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The regional migration of a constitutional idea: Qualified laws as instruments for the protection of fundamental rights in Central Europe

Abstract: In this study, qualified law is examined as a potentially effective instrument for the protection of fundamental rights in Central Europe. My argumentation is based on the comparative analysis of the Hungarian,[1] the Romanian,[2] and the Moldovan constitutional development. These are those three countries in Central Europe where qualified laws have been implemented during the democratic transition. The relevant elements of a fourth constitutional framework, the Austrian experience, will be also outlined, but this concept differs remarkably from the three aforementioned constitutional designs.

Keywords: Qualified laws, organic laws, legal migration, laws with constitutional force

Introduction

As a preliminary consideration, we shall define the term "qualified law." The relevant national legal systems outline the concept of qualified law differently; however, certain common points are identifiable between the various approaches. Qualified law is a constitutionally prescribed subcategory of laws, which covers at least theoretically the most crucial legislative subject matters, and which is subject to stricter procedural safeguards,

1 Art. *T.* (4) of the Fundamental Law of Hungary [25.04.2011].
2 Art. 73. (3) of the Constitution of Romania [08.12.1991].

than the requirements of the ordinary legislative process (Camby 1998, 1686–1698; Jakab and Szilágyi 2014; Avril and Gicquel 2014).

After having provided a brief international overview, and some further introductory considerations, I would focus on the comparison, which would be based on three aspects: the historical background, the procedural safeguards, and the scope of qualified law. The analysis will provide an overarching picture from the Central European development of qualified law, which demonstrates also an excellent example to assess, how could a constitutional idea spread within the region. My hypothesis would be the strong role of qualified legislation in Central Europe as an indirect tool for the protection of fundamental rights, but the scope of qualified law shall be determined narrowly, and most fundamental rights shall not fall explicitly within the enumeration of qualified subject matters.

The different national legal systems apply a wide range of expressions for the denomination of qualified laws. Despite the fact that the terminology is not a decisive factor for the substantial analysis, in this particular case, it is worth to assess this issue, since the terminology demonstrates well the different functions of this legal concept: The constitutional, the political, the historical, and the sovereignty-based approach shall be highlighted.

The term "organic law" is used by the Constitutions of France,[3] Spain,[4] Romania, and Moldova, and by several countries outside Europe. This terminology focuses on the approach of constitutional law. In Spain, organic laws fall within the broader constitutional design, the constitutional bloc, and in most relevant constitutional systems, organic laws may be invoked during the constitutional review of ordinary laws.[5]

The category of "laws with constitutional force" was introduced in Hungary during the democratic transition. These laws had the same legal force, as the articles of the Constitution (Kilenyi 1994). The form of "laws adopted by two-thirds majority" was also applied during two decades in Hungary between 1990 and 2011. This approach highlighted the political

3 Art. 46. of the Constitution of France [04.10.1958].
4 Art. 81. (1) of the Constitution of Spain [07.12.1978].
5 N° 66–28, DC du 8 juillet 1966 (Rec., p. 15)., cf. Troper and Chagnollaud (2012, 346).

relevance: Instead of simple majority, broad consent was necessary to adopt or amend qualified laws.

The Fundamental Law of Hungary established, or even reinstated, a new legal concept, the cardinal law,[6] which had almost the same logic, as the former "laws adopted by two-thirds majority." This symbolic step strengthened the historical rhetoric of the new Fundamental Law (Küpper 2014, 2–5).

Foreign models

France and Spain represent two main models for legislation with a qualified majority. However, the issue of qualified law concerns not only these two countries, but also several other constitutional systems of the world.

In spite of the fact that some elements of the English constitutional development were close to the logic of qualified law (Leyland 2012), the modern history of qualified law dates back to 1958, when the Constitution of the Fifth French Republic was adopted.[7] After the decolonization of Africa, numerous African countries have implemented organic law into their constitutional design (David 1964, 630). Currently, approximately 21 African Constitutions provide expressly for organic law, such as Algeria,[8] Senegal,[9] or Tunisia,[10] and further countries across the continent.[11]

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6 Art. T. (4) of the Fundamental Law of Hungary [25.04.2011].

7 Art. 46. of the Constitution of France [04.10.1958].

8 Art. 123. of the Constitution of Algeria [15.05.1996].

9 Art. 78. of the Constitution of Senegal [07.01.2001].

10 Art. 65. of the Constitution of Tunisia [26.01.2014].

11 Art. 166. (2) b) and Art. 169. (2) of the Constitution of Angola [21.01.2010]; Art. 97. of the Constitution of Benin [02.12.1990]; Art. 155. of the Constitution of [02.06.1991]; Art. 127. of the Constitution of Chad [1996]; Art. 66. of the Constitution of Djibouti [1992]; Art. 104. of the Constitution of Equatorial Guinea [1991]; Art. 71. of the Constitution of Ivory Coast [08.11.2016]; Art. 60. of the Constitution of Gabon [1991]; Art. 83. of the Constitution of Guinea [07.05.2010]; Art. 124. of the Constitution of the Democratic Republic of Congo [18.02.2006]; Art. 125. of the Constitution of the Republic of Congo [2001]; Art. 52. 70. 73. 77. 80. 85. 87. 89. 92. 93. 99. 101. 102. 103. and 105. of the Constitution of the Central African Republic [27.12.2004]; Art. 88. and 89. of the Constitution of Madagascar [14.11.2010]; Art. 85. and 86. of the Constitution of Morocco [01.07.2011]; Art. 67. of the Constitution of Mauritania [12.07.1991]; Art. 131. of the Constitution of Niger [31.10.2010];

The second wave of the spread of qualified law were connected to the fall of nationalist dictatorships in Spain and Portugal:[12]Qualified laws were introduced in both constitutions (Conversi 2002), and later, this model was followed by a considerable number of Latin-American countries, such as Ecuador[13] or Venezuela,[14] and other countries.[15]

Finally, owing to the third wave of the spread of qualified law, after the failure of the communist regimes, this solution was also implemented in the Hungarian, in the Romanian,[16]and in the Moldovan[17]constitutional systems.

Apart from this, after the democratic transition, some former Soviet republics have also implemented organic law, but the relevant constitutional articles were soon repealed.

It is also worth contemplating that the qualified subject matters of organic laws are divided into two main categories: the fundamental rights and the basic institutional framework of the state.[18] Qualified laws cover often a wide range of fundamental rights, such as freedom of assembly, freedom of association, freedom of religion, or the fundamental political rights. In addition to this, the key rules on the main constitutional actors and institutions fall also within the scope of organic law. For instance, in Hungary, the act on the Parliament,[19] on the Constitutional

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Art. 92. of the Constitution of Togo [14.10.1992]; Art. 73. (3) and Art. 86. (2) b) of the Constitution of Cape Verde Islands [1980].

12 Art. 81. (1) of the Constitution of Spain [07.12.1978], Art. 136 (3) of the Constitution of Portugal [02.04.1976].

13 Art. 133. of the Constitution of Ecuador [28.09.2008].

14 Art. 203. of the Constitution of Venezuela [20.12.1999].

15 Art. 63. of the Constitution of Chile [21.10.1980]; Art. 112. of the Constitution of the Dominican Republic [13.06.2015]; Art. 151. of the Constitution of Colombia [04.07.1991]; Art. 164. of the Constitution of Panama [1972]; Art. 106. of the Constitution of Peru [31.12.1993].

16 Art. 73. (3) of the Constitution of Romania [08.12.1991].

17 The Constitution of Moldova, Art. 61. (2), Art. 63. (1) and (3), Art. 70. (2), Art. 72. (3) and (4), Art. 74. (1), Art. 78. (2), Art. 80. (3), Art. 97, Art. 99. (2), Art. 108. (2), Art. 111. (1) and (2), Art. 115. (4), Art. 133. (5) [29.07.1994].

18 14/B/2002. ruling of the Hungarian Constitutional Court, ABH 2003, Pp. 1476, 4/1993. (II.12.) ruling of the Hungarian Constitutional Court, ABH 1993, Pp. 48.

19 Art. 4. (5), Art. 5. (8), and Art. 7. (3) of the Fundamental Law of Hungary [25.04.2011].

Court,[20] on the general accounting office,[21] on the National Bank,[22] and on the organization of the judiciary[23] shall be adopted by two-thirds majority of the deputies present.

The present study focuses on the fundamental rights protection aspect of qualified legislative majority; however, this could not be assessed in an isolated way. Consequently, the institutional side will be also concerned in certain respects, as an indirect tool for the protection of fundamental rights.

Scope of qualified legislation

After having elaborated a cursory glance on the organic laws of the world, now I turn to those circumstances, which entail general introduction to this legal concept. First, some very brief points would be provided from the French and the Spanish background, as these two countries are really influential worldwide in this regard. Then, the relevant Central European experience will be conceptualized, which gives us some insight, on why the function of qualified laws in the field of fundamental rights protection have been deemed as significant in Central Europe. Finally, certain statements will be provided from the Austrian constitutional framework, which contains elements that had a crucial impact on the development of Central European qualified laws. However, the Austrian development entails inherently different constitutional challenges, than the Hungarian, Romanian, and Moldovan context.

In France, organic laws were introduced by De Gaulle, who highlighted the institutional aspect, and almost neglected the role of organic laws as an instrument for rights protection (Acher 2012). Owing to this approach, the French organic laws cover mostly the basic institutional framework of the state (Troper 2008, 13). On the contrary, in Spain, certain balance is applied between the fundamental rights and the institutional approach.[24] Contrary to France, in Spain, a broad circle of fundamental rights are

20 Art. 24. (8) of the Fundamental Law of Hungary [25.04.2011].
21 Art. 43. (4) of the Fundamental Law of Hungary [25.04.2011].
22 Art. 41. (6) of the Fundamental Law of Hungary [25.04.2011].
23 Art. 25. (8) of the Fundamental Law of Hungary [25.04.2011].
24 SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2.

regulated by organic laws.[25] The Spanish Constitutional Court has elaborated consequently a restrictive interpretation of the organic legislative domain to avoid the unnecessary limitation on the governmental margin of appreciation (Barceló y Serramalera 2004, 30–31).

In the following, I will focus on the comparison of the Hungarian, the Romanian, and the Moldovan experience.

During the democratic transition, the huge fear from the unlimited governmental power constituted a crucial factor, generated by the memories from the communist period.

This was a key consideration, which explains the introduction of organic laws in these countries (Bozóki 1999, 2478). Political transition may often lead to extended violence, or even armed conflicts; therefore, a further target was to exclude violent incidents, or at least take immediate control over aggressive tendencies (Elster 2012, 7–9, 21–37).

Despite certain similarities, the historical background differs remarkably in the three relevant Central European countries. In Romania, the drafters of the Constitution could not rely on national traditions – one could refer only to a document from the middle of the nineteenth century, which was called "organic law of Romania." However, this organic law had a constitutional status, rather than a distinguished form of legislation.[26] Nevertheless, the French, and in certain respects the German, the Italian and the Belgian constitutional systems were also influential during the drafting of the Romanian democratic framework (Deleanu 2006, 220). Apart from this, from the 1980s, the Romanian society had several direct and painful experiences from the overbroad power of the dictatorship, with systematic and serious breaches of fundamental rights. In Romania, instead of peaceful means, the transition was achieved by a revolution. This situation required serious carefulness from the drafters of the new Constitution: several legal instruments were considered, which could promote the stability of the constitutional system. Romania is thus the

25 JCC no. 236/2007.

26 On the basis of the interview with Prof. Simina Elena Tanasescu, and Prof. Stefan Deaconu, lecturers of the Constitutional Law Department at the University of Bucharest. [Bucharest, 23.01.2017].

only European country, where qualified laws were implemented to the Constitution shortly after an armed conflict.

In Moldova, local constitutional traditions were apparently irrelevant, since an independent Moldovan State just existed during the last period of World War I, and even then only for some months (Lengyel 2011, 55). As a consequence, the foreign models were highlighted: In reality, the structure and the logic of the Romanian Constitution dominated the Moldovan constitution-making process (Carnat 2005, 129–130). It is also worth noting that the Moldovan society was divided by a great number of conflicts during the process of the democratic transition: the tensions between the Romanian and the Russian population, the claim for independence from the Transnistrian Territory, as well as the autonomous status of Gagauzia were also controversial issues. In the light of these concerns, it may have been justifiable to require a higher level of parliamentary majority for the adoption of organic laws. However, it should be also noted that according to certain Moldovan experts, during the constitution-making process, the aforementioned conflicts and risk factors had not yet been identified; therefore, these considerations did not influence the introduction of organic laws. The representatives of this theory claim that Moldovan organic laws were introduced due to the strong Romanian and Russian impact, and several other legal arguments were also raised.[27]

The Hungarian case is more complex in this regard, as it originates from the era of the historical constitutional development (Marczali 1907, 110) from before 1945, when the so-called cardinal laws were the cornerstones of the Hungarian constitutional framework (Hajnóczy 1958, 236–240). Nevertheless, the scope of cardinal laws was not outlined precisely, and these laws were subject to the same legislative procedure, as ordinary acts (Ferdinándy 1902, 77). In 1989, the six laws that determined the character of the democratic transition were also often summarized as "cardinal laws" (Antal et al. 2011, 5). Almost simultaneously with this development, the category of laws with constitutional force was established to supplement the democratic constitution: Similar to the constitution, for

27 On the basis of the interview made with Prof. Violeta Cojocaru, the leader of the Constitutional Law Department of the University of Chisinau. [Chisinau, 14.09.2017].

the adoption or amendment of these laws, the two-third majority consent of all parliamentary members was required.[28] According to the contemporary approach, all legal rules, which concern fundamental rights, were to be covered by laws with constitutional force. However, the overbroad application of qualified majority requirement thereby undermined the governance of the country, since almost all legislative fields concern – at least indirectly – fundamental rights (Antal et al. 2011). The qualified majority requirement was thus stricter in 1989, than nowadays. A wider circle of laws fell within its scope, than currently, under the Fundamental Law of Hungary. The concept of laws with constitutional force was thereby created to decrease uncertainty: the participants of the political arena could not foresee the outcome of the forthcoming parliamentary elections, and the intentions of the future winners. As a consequence, almost every political actor had strong interest to establish an inclusive legislative process (Szalai 2011).

Since the distortive effect of the overbroad qualified majority requirement was recognized generally, after the first democratic elections, during the spring of 1990, the new government and the opposition concluded a compromise to reduce the domain of qualified laws. The "laws with constitutional force" were replaced by the terminology of "laws adopted with two-thirds majority," and the qualified legislative subject matters were more or less exhaustively enumerated by the Constitution.[29] Instead of the "large qualified majority," only the two-thirds majority consent of those deputies was prescribed, who participated in the particular vote. This solution was close to the Spanish logic, which is based on a proper balance between the rights protection and the institutional approach (Chofre Sirvent 1994, 59–61).

On January 1, 2012, the Fundamental Law of Hungary entered into effect, highlighting the historical traditions by reinstating the term of "cardinal law," albeit the current content of this expression is not equivalent to the historical meaning (Barna and Szentgáli-Tóth 2013). Currently, the cardinal subject matters are enumerated exhaustively by the Fundamental Law (Bodnár and Módos 2012, 33–34). The required majority is always

28 Art. 8. of Act XXXI. of 1989.
29 Act XL. of 1990.

the two-thirds majority consent of the parliamentarians present. However, the fundamental rights have almost disappeared from the list of cardinal fields under the new constitutional framework (Szentgáli-Tóth 2012). The current Hungarian interpretation is thus close to the French as well as to the Romanian/Moldovan approach, since the institutional side is dominant, and only a little number of fundamental rights, and a narrow circle of indirect safeguards for fundamental rights protection is regulated by cardinal laws (Jakab 2014).

Hungary is a special model of qualified legislation, because during less than 30 years, at least three different models of qualified law have been introduced. While in other countries, the established version of qualified law – with its advantages and weaknesses – determines the constitutional development during long decades, Hungary has experienced the regular reconsideration of the qualified law concept (Kukorelli 2006, 155).

The Hungarian, the Romanian, and the Moldovan systems differ remarkably as regards the relevant procedural rules. In Romania, following the French model, the absolute majority of both chambers is required instead of the two-thirds majority of the deputies present.[30] A further difference should also be taken into consideration: Any governmental decree could intervene in the organic domain only on the basis of parliamentary authorization. The urgent decrees might be approved by the Parliament a posteriori, but these legal instruments could not interfere with the organic domain (Vida 2006, 52–62).

Concerning the level of required majority, similar logic is applied in Moldova. However, the Moldovan Parliament is a unicameral legislative body. Apart from this, the parliamentary stage of the organic legislative process is subject to stricter rules than the ordinary legislation.[31]

The Hungarian Parliament is also unicameral, but only "small two-thirds consent" is prescribed for the adoption and the amendment of these laws.[32]

30 Art. 76. (1) of the Constitution of Romania [08.12.1991].
31 Art. 74. (1) of the Constitution of Moldova [29.07.1994].
32 Art. T. (4) of the Fundamental Law of Hungary [25.04.2011].

Specificities of qualified legislation

In reality, the organic legislative process is not a unitary concept in most of the relevant constitutional systems. In France, certain organic laws have a quasi-constitutional status (De Duy Braibant 1996), while in Spain, the organic laws from autonomous regions are subject to stricter legislative procedure, than other organic laws (mandatory a priori constitutional review is required) (Sosa Wagner 1979, 199–204). A similar tendency may be experienced in Moldova, where the autonomous status of Gagauzia is covered by an organic law, which shall be adopted or amended by three-fifths parliamentary majority instead of the mere absolute majority.[33] The Hungarian concept also applies procedural distinction between qualified laws. The "small two-thirds requirement" means the two-thirds majority of the deputies present, while the "large two-thirds majority" means the two-thirds majority consent of all parliamentarians.[34] In the light of the abovementioned examples, there is a widespread tendency to make procedural distinction between qualified laws; however, fundamental rights are not concerned by this issue. One cannot identify constitutional systems, where the special qualified laws would only cover fundamental rights.

As it was stated earlier, the two main branches of qualified legislation deal with the institutional and the fundamental rights aspect.[35] The institutional aspect is not analyzed here in depth; however, in almost all relevant legal systems, the extra-constitutional rules on the functioning, on the organization, and on the relationships of basic state institutions shall be covered by qualified laws. Among the qualified subject matters, one may find fundamental rights, and the regulation of those institutions, which play key role as to the protection of fundamental rights. In my view, this ambiguity may be interpreted as the two levels of rights protection by qualified laws. The direct level constitutes that certain fundamental rights shall be covered by qualified law, while the indirect aspect provides that the rules on the constitutional court, on the ombudsman, on the judicial

33 Art. 111. (7) of the Constitution of Moldova [29.07.1994].
34 Art. E. (4) of the Fundamental Law of Hungary [25.04.2011].
35 1/1999. (II. 24.) ruling of the Hungarian Constitutional Court, ABH 1999, 25.

system, and on the status of judges shall be adopted by qualified majority, as a safeguard of independence.

As the historical references demonstrate well, the scope of qualified law is reconsidered regularly in Hungary; however, at the moment, the Hungarian, the Romanian, and the Moldovan solutions are relatively close to each other: All three constitutional systems operate with qualified laws only in a very narrow scope as a tool for the direct protection of fundamental rights. Two examples may be mentioned here: the freedom of religion[36] and the right to citizenship.[37]

The qualified majority requirement concerns not only, and not primarily, the fundamental rights, but also such institutions, which guarantee the prevalence of human rights. In the Hungarian, Romanian, and Moldovan Constitutions, three such institutions are included within the qualified legislative domain: the constitutional court, the ombudsman, and the judicial system. In reality, qualified laws play even a more complex role as an indirect safeguard for the protection of fundamental rights: For instance, in Romania and Moldova, the system of public education is also considered as a field of qualified legislation.[38]

Despite the fact that these common points seemingly explain in which circle qualified laws influence the protection of fundamental rights in Central Europe, the effective functioning of the system could not be understood without analyzing such techniques, by which the bounds of the qualified legislative domain are identified.

The Hungarian Fundamental Law introduced a new system to make a more coherent distinction between qualified and ordinary provisions. The Fundamental Law provides that the detailed, or the fundamental, rules of certain subject matters shall be adopted by two-thirds majority (Schmidt 2013). Since according to the jurisprudence of the Constitutional Court,

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36 Art. XIX. (3) of the Fundamental Law of Hungary [25.04.2011], Art. 73. (3) point S. of the Constitution of Romania [08.12.1991], Art. 72. (3) point K) of the Constitution of Moldova [29.07.1994].

37 Art. G) (4) of the Fundamental Law of Hungary [25.04.2011], Art. 5. (1) of the Constitution of Romania [08.12.1991], Art. 17. (1) of the Constitution of Moldova [29.07.1994].

38 Art. 73. (3) point N) of the Constitution of Romania [08.12.1991], Art. 72. (3) point K) of the Constitution of Moldova [29.07.1994].

the same law may contain qualified and ordinary provisions as well,[39] in such laws, which contain cardinal provisions, a cardinal clause shall be incorporated. The Constitutional Court has the competence to review the constitutionality of cardinal clauses: for instance, to verify whether the cardinal provisions of the act on citizenship are equivalent to the term of "detailed rules on citizenship."[40]

The Fundamental Law thereby does not provide a separate list of cardinal subject matters. Instead of this, several constitutional articles refer to the qualified majority requirement. The Fundamental Law does not constitute a legal hierarchy between cardinal and ordinary laws at all – this approach is discussed and contested regularly (Cserne and Jakab 2015, 40–47). The Constitutional Court has issued several rulings, which analyze the legal relationship between the two categories of law, and the boundary between the cardinal and the ordinary domain have been also under scrutiny.[41]

Art. 73. of the Constitution of Romania prescribes most of the qualified subject matters; however, several other legislative fields are also classified by the Constitution as "organic." The scope of organic law is remarkably broader in Romania, than in Hungary. Each act declares whether it is an organic or an ordinary law; however, both types of provisions may coexist within the same act. The Romanian Constitutional Court made several times a clear distinction between organic and ordinary provisions within the same legal text.[42]

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39 55/2010. (V. 5.) ruling of the Hungarian Constitutional Court, ABH 2010, 366.

40 As an example for this logic, please see: 17/2013. (VI. 26.) rulings of the Hungarian Constitutional Court, ABH 2013, 583; 16/2015. (VI. 5.) ruling of the Hungarian Constitutional Court, ABK 09.06.2015, 741.

41 As examples, please see: 5/1990. (IV. 9.) ruling of the Hungarian Constitutional Court, ABH 1990, 32.; 26/1992. (IV. 30.) ruling of the Hungarian Constitutional Court, ABH 1992, 135.; 4/1993. (II. 12.) ruling of the Hungarian Constitutional Court, ABH 1993, 48.; 54/1996. (XI. 30.) ruling of the Hungarian Constitutional Court, ABH 1996, 173.; 66/1997. (XII. 29.) ruling of the Hungarian Constitutional Court, ABH 1997, 397.; 48/2001. (XI. 22.) ruling of the Hungarian Constitutional Court, ABH 2001, 330.; 27/2008. (III. 12.) ruling of the Hungarian Constitutional Court, ABH 2008, 289.

42 For the demonstration of the relevant Romanian jurisprudence please see: Decision of Constitutional Court no 88/2.06.1998, Official Gazette no 207/3.06.1998; Decision of Constitutional Court no 442/10.06.2015,

The scope of Romanian organic law is considerably wider, than its Hungarian counterpart, but the required level of majority is lower, so the legal consequences are less serious. In Romania and Moldova, the civil code, the criminal code, and further codes, which cover a wide range of social relationships, are also considered as organic laws. In Hungary, these laws are not classified as cardinal, because it is claimed that this categorization would exclude even the most necessary amendments of these codes.

As regards Moldova, it shall be noted that the real circle of organic laws may not be identified on the sole basis of the constitutional text (Carnat 2005, 114–115, 129–130). An enumeration of organic subject matters is provided by Art. 72(3) of the Constitution of Moldova, but other constitutional articles also declare further fields of organic legislation.[43] The Parliament has also the possibility to adopt organic laws on such matters, which are not listed by the Constitution as required fields of organic legislation. In such case, the organic character of the act shall be provided expressly.[44] This margin of decision of the Parliament is not only a theoretical issue: On the basis of this competence, the Parliament has adopted organic law on the general prosecutor, organization of armed forces, status of the judiciary, lawyers, and national security services.[45]

In practical terms, this means that the hierarchy of legal sources is based on the Constitution and on organic laws, and the organic character shall be considered as usual in Moldova rather than exceptional. The scope of Moldovan organic law may be described as overbroad – consequently, the number and significance of ordinary laws is lower than elsewhere. This background clarifies why the necessity of organic law has not been contested in Moldova. Similarly, the supreme legal effect of organic law over ordinary law is beyond doubts. For this reason, organic law is often considered a safeguard, as a prolongment of the Constitution, while the

Official Gazette no 526/15.07.2015; Decision of Constitutional Court no 568/15.09.2015, Official Gazette no 844/12.11.2015; Decision of Constitutional Court no 622/13.10.2016, Official Gazette no 60/20.01.2017.

43 Art. 72. (3) point P) of the Constitution of Moldova [29.07.1994].

44 Art. 72. (3) point R) of the Constitution of Moldova [29.07.1994].

45 On the basis of the interview made by Teodor Carnat, the member of the Judicial Council of Moldova and the professor of the Constitutional Law Department in the State University of Moldova [Chisinau, 14.09.2017].

unwanted or distortive consequences are almost neglected.[46] Under the Moldovan jurisprudence, only the substantial constitutionality of organic laws might be dubious, and the formal legal character of organic law is not assessed in depth.[47]

Austrian model

Some paragraphs of this contribution shall be also devoted to the Austrian experience, which constitutes a different model of implementation of qualified legislation. The Austrian system does not operate explicitly with any terminology of qualified law, but in practice, the internal structure of the Austrian Constitution implies certain components of qualified legislation. The Austrian constitutional framework is a multilayer and inherently fragmented concept, which makes a clear difference between ordinary legislative provisions and those statutory articles, which are vested with quasi-constitutional force. The Austrian Federal Constitution is composed of numerous federal acts, starting from the 1867 Grundgesetz[48] and the 1920 Federal Constitutional Act. The international conventions of constitutional rank (for instance, the European Convention on Human Rights) and the statutory provisions with constitutional force should be also mentioned: To demonstrate this distinction between the two categories of legal norms, the first paragraph of the act on data protection is a quasi-constitutional norm, while the second paragraph of the same act is an ordinary statutory provision. From our perspective, this ambiguity is a relevant point here (Jakab 2010, 142).

Moreover, in Austria, any amendment to the constitutional framework should not be passed always as constitutional amendments. Therefore, the constitutional concept does not provide for a transparent and coherent

46 On the basis of the interview made with Rodica Secrieru, the general secretary of the Constitutional Court of Moldova [Chisinau, 15.09.2017].

47 For example, please see: Decision no. 36. of 2013. of the Constitutional Court of Moldova [05.12.2013].

48 A Birodalmi Tanácsban képviselt királyságok és országok polgárai általános jogairól szóló Állami Alaptörvény 1867. December 21. (Staatsgrundgesetz vom 21.12.1867 über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder).

system of norms of the whole legal system. During the coalitional periods, it was a generally accepted practice that the two-thirds parliamentary majority amended the constitutional framework unilaterally, by vesting certain statutory provisions with quasi-constitutional force, instead of amending the constitutional documents themselves. This tendency has not been relevant during the last years, though. These considerations explain why the Austrian literature operates with the concept of unconstitutional constitutional law, and why the Austrian Constitutional Court is entitled to review the constitutional amendments substantially.[49]

The Austrian constitutional development has a special historical background due to certain continuity with the constitutional design of the Austrian Empire. Furthermore, despite the geographical proximity, the country fell outside from the socialist sphere of interest. As a consequence, those elements of the Austrian constitutional framework, which are close to the concept of qualified law, have not been implemented to secure democratic transition by peaceful means, but rather to complement an inherently fragmented, historically entrenched constitutional surrounding. Due to these differences, the Austrian experience does not constitute a separate model of Central European qualified laws, but it should be assessed as a close point of reference for those lawyers and politicians, who argued for the introduction of qualified laws in Hungary, Romania, and Moldova.[50] Apart from this, the Austrian statutory provisions with quasi-constitutional force play a significant role in protecting certain fundamental rights, which in fact inspired the Hungarian and Romanian drafters to consider qualified majority as a potential safeguard for the protection of fundamental rights and human dignity.

Qualified legislation in Central Europe

On the basis of this brief comparison, one may argue that qualified law is a proper instrument to strengthen the protection of fundamental rights in the post-communist countries of Central Europe. In my view, at least two

49 VfSlg 11.756 (1988); VfSlg 11.829 (1988); VfSlg 11.916 (1988); VfGH 11.10.2001, G 12/00.

50 The oral statement of István Somogyvári, a former Hungarian secretary of state during a personal interview made with him on 27 October 2016.

historical situations should be distinguished clearly at this point. The qualified law requirement enforced the consensual legislation, meaning this was a crucial peaceful means to promote the democratic transition in Hungary, Romania, and in Moldova. This may have been a model to follow by other states of the region as well. Furthermore, during the democratic transition, the Central European states were not bound by a series of international agreements and memberships in organizations for the protection of fundamental rights, and the internal institutional framework of these states often failed to enforce effectively and predictably the fundamental rights. In contrast, now several international agreements provide standards and legal duties for Central European countries, and well-organized state and civil institutions monitor the reality of fundamental rights closely so that the relevant political parties would not undermine the democratic character of the constitutional framework, and would not establish an authoritarian regime.

However, the recent Hungarian and Romanian experience raises the following issue: In the hands of a strong parliamentary majority, qualified law could function easily as an instrument to fix governmental policies for long-term periods. It would be difficult, or almost impossible, to amend rules adopted with qualified majority. In the light of these considerations, during the democratic transition, the implementation of a broad qualified law concept was justifiable; however, among the current circumstances, the same logic would result in unjustifiably serious limitation of the margin of appreciation of the respective states and governments.

Strong arguments support the idea that qualified laws may be valuable parts of the Central European constitutional systems, especially with regard to protection of human rights, but the unnecessary distortion of the parliamentarism should thereby be avoided. When qualified law is introduced in any field of legislation, the particular law should not be able to be enacted without oppositional votes.

Finally, I will provide certain points on qualified law as a migrating constitutional idea within the Central European region.[51] In my view, we should clearly distinguish at this stage the external and the internal

51 Regarding the general tendencies of circulation of constitutional ideas, see Choudry (2006, 1–35).

direction of the constitutional migration. On the one hand, qualified law has been such a constitutional solution, which has been borrowed from foreign, mostly Western European models. But this implementation meant not a mere copy of external frameworks – it adapted a globally acknowledged legal concept to the local circumstances, which vary remarkably from country to country. Moreover, the introduction of the new constitutional idea is strongly attached to a particular historical situation, and it is also influenced considerably by the long-term historical tradition of each country.

The constitutional migration has also an internal aspect, which demonstrates how the path of qualified law advanced within the Central European region. The similar historical moment in the countries of the region explains why the almost parallel introduction of this constitutional concept took place. Nevertheless, it was also important that the three countries (Hungary, Romania, and Moldova) inspired each other as well. Qualified law spread from the West towards the East, but it might be an exaggeration to describe this as a conscientious or coherent process. Qualified law was introduced firstly in Hungary in the Autumn of 1989. The Hungarian decision relied on the West European (French and Spanish) and the Austrian model, while the historical predecessors from the medieval centuries were also relevant. It seems that, for the Romanian drafters, the Hungarian implementation of qualified legislation in 1989 was not an important point of reference. The Romanian constitution-making process had a special regard to the French development, which brought the idea of organic law into the Romanian constitutional discourse. Two years after the Romanian introduction of organic law, this legal category appeared also in the Constitution of Moldova. It is beyond doubt that this constituted an almost direct and automatic transfer from the Romanian practice; however, certain Moldovan experts relativized this explanation and highlighted other constitutional and political considerations, which motivated the implementation of organic law in Moldova.

Conclusions

To summarize, how this brief assessment could contribute to the discussion on Central European constitutional migration, it is deemed that this region

mostly relies on West European theoretic concepts. However, the Central European countries do not copy West European solutions automatically. Moreover, in certain respects, the local traditions play down or at least amend remarkably the exported concepts. There are logical and historical similarities between the Central European constitutional frameworks, but their development is independent from each other, and their external influence is stronger than their interdependence.

After having considered each relevant argument, on the basis of the Hungarian, Romanian, and Moldovan models, my point is the following: Qualified law should play a crucial role as an indirect tool for the protection of fundamental rights. The relevant institutions (such as the constitutional court, the ombudsman, and the judicial system) should be covered by qualified laws. Nevertheless, for the fundamental rights themselves, the simple legislative majority would constitute sufficient safeguard – this solution would combine proper structural guarantees with a reasonable governmental margin of decision.

The present study provided an overview from the Central European experience of qualified legislation. In this region, the historical role of qualified majority requirement was to support the inherently peaceful character of the post-communist democratic transitions. Nevertheless, qualified law might be influential in the field of human rights protection, even nowadays: Among other institutional guarantees, qualified law would enhance the general level of rights protection. Still, bearing this in mind, it is recommended to outline and interpret the scope of qualified law in a restrictive way, to preserve the logic of parliamentarism.

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