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The organic laws in Africa and the judicial branch: a brief contextual analysis

The impact of organic laws to the constitutional adjudication and to the judicial branch in Africa

Introduction

The concept of organic law has been spread more than 50 countries around the world, and it has been denominated by various terminologies such as qualified or institutional laws, however in the interest of uniformity this paper shall use the term organic law. This paper explores the scope of organic law and its role in the development of constitutionalism in Africa, especially in the field of constitutional adjudication, and the structure of the judiciary. Nevertheless, the relevant European models will be also kept in mind as contextual elements, and as crucial point of references for the African development. The main goal of this contribution is two-folded. On the one hand, the academic literature has not been analysed in depth the characteristics and potential classification of African organic laws, therefore, as for starters, we attempt to provide a general framework of this issue, with a mostly descriptive character. For this reason, relatively long chapters will cover the background and the context of African organic laws. Although their essentially summarizing character, these parts are indispensable, as the basic framework of African organic laws have not been outlined earlier by relevant academic contributions. Some of the issues to be addressed include the historical overview of organic laws, its spread into Africa especially its effect on the stability of key institutions and the protection of fundamental rights and freedoms on the continent. It shall be also investigated, whether the African model of organic law offers any new insights or is it a mere adoption of the European models. Moreover, a comparative analysis between varieties of African organic laws and the European models is targeted. On the other hand, as specific issues within this relatively broad field, three questions will be raised: how organic laws could influence the efficiency of constitutional adjudication; whether organic law would have any impact to the status of the judicial branch, and whether further instruments would be advisable to develop the current system further. The methodology to be used means comparative analysis of constitutions of various states in Africa and in certain regards Europe, and the assessment of secondary literature, mostly published in Europe and

North-America. In the reality, most organic laws of the world are adopted in Africa, as more than twenty African constitutions have implemented the framework of organic law, usually with any heightened majority requirement, and with a broader set of judicial review.

Organic law is defined as a category of statutes havingconstitutional backing that cover at least theoretically, the most important legislative subject matters, usually the protection of institutional frameworks and fundamental rights and freedoms.[1]Organic laws operate using stricter procedural mechanisms than those available under ordinary legislative processes (usually passed by super majority).[2] Organic laws are also underpinned by constitutional, political and historical functions.[3] Due to their origin, organic laws are more common in civil law countries in Europe, such as France,[4] and Spain.[5] In Spain for example organic laws form part of the Constitutional bloc, which includes those norms, which might be invoked during the constitutional review of ordinary laws.[6]

1. Background

This section covers the origin and samples of African organic lawsto facilitate a better understanding of the concept, as this field has been considered traditionally as little-researched. Therefore, We would provide a historical, political and legal overview of organic laws and its major classifications and models around the world, which have been highly influentious also in the African continent.

1.1. Models of Organic Laws

By general terms, there are three main models of organic laws namely: the French, the Spanish and the Hungarian approach. Especially the first two samples produced remarkable impact in Africa, mostly owing to the post-colonial influence of these countries. As it will be demonstrated later, organic laws have been implemented across Africa from Tunisia to Angola, so one may

[1] JP Camby *Fourty Years of Organic Laws* (1998) 1686-1698.
[2] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (eds) *Proceedings of the IISES Annual Conference* (2018) 269.
[3] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 269.
[4] Art. 46 the Constitution of France (4 October 1958).
[5] Art. 81-1 the Constitution of Spain (07 December 1978).
[6] MD Chagnollaud *International Treaty of Constitutional Law, Vol. 1* (2012) 340.

argue, that there could be also a fourth African model. On the contrary, this paper argues, that the despite the fact, that African organic laws show certain common characteristics, the African model has not yet crystallized into a model as it is still in flax and ever changing. Each of these models espouses unique constitutional, legal and historical context that make it apart from the other.

1.1.1. The French Model

Organic laws first came into existence through the effforts of De Gaule, who was the founding President of the Fifth French Republic).[7] He viewed the role of organic laws as being the protector of institutions but not necessarily of fundamental rights and freedoms.[8] Organic laws were forthwith encapsulated into the French Constitution in 1958 with the aim of weakening the power of parliament to reorganize institutions and rebalance the separation of powers.[9]

De Gaule had three main reasons to make his decision to undermine parliamentary powers. Firstly, the Fourth Republic was formed after the second World War was not only weak but unstable with frequent changes in government.[10] According to him, limiting parliamentary power and giving more of it to the executive was the panacea for stability in France. Secondly, the frequent political and legal changes caused instability and without any safeguards on stability norms arising from parliamentary majority, organic laws were viewed as a check on existing unlimited powers of Parliament,[11] that held state captive to political considerations.[12] Thirdly, and more importantly, organic laws were motivated by the sheer fear of dictatorship and a desire not to return to authoritarian rule experienced during the second World War arising from Nazi occupation.[13]

[7] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 269.
[8] P Blacher *The Parliament in France* (2012) 11-23.
[9] Art. 46 of the Constitution of France (04 October 1958).
[10] M Debre „The New Constitution" (1959) 9 *Revue Française de Science Politique* 1. 7
[11] P Ardant & M Bertrand "Constitutional Law and Political Institutions" (2014) 26 *Édition* 344-345.
[12] M Troper „Constitutional Law" in G Berman & E Picard (eds) *Introduction to French Law* (2008) 13.
[13] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 273.

The French model provided inspiration for other European models and later also the decolonization of Francophone Africa.[14] On attainment of independence, more, than 20 African countries have adopted this model,[15] that is why it is unavoidable to analyse here the origin of the French framework. From France, organic laws spread not only to Africa, but also to other Central European states of Spain, Hungary, Moldova and Portugal and to Latin America. Several elements of the French system will also appear during the assessment of the African development.

1.1.2. The Spanish Model

The Spanish model traces its origin to the fall of the authoritarian regimes in Spain and Portugal.[16]This model is much more recent as it was introduced in the Constitution in 1978 as part of the democratic transition after the fall of Franco's regime. Although the Spanish model was influenced by the French one, it clearly lacked democratic credentials. The republican tradition of Spain was usually shortlived due to instability since institutions lacked capacity to grow into bulwark against authoritarian rule.[17]

The application of organic laws in the Spanish model was designed to balance its role between strengthening institutional frameworks and the protection of fundamental rights and freedoms. Spanish courts have provided a narrower interpretation of the organic laws so as not to limit government actions unnecessarily.[18] This contrasts sharply with Portugal whose institutional approach is closer to that of the French.[19]Organic laws in Spain were therefore considered as mechanisms to address the fragmented political climate caused by too many political parties and the ethnicization of politics.[20]Thus a wider consent was required as being essential for the long-term provision of a new legislative framework, new governance structures and integrity that

[14] R David *The Major Contemporary Systems of Law* (1964) 630.
[15] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 270.
[16] Art. 169 (2) of the Constitution of Portugal (02 April 1976).
[17] C Assunção; CF Almeida & N Piçarra *Portuguese Law: An Overview* (2007) 75-89.
[18] MB Serramalera *Organic Laws, and their Status within the Hierarchy of Norms* (2004) 30-31.
[19] C Assunção; CF Almeida & N Piçarra (n 17 above) 75-89.
[20] A Bonime-Blanc „Constitution Making and Democratization. The Spanish Paradigm" in LE Miller & L Aucoin (eds) *Framing the State in Times of Transition. Case Studies in Constitution Making* (2010) 200.

would stabilize the state.[21] Evidently, the scope of organic laws in Spain is broader due to the desire to protect democracy, fear of totalitarianism, requirements of integrity and ethnic inclusion.[22] The Spanish model inspired the implementation of organic laws in the Constitution of several Latin-American countries,[23] and also the Portuguese model, which was considered by Angola, and the Cape Werde Islands during the 1970s.[24]

1.1.3. The Hungarian Model

The Hungarian model originated from the era of historical development where Cardinal laws formed the basis of the Hungarian constitutional regime.[25] However, the historical Cardinal laws have not beeen elaborated precisely, their exact circle was always dubious.[26] Moreover, these laws were subject to the same legislative processes just like ordinary laws.[27] In 1989, modern organic laws were introduced in Hungary, initially, this new category of organic law amounted to quasi constitutional force, but this was abolished in 1990.[28] Any adoption or amendment of these new laws required a two thirds majority in Parliament.[29] This form of qualified law was designed to institute certainty in the legislation, and their denomination is cardinal law since 2012, when the new Fundamental Law of Hungary came into effect. Fundamental rights and freedoms were left out from the updated enumeration of cardinal laws, which brings the Hungarian model closer to the French one where institutional protection is the dominant factor.[30]

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[21] A Bonime-Blanc „Constitution Making and Democratization. The Spanish Paradigm" in LE Miller & L Aucoin (n 20 above) 200.
[22] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 274.
[23] Art. 133 of the Constitution of Ecuador (28 September 2008); Art. 203 of the Constitution of Venezuela (20 December 1999).
[24] C Assunção; CF Almeida & N Piçarra (n 17 above) 75-89.
[25] H Marczali *Az 1790/1-diki országgyűlés. 1. kötet* (*The Hungarian Parliament in 1790/1, and act I.)* (1907) 110.; J Hajnóczy "Public dissertation on the Hungarian Parliament and its organization" („Magyarország Országgyűléséről és annak szervezetéről szóló közjogi értekezés") in A Csizmadia *Hajnóczy József közjogi politikai munkái (József Hajnóczy's public policy work)* (1958) 236-240.
[26] K Molnár *Magyar közjog (Hungarian public law)* (1929) 29-44.
[27] G Ferdinándy *The Public Law of Hungary* (1902) 77.
[28] G Kilényi (ed) *Az Alkotmány alapelvei (The fundamental principles of the constitution) Alkotmányjogi Füzetek 1.* (1989) 18-32.
[29] Art. 8 of Act XXXI. of 1989. (Hungary)
[30] I Kukorelli „Az új Alaptörvény bevezető gondolatai" ("Introductory remarks to the new Fundamental Law") in A Kubovicsné Borbély (ed) *Az új Alaptörvényről - elfogadás előtt (From the new Fundamental Law before its enactment*) (2011) 32-35.

The Hungarian model is characterised by a two thirds majoritarian rule for the enactment of organic law. This approach demonstrates the political character of the model since a wider consent would be required rather than a mere simple majority, which would provide certain political weight to the opposition. The term of „cardinal law" was just symbolic as it cemented the historical foundation of the fundamental law in Hungary.[31]In Central-Europe, a mixed model of qualified law, inspired by the French, the Spanish, and Hungarian development also was adopted by Romania[32] and Moldova[33] mainly after the democratization process. Other states of the former Soviet Union also adopted this model momentarily but the relevant constitutional provisions have been repealed.

2. Context of Organic Laws in Africa

2.1. General overview

After having considered European samples, as an indirect, but crucial background, now we turn to the direct assessment of the relevant African solutions. As for starters, one shall outline an overarching picture from the current tendencies as regard African organic laws, more precise conclusions shall be based on this ground. Organic laws in Africa were mainly inspired by the decolonization process which explains why this concept is common in Francophone rather than Anglophone countries. The European experience shall have been outlined as part of the context, since African organic laws were entailed primarily by their European counterparts. Nevertheless, if one tries to describe the basic character of african organic laws, it shall be highlighted, that they are usually not mere adoptations of European versions, the implemented models were always adapted to suit local circumstances. The particular background is crucial, as most of the newly formed independent African states were not cohesive as they were mere ethnic enclaves created by colonial governments and forced to co-exist. The Maghreb region shall be distinguished clearly here from other parts of Africa, as an exception, since those states constituted more or less an unitary development for the ancient period. However, most African

[31] H Küpper "The Phenomena of Cardinal Laws in the Hungarian Legal System" (2014) 46 *MTA Law Working Papers* 2-5.
[32] Art. 73 the Constitution of Romania (08 December 1991).
[33] Art. 72 (3) the Constitution of Moldova (29 July 1994).

states expected to be threatened by the internal conflicts, therefore, all instruments were considered, which could promote the stability of these countries. In most Francophone countries, organic laws were adopted as a mechanism to promote internal stability, strengthen national cohesion and avoid authoritarian tendencies.[34]

An important characteristic of organic laws in Africa is that they are partly diverse variants of European legal frameworks mainly France, Spain and Portugal. A cursory glance at the five groups of African states where organic laws have been adopted reveals that they are regions that were formerly colonized by the French or Portuguese empires and followed the French and in certain respects Portuguese constitutional model. Firstly, some North-African countries from the Maghreb have introduced organic laws, which survived even the Arab Spring.[35] Secondly, those West African states shall be mentioned, which were colonized by the French,[36] with the exception of Mali, where this legal instrument has not been applied. Thirdly, there are Francophone countries in East Africa;[37] fourthly, certain Central African countries that were mainly influenced by both France and Belgium.[38] Fifthly, and more importantly after the fall of Salazar government in Portugal, organic laws were implemented not only in Portugal, but also in Angola and Cape Verde.[39] There are remarkable differences between each region, and even amongst the particular subgroups. The applied level of majority; the existence or lack of a priory judicial review; the detailed rules on the qualified legislative process; and the prescribed scope of organic law are such key factors, which make considerable differences between the wide range of relevant African constitutional systems. One may also notice, that organic laws have been

[34] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 277.
[35] Art. 123 the Constitution of Algeria (15 May 1996); Art. 67 the Constitution of Mauritania (12 July 1991); Art. 85 and 86 the Constitution of Morocco (01 July 2011).
[36] Art. 97 of the Constitution of Benin (02 December 1990); Art. 155 of the Constitution of Burkina Faso (02 June 1991); Art. 83 of the Constitution of Guinea (1991); Art. 71 of the Constitution of I˙vory Coast (08 November 2016); Art. 31 and 84 of the Constitution of Niger (31 October 2010); Art. 78 of the Constitution of Senegal (07 January 2001); Art. 92 of the Constitution of Togo (14 October 1992).
[37] Art. 26 of the Constitution of the Comoros (23 December 2001); Art. 66 of the Constitution of Djibouti (1992); Art. 88 and 89 of the Constitution of Madagascar (14 November 2010).
[38] Art. 28 of the Constitution of Burundi (28 February 2005); Art. 70 and 73 of the Constitution of the Central African Republic (27 December 2004); art. 127 of the Constitution of Chad (1996); Art. 104 of the Constitution of Equatorial Guinea (1991, amended in 2011); Art. 60 of the Constitution of Gabon (1991, last amended in 2011); Art. 124 of the Constitution of Democratic Republic of Congo (18 February 2006); Art. 125 of the Constitution of the Republic of Congo (2001, last amended 25 October 2015); Art. 73 (1) of the Constitution of Rwanda (30 May 1991).
[39] Art. 166 (2) b) and Art. 169 (2) of the Constitution of Angola (21 January 2010); Art. 173 (3) and 187 (2) b) of the Constitution of Cape Verde Islands (1980).

introduced mostly in former French and Portuguese colonies, Anglo-Saxon countries have less tradition in this regard on which they could rely. This phenomenon is not only an African particularity, but also a global tendency, as common law countries prefers parliamentary sovereignity rather than legislation with qualified majority.[40]

The African context of organic laws has undergone numerous changes first arising from the genocide in Rwanda where a heightened majority system of three fifth of the vote was required for the enactment of organic laws.[41] The next important amendment was perceptible in the Maghreb, when the Arap Spring engulved most of the North-African countries, and Tunisia introduces certain changes to the characteristics of organic laws in that country that brought it closer to Rwanda's position.[42] If an organic law is subject to a presidential veto in Tunisia, the parliament could overturn the veto only with a three-fifths majority. An other direction of changes might be also worth-contemplating: after the end of the civil war in Ivory Coast, the two-thirds system was replaced by a mere absolute majority requirement, which made the framework of organic law more flexible, the two-thirds requirement remained only a complementary element of the concept.[43] The overall picture shows, that in most African countries, qualified majority means absolute majority as regard legislation, while In Rwanda, three-fifths of the votes is needed for the enactment of an organic law. In Burundi,[44] in the Cape Werde Islands,[45] in the Comoros,[46] and in Guinea,[47] two-thirds consent is necessary. On the contrary, in Gabon, qualified laws are adopted just with ordinary simple majority the sole additional requirement is the mandatory a priory constitutional review.[48] Gabon is the only country of the world, where qualified/organic laws are subject to simple majority consent of the legislative body. It is also important to note here, that several African countries require two-thirds majority for the adoption or amendment of the constitution, but this means a completely separate issue, which shall be clearly distinguished from the concept of qualified law. It shall be also highlighted, that similarly to the European models, the required majority for certain organic

[40] J Jowell & D Oliver *The changing constitution* (2011) 92-114.
[41] Art. 73 (1) the Constitution of Rwanda (30 May 1991).
[42] Art. 81 of the Constitution of Tunisia (26 January 2014).
[43] Art. 102 of the Constitution of Ivory Coast (08 November 2016).
[44] Art. 75 and 86 of the Constitution of Burundi (28 February 2005).
[45] Art. 173 (3) of the Constitution of Cape Werde Islands (1980).
[46] Art. 26 of the Constitution of the Comoros (23 December 2001).
[47] Art. 83 of the Constitution of Guinea (07 May 2010).
[48] Art. 61 and 85 of the Constitution of Gabon (1991, last amended in 2011).

laws may differ even within one constitutional system. To set examples, it is provided expressly in some African countries, that the rules on public finances under a special procedure are covered by organic laws,[49] while in other African countries, the basic financial regulations are subject to a special procedure, which is close to the organic legislative process. It is also incorporated by some African constitutions, that organic laws related to the senate shall be adopted by identical terms by the two chambers,[50] which represents the mere migration of a French constitutional provision.[51]

2.2. The Subject Matter and Role of Organic Law sin Africa

By general terms, the subject matter of organic laws is two folded; namely: protection of institutional frameworks and fundamental rights and freedoms.[52]In Africa, the institutional function of organic law has been given primary consideration as a mechanism, but it shall be considered with particular weight, that the institutional aspect protects also indirectly fundamental rights and freedoms in certain respects, as it will be conceptualized later more deeply.[53] Organic laws are always implemented under the pressure of particular circunstances, to promote clear constitutional objectives. For that reason the scope of organic law differs from one state to the other on account of various historical and political foundations, despite sharing a partly similar origin.

The categorization of organic laws into defender of institutional frameworks and protector of fundamental rights and freedoms provide an indication as to its role in the entire constitutional dispensation. The next two subchapters will demonstrate this two direction to interpret the basic constitutional purpose of organic laws, even in Europe, or Africa.

[49] Art. 112 of the Constitution of Benin (02 December 1990); Art. 127 of the Constitution of the Republic of Congo (2001, last amended 25 October 2015); Art. 88 (11) of the Constitution of Madagascar (14 November 2010); Art. 65 of the Constitution of Tunisia (26 January 2014).
[50] Art. 67 (4) of the Constitution of Mauritania (12 July 1991); Art. 85 of the Constitution of Morocco (01 July 2011).
[51] Art. 88 (3) of the Constitution of France (04 October 1958).
[52] 14/B/2002.ruling of the Hungarian Constitutional Court, ABH 2003, 1476; 4/1993. (II.12.) ruling of the Hungarian Constitutional Court, ABH 1993, 48.
[53] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 271.

2.2.1. Defender of Institutional Frameworks

All legal systems provide extra constitutional rules on the functions, organization and relationships of the crucial institutional framework of the state: organic laws were originally designed to create specifically strong, but extra-constitutional protection for the key institutions of the state. Organic laws regulate the functions of Parliament, status of the judiciary, powers and functions of defenders of rights, and the limitation of sovereignty.[54] Other roles include the organization of the military forces, regulation of succession to the throne, or the way to elect the president of the republic, and the functioning of the constitutional courts. However, the introduction of organic laws in most African states have not been associated with stronger institutions, since collapse of constitutional frameworks has been common in Franco-Phone Countries as well. If one might compare Francophone and Anglophone countries, there is not any evidence, that the institutions of the French-influenced regions, where organic laws are often concerned would produce a better record of stability, or a higher level of right protection.

It is also worth-contemplating, especially from our perspective, that the status and competences of the judiciary and the constitutional court are always covered by organic laws in Africa, so organic law might be a potential safeguard of long-term stability and judicial independence, as will be conceptualized later more deeply. In addition to this, some further key judicial institutions are often covered separately by an organic subject matter, as the functioning, composition and competences of the highest judicial bodies (constitutional court, supreme council of magistrature, supreme court, court of audits, court of cassation, etcetera).

Nevertheless, not only the organic law has clear impact on the status of the judiciary, but the constitutional court has often a mandatory task to check the constitutionality of enacted organic laws before their promulgation. This is crucial especially in Gabon, where organic laws are not distinguished by qualified majority from ordinary laws, just by the requirement of mandatory a priory constitutional review. A brief, but sistematic introduction to the relationship between African organic laws and the judicial branch will be conceptualized later.

[54] FS Wagner “Introduction to the System of Organic Laws” (1979) 21 *Revista española de derecho administrativo* 199-204.

2.2.2. Protection of Fundamental Rights and Freedoms

Apart from the institutional field, organic laws adopted in Africa had an important role of protecting fundamental rights and freedoms, especially in the Maghreb region. Although the African concept of organic laws is heavily influenced by the French and eventually by the Portuguese model, independent characteristics from the original European concepts has been also elaborated. For example, the scope of African organic laws is narrower except that of Burundi which purely focuses on institutional frameworks. Organic laws in Africa concentrate on the institution of the legislature[55] and the judiciary.[56]Organic laws in Africa have been extended to the regulation of electoral bodies,[57] elections[58]and the conduct of referendum.[59]Although the impression might be created, that organic laws do not protect directly fundamental rights and freedoms, in the Maghreb this is not usualy the case. In Morocco for example, the right to petition[60] or take industrial action[61] is covered by organic law. But these represent mostly isolated examples in Africa, as the substantial statutory rules on the protection and limits of certain fundamental rights usually (for instance: the national acts on freedom of expression) fall outside from the acknowledged scope of African organic laws.

This brief introduction demonstrates well, that fundamental rights are protected directly by African organic laws only in the Maghreb region within a relatively narrow circle. By contrast, was far as the indirect aspect is concerned, other African countries focus on the protection of such institutions, which might strengthen the cohesive protection of fundamental rights. The judicial branch is crucial in this regard, as the heightened level requirement for organic law might highlight the independence, and the credibility of the judicial bodies. Since powerful and

[55] Art. 103, 108, 112 and 115 the Constitution of Algeria (15 May 1996); Art. 86 the Constitution of Burkina Faso (02 June 1991); Art. 148, 153 and 156 the Constitution of Burundi (28 February 2005); Art. 37 and 62 the Constitution of Gabon (1991 amended in 2011); Art. 79 the Constitution of Madagascar (14 November 2010).
[56] Art. 123, 153, 157 and 158 the Constitution of Algeria (15 May 1996); Art. 236 the Constitution of Burundi, (28 February 2005); Art. 77, 85, 89, 92, 93 and 99 the Constitution of Central African Republic (27 December 2004); Art. 28 and 29 the Constitution of Comoros (23 December 2001); Art. 90(2), 96(2), 100(2) and 104 the Constitution of Equatorial Guinea (1991 amended in 2011); Art. 63 the Constitution of Guinea (07 May 2010); Art. 125, 136, and 141 the Constitution of Niger (31 October 2010); Art. 60 the Constitution of Senegal (07 January 2001).
[57] Art. 211 the Constitution of the Democratic Republic of Congo (18 February 2006).
[58] Art. 79, 88 (3) and (10) the Constitution of Madagascar (14 November 2010); Art. 48 (1) the Constitution of Mauritania (12 July 1991); Art. 35 the Constitution of Senegal (07 January 2001).
[59] Art. 164 (g), the Constitution of Angola (21 January 2010); Art. 187 (1) c, the Constitution of Cape Werde Islands (1980); Art. 176 the Constitution of the Republic of Congo (2001 amended 2015).
[60] Art. 15 the Constitution of Morocco (01 July 2011).
[61] Art. 29 the Constitution of Morocco (01 July 2011).

impartial institutions would keep guard over the proper prevalence of fundamental rights, a number of constitutional actors might be concerned by the task of indirect right protection. For instance, apart from the courts, the constitutional court and the defender of rights are also covered by organic laws as relevant institutions. As for partial conclusion, it is worthy for highlight, that although the fact, that relatively a little number of fundamental rights are provided explicitely as organic subject matters, organic law shall not be underestimated as an additional safeguard of right protection across Africa.

In most of the concerned African constitutions, the statutory rules on the competences, the structure, and the independence of the judicial system are subject to stricter procedural rules, than ordinary laws. It is a well-founded principle in several African constitutions, that whoever claims, that his/her constitutional rights are breached, is entitled to initiate remedial procedures before the judiciary.[62] As the details of this opportunity is covered by organic law, and also the status, and the functioning of those bodies, which are vested with the right to trial these legal controversies, these remedies constitute remarkable safeguards for the potential plaintifs, since the courts are deemed to be protected effectively from direct political influence. This impact might be essential to diminish the vulnerability of citizens vis a vis the public administration, as in most cases, constitutional rights are violated by public authorities.[63] The citizens could rely better on the judicial system as an impartial actor, as it has been established by wide political consent, and its composition could not be modified without oppositional votes, regardless the current political configuration. As the stricter procedural requirements concern also the highest judicial bodies, which determine the functioning of the whole judiciary, this factor of trust might be relevant in case of particular judges or tribunals, and in the light of the judicial system as a whole.[64]

[62] S. Tabe Tabe, The Judiciary and the Enforcement of Constitutional Rights in Cameroon: Emerging Challenges. (2018). https://www.researchgate.net/publication/328099164_The_Judiciary_and_the_Enforcement_of_Constitutional_Rights_in_Cameroon_Emerging_Challenges

[63] K A. Mingst Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect. (1988) 1 African Studies Review 135-147

[64] S. Tabe Tabe, The Judiciary and the Enforcement of Constitutional Rights in Cameroon: Emerging Challenges. (2018). www.researchgate.net/publication/328099164_The_Judiciary_and_the_Enforcement_of_Constitutional_Rights_in_Cameroon_Emerging_Challenges

In addition to this, the indirect protection of fundamental rights by African organic laws have constituted more instruments as safeguards. It is widespread recently in Africa, that defenders of rights, or parliamentary commissioners are elected or nominated, who are authorized to investigate each alleged violations of constitutional rights, and in case of well-founded complaints, these ombudspersons might initiate certain measures. As this institution is also often covered by organic law, the stability and the independence of a further safeguard might be strenghtened remarkably owing to the stricter procedural rules. As the ombudspersons are usually accessible directly for all citizens, and they represent a crucial and even emerging path to seek redress for right violations in Africa,[65] the importance of the indirect protection of rights shall be highlighted again.

Lastly, the role of the constitutional court as a further institution covered by organic laws shall be also taken into consideration, which is at least two-folded. On the one hand, according to the relevant constitutional and organic statutory provisions, the constitutional court has a general competence to review the substantial constitutionality of certain normative acts and individual decisions, which concern the prevalence of fundamental rights in practice. On the basis of the constitutionally determined framework, African organic laws outline, who is entitled to turn to the constitutional court in case of individual complaints, or the supposed unconstitutionality of an act or measure. Apart from this, the status of the constitutional court, and the position of its members as individuals are also safeguarded by organic laws, since these guarantees could not be removed or amended without wide political support. As a last subpoint, it is also worthy for consideration, that most of the relevant African constitutions provides a mandatory a priory constitutional review of organic laws before their promulgation by the constitutional court, therefore, these laws could not enter into force if they do not comply with the right protection standards stipulated by the constitutional norms. As a consequence, organic laws do not cover usually the substantial statutory norms for the protection of fundamental rights, but it might contribute considerably to the establishment of such a legal surrounding, where the regulations and policies are in compliance with constitutional standards of right protection, and where the citizens could access effective remedies against any violation of constitutional rights. In the light of these points, inspite of the undoubted dominance of the institutional aspect, African organic

[65] unpan1.un.org/intradoc/groups/public/documents/AAPAM/UNPAN029881.pdf

laws shall be evaluated as indirect, but paramountly important legal instruments for the protection of fundamental rights.[66]

3. Critique of Organic Laws in Africa

Whereas the concept of organic laws as originally conceptualized in Europe was meant to built strong institutions, better protection of fundamental rights and freedoms, mitigate against possibilities of dictatorship and ultimately lead to constitutional stability, in Africa, organic laws have often failed to facilitate these targets. In states that have adopted organic laws such as Chad, the effect has been supposed to be the prolongation of the constitutional dispensation and extension of the endurance of existing constitutional regimes.[67] This is ably demonstrated by the numerous constitutional amendments and reforms in Francophone countries of the continent,[68] which undermines the hipothesis, that organic law could serve as a factor of stabilization in Africa. This is also a consequence of the lack of long-term political and constitutional culture, as organic law could function as a safeguard only if uncodified constitutional norms and conventions bound the margin of movement of the political and constitutional actors strictly. Without these mechanisms, organic law might just deepen the fragmentation of the political arena, and may even increase the motivation to amend the constitutional framework by violent means.[69] This is further exacerbated by certain derivatives of organic laws in Africa such as those practiced in Rwanda and Tunisia that require a heightened level of consent (three-fifths). The stricter form of qualified legislation, the two thirds majority, which has been aplied only by a little number of African countries have been critisized for distorting parliamentary democracy.[70] According to these concerns, the two-thirds requirement would mean a too severe limit on the governmental margin of decision, or in case of strong parliamentary majority, it would almost eliminate the opposition from decision-making processes on the long term.

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[66] PK. Nwokedi, "Enforcement of Court Orders and the Stability of Government and Society", Judicial Lecturer: Continuing Education for the Judicial, Lagos, M.I.J. Professional Publishers Limited. (1992), p. 7.
[67] Art. 127 the Constitution of Chad (1996).
[68] B Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in J Rotschedl & K Cermakova (n 2 above) 282.
[69] N Johnson „A Super Bad Idea: Requiring a Two-thirds Legislative Supermajority to Raise Taxes Protects Special Interest Tax Breaks and Gives Budget Veto Power to a Small Minority of Legislators" (2006) *Center on Budget and Policy Priorities*
www.revolvy.com/topic/Supermajority&item_type=topic
[70] N Johnson „A Super Bad Idea: Requiring a Two-thirds Legislative Supermajority to Raise Taxes Protects Special Interest Tax Breaks and Gives Budget Veto Power to a Small Minority of Legislators" (n 64 above)

Moreover, the question as to whether organic laws have been better at the protection of fundamental rights and freedoms in Francophone countries as compared to Anglo-Phone countries in Africa is premature since Francophone countries have witnessed some of the worst violations of human rights on the African continent.[71] Examples include Burundi, Democratic Republic of Congo (DRC), Ivory Coast and Rwanda. Bearing in this in mind, it shall be noted, that in the light of the fact, that organic law has not been copied automatically from European modells to Africa, the adaptation has not been proper, and a partial or full reconsideration of the African framework of organic law might be necessary.

4. Organic laws in Africa: its impact to the constitutional adjudication, and to the judicial branch

The task of this subchapter is just to conceptualize briefly, how organic laws could influence the African development of constitutional adjudication, and the judicial branch, and to outline certain recommendations for future constitution-making processes.

As regard the constitutional adjudication of Africa, organic laws extend remarkably the competences of the constitutional court, and due to this phenomena, the separation of powers is also influenced by this legal concept in at least two respects.[72] Firstly, the status, and the competences of the constitutional court, and also the constitutional judges are covered not only by constitutional norms, but also by organic statutes. This means by practical terms, that the different political parties shall create a wider consent to adopt and amend these rules, which could provide certain level of permanence and stability for the constitutional court, as far as the regulatory background is concerned. Moreover, the constitutional court is entitled to review any modification of its status, which would mean a crucial safeguard against any endeavour to weaken the role of the constitutional court as a counterbalance. Especially within the African circunstances, these considerations are significant, nevertheless, constitutional changes are often launched via extra-legal means, when organic laws are not able to fulfil their inherent tasks.[73]

[71] N Johnson „A Super Bad Idea: Requiring a Two-thirds Legislative Supermajority to Raise Taxes Protects Special Interest Tax Breaks and Gives Budget Veto Power to a Small Minority of Legislators" (n 64 above)
[72] T Ginsburg *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* (2010).
[73] J Elster „Constitution-making and violence" (2012) 1 *Journal of Legal Analysis* 7; 21.

Secondly, the mere existence of organic law creates a new ground of constitutional review for the constitutional court, which embroaden its margin of movement against the legislation. When a bill shall be passed as organic law, but it is enacted as ordinary statute, the constitutional court might annul that particular act. If an ordinary law contains certain provisions, which have organic character, the constitutional court has again the power to rule these provisions out.[74] Apart from these issues, the value of organic laws as a legal source is always dubious, so the constitutional court shall clarify this issue also.[75] In Africa, this second point has less relevance, as the dogmatic background has not been elaborated in depth by the African literature.

Turning now to the judicial branch, it is essential, that in several African states, a wide range of judicial bodies are subject to the stricter legislative requirement. For instance, apart from the ordinary courts, the court of audits, or the supreme council of magistratures fall also within the enumeration of organic subject matters. As a consequence, the detailed constitutional status of the judicial branch is protected from daily political interventions, and the organisational model of the judiciary, or the status of the judges could be amended only in case of wide political consent, and only after a priory constitutional review of the proposed amendment.[76] This solution would strenghten the independence of this branch of power, as the legislation and the executive has considerably less chance to influence the structure of the judiciary unilaterally. This consideration shall be given particular weight in Africa, where the strong representation of the judiciary is widespread amongst the qualified legislative subject matters.[77] The reason of this greater highlight on the judiciary is explained by the direct French influence, as the French Constitution declares a wide range of laws concerning the judiciary as organic.[78]

On the basis of this brief introduction, one might raise the question: how could organic law funnction more efficiently in Africa, especially to promote further the independence of the judicial branch, and the credibility of the constitutional adjudication? One might argue, that the better would be to abolish organic law, as a separate legal concept, but in our view, due to its role

[74] P Ducoulombier „Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform" (2010) 4 *Public Law* 688.
[75] S Alberts; C Warshaw & BR Weingast "Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy" in T Ginsburg (ed) *Comparative Constitutional Design* (2012).
[76] D Landau „The Importance of Constitution-Making" (2011) 2 *Denver University Law Review* 611-614.
[77] The status, composition, competences, and functioning of the highest judicial bodies; the rules to initiate and conduct a judicial proceeding; the structure safeguards of the judicial independence
[78] M Troper „Constitutional Law" in G Berman & E Picard (n 12 above) 1-34.

as a safeguard, it has a number of advantages to maintain this legal framework. In this respect, we have three main recommendations, which we could just put forward now, but their potential implementation requires further research, and professional discourse. Firstly, mandatory a priory judicial review shall be preferred as an element of organic law over the different forms of qualified majority. The heightened majority requirement could force different political parties to negotiate with each other, but without honest intention, the outcome would be at least uncertain. By contrast, the mandatory a priory judicial review could exclude unconstitutional contents from the legal system, especially when initiations might be also sent to the constitutional court before its assessment. Secondly, the African legal literature should provide a more detailed analysis of the issue of organic law across the continent, in more than 20 countries, to provide a more broad picture from this legal instrument, and to gain a deeper understanding of its special African characteristics. Such research could also reveal valuable points from several dogmatic problems, such as the place of organic law within the hierarchy of norms. Thirdly, a relatively narrow scope of organic lawis advisable. A stricter form of legislation is justifiable for a narrow circle of key state institutions, but organic law could distort the parliamentary system, and restrict the competences of the government heavily.

Conclusion

As concluding remarks, although organic laws originated in Western- and Central Europe (France, Spain and Hungary), its influence has spread to other parts of the world especially in Latin America and Africa also. The Frenc sample was mostly followed by numerous African states, owing to the colonial past of these countries. However, organic law as a legal concept has not been adopted wholesome but has been modified remarkably by specific local circumstances to fit regional requirements. Organic law adopted with three-fifths majority, which has been introduced in Rwanda and Tunisia is uniquely African innovations, similar solutions might not be perceptible in other continents. Although organic laws have tremendously influenced constitutional development in Africa, due to its relatively, but potentially still too wide scope, the influence has relativelly less highlight, than in Europe. It shall be admitted, that Francophone countries that adopted organic laws have not performed better in terms of protecting human rights than those that did not. Some of these countries in the Great Lakes region suffer from

weak institutions, massive violations of human rights, and a poor record of the rule of law. We have four main statements, which have been intended to be proved in this study.

Firstly, African organic laws are mostly inspired by European samples, however, the African organic laws are deemed to be independent legal concepts, not mere copy of European (French) constitutional provisions.[79]

Secondly, although the fact, that the European approach of organic law is based on a proper balance between the institutional and the human rights approach, in Africa the fundamental right aspect has been almost completely neglected, organic laws cover generally the basic institutional framework of the state.

Thirdly, African (and European) organic laws could promote rarely the endurance of the constitutional framework, consequently, the justification of their existence is not convincing.

Fourthly, on the basis on this experience, one may argue, that organic laws may be more influentious in Africa, when the judicial branch would be more concerned by this legal framework: the constitutional adjudication might have more respect, and judicial independence might be protected better.

To facilitate the further analysis from this increased level of protection, we put forward some recommendations just to prefer mandatory a priory judicial review over qualified majority; to diminish the scope of organic law; and to conduct more academic research to conceptualize an even deeper understanding of African organic laws, and their impact to the judicial branch. We are aware of the fact, that our contribution leaves more question opened, then closed, however, our primary purpose was not to give exclusive answers, but to raise proper questions, and to generate further intense professional discussion from this topic.

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