement, which cannot be offset by the fact that some provisions are enforced 'in part' or 'in some sense', nor by the fact that while some constitutional provisions cannot be enforced, others, or even most of them, are really implemented.

However, judging the practical validity of a constitution is not a simple task: it would be obvious to apply the formal assessment criterion that it is for the constitutional court (or other higher courts exercising constitutional review) to enforce the constitution, at least where there is judicial protection of the constitution. This would mean, however, that the constitution is always and fully enforced (because if it were not, the court would have already acted), which would make the very questioning of the issue meaningless. However, by the prevalence of a constitution, we do not only mean that there are no unconstitutional legal norms in force, but we also take into account its effects on society, and the practical achievement of the objectives pursued by its provisions. Beyond this, the conclusions that can be drawn from constitutional or other supreme court practice are important for scientific assessment, but they are not compelling arguments, especially in a country where the rule of law or the quality of democracy is widely questioned and where the composition of the competent court is determined by the governing parties. Hungary is a good example of this, since, despite the fact that the HCC, which is the main guardian of the Constitution, has been functioning continuously also since the adoption of the new constitution, the Fundamental Law has a very poor record in this respect: many of its provisions are not enforced at all, i.e. it can be considered a 'sham constitution'.[32]

As I have already pointed out, the Fourth Amendment to the Fundamental Law, passed in 2013, was largely adopted precisely to enshrine in the constitutional text the essential content of a number of legal provisions that had previously been repealed as unconstitutional ones, thus giving effect to the will of the legislature—as opposed to the provisions of the Fundamental Law that had been, and still are, unchanged and contrary to it.[33] Then, the so-called quota referendum initiated by the government in 2016—which proved invalid—was a textbook example of an unconstitutional popular vote.[34] The debt-ceiling rules of the Fundamental Law had no real effect; at most they were formally enforced by budgetary and other tricks, while nobody took seriously the constitutional principle of a 'balanced, transparent and sustainable management of the budget':[35] the state budget of 2023, for example, was adopted in the knowledge that many of the data on which it was based were wrong or outdated. The rules of the Fundamental Law on special legal orders did not matter when the state of emergency was proclaimed in March 2020[36] or when the

[32] See on this, Law and Versteeg (2013).

[33] Vörös (2014).

[34] The Controversial Anti-Migrant Referendum in Hungary is Invalid, 11 October 2016, https://bitly.ws/3bwnc.

[35] Art. N para (1) of the Fundamental Law.

[36] Government Decree 40/2020. (III. 11.).

Parliament, in the first enabling law,[37] spectacularly abdicating its duty to control the emergency decrees as required by the Fundamental Law, gave unlimited authorisation for government by decree.[38] Examples of constitutional provisions that are not enforced could be further listed.

In many cases, the lack of enforcement of the Fundamental Law is not apparent simply because the constitution does not have the authority to be worth invoking in political debates, or because it contains too general, abstract principles. It is difficult, for example, to take seriously the constitutional guarantees which solemnly declare that 'Hungary shall protect the freedom of scientific research,'[39] when a well-established (foreign-founded), prestigious university (the Central European University) that had been operating well for more than 25 years was driven out of the country for political reasons, the research institutions were arbitrarily taken away from the Hungarian Academy of Sciences, and most public universities were put under political control (changing the way they are maintained and the status of their teachers), and when gender studies were banned, and so on. Then, in a country of oligarchs linked to the governing parties and free transfers of state property to private individuals, arguably the most corrupt member state of the EU,[40] the constitutional principle that Hungary 'shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position' has only scant credibility.[41]

Nor can it be overlooked that, according to some EU institutions, a number of other international organisations and domestic nongovernmental organizations (NGOs), some fundamental rights (such as freedom of expression, freedom of conscience and religion, non-discrimination, the right to property, the right to social security or the right to strike) are not fully respected in Hungary and are subject to restrictions that are (would be) incompatible with the relevant provisions of the Fundamental Law.

3.2 Limitation of Public Power and Guarantee of Fundamental Rights by the Fundamental Law

It is hardly an excessive requirement for a twenty-first century constitution to meet the substantive requirements of modern constitutionalism. Given that Hungary is located in the centre of Europe and is a member of European integration organisations (the EU and the Council of Europe), it is also obvious that in this respect it is a matter of asserting the values of European constitutionalism.

[37] Act XII of 2020 on the Containment of the Coronavirus.

[38] On this, see Szente (2020a); Győry and Weinberg (2020); this book's introductory chapter by Fruzsina Gárdos-Orosz and Nóra Bán-Forgács.

[39] Art. X para (1) of the Fundamental Law.

[40] Transparency International: Corruption Perceptions Index 2022, https://bitly.ws/zC2G.

[41] Art. M para (2) of the Fundamental Law.

Nevertheless, the 2011 Fundamental Law contains some provisions that are contrary to these values, or at least not in line with the direction of European development, and several amendments also introduced such elements. These include the provision already mentioned, which removed public finances from constitutional review, but reference should also be made here to the constitutional possibility of life imprisonment without parole.[42] The exclusionary notions of family and marriage[43] constitute a constitutional prohibition on the recognition of same-sex marriage, which is incompatible with the principle of non-discrimination on grounds of sexual orientation, even though this institution is not (yet) recognised in the legal systems of several other EU Member States.

Apart from this, the 2011 Fundamental Law is in fact very similar to the previous constitutional arrangements. If a reader unfamiliar with the Hungarian political and legal context were to compare the previous constitutional text with the new one that replaced it, he or she might be surprised that it was necessary to adopt a new constitution, since neither the system of separation of powers nor the content of fundamental rights and the way in which they can be restricted had changed to such a significant extent that, say, a constitutional revision would not have made it possible to implement the changes intended by the constitution-maker.

However, despite the fact that the 2011 Fundamental Law recognises a number of institutions whose function is to counterbalance or control other branches of power, in practice the restriction of executive power is almost non-existent: Hungary can no longer be considered a Western-style constitutional democracy, which was the unanimous goal of democratic parties and movements during the process of regime change at the turn of the 1980s and 1990s. This is reflected in the EU proceedings against Hungary for systemic threats to the rule of law,[44] comparative studies by

[42] Art. IV para (2) of the Fundamental Law.

[43] Art. L para (1) of the Fundamental Law.

[44] In September 2018, at the initiative of the European Parliament, the so-called Article 7 procedure was launched against Hungary to determine whether there is a systemic threat to the rule of law in the country. European Parliament, P8_TA-PROV(2018)0340, The Situation in Hungary. European Parliament resolution of 12 Sept. 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL), https://bitly.ws/3bwon. On 22 April 2022, the European Commission initiated the so-called conditionality mechanism procedure, which sought to have the Council suspend part of the EU funds due to Hungary in order to protect the EU budget. As a result, on 16 December 2022, the Council decided to freeze €6.3 billion from the Cohesion Fund and the so-called Recovery and Resilience Fund (although formally for separate reasons, but essentially both for rule of law concerns). See Council Decision 2022/2506 of 15 December 2022, https://bitly.ws/3bwov.

independent international organisations,[45] as well as in the research findings of the domestic[46] and international[47] professional and academic community.

The separation of powers provided for in the 2011 Fundamental Law is only formally enforced, firstly because politically based organisations have no real autonomy and, consequently, they have no independent policy-making capacity, and secondly because non-politically based public authorities are not a counterweight to the executive, but serve it: the leadership of the HCC, the Curia, the National Office of Judiciary, the Public Prosecutor's Office, and the State Audit Office are filled with party soldiers or other people loyal to Fidesz, the major governing party; the National Election Commission, and the position of the Commissioner for Fundamental Rights are under political patronage; and the autonomous regulatory bodies also operate under direct political control.

The above-mentioned restrictions on the exercise of fundamental rights also show that the Fundamental Law is not capable of imposing limits on the government and its majority in Parliament, but the same is also shown by the special legal order that has been in place for almost 4 years (with the exception of a short period), as noted above.

Hungary has become a world-renowned example of a modern, twenty-first century autocracy[48]; just as it was a forerunner of the democratic transition in 1988–1989, it has been the pioneer of the authoritarian transition since 2010. And the Fundamental Law has not been able to prevent this—although the coalition

[45] According to Freedom House's time-series analysis, the level of democracy in Hungary has steadily deteriorated over the last 10 years, and the country is no longer a democracy, but a 'hybrid' regime, and all Balkan countries except Kosovo and Bosnia and Herzegovina are more democratic than Hungary (according to 2023 data), https://bitly.ws/3bwqt. The same trend is shown by the World Justice Project's Rule of Law Index, which ranks Hungary 72nd out of 142 countries in 2023, the lowest in its region, https://bitly.ws/3bwqh. Hungary is also the worst performer in the EU in terms of the rule of law, according to World Economics, https://bitly.ws/3bwqc. According to Reporters Without Borders, Hungary has the most restricted press freedom in the EU, ranking 72nd out of 180 countries in the World Press Freedom Index, see https://rsf.org/en/index. Hungary has received similar criticisms from other professional organisations, see for example Centre for Media Pluralism and Media Freedom and Robert Schuman Centre (EUI), Monitoring Media Pluralism in the Digital Era. European University Institute, San Domenico de Fiesole, 2022, https://bitly.ws/3bwpL; International Press Institute, Mission Report: Media Freedom in Hungary Ahead of 2022 Election, https://bitly.ws/3bwq6. According to Transparency International's latest Corruption Perceptions Index (CPI) 2022, Hungary is the most corrupt country in the European Union, ranking 77th out of 180 countries in a tie on the list of the least corrupt countries, https://bitly.ws/zC2G. The most recent report by Amnesty International Report 2022/23: The state of the world's human rights (https://bitly.ws/3bwKG) and the US State Department's 2022 Country Reports on Human Rights Practices: Hungary (https://bitly.ws/3apVL) have also made a number of criticisms of Hungary's record on fundamental rights.

[46] See, for example, Kovács and Tóth (2011), Tóth (2012), Chronowski and Varju (2015), Halmai (2018), Szente (2017), Szente (2022), Varju et al. (2019).

[47] Among the vast literature, see, for example, Landau (2013), Bogaards (2018), Castillo-Ortiz (2019), Bugarič (2019), Fournier (2019), Pinelli (2015), Drinóczi and Bień-Kacała (2019), Kelemen and Pech (2019).

[48] See, for example, Pichl (2019), Bozóki (2022), Rupnik (2023).

government of the Fidesz and the KDNP and its MPs probably did not intend it to play this role, as demonstrated by the unilateral constitution-making and its amendments that have been made to serve current political interests.

Since the 2011 Fundamental Law was adopted, it has not been a limit on public power, but a tool and legitimizer of its expropriation and abuse.

3.3 The Fundamental Law as an Expression of National Identity

As far as the symbolic function of representing and strengthening the common elements of national identity is concerned, the Fundamental Law started with a handicap that is difficult to remedy afterwards. The unilateral constitution-making process and the failure to adopt the new constitutional text by referendum (although a constitutional referendum could have compensated to some extent for the one-sided nature of the constitution-making process) meant that opposition parties and voters were not in any way involved in the constitutional moment, which would have been all the more important given that there was no consensus or even a palpable social demand for the need to replace the previous Constitution. As is often said, a weak start was followed by a sharp decline: successive amendments, without consultation, and always serving current political interests, showed that there was no intention to strengthen the common, national character of the Fundamental Law.[49]

Its highly ideological nature, which was only reinforced by the amendments, also precluded the Fundamental Law from having any identity-building function at the societal level, as the governing parties asserted their political interests and ideological values even on divisive ideological or moral issues such as Christianity, or the concepts of family and marriage. Moreover, the reality of many of these values or propositions is highly contested: for example, the written form of the Fundamental Law is, in itself and in many of its fundamental features, the antithesis of the historical constitution, the constitutional identity based on it is anachronistic, just as the making of the defence of Christian culture the duty of all state bodies (at the expense of the state's ideological neutrality) is particularly unjustified in a country where Christians are in the minority[50] (and would not be justified even if they were in the majority). And after the opposition parties often voiced constitutionally absurd ideas for the abolition of the Fundamental Law after a possible electoral success in the run-up to the 2022 parliamentary elections, it is hard to imagine that a political consensus on this constitution can emerge between the different sides of the party structure.

[49] Várnay (2022).

[50] Hungarian Central Statistical Office: Final data 2022—Main population characteristics (national and regional data), https://bitly.ws/3bwvG.

4 Conclusion

While it seems obvious that the performance of the 2011 Fundamental Law should be judged on the basis of how it has fulfilled its basic constitutional functions, there may obviously be other criteria for evaluation. The judgement of the success of a constitution also depends on whether it is an internal (measured against the intentions of the drafters) or external (of those affected by the constitution) evaluation[51] and the evaluators' own motivations are also relevant. There are, for example, interpretations of the history and achievements of the Fundamental Law that are quite different from the above,[52] which describe the period since its adoption as a success story. There is no doubt that the Fundamental Law can be considered a great success by those in government and their supporters, as it provides a stable framework for government that is able to implement its policies without hindrance.

However, this is not the stability of a constitutional system that operates on the basis of principles recognised in the Fundamental Law: based on the above analysis, the 2011 Fundamental Law is rather a sham constitution of a modern, twenty-first century autocracy, which maintains the appearance of democracy and the rule of law, but is unable to ensure their enforcement, just as it was unable to prevent the authoritarian transition of the Hungarian constitutional and political system. Therefore, it is very difficult to imagine that a Western-type constitutional democracy and the rule of law could be restored in Hungary on the basis of the Fundamental Law, or at least without its comprehensive revision.

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[51] Ginsburg and Huq (2016), pp. 6–10.

[52] Csink et al. (2012), Trócsányi (2016), Varga and Mázi (2022).

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