Comparative analysis of qualified law: France, Spain and Hungary

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Submitted to

Central European University

Department of Legal Studies

In partial fulfillment of the requirements for the degree of LLM in Comparative Constitutional Law

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Budapest, Hungary

2015

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Abstract

During the last decades, several countries have entrenched a special subcategory of law, which is adopted by stricter procedural rules, than the requirements of the ordinary legislative process. These laws are enacted by qualified majority, by the consent of the two chambers of the legislation, they are subject to mandatory constitutional review before their promulgation, or additional safeguards are implemented in the ordinary legislative process. In this study, I compare the experiences of three legal systems, France, Spain, and Hungary, which provide three different frameworks of qualified law. My aim is to identify the most contested issues from the legal nature of qualified laws, and to seek the proper solutions of these issues, as well as an ideal model of qualified law.

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Introduction

As a preliminary consideration, I will identify, what I understand under the term qualified law. Different countries have constituted diverse concepts of qualified law, but we could outline the general content of this notion on the basis of national constitutions. Qualified law is a special category of statutes with clear constitutional background, which covers certain domain of crucial subject matters, and which is adopted with stricter procedural rules, than the ordinary legislative process.[1]

Several expressions are used for the identification of qualified laws in the national legal instruments. These denominations shows the key functions of qualified laws, which are not only constitutional, but also political, historical, and have a clear sovereignty aspect also. Organic law appears in the French,[2] and the Spanish[3] Constitution, this terminology focuses on the constitutional role of these texts. In Spain, these laws are part of the constitutional concept (constitutional bloc), and in most of the countries concerned, they are invoked during the constitutional review of ordinary laws.[4] The name of statutes with constitutional force was in force in Hungary after the fall of the communist regime, and it was considered that qualified laws has the same legal value as constitutional provisions. The expression of „law adopted by two-third majority" was the common language of the Hungarian public discussion between 1990 and 2011. This approach referred to the political aspect of this concept: a wide consent was required from the deputies to enact a qualified law, the simple majority was not sufficient. The

[1] *Camby* Jean-Pierre [1998]: Quarante ans de lois organiques. (Fourty years of organic laws). Revue de droit publique. 1998. 5-6. ed. p.: 1686-1698.; *Jakab* András – *Szilágyi* Emese [2014]: Sarkalatos törvények a Magyar jogrendszerben. (Cardinal laws in the Hungarian Legal System.) Új Magyar Közigazgatás, 7/2014., 3. ed., p. 96-110; *Avril* Pierre - *Gicquel* Jean [2014]: Droit parlamentaire (Parliamentary law). Dalloz, [ISBN-102275041516], p. 267-307.

[2] art. 46. of the French Constitution of 4 October 1958

[3] art. 81-1 of the Spanish Constitution

[4] N° 66-28, DC du 8 juillet 1966 (Rec., p. 15)., *Troper* [2012],. Cited above, p. 346.

new Fundamental Law of Hungary have modified the terminology, and constituted the category of cardinal laws,[5], with mostly similar content, as its predecessor, the ”laws adopted by two-third majority”. This symbolic step aimed to strengthen the historical rhetoric of the Fundamental Law.[6]

France, Spain and Hungary represents three main models of qualified law. However, the issue of qualified law concerns not only the three abovementioned countries, but a huge number of jurisdictions around the word. The modern history of qualified laws dated back to 1958, with the Constitution of the Fifth Republic of France.[7] After the decolonization of Africa, from the inspiration of the French model, numerous African countries from the francophone legal family,[8] accepted this legal solution, currently, the Constitution of twenty-one African countries contains the category of organic law such as Algeria,[9] Senegal,[10] or Tunisia.[11] The second wave of the spread of qualified law started after the fall of the authoritarian regime in Spain and Portugal:[12] qualified law was implemented in both constitutions, and later, from that legal family, several Latin-American countries followed this sample, like Ecuador,[13] or Venezuela.[14] Finally, as the third stage of spread of qualified law, this framework was added to the Hungarian, Romanian,[15] and Moldovan[16] constitutional system after the democratic transition.

[5] art. T. of the Fundamental Law of Hungary

6 *Küpper* Herbert [2014]: A kétharmados/sarkalatos törvények jelensége a magyar jogrendszerben. (The phenomena of cardinal laws in the Hungarian legal system) MTA Law Working Papers 2014/46. p. 2-5.

[7] art. 46. of the French Constitution of 4 October 1958.

[8] *David* René [1964]: Les grands systemes de droit contemporains, (The major contemporary systems of law), Dalloz, Paris, [ISBN 978-2247013791], p. 630.

[9] art. 123. of the Constitution of Algeria

[10] art. 78. of the Constitution of Senegal

[11] art. 65. of the Constitution of Tunisia

[12] art. 136. (3) of the Constitution of Portugal

[13] art. 133 of the Constitution of Ecuador

[14] art. 203. of the Constitution of Venezuela

[15] art. 73. of the Constitution of Romania

[16] The Constitution of Moldova, (VII. 29. of 1994) art. 61. (2), art. 63. (1) and (3), art. 70. (2), art. 72.(1), (3) and (4), art. 74. (1), 78art. . (2), art. 80. (3), art. 97, art. 99. (2), art. 108. (2), art. 111. (1) and (2), art. 115. (4), art. 133. (5)

Moreover, some former member states of the Soviet Union have also codified a concept of qualified law, but these initiatives have been repealed.

The foregoing considerations give us some sense of the main constitutional issues, raised by the concept of qualified law. Each country have applied this solution to promote a clear constitutional aim, therefore, in the first chapter, I will compare the historical background of the three emerges. The scope of qualified law differs significantly from country to country, consequently, the in the second chapter, I will outline the scope of ordinary and qualified law in each country, and I will argue for a narrower scope of qualified law. Furthermore, qualified law may have a special position in the hierarchy of norms, somewhere between statutory and the constitutional level, so chapter three will cover this issue.[17] I will concentrate especially on the level of precision of constitutional articles in this regard. Then, the practical impact of this concept on the constitutional system and political configuration shall be taken into consideration: so I will deal with the separation of powers perspective of qualified laws as the fourth chapter. From this perspective, I have two main points: the neglect of two-third majority, and the mandatory a priory review. As the main outcome, certain points will be highlighted for a potential constitution-drafting process.

[17] *Troper* Michel - *Chagnollaud* Dominique (ed.),[2012]: Traite international de droit constitutionnel (International treaty of constitutional law), vol. 1. Paris: Dalloz, 2012, p. 340.

1. Qualified law in national constitutions

Introduction

The extent of qualified domain is mostly determined by historical circumstances of constitution drafting, therefore, historical perspectives give us some sense of the original intent of introduction of qualified law, and of the functions which were assigned to qualified law. The function is the primary factor which determine the scope, as well as the legal value of qualified law. This comparison will clarify some connection between particular circumstances, and codified models, and provide some points which shall be kept as a background for the purpose of further analysis.

1.1. Historical references

The conceptualization of a special subcategory of significant laws dated back to the eighteenth century, when the jurisprudence of certain countries made a distinction between legal texts, which had constitutional force, and than ordinary laws. This distinction had still clear influence on the experts of the first wave of constitution-making. The British constitutional framework has been distinguished a more or less cohesive list of statutes, which have been considered as constitutional documents.[18] These laws were not adopted by exceptional procedural rules, but the additional legal value, which were conferred upon them by the judiciary and the legal scholars have

[18] *Leyland* Peter [2012]: The constitution of the United Kingdom: a contextual analysis (Oxford; Portland, Or., Hart Publishing, 2012), p. 25-42.

provided qualified character for them. This example also demonstrates, that qualified laws are not always determined by constitutional articles.

During the nineteenth century, the idea of qualified law was almost neglected, we can mention as a lone example, that after the fall of Napoleon III. in France, instead of codifying a new Constitution, due to the lack of consent, three organic laws were enacted, which had temporal character. After having realized, that the cooperation with Bourbons and the restoration of the monarchy is impossible, these organic laws had constitutional force in the legal practice.[19] In the meantime, the jurisprudence also dealt with the political necessity of qualified law.[20]

1.2. The historical background of qualified law in France

Firstly, since France had consistently a number of qualified norms even at the constitutional level,[21] not surprisingly, this country was the first which incorporated the concept of qualified law in its constitutional system in 1958. Organic law had been expected to be a proper instrument to promote the aims of the framers to weaken the Parliament and to rebalance separation of powers. De Gaulle had at least four considerations for playing down the legislature. Firstly, the Fourth Republic was suffered from a very serious degree of instability: governments were not able to survive even a year.[22] It was generally considered, that the over weakness of the government was the main reason of this discrepancy,

[19] *Le Pourhiet* Anne-Marie [2007]: Droit constitutionnel. (Constitutional law) Paris : Economica, p. 233-243.
[20] *Hauriou* Maurice [1918]: Principes du droit public (An interpretation of principles of Public Law), Harvard Law Review, volume 31. p. 813-821.
[21] *Camby* [1998]: Cited above, p. 1686.
[22] *Debré* Michel [1959]: La nouvelle Constitution (The new constitution). In: Revue française de science politique, 9e année, n°1, 1959. p. 7.

consequently, the legislative branch had too broad margin of movement. De Gaulle and his colleagues intended to reduce the decisive role of the Parliament, accordingly, the distribution of public power was reconsidered in favour of the executive: Parliament would not have unlimited power to determine the organisation of state, the executive branch would have wider competences in these fields.[23]

Secondly, the significant laws were modified too frequently during the Fourth Republic, in light of the preferences of the actual parliamentarian majority. We have to take into consideration that the composition of the legislation changed rapidly, and there were not any safeguard on the stability of norms. Owing to the "rationalisation of the parliamentarism",[24] certain subject matters would be protected from the unlimited power of the Parliament, the basic rules of the organisation of state would be not subject to actual political considerations.

Thirdly, the original constitutional framework of the Fifth Republic focused on institutional issues, the constitutional text do not contain any catalogue of fundamental rights.[25] This is the main reason, that the French model of qualified law is applied only in the field of the organisation of state fundamental rights are not covered by this concept. The founders of the Fifth Republic wanted to create a safeguard only for the basic institutions of the state, but the framers were not interested in other possible fields of introduction, such as fundamental rights.

[23] *Blacher* Philippe [2012]: Le Parlement en France (The Parliament in France) - Etude (broché). Paru en 08/2012. p. 11-23.
[24] *Ardant* Philippe –*Mathieu* Bertrand [2014]: Droit constitutionnel et institutions politiques. (Constitutional law and political institutions) 26e Édition. p. 344-345.
[25] *Troper* Michel [2008]: "Constitutional Law", in George *Berman* & Etienne *Picard* (eds.), Introduction to French Law, 2008, Kluwer, p. 13. 1-34.

Fourthly, as an implicit aspect, we shall mention the fear from the dictatorship, which was experienced during the Second World War, by the Vichy regime. Organic laws were able not only to protect the democracy from instability, but also exclude the future chances of an authoritarian regime.

The original model of organic law was slightly modified by constitutional amendments. To set an example, the organic laws related to the Senate shall be enacted with identical terms by the two chambers. This category was created for preventing the National Assembly to have the final word from the status of the Senate. This compromise was entrenched in a very special political situation: French-based EU citizens were permitted to participate in local elections, but they were prevented from voting in the elections of the Senate.[26]

1.3. The historical background of qualified law in Spain

Organic laws were added to the Spanish constitutional system by the Constitution of 1978, after the fall of the Franco regime, as part of the democratic transition of the country. Despite the clear French influence, the historical background of the constitution-drafting process was completely different, than in France. Spain had lack of democratic traditions, the two previous Spanish republics had very short life, these regimes failed to gain stability, and to create efficient mechanisms to prevent authoritarian aspirations.[27]

[26] Constitutional amendment on 25th June of 1992.
[27] *Comella* Victor Ferreres [2013]: The Framing of the Spanish Constitution, in V. Comella: XXX (2013) p. 4-34

Moreover, a remarkable degree of uncertainty surrounded the transition: initially, it was very questionable, whether the new king was engaged to democratic processes, or try to maintain some sort of dictatorship. Regarding these circumstances, the drafters sought for such solutions, which were able to promote the self-defence of the democratic system. Indeed, the primary purpose of the framers was the emerge of democratic safeguards, and organic law was one of them. Due to the numerous parties,[28] and ethnicities,[29] the Spanish political life was very fragmented, thus, wide consent was essential to outline the new structure and to maintain the integrity of the country.[30] Despite the clear French influence,[31] the requirements of a democratic transition, the huge fear from authoritarian tendencies, the protection of integrity, and the demands of autonomous regions explain, that the scope of Spanish organic law is significantly broader, than its French counterpart as will be demonstrated later.

1.4. The historical background of qualified law in Hungary

The Hungarian example mixes the elements of the French and the Spanish models. On the one hand, similarly to the French model, historical inspirations were important factors to accept this idea. The concept of cardinal laws came from the medieval centuries, and it was the integral part of the historical constitution until the end of the

[28] *Bonime – Blanc* Andrea [2013]: Constitution Making and Democratization (2013), p. 200.
[29] *Conversi* Daniele [2002]: The Smooth Transition (2002) National Identities, Vol. 4, No. 3, 2002. p. 223-244.
[30] *Conversi* Daniele [2002]: cited above, pp. 230.
[31] *Troper* [2012]: Cited above, p. 344.

Second World War.[32] For the purpose of the resistance of estates against the absolutist efforts of the Habsburg dynasty, a more or less exhaustive list of cardinal laws were established, and this legal framework was referred as the historical Constitution of the country.[33] This abstraction was clearly influenced by the English constitutional development.[34]

On the other hand, modern Hungarian qualified laws were created to ensure the peaceful and continuous change of the political system and to prevent the revival of dictatorship. Some authors argued for the significance of the French influence[35,] while others rejected the migration of a constitutional idea, and considered the national traditions as primary factor.[36]

Nevertheless, Hungary has a special characteristic in this regard: the country have applied, more concepts of qualified law. At the moment of the transition (the summer and autumn of 1989), both the communist government and the opposition wanted to reduce the fear from future uncertainty with the help of qualified majority. This solution would ensure the participation of all relevant political parties on the decisions from fundamental rights, and basic institutional frameworks. What is more, the change of the political configuration would have require, several constitutional amendments, but only some of these amendments were prepared and enacted in the autumn of the year. The

[32] *Széchenyi* István [1864]: A sarkalatos törvények és a Magyar közjog fejlődése 1848-ig. (The cardinal laws of Hungary and the development of public law until 1848.) Eggenberger Ferdinánd Akad. Press. Pest. p. 168.

[33] *Hajnóczy* József [1791]: Magyarország Országgyűléséről. (Public law review from the organisation of the National Assembly of Hungary) In: *Hajnóczy* József közjogi-politikai munkái. (Studies of József *Hajnóczy* from public law and politics) Akadémiai Kiadó, Budapest 1958, p. 236-240.

[34] *Kukorelli* István (ed.) [2002]: Alkotmánytan. (Constitutional law.) OSIRIS, Budapest, 2002. p. 31.

[35]*Trócsányi* László [2014]: Alaptanok (Basic studies) In: *Trócsányi* László – *Schanda* Balázs [2014]: Bevezetés az alkotmányjogba. Az Alaptörvény és Magyarország alkotmányos intézményei. (Introduction to constitutional law. The Fundamental Law and the constitutional institutions of Hungary.) HVG ORAC, Budapest [ISBN 978-963-258-253-5], p. 55.

[36] *Jakab* András [2009]: A kétharmados törvények egyes problémái az Alkotmányban (The implementation of qualified laws in the Constitution) Új Magyar Közigazgatás. (New Hungarian Administration.) 2009/ed. 10-11. p. 38.

inception of laws with constitutional force[37] with an extremely broad extent[38] provided the drafters the possibility to adopt the new quasi constitutional rules continuously during the sessions of the Parliament. Accordingly, the Constitution was amended on the basis of the compromise of the government and the opposition,[39] and the scope of qualified majority was limited to an enumerated list of subject matters. Instead of requiring two-third consent of all deputies, the two-third of the representatives who were present was prescribed for most cases.[40]

This terminology was repealed in 2012. by the Fundamental Law of Hungary, which brought the terminology of cardinal law to life again.[41] The main purpose of the emerge of qualified law to the Fundamental Law was to prevent future governments from amending certain rules of the constitutional framework. The scope of qualified law was also modified: the fundamental rights were removed from qualified matters, but the institutional aspect has been reinforced. The source of qualified majority is also different: in addition to the constitutional background, a cardinal clause was added to each statute, which contains cardinal provisions.[42] These clauses enumerate explicitly, which provisions of that particular statute fall within the cardinal domain. These clauses are enacted by simple majority, and they are subject to constitutional review.

An other phenomena in light of subsequent developments is the reduced role of qualified majority as a safeguard. Since the government has currently two-third

[37] act XXXI. of 1989. art. 8.

[38] *Kilényi* Géza [1994]: Az alkotmányozási folyamat és a kétharmados törvények. (The Constitution-drafting process and qualified laws.) Jogtudományi Szemle, 1994. ed. 5. p. 201-209.

[39] *Bozóki* András (ed.) [1999]: The Roundtable Talks of 1989: The Genesis of Hungarian Democracy (2002), Central European University Press, [ISBN 963-9241-21-0], p. 2478.; *Elster* Jon – *Offe* Claus-*Preuss* Ulrich: Constitutional Politics in Eastern Europe (1998) p. 63-108.

[40] act. XL. of 1990.

[41] art. T. of the Fundamental Law of Hungary

[42] *Barna* Dániel – *Szentgáli-Tóth* Boldizsár [2013]: Stabilitás vagy Parlamentarizmus? – A sarkalatos törvényekkel kapcsolatos egyes jogalkotási problémák. (Stability or parliamentarism. Current issues from law-making.) Ars Boni Law Review, 14th February of 2013., link. Accessed: 28th February 2015. http://www.arsboni.hu/barnaszentg.html

majority, it has the possibility to modify unilaterally cardinal laws or even the constitutional provisions from the scope of cardinal domain. For instance, the scope of qualified law has been modified in relation with the organisation of churches twice, on the basis of direct political considerations.[43]

Conclusion

In light of the historical background, it shall be noted that the three compared countries demonstrate the three main categories of countries which have accepted the concept of qualified law. France have first explored the idea for the modern era, and it has been used for several purposes, but the basic consideration was to seek stability, to prevent dictatorship on the one hand, and to exclude over flexibility on the other hand, in other words, to weaken Parliament.[44] Spain and Portugal, and the Latin-American followers, sought an instrument to give further protection to the basic frameworks and principles of democracy, consequently the intent was the reinforcement of the legislature. In Hungary, historical considerations and to safeguard the peaceful transition were the two main original functions of qualified law. It is clear from the historical analysis that every model of qualified statute is influenced heavily by the French concept, and the maintenance of peace was always a crucial consideration. With this background, the next chapter will demonstrate, how the scope of qualified law is determined by the historical circumstances.

[43] art. 4. of the Fourth Amendment of the Fundamental Law of Hungary, art. 1. of the Fifth Amendment of the Fundamental Law of Hungary
[44] *Avril* [2014], Cited above,p. 270.

2. The scope of qualified laws

Introduction

The scope of qualified law has two aspect:

1. which subject matters are covered by this requirement;
2. What are those details of a qualified subject matter, which shall be regulated under the stricter procedural rules?

In this chapter, I will focus on the comparison of the first perspective. The second point is also a proper ground of comparison, but it could be the object of a separate study.

2.1. The scope of qualified law in France

In France, most of the organic laws cover institutional fields: inter alia, the functioning of the Parliament,[45] the status of the members of the judiciary[46], the status of the Constitutional Council,[47] the functioning of the Economic, Social and Environmental Council,[48] the powers and actions of the Defender of Rights.[49] Moreover, the limitation of sovereignty of France also falls under the scope of organic law. The most conspicuous phenomena here is the almost exclusive dominance of the institutional aspect. Since fundamental rights were not included in the original framework of the Constitution of the Fifth Republic, they are almost ineligible to fall within the scope of organic law. Since 1958, the scope of organic law was slightly extended by

[45] art. 25. sec. 1. of the French Constitution of 4 October 1958
[46] art. 64. sec. 3. of the French Constitution of 4 October 1958
[47] art. 63. of the French Constitution of 4 October 1958
[48] art. 71. of the French Constitution of 4 October 1958
[49] art. 71-1 sec. 3. of the French Constitution of 4 October 1958

constitutional amendments, for instance, the defender of rights was referred to the qualified domain in 2008.

The organic character within the practice of the Constitutional Council is related to particular provisions and subject matters rather than certain laws, which regulates organic subject matters.[50] As a consequence, there are several statutes, which contains organic as well as ordinary provisions. Accordingly, in case of legal doubt, it is the task of the Constitutional Council to determine the scope of ordinary and organic law even within the same legal text. What is more, the scope of organic law is not only a technical circle of laws, but it has also strong constitutional protection, with the help of the notion of organic character.[51] Each law shall provide explicitly its character; organic laws may contain ordinary provisions, but this dispositions shall be declassified;[52] by contrast, organic provisions shall not be placed within ordinary laws.[53] This ambiguity shows that despite the primary role of principle of competence, some hierarchic elements are not alien from the relationship between organic and ordinary laws in France.

2.2. The scope of qualified law in Spain

The Spanish structure differs significantly from the French approach. A separate article determines the two main areas of organic law: the statutes of the autonomic communities, and the fundamental rights and freedoms.[54] Apart from this, several articles of the Spanish Constitution prescribe organic law on further institutional

[50] *Camby* [1998]: cited above, p. 1690.
[51] n° 84-177 DC du 30 aout 1984
[52] 75-62 DC du 28 janvier 1976, 87-228 DC du 26 juin 1987, 88-242 DC du 10 mars 1988
[53] 86-217 DC du 18 septembre 1986
[54] art. 81-1 of the Constitution of Spain

matters: for instance, the organisation of military forces[55], the succession of the throne[56], the referendum[57], or the organisation of the judiciary[58], and the functioning and organisation of the Constitutional Tribunal[59]. Accordingly, the scope of Spanish Organic Law covers two main fields: fundamental rights, and the most important institutional aspect, as the Spanish Constitutional Court have identified. The institutional framework is based on the statutes of autonomous communities, however, other fields are also crucial.

An organic law has been covered also the accession of Spain to the European Union,[60] and organic law is also required for the limitation of the sovereignty of Spain in favour of international organisations[61]. It shall be noted here, that the limitation on sovereignty is a qualified subject matter in almost all countries at least qualified majority is required even if the concept of qualified law has not been implemented in that country[62]. Going back to Spain, there is some sort of balance between the fundamental right, and the institutional aspect of organic law, the scope of qualified law is wider in Spain, as in France.

Regarding the extent of organic matters, the Spanish model is also based on particular matters, prescribed by the Constitution. For instance, in this regard, fundamental rights are exclusively those, which are regulated by art. 15.-29. of the Spanish Constitution.[63] Since the Spanish Constitution outlines the scope of qualified law with very broad terms, the main task of the Constitutional Tribunal is to give a rational interpretation in

[55] art. 8. of the Spanish Constitution
[56] art. 57. (5) of the Spanish Constitution
[57] art. 93. of the Spanish Constitution
[58] art. 122. (1) of the Spanish Constitution
[59] art. 65. of the Spanish Constitution
[60] *Iliopoulos-Strangas* Julia. [2007]. Cours supremes nationales et cours européennes: concurrence ou collaboration? In memoriam Louis Favoreu. Bruylant. p. 153.
[61] art. 104. par. 1. of the Spanish Constitution
[62] art. 93. of the Constitution of Norway; art. 90. (1) of the Constitution of Poland
[63] SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2).

this regard. Within the practice of the Spanish Constitutional Court, the key term is not the organic character, or essential content of a subject, but the reserved constitutional domain for organic law.[64] If an ordinary law intervene to the organic domain, it would be strike down by the Constitutional Tribunal.

2.3. The scope of qualified law in Hungary

Hungary provides us again a special case from a qualified law perspective: the scope of qualified majority has been modified continuously since 1989. The laws with constitutional force covered all norms, which affected fundamental rights and freedoms[65], and it was also extended to an exhaustive list of institutional fields. After the compromise between the government and the opposition in the spring of 1990, the open-ended character of the enumeration of qualified subject matters was abolished, and instead of the phrase of „all norms which affects fundamental rights and freedoms", a closed list of fundamental rights, which are protected by two-third majority was given with aproximetely thirty subject matters.

Another characteristic of the Hungarian development is the changing role of qualified laws in the field of fundamental rights. After 1990, the institutional and the right protection functions of qualified laws were distinguished by the Constitutional Court,[66] because most of the qualified subject matters were selected from these fields. The Constitutional Court used the framework of essential content to outline the scope of qualified majority, the limitation of these aspects of fundamental rights were subject to

[64] JCC no. 236-2007.
[65] art. 8. (2) of the Act XXXI. of 1989.
[66] 14/B/2002 Decision of the Hungarian Constitutional Court

qualified majority.[67] To set an example, the limitation on the freedom of religion fall under the fundamental rights aspect, while the organisation of churches is covered by the institutional field. The Constitutional Court also distinguished ordinary and qualified provisions within the same legal text. For instance, the body found, that only certain provisions of the act on police forces fall under the qualified majority requirement.[68] Moreover, the Constitutional Court made clear, that the competences of the institutions concerned shall not be covered by qualified laws.[69] During the following two decades, the scope of qualified law was slowly en broadened by constitutional amendments: some institutional issues, such as the status of the members of the judiciary, and the procedural rules for elections were recognized as qualified matters[70]. The other inspiration for the extension of the scope of qualified law was the reinforcement of international cooperation, and the accession to the European Union: the limitation on the sovereignty of Hungary was also incorporated within the scope of qualified law[71]. Moreover, two forms of qualified majority was identified: the „large qualified majority" (the two-third majority of all deputies) was applied for the statute on the flag and the bearing of Hungary[72], while the „small qualified majority" (the two-third of the representatives who were present) shall have been conducted for every other qualified law.

The drafting of the Fundamental Law of Hungary in 2011. brought some new tendencies for the scope of qualified majority in Hungary. Firstly, as it was already noted, the fundamental right aspect of qualified law has been almost neglected. It was

[67] 4/1993. (II.12.) Decision of the Hungarian Constitutional Court
[68] 1/1999. (II.24.) Decision of the Hungarian Constitutional Court
[69] 26/1992. (IV. 30.) decision of the Hungarian Constitutional Court; 1/1999.(II. 24.) decision of the Hungarian Constitutional Court
[70] act XCVIII. of 1997
[71] act XLI. of 2002
[72] art. 76. (3) of the previous Constitution of Hungary

considered, that in light of the strong international monitoring, and the stable democratic political system, qualified majority has not place in the field of fundamental rights.[73] In the meantime, the role of qualified majority in the field of institutional issues have been reinforced with the establishment of independent regulatory authorities[74] and the extension of the circle of the institutions concerned. This tendency would be similar to the French approach, but this enlargement overstepped the organisation of state: a number of purely political matters were referred into the scope of qualified law, such as the protection of families[75], and the basic provisions of taxation and pension system.[76] Moreover, the Fourth Amendment of the Fundamental Law extended further the list of these matters by the acquisition of fields and forests[77]. The addition of these matters is in conflict with the original function of the concept of organic law: it do not promote stability, but impose a heavy limit on the margin of movement of future governments. The forthcoming governments would be prevented from modify the system of taxation or the system of pensions, in spite of the fact, that these sectors are traditionally subject to the consideration of the actual government. One could argue, that the regulation of these subjects have crucial impact on fundamental rights, but on the basis of this logic, an extremely broad circle of statutes would have been subject to qualified majority.

To sum up, the scope of cardinal laws from a quantitative perspective has not been significantly changed by the Fundamental Law: the number of qualified subject matters are, almost thirty. Nevertheless, substantial changes were made as regard the list of

[73] *Balogh* Elemér et al.[2012]: Változások a magyar alkotmányjogban. Tanulmányok az Alaptörvényről. (Fundamental rights in new basis? Changes in the Hungarian constitutional law. Essays from the Fundamental Law.), edited by.: FÁMA ZRT. National Press for Public Services and TanBooks, 2012. p. 53-79.
[74] art. 23. of the Fundamental Law of Hungary
[75] art. L. of the Fundamental Law of Hungary
[76] art. 40. of the Fundamental Law of Hungary
[77] art. P. (2) of the Fundamental Law of Hungary

cardinal matters: on the one hand, fundamental rights were eliminated on the other hand, the scope of qualified law was extended to sensitive political matters.

I do not deal here on details with the extent of qualified laws, but to demonstrate this issue, I outline briefly the Hungarian interpretation. The Constitutional Court reviewed the constitutionality of qualified majority, or the lack of this requirement in a number of cases on the basis of the previous Constitution of Hungary[78]. The Fundamental Law have attempted to clarify the scope of cardinal and ordinary laws with two main instruments. Firstly, every statute, which contains cardinal provisions, has a special component: a cardinal clause, which enumerates the cardinal provisions of the law concerned, and refers to the constitutional background of qualified majority. Secondly, instead of the legal practice of the Constitutional Court, constitutional articles describes, in what extent particular subject matters shall be regulated by qualified majority. For instance, a cardinal law shall cover the detailed rules of citizenship.[79] On the contrary, only the fundamental rules of taxation fall within the scope of cardinal law. These modifications increased the accuracy of constitutional text from the scope of cardinal law, but the final word in this regard is still up to the constitutional court. Accordingly, the main part of the Hungarian solution is similar to the French model as regard the scope of qualified law, the main difference is the existence of explicit constitutional orientations from the extent of this requirement. The idea of such orientations has already existed in France, but without any practical relevance.[80]

[78] 1/1999. (II. 24.) Decision of the Hungarian Constitutional Court
[79] art. G. (4) of the Fundamental Law of Hungary
[80] *Ardant* [2014] Cited above, p. 27.

Conclusion

The origin and scope of qualified law is strongly related to each other, the differences between each national jurisdictions could be explained mostly by historical circumstances. Fundamental rights, and institutional issues could be identified, as the main fields concerned, but the relation between these aspects varies significantly in the three countries. The French model concentrates on institutional issues, while the Spanish approach is based on proper balance between fundamental rights and institutional aspect. The original version of the Hungarian framework was closer to the scope of Spanish qualified law, however in light of subsequent modifications, it moved in the direction of the French interpretation. The scope of qualified law has a high influence on the exact form of separation of powers therefore I will discuss this relation in the fourth chapter. There, I will also identify some arguments for a narrower coverage of qualified law. The scope of qualified law has also strong impact on the structure of hierarchy of norms, as will be conceptualized in the following chapter.

3. Qualified law within the hierarchy of norms

Introduction

In the previous chapters, I have mainly concentrated on the circumstances of introduction of qualified law. Now, the constitutional issues of this concept will be highlighted. The determination of the legal value of qualified law is essential for Practical and theoretical considerations also. The hierarchy of norms is an integral and unalienable component of the broad principle of rule of law, and legal state.[81] The different categories of legal sources have a clear hierarchic order, and the lower ranked norms shall not infringe the legal texts, which are higher than them in at this structure. Regarding qualified law, the main issue is whether these norms have constitutional or statutory character, or these statutes constitute a separate legal framework between these two levels.

The practical consequences of the answer are essential: ordinary law shall not contradict with any qualified law with constitutional force, and this would en broaden remarkably the competence of the constitutional court.

The determination of the legal value of qualified law would bound, the prevalence of these norms within a particular system of law. To show practical examples, if qualified law falls outside from the constitutional framework, it shall comply with constitutional provisions. However, qualified law with constitutional force could also exist, like in Hungary between 1989-1990. From the other direction, if qualified law has a higher

[81] 19/2005. (V. 12.) Decision of the Hungarian Constitutional Court, 193/2010. (XII. 8.) Decision of the Hungarian Constitutional Court

position in the hierarchy of norms, than ordinary statutes, the relation between the two domains is regulated by the principle of hierarchy. In case of lack of such hierarchic order, the role of principle of competence shall be highlighted.[82]

Due to the essence of clarification, we shall distinguish three levels of legal instruments for this purpose. Firstly, constitutions may provide explicit rule from the legal value of qualified laws. Secondly, constitutional courts shall interpret the relevant constitutional articles. In case of lack of constitutional precision, the body shall constitute its own framework to solve this issue. Finally, legal theorists have worked a lot for conceptualizing the legal nature of qualified law, this is the most frequently contested issue in this regard. As a legal source, this category raises a number of theoretic as well as practical issues, and a coherent concept of interpretation shall not be formulated unless it contains the combination of these aspects. Accordingly, in the subsequent subchapters, the theoretic and practical experiences will be analyzed.

3.1. Theoretic approach of qualified law as a legal source

The role of legal theory in the field of qualified law is to provide alternative approaches from the legal nature of these norms. It is clear, that qualified law shall be placed somewhere between constitutional and statutory level within the hierarchy of norms,[83] but the details of this framework is highly debated.[84] Nevertheless, we have to confess, that the theoretic concepts could be mainly identified on the basis of the decisions of the constitutional courts, or the relevant legal provisions, theorists participate rarely in

[82] *Camby* [1998], Cited above, p. 1693.
[83] *Avril* [2014], Cited above, p. 271-273.
[84] *Tushnet* Mark [2013]: Constitution-making: An Introduction. 91 Texas Law Review 1983.

abstract debates from these issues. Due to this phenomena, the theoretic aspects will be analyzed purely as the background of codified solutions.

One end of the scale is the constitutional level, when qualified laws are incorporated in the constitutional framework. The constitution is a document with limited specificity, consequently, it cannot cover all details of essential matters. Qualified law could be used as an instrument of extension of constitutional framework to provide additional – almost constitutional - protection for particular extra constitutional subject matters.[85] Nevertheless, the scope, the substance and the legal nature of qualified law is subject to the relevant provisions of the constitution, qualified law shall comply with constitutional requirements. As regard the relationship between qualified and ordinary law, the principle of hierarchy is essential. The practical consequences of such models are essential: ordinary law shall not contradict with any qualified law with constitutional force, and this would also en broaden remarkably the competence of the constitutional court. This idea have been discussed for instance by some Hungarian authors.[86]

An other possible approach is based on the framework of ordinary law: qualified statutes do not differ from ordinary statutes as regard their legal value, they are just adopted by stricter proceedings and cover just a different domain. The additional constitutional requirements do not mean substantial differences, these are just technical rules. Qualified law is a subcategory of law, it do not constitute a separate legal framework, and ordinary law can even contradict with the qualified norms.[87]

[85] *Avril* [2014], Cited above, p. 271-273.
[86] *Drinóczy* Tímea [2011]: Az Alaptörvény főbb elvei. (From the main principles of the Fundamental Law.) Pázmány Law Working Papers 2011/9. ed. http://www.plwp.jak.ppke.hu/images/files/2011/2011-09.pdf p. 12.; *Varga Zs.* András [2010]: Néhány gondolat Magyarország új Alkotmányáról. [Some points from the new Constitution of Hungary], in: Iustum Aequum Salutare, VI.2010/4. ed, p. 21-25. http://www.jak.ppke.hu/hir/ias/20104sz/21.pdf
[87] *Sirat* Charles [1960]: La loi organique et la constitution de 1958 (The organic law and the Constitution of 1958) Paris, Dalloz 1960, chron., p. 153-160.

These are the sharpest interpretations of the issue, but in reality, most of the theories is allocated within these bounds, with particular accents. We shall consider either the constitutional, and the statutory aspect of qualified law, and the outcome of the analysis depends mostly on the functions assigned to qualified law. If we accept the extension of the constitutional framework as a primary goal,[88] qualified law would have almost constitutional force. But the basic rules of the framework of qualified law are always provided by the constitution. In the next subchapter, I will analyze the case law of the three constitutional courts, and than, I will identify the key differences between the theoretical and practical interpretations

3.2. The comparison of the case laws of the constitutional courts

Although in light of the national context, constitutional courts apply slightly different frameworks, the main experimental issues are almost the same in the three countries. Inter alia, these circle of issues include: whether an ordinary law could amend a qualified law; whether an ordinary law could contradict with qualified law; whether an ordinary law is entitled to intervene into the qualified domain, whether an ordinary law could include qualified provisions or vice versa; whether there is a hierarchy between ordinary and qualified laws; whether qualified law constitute a separate legal category; whether qualified law is part of the constitutional framework.[89]

In France, despite of their clear constitutional background, the Council have clarified, that organic laws do not fall inside neither the constitutional framework, nor the

[88] *Camby* Jean-Pierre [1989]: La loi organique dans la Constitution de 1958, (Organic law within the Constitution of 1958), RDP 1989, p. 1401.
[89] *Camby*[1998], Cited above, p. 1688.

constitutional bloc.[90] The Constitutional Council have improved its practice during the recent decades. The approach of the Council is based on three considerations.

Firstly, the Court have recognized the different legal character of organic and ordinary statutes, but have refused to create some sort of clear hierarchy between them.[91] This approach was also confirmed by the French Government,[92] and by the academic literature.[93] Either the competence of the organic as well as the ordinary legislature enjoy the same level of constitutional protection, both of them are prohibited from any interference in the other domain.[94] « From 1958, the term of organic law have been descriptive rather than normative. »[95] In other words, the relation between qualified and ordinary statute is outlined by the principle of competence instead of the principle of hierarchy. The principle of competence emphasises, that ordinary and qualified law are in the same level within the hierarchy of norms, they just have separate domain of subject matters. By contrast, the principle of hierarchy means, that qualified law has supreme effect over ordinary law. However, despite the consistent rejection of supremacy of organic law over ordinary law, the French framework is not absolutely clear, for instance, the prohibition of explicit of even implicit amendment of organic law by an ordinary statute refers to some sort of hierarchic order.[96]

[90] la décision du CC, n° 84-177 DC du 30 aout 1984
[91] *Camby* [1998], Cited above, p. 1690.
[92] Documents pour servir à l'histoire de l'élaboration de la Constitution, (Documents from the history of the drafting of the Constitution)volume III, p. 350.
[93] *Le Mire* (in *Luchaire* et *Conac*, La Constitution de la Ve République (The Constitution of the V. Republic), Economica, 1987, p. 179-207.
[94] N° 87-234, DC du 7 janvier 1988, Rec., p. 2.
[95] *Avril* [2014], Cited above, p. 274.
[96] la décision n° 96-386, DC du 30 décembre 1996

Although an organic law could precise and complete the constitutionally prescribed scope of statutes,[97] this authorization do not constitute an extra constitutional power to outline the scope of organic law, hence this catalogue shall be in conformity with constitutional provisions and principles. Organic laws fall outside from the constitutional bloc,[98] nevertheless, the contradiction with an organic law has the same impact, as a conflict with a constitutional provision.[99] Furthermore, the rules of the procedure of the two assemblies shall comply also with organic laws,[100] as well as other parliamentary acts.[101]

The second point from the Council is the distinction between ordinary and qualified provisions within the same legal text. The competence of the organic legislator is described by particular subject matters, and not by statutes. Accordingly, a legal text could include the provisions from both domain, but the Council would struck down such organic provisions, which are adopted under the ordinary legislative procedure.[102] When an organic law includes provisions from the field of ordinary law, these provisions shall be declassified, and could be amended without the application of art. 46. of the Constitution. The Council have established the notion of organic character, and it uses this term to bound the scope between qualified and ordinary law. As a consequence, the terminology of "organic text" would be more precise, than the traditional wording of organic laws, hence the organic character is related to certain provisions, and not always to whole statutes.

[97] art. 34. of the French Constitution of 4 October 1958, last clause
[98] *Verpeaux* Michel - *Maryvonne* Bonnard. [2007] : *Le Conseil constitutionnel.* (The Constitutional Council.) Paris: La documentation française. p. 101.
[99] la décision du Cc, n°60-8 DC du 11 aout 1960.
[100] *Le Pourhiet* [2007], Cited above p. 379; La décision en 2006-537 DC, 22 juin 2006; la décision en 99-419 DC du 9 novembre 1999
[101] art. 40 (5) of the Regulation of the National Assembly of France
[102] N° 84-177, DC du 30 août 1984, Rec., p. 67 ; N° 86-217, DC du 18 septembre 1986.

The third tendency in the French practice is the diversification within the category of organic law: there is some sort of hierarchy even amongst institutional acts. This legal framework do not constitute an unified legal concept, some subgroups of organic law demand special treatment.[103] On the one hand, certain ordonnances (legislative acts adopted by the executive on the basis of parliamentary authorization)[104] are not allowed only in the field of ordinary law, but also within the domain of institutional act.[105]

Furthermore, in light of the legal practice, the organic law on the public finances and social security has a supreme effect over other organic laws[106] and has a quasi-constitutional character.[107] The theoretical background of this distinction is not very clear, generally, it is supported by some constitutional references. Moreover, the Constitution requires for the limitation of the national sovereignty, and for the organic laws related to the Senate identical terms by the two Houses.[108] This classification opens up against a constitutional problem: which organic law is related to the Senate and which not. The Constitutional Council interpreted this concept relatively restrictively, only the direct impact on the Senate is considered in this regard.[109] For instance, the number of the senators shall not be determined by identical terms, while the composition of the electoral colleges of the second chamber shall be regulated under this requirement. These examples demonstrate, that it is the Constitution, which

[103] *Camby* [1998], Cited above, p. 1695.
[104] *Ardant* [2014], p. 417-419.
[105] Droit constitutionnel et science politique, (Constitutional law and political science), XVe édition, p. 379 ; also for instance : Organic ordonance of 24 October 1958
[106] *de Guy Braibant*, Mélanges [1996]: Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein. (Normes of reference for constitutional control, and the respect of hierarchy of norms.) p. 323.
[107] N° 98-401, DC du 10 juin 1998.
[108] art. 88-3. of the French Constitution of 4 October 1958
[109] N° 85-195, DC du 10 juillet 1985.

provides the basis of the diversification within organic laws. The task of the Constitutional Court is the clarification of the details in this regard.

The main considerations are similar in Spain, than in France: organic laws as legal sources are bound by the Constitution,[110] and by the organic law from the constitutional court.[111] As a result, Spanish organic laws are subject to constitutional review.[112] Although some hierarchic elements between organic and ordinary laws,[113] the principle of competence is highlighted vis a vis principle of hierarchy, organic law is not a separate constitutional category.[114] However, some hierarchic aspects are also relevant, organic laws are considered during the constitutional review of ordinary statutes.[115] Nevertheless, the constitutional character of qualified laws have rejected,[116] organic laws shall comply with constitutional provisions.[117] The Spanish approach is more pragmatic, than the French one, the organic law is installed to certain domain, based on subject matters. As a consequence, the distinction within a particular legal instrument is not so strong, than in France. However, the intervention in the ordinary domain shall be prevented, therefore, the Constitutional Tribunal strikes out ordinary and organic provisions which infringes the constitutionally prescribed distribution of competences respectively.[118] In spite the fact, that organic laws are incorporated within the constitutional bloc in Spain, they

[110] art. 9. (3) of the Spanish Constitution
[111] 2/1979. Organic law from the Constitutional Court of Spain, art. 27. (2), art. 28. (2)
[112] *Troper* [2012]: Cited above, p. 344
[113] *Troper* [2012]: Cited above, p. 344-345.
[114] JCC no. 236-2007.
[115] *Troper* [2012]: Cited above, p. 344-345.
[116] *Prakke* Lucas – *Kortmann* Constantijn - *van den Brandhof* Hans: Constitutional law of 15 EU member states (6th Edition, 2004), Kluwer, [ISBN 90-13-01255-8], p. 743.
[117] JCC. no 53. of 1985. (IV. 11.)
[118] JCC No. 236. of 2007.

are infra-constitutional sources of law, and their legal value is clearly between the constitutional and the statutory level.[119]

The Hungarian constitutional practice is also very close to the French interpretation however, slighter differences shall be highlighted. Despite the doctrinal concerns,[120] the principle of hierarchy has been consistently refused.[121] Instead of that, the constitutional review of qualified laws has been based on the distribution of subject matters. But qualified law is considered unequivocally as a separate constitutional framework in the same level as ordinary statutes within the hierarchy of norms. A qualified law shall not be amended by an ordinary law, and an ordinary law shall not contain qualified provisions.[122] Under the previous Constitution, the Constitutional Court have conceptualized the term of "essential content" of cardinal subject matters to bound the scope of qualified and ordinary law.[123] Nevertheless, there was only a few number of statutes, which contained ordinary and cardinal provisions also.[124]

As I have outlined earlier, the Fundamental Law made some remarkable steps to create a more foreseeable framework of qualified majority. The cardinal clauses gives an explicit list of cardinal provisions, therefore, the legislation has an explicit guideline to decide, whether qualified majority is required for an amendment. And the cardinal clauses could be contested before the Constitutional Court.[125] Although the legislative

[119] *Troper* [2012]: Cited above, p. 346.
[120] *Cserne* Péter – *Jakab* András [2015]: A kétharmados törvények helye a magyar jogforrásihierarchiában [Qualified Majority and the Hierarchy of Sources of Law in Hungary] Fundamentum, 2001./2. ed. Available at: http://works.bepress.com/peter_cserne/25, accessed: 2nd March of 2015 p. 42. 40-47.
[121] 4/1993. (II.12.) Decision of The Hungarian Constitutional Court; 53/1995. (IX.15.) Decision of the Hungarian Constitutional Court; 3/1997. (I. 22.) Decision of the Hungarian Constitutional Court
[122] 1/1999. (II. 24.) Decision of the Hungarian Constitutional Court
[123] *Cserne* [2015], Cited above, p. 44.
[124] for instance: Act XXXIV/1994. on the police forces
[125] *Barna* [2013], Cited above.

efforts to give an exact list of cardinal provisions, the significance of constitutional review in this regard is maintained. Hungary also knows a multiple model of qualified law: the "small two-third majority" is the general form, but for the limitation of the sovereignty of state, the "larger form of two-third majority" have been still required, however this do not create any legal hierarchy between qualified laws.[126] An other major change is that the Fundamental Law provides explicitly the principle of competence for the distinction between cardinal and ordinary domain.[127] As a consequence, the Constitutional Court have recognized, that a qualified law shall not clearly contradict with an already existing ordinary law.[128]

Conclusion

This chapter have showed, which are the main theoretical frameworks within qualified law, and how these considerations have been applied by the relevant bodies in their practice. These issues concerns a number of aspects from the perspective of rule of law, and legal practice. The most important experience here is the insufficient level of clarity: we are not able to give a short answer, what is the proper position of qualified law between the constitutional and statutory level, and where is the exact bound of qualified domain. The constitution is the most suitable instrument to provide orientation from the legal nature of qualified law, therefore, more precision is needed during any constitution-drafting process. However, despite any constitutional background, constitutional courts and the jurisprudence plays also significant role in this regard. Qualified character is mainly based on provisions, and not on texts, and in light of legal

[126] 1260/B/1997. decision of the Hungarian Constitutional Court
[127] art. T. (1) of the Fundamental Law of Hungary
[128] 43/2012. (XII. 20.) Decision of the Hungarian Constitutional Court

practice, qualified law is not an unitary concept. The comparison of theoretical and practical settings shows for us, which issues have been left open, and subject to further clarification. Due to the national context, respective differences could be identified between legal solutions, but the main issues, which have been raised, are almost the same under the three jurisdictions. The legal value of qualified law emphasize in what extent this legal instrument would influence the political configuration.

4. Qualified laws from separation of powers perspective

Introduction

This chapter analyses how, and to what extent, the emerge of the concept of qualified law would influence the separation of powers through the examination of the abovementioned three constitutional systems. In most cases, like in France in 1958, separation of powers considerations meant the essential motivation for the emerge of organic laws. The establishment of qualified law always means that legislation from certain subjects are covered by additional constitutional safeguards, and these rules would have a remarkable impact on the separation of powers, in my view, on at least two grounds. Firstly, regardless of the number of chambers within the Parliament, and the qualified laws, especially qualified majority would require a wide consent or at least cooperation between the government and the opposition. This pressure is stronger, when two-third majority is prescribed, like in the Hungarian model.[129] In this regard, I will focus on the disadvantages of two-thirds majority and argue for the neglect of this framework. Secondly, the concept of qualified law would modify the role of the constitutional court also: this body is entitled to clarify a number of questions, which were left opened by the Constitution in this regard. What is more, in the French model, all organic law shall be reviewed by the Constitutional Council before enter into force. I will support mandatory a-priory constitutional review of qualified laws, but with the possibility of applications in these proceedings.

[129] *Szalai* András [2011]: A kormányzati hatalom ellensúlyai Magyarországon. (Balances ont he power of the government in Hungary) 2011. p. 20.
http://www.propublicobono.hu/pdf/Szalai_2.pdf

As a preliminary note, we have to also add that after having analyzed constitutional problems, this chapter will mostly consider qualified law as a political phenomena, since the separation of powers perspective is strongly related to the mechanism of politics.

4.1. The relation between the government and the opposition: the legislative procedure

During the foregoing pages, I will briefly outline the two main separation of powers aspect of qualified law, and as a background, I will also provide the relevant procedural rules from the three countries. I refer here not to the classical sense of separation of powers with three separate branches of power,[130] but as checks and balances, which provides interdependence for all relevant factors of the constitutional system.[131]

Firstly, all relevant models of qualified law contain a qualified majority component: these laws should be passed by a two-third majority, or at least by absolute majority.[132] In case of stable majoritarian support behind the government, the absolute majority as the weaker form of qualified majority would not modify radically the separation of powers between the government and the opposition. The government would be able to prevail its will regardless of the disagreement of the opposition. The role of absolute majority, as well as an additional vote at

[130] *de Montesquieu* Baron [1748]: The Spirit of the Laws.
[131] The Federalist no. 51.
[132] Fort he purpose of the present study, the terminology of absolute majority means the support of the majority of all deputies

the end of the process[133] is to provide a further check on the power of the majority: qualified statutes should not be promulgated, unless they have been supported widely by deputies, at least on the government side. These requirements have multiple functions. Broader consent is sought for the enactment of an ordinary statute, and with the help of this heightened level of minimum support, the stability of certain circles of law could be increased. Moreover, the opposition would have a better chance to prevent the government from adopting the bill, even a slight resistance on the government side is sufficient to put the enactment off. And this is a crucial safeguard of pluralism.[134] Apart from this, since most of the democratic governments are coalitional, smaller groups in the government side could play decisive role, since their consent is needed for absolute majority. To set an example, some smaller fractions benefited from this situation regularly in France during the 1980s.[135]

However, within this model, non-political actors play stronger role in the control of the qualified legislation, than the parliamentary opposition. Qualified law is not a crucial instrument within the hands of the opposition, these parties use mostly the traditional methods of parliamentary obstruction.[136] This statement is also valid for second chambers.[137] An other very contested issue especially in France, is whether a vote of no-confidence could be initiated in the case of voting from organic law.[138] As a further consequence, minority governments are almost eliminated from those countries who follow an absolute majority model.

[133] art. 81.1. of the Spanish Constitution
[134] Cc, n° 2007-559 DC du 6 decembre 2007
[135] *Avril* Pierre [2010]: Ecrits de théorie constitutionnelle et de droit politique. (Studies from constitutional theories and from the legal background of politics.) Paris : Éditions Université Panthéon Assas. p. 267.
[136] *Arlettaz* Jordane – *Bonnet* Julien [2012]: Pouvoirs et démocratie en France. (Powers and democracy in France) Montpellier : CRDP. p. 211.
[137] *Avril* [2014], Cited above, p. 292.
[138] *Camby* [1998], Cited above, p. 1690.

In the case of a wider consent requirement (for instance: two-thirds majority), not only the minority government, but also government in a majority position is unable to enact qualified laws without a two-thirds majority in the Parliament, or oppositional support. However, a majority government could pass bills with an absolute majority, but a minority government would need considerable effort to gain some sort of support from certain oppositional representatives. These considerations would explain why minority government is not part of the real life in the countries which follow the absolute majority version of qualified law.

The French and Spanish model shows, that absolute majority does not tend to be the lone special requirement in the field of qualified law. However, the Spanish model (followed also by Latin-American countries) do not operate with a wide circle of guarantees, organic laws differs from their ordinary counterparts only by an additional round of vote, and by the prescription of absolute majority. This is the main reason, that the distinction between organic and ordinary laws is not so strict in Spain, as in France. Indeed, in France, this concept has been completed with further elements (mandatory control of constitutionality a priori, additional procedural safeguards, bicameral consent). To show an example, within the French system, The Senate is entitled to block the legislation of the first chamber in such matters, which are related directly to the Senate.[139] This competence was founded as a compromise after expanding the right to vote to EU citizens in local elections.[140] In light of the traditional oppositional attitude of the French Senate, this is not only a theoretical consideration.[141] Another special

[139] N° 85-195, DC du 10 juillet 1985.
[140] Amendment of the French Constitution on 25th June 1992
[141] *Ardant* [2014], Cited above, p. 430.

case is the cohabitation, when the majority of the two chambers is different.[142] When the qualified majority requirement is stronger (two-third consent is needed), the concept of qualified law would be based on the consent aspect other potential elements are neglected.

Secondly, to continue with the stricter form of qualified majority, from a separation of powers perspective, the two-third majority, like in Hungary,[143] concerns a number of questions. This framework would prevent the government from amending qualified laws unilaterally, unless it has a two-third majority. A government in a simple majority position would be forced to negotiate, or at least cooperate with the opposition to make compromises. The rules from the status of the members of the Parliament had not been amended for twenty years, due to the lack of required consensus.[144]

This means that the opposition has a direct impact on the regulation of some basic matters, the legislator is not identifiable with the government. As a consequence,, on the one hand, the opposition checks the government directly, and more efficiently, the minority interests should be respected at least in the scope by qualified law.[145] This approach is in conformity with the current interpretation of democratic representation[146] and this was a relevant consideration for the amendment of the French Constitution in 2008.[147] As a

[142] *Avril* Pierre - Le *Pourhiet* Anne-Marie [2008]: *Représentation et représentativité*. (Representation and representativeness.) Paris: Dalloz. p. 83.
[143] Art. T. of the Fundamental Law of Hungary
[144] *Antal* Attila –*Braun* István –*Finta* László –*Török* Zoltán [2011]: Sarkalatos kérdések. (Cardinalissues) Méltányosság Politikaelemző Központ 24th November of 2011., p. 20. http://www.meltanyossag.hu/files/meltany/imce/doc/kp_sarkalatos_kerdesek_111122.pdf, accessed: 2nd March 2015
[145] *Kilényi* [1994], Cited above, p. 208.
[146] *Avril* [2008], Cited above, p. 7. European Council, Orientations from the status of the opposition in a democratic Parliament, doc. 10488, 31 march 2005.
[147] Comite de reflexion et de proposition sur la modernisation et le reequilibrage des institutions de la V^{e} Republique, Une V^{e} Republique plus democratique, (The Committee of Reflection and proposals for the

consequence, special rights were provided to the parliamentary opposition as the part of this reform.[148] On the other hand, when there is a lack of political culture and willingness to cooperate, the opposition could abuse its rights, and it could bloc all attempts of the government to amend qualified law. What is more, in the field of ordinary law, the government is responsible for the passed laws, but a qualified law is also supported by oppositional deputies, therefore the responsibility for the text is not very clear, and the basic logic of parliamentarism is breached.[149]

When a government has two-third majority, the supermajority requirement would exclude the opposition from all opportunities to influence the decisions. The government would be able to legislate regardless of oppositional views, and the amendments of qualified laws would reflect only the preferences of the government. And later, it would be extremely hard to repeal or modify these qualified laws on the basis of the two-thirds requirement. Accordingly, actual weak opposition would not have serious influence on the decisions of the Parliament, regardless of the scope of the two-thirds requirement. However, during such a situation, a government with a two-thirds majority is authorized to enact statutes, which will also be binding for governments of the future, without any power to modify these rules. In other words, the two-thirds requirement would not only play a significant role in the current model of the separation of powers, but also affects the margin of movement of the actors in the future.[150]

modernization and the rebalancing of institutions of the V. Republic, a more democratic V. Republic) Paris, Fayard'La documentation francaise, 2008, pp. 209.

[148] *Arlettaz* [2012], Cited above, p. 78.

[149] for instance:. 55/2010. (V. 5.) decision of the Hungarian Constitutional Court

[150] *Szentgáli-Tóth* Boldizsár [2014]: A minősített többséggel elfogadott törvények múltja, jelene és jövője a magyar jogrendszerben. (The past, present, and future of cardinal laws in Hungary. Report of the Office of the Hungarian Parliament.) Parliaments Practicum 2011-2012. Edited by: István *Soltész*. Parliamentary Methodology Office, Budapest, [ISSN 1785-3397], 2014. p. 71-101.

These are not purely theoretical concerns: in Hungary, three such elections have been taken place since the democratic transition, when the government had a two-third majority in Parliament.[151] The stricter form of qualified majority would also highlight the role of direct democracy as regard qualified laws, since not only ordinary, but also qualified laws are available for referendum.[152]

To sum up, the two-thirds majority within the concept of qualified law could easily distort the relations between the government and the opposition, it would give too broad power to the opposition, or it would almost eliminate these groups from the political process for the long term. From this perspective, the absolute majority model with additional checks is more compatible with the traditional understanding of separation of powers, while the emerge of a two-thirds requirement is more riskful. Usually, it do not serve real consensus-making, but requires from political parties unwanted compromises, which results inconsistent solutions.

4.2. The relation between the constitutional court and political branches of power

Regarding the other relevant separation of powers aspect, the relations between the constitutional court and political branches of power, we shall highlight the role of constitutional courts as a counterbalance on concentration of powers within the hands of

[151] valasztas.hu
[152] *Németh* Márton [2015]: Sarkalatos dilemmák. (Cardinal issues.) Ars boni legal review. www.arsboni.hu Accessed: 12 March 2015

political actors.[153] Two main questions is to be raised here: whether the constitutional review of qualified law is mandatory or optional; and whether there is an initiative of constitutional review, or it is conducted ex officio.

As regard the first issue, the review is optional, and mostly a posterior in Hungary,[154] and in Spain.[155] However, the concept of qualified law is prescribed in these systems by constitutional provisions, which are enforceable by the respective constitutional bodies. As a consequence, this constitutional concept would create additional grounds of constitutional review: the constitutional court is entitled to examine the prevalence of the procedural norms,[156] and in case of any doubt, to bound the scope of qualified and ordinary law.[157] This mechanism raises the compliance not only with procedural, but also with substantial requirements.[158] The details of this theoretical framework has been analyzed elsewhere, but here, we should already highlight the role of the constitutional court in dealing with these issues. The basis of this distinction is prescribed by the constitution, but the relevant constitutional provisions are subject to interpretation,[159] even if they are formulated by certain levels of precision. In other words, the constitutional court is entitled to control whether a qualified subject matter is covered

[153] *Avril* Pierre - *Seiller* Bertrand [2010]: Le controle parlementaire de l'administration. (The parliamentary control of the administration) Paris : Dalloz. p. 104.
[154] art. 24. of the Fundamental Law of Hungary
[155] art. 28. of the organic law 2/1979. on the Constitutional Tribunal of Spain
[156] la décision n° 89-263 DC du 11 janvier 1990
[157] For instance: La décision du CC, n° 84-177 DC du 30 aout 1984; Spanish Constitutional Court Judgment No. 11/1981, of April 8; Decision 1/1999. (II. 24.) of the Constitutional Court of Hungary
[158] La décision du Cc, n°60-8 DC du 11 aout 1960
[159] *Bodnár* Eszter – *Módos* Mátyás [2012]: A jogalkotás normatív kereteinek változásai az új jogalkotási törvény elfogadása óta (The changing structure of the normative framework of legislation after the enactment of the new act on legislation.) 2012. 1. ed., p. 33-34.

exclusively by qualified law. Certain constitutional frameworks, like the French also protect the domain of ordinary law.[160]

This approach, which is the more popular version of qualified law, would open up significantly the scope of the control of constitutionality: the legislation should also be reviewed in the light of these special requirements. Nevertheless, the presence of qualified law in the legal system would increase the political engagement of the constitutional court. The concept of qualified law is a limit imposed on the power of the government, and the majority in the legislature. The constitutional court would be the primary actor in the constitutional system, who would have the competence to prevent the political branches from overstepping their competence even in this field. As a result, the role of the constitutional court as a check on the political branches would be significantly stronger.

The second model, which is more special, than the previous one, is applied in France, and it cannot be understood without the consideration of the special historical background of this country. The scope of the legislation is outlined by a closed list of enumeration,[161] however, this strict distinction have been relativized.[162] Nevertheless, the Constitutional Council is still entitled to prevent the Parliament from overstepping this domain.[163] Therefore, the Constitutional Council has to mandatorily review all passed organic laws before their promulgation, without this step, these laws would not enter into force.[164] This system would prevent, at least theoretically, unconstitutional acts in some

[160] la décision du CC, ° 75-62, DC du 28 janvier 1976.
[161] art. 34. of the French Constitution of 4 October 1958.
[162] *Ardant* [2014], Cited above, p. 425-476.
[163] *Avril* [2014], Cited above, p. 271.
[164] French Constitution on 4th October 1958, art. 46. cl. 5, and art. 61. cl. 1

essential fields of law. Furthermore, the position of the Constitutional Council is remarkably strengthened by this solution: without its agreement, any organic law, even if the organic law from the organisation and functioning of the Council[165] would not be effective.

The significance of this mechanism should be considered in light of the French context of constitutional review. The considerations of the framers explain the narrow circle of initiators of constitutional review. Before 2008, only a very limited circle of high officers,[166] and since 1974, a larger group of Parliamentarians[167] were eligible to initiate constitutional review of ordinary laws, only before the promulgation of these laws.168 The competence of the Council was extended only in institutional fields, accordingly, only some players in political life were authorized to lodge an application before the Council. And due to the fear of strong judicial review of legislative decisions, the possibility of review a posteriori was excluded.

With the constitutional reform of 23rd July 2008, constitutional problems could be brought otherwise also before the Council, 169 but it is still relatively difficult to refer a constitutional problem before the Council.170 The direct recourse is already missing with the help of the application for the preliminary ruling of constitutionality individuals can also access the Council with the intervention of

[165] *Julien* Thomas [2010]: L'indépendance du Conseil Constitutionnel. (The independence of the Constitutional Council.) PhD diss., Université libre de Bruxelles. p. 103.; *Camby* Jean-Pierre [2008]: «Les archives du Conseil constitutionnel: declaration d'independance. (The archives of the Constitutional Council. Declaration of independence.) LPA, 24 septembre 2008, n° 192, p. 6-14.

[166] art. 61. cl. 2. of French Constitution of 4 October 1958.

[167] Association française de droit constitutionnel. 2006. 30 ans de saisine parlementaire du conseil constitutionnel. (Thirty years of parliamentary referral before the Constitutional Council) Paris: Economica.

[168] French Constitution on 4th October of 1958, art. 61. cl. 2

[169] French Constitution on 4th October 1958, art. 61-1.

[170] *Ducoulombier* Peggy [2010]: "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform", Public Law, 2010, p. 688-708.

judicial bodies. Regarding this background, the mandatory review of organic laws is an essential task of the Council, which highlight the constitutional role of this body as a check on the legislation. Before the establishment of preliminary ruling and constitutional bloc, the mandatory a priory review was a crucial vehicle to provide additional constitutional protection for certain subject matters. In light of the subsequent modifications of the French system, the significance of this rule would have been partly reduced, but this is not the case. The introduction of a posteriori review provides other safeguards against unconstitutional legislation, and according to the Council, organic laws fall under the coverage of preliminary ruling,[171] except from the issues concerning the breach of distinction between the domain of organic and ordinary law.[172] Moreover, the continuous extension of the constitutional framework means that the legal background of a priori review is significantly broader than within the original concept, and the extent of possible fields of unconstitutionality is higher.

If the scope of control of constitutionality is narrow, and the qualified majority requirement is not so strict, the mandatory a priori review could be an effective safeguard, but we should also be aware of the risks of this mechanism. On the one hand, it would strengthen the competence of the constitutional court, but on the other hand, this would also be a vehicle of political engagement on the body and would undermine democratic principles.[173] Lack of democratic legitimacy is always a strong argument against any form of judicial review.[174]

[171] Décision en 2012. 278 QPC du 5 Octobre 2012.
[172] CC, 25 mars 2014, 2014-386 QPC
[173] *Troper* [2012], Cited above, p. 341-342.
[174] PRX » Piece » CBC - Sunday Edition: Justocracy, www.prx.org/pieces/72-cbc-sunday-edition-justocracy, accessed: 2nd February of 2015

Regarding the issue of initiatives, there is a clear bound between the French system, where the prime minister is obliged to refer qualified laws before the Council without discretion,[175] and the other two approach, where an initiative is only facultative for the beginning of the review proceeding. We can classify initiatives on the basis of their binding force.

Initiatives provide some sort of orientation for the constitutional courts for their interpretation, the body focus generally on the contested issues. Even in case of mandatory a priory review, an initiative shall be lodged, however, it is up to the judges, from which perspectives they would review the constitutionality of the law.[176] The judges shall decide without the arguments of the parties, and they do not have any support to identify the constitutional issues within the qualified statutes with hundreds of articles. Consequently, the efficiency of the mechanism is questionable, the attitudes of each judge is a crucial factor. Owing to the mandatory a priory review with unrestricted scope, the constitutional review shall be considered as the part of the qualified legislative process, and in the reality, the Council participates in the exercise of the legislative power.[177] In light of the case law of the Council, it seems, that this solution open up significantly the margin of movement of the Council. However, the possibility of application in these proceedings would enhance the efficiency of mandatory a priory review.

Finally, considerations of this chapter again demonstrate, that a wide scope of qualified law would impose a disproportionate burden on the reigning

[175] l'Ordonnance n° 38-1067 du 7 novembre 1958
[176] *Thomas* Julien. [2010]: Cited above, p. 108-109.
[177] *Troper* Michel [2006]: La V Republique et la separation des pouvoirs . (The V. Republic and the separation of powers.) Droits, n° 43, 2006, p. 43.

government, therefore, the traditional principles of separation of powers would not prevail. The arguments based on separation of powers support a narrow coverage of qualified law, related to some institutional aspects, where the wide political consent is really necessary (for instance: the electoral system, and the fundamental principles of the organization of the state). With a restricted scope, the practical influence of the advantages of qualified law could be also reinforced, but the disadvantages could be played down. Therefore, as far as I am concerned, only some basic institutional matters shall be referred into the qualified domain, other possible fields, such as fundamental rights, or political matters shall be regulated by ordinary laws, and shall be protected by other mechanism (such as constitutional review, or international cooperation).

Conclusion

The concept of qualified law would influence remarkably the model of separation of powers, and the relations between constitutional actors, in countries, which have implemented it. This framework would reconceptualize the role of the opposition, and also the competence of the constitutional court. The exact form and level of this influence differs country to country, in the light of the particular circumstances.

The absolute majority requirement with additional safeguards would limit the power of the government by a combined mechanism, and this more complex approach is able to function as a real safeguard. By contrast, the super majority model without corrective instruments is less efficient, it would easily distort the relation between the government and the opposition, and it is not compatible with the traditional logic of parliamentarism. As a further point, the initiative is an important vehicle for political

branches to make pressure on the constitutional adjudication. To avoid this, mandatory a priory review could replace the requirement of heightened level of majority. However, the possibility for applications should be left open in these cases to provide some sort of orientation for the constitutional courts. And as a final note, it shall be repeated, that from a separation of powers perspective, a narrower description of qualified domain would be desirable.

Conclusion

This contribution has opened up some new perspectives from conceptualizing qualified law in national constitutions, and it has given some orientations for future constitution-drafting processes in this regard. Obviously, I have not targeted to build an exclusive concept, with all details. This study covers a particular comparative approach of qualified law, accordingly, the conclusions are based on this analysis. The research of further aspects, especially within the comparative field would reveal several other valid points.

I have examined qualified laws from four different perspectives within three legal systems. In the first chapter, I dealt with historical background, and identified the maintenance of peace and the prevention of authoritarian regimes as the main purposes of qualified law. The second chapter compared the scope of qualified law within the three countries, the main outcome here is the different proportion between fundamental rights and institutional aspects, and the arguments for a narrower scope of qualified law. As third chapter, I examined the legal value of qualified law, and concluded, that more precision in the constitutional level shall be the primary purpose of the clarification of these issues. Finally, the separation of powers aspect was highlighted, I argued against two-third majority, and for a priory constitutional review.

The aforementioned grounds of research are strongly related to each other. I would demonstrate this through the scope of qualified law. Firstly, the scope of qualified law is strongly related to the historical functions assigned to this concept. Where the promotion of democratic transition was the essential purpose, the role of qualified majority in the protection of fundamental rights is stronger (Spain, and the original

Hungarian model). In case of priority of stability, and consent requirement, institutional issues are more important.

Secondly, the scope of qualified law would also have clear impact on the separation of powers. As a general remark, we can say that the basic rules of the organisation of state are adopted by a stricter procedure, especially by wider consent, and this would give some sort of stability for the political and administrative structure. Sometimes the relation between the central government and local entities are also concerned, as a separate aspect within separation of powers.[178] For instance, the statutes of the Spanish autonomous communities or certain matters concerning overseas territories of France are covered by organic laws.[179] What is more, the distribution of competences in the field of fundamental rights is remarkably different in countries, where the scope of qualified law includes these rights (like in Spain).

Another crucial outcome of the analysis is the requirement of precision as regard the relevant constitutional provisions. The legal nature of qualified law is evidently subject to interpretation, but some instruments could reduce the field of judicial considerations. Firstly, constitutional provisions from qualified law shall be drafted more precisely. None of the constitution contains a sufficiently exact description of qualified law as a source of law, even the Fundamental Law of Hungary, which has a separate paragraph from the legal nature of cardinal law. In addition to this, we have to admit that the selection of qualified laws is not based on any clear principle. Theoretically, the significance of certain matters justifies this distinction, but in the reality, practical considerations are more important.

[178] art. 72. of the French Constitution of 4 October 1958
[179] art. 73. of French Constitution of 4 October 1958

The comparison also shows that in the details there are significant differences between national interpretations, but the main issues, and especially the responses of these concerns, are quite similar within the three legal systems. This outcome supports the idea that in the field of qualified law, a comparative analysis can provide quite valuable experiences for future references from an existing theoretical setting. This paper argued for a narrower scope of qualified law, for the neglect of two-third majority, for mandatory a priory constitutional review of qualified laws, and for the clarification of their constitutional and theoretical background. In light of the national context, the introduction of these policies may be slightly different, but as general standards these points may be appropriate to outline a new approach to qualified law.

This analysis has reflected on the lack of theoretical and comparative analysis in the field of qualified law. For the conceptualization of the legal issues concerned, we shall examine qualified law from a broader perspective. I did not want to focus only on a particular issue in relation to qualified law, but give a general outline from the relevant issues, and provide a possible direction for further analysis.

However, in the field of qualified law, the most relevant issue is the necessity of further extensive and deep professional discourse from this matter to seek more appropriate solutions. This study would be a modest contribution to this process.

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