COMPARATIVE ANALYSIS OF QUALIFIED LAW: FRANCE, SPAIN AND HUNGARY

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I. Introduction

As a preliminary consideration, I will identify what I understand under the term qualified law. Qualified law is a special category of statutes with a clear constitutional background, which covers a 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 national legal instruments. These denominations show the key functions of qualified laws, which are not only constitutional, but also political, historical, and also have a clear sovereignty aspect. Organic law appears in the French[2] and the Spanish[3] Constitutions, 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 have 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, simple majority was not sufficient. The new Fundamental Law of Hungary modified the

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1 J. P. CAMBY, 'Quarante ans de lois organiques' (1998) 5-6 Revue de droit publique 1686; A. JAKAB – E. SZILÁGYI, 'Sarkalatos törvények a Magyar jogrendszerben' (2014) 7 *Új Magyar Közigazgatás* 96; P. AVRIL – J. GICQUEL, Droit parlamentaire (2014 Paris) 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, 346.

terminology and constituted the category of cardinal laws[5] with a similar content as its predecessor, the "laws adopted by two-third majority". This symbolic step aimed at strengthening the historical rhetoric of the Fundamental Law.[6]

France, Spain and Hungary represent three main models of qualified law. However, the issue of qualified law concerns not only the three abovementioned countries, but also a huge number of jurisdictions around the word. The modern history of qualified laws dates 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 contain 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 regimes 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 the spread of qualified law, this framework was added to the Hungarian, Romanian,[15] and Moldovan[16] constitutional systems after the democratic transition. Moreover, some former member states of the Soviet Union have also codified the concept of qualified law, but these initiatives have been repealed.

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5 Art. T of the Fundamental Law of Hungary.

6 *H. KÜPPER, 'A kétharmados/sarkalatos törvények jelensége a magyar jogrendszerben' (2014) 46 MTA Law Working Papers 2-5.*

7 Art. 46. of the French Constitution of 4 October 1958.

8 R. DAVID, *Les grands systemes de droit contemporains* (1964 Paris) 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 Arts. 61. (2), 63. (1) and (3), 70. (2), 72. (1), (3) and (4), 74. (1), 78. (2), 80. (3), 97., 99. (2), 108. (2), 111. (1) and (2), 115. (4), 133. (5) of the Constitution of Moldova of 29 July 1994.

The foregoing considerations give us some sense of the main constitutional issues raised by the concept of qualified law. Qualified law may have a special position in the hierarchy of norms, somewhere between the statutory and the constitutional level, therefore the first chapter 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: consequently, I will deal with the separation of powers perspective of qualified laws in the second chapter. From this perspective, I emphasise 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.

II. Qualified law within the hierarchy of norms

The determination of the legal value of qualified law is essential for practical and theoretical considerations alike. The hierarchy of norms is an integral and unalienable component of the broad principle of rule of law and legal state.[18] The different categories of legal sources have a clear hierarchic order, and the lower ranked norms shall not infringe those legal texts which are higher than them in this structure. Regarding qualified law, the main issue is whether these norms have a constitutional or statutory character, or if these statutes constitute a separate legal framework between these two levels.

The practical consequences of the answer are essential: ordinary law shall not contradict any qualified law with constitutional force, and this would 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 quote some practical examples, if qualified law falls outside the constitutional

[17] M. TROPER – D. CHAGNOLLAUD (ed.), Traite international de droit constitutionnel (2012 Paris, Vol. I.) 340.

[18] Decision No. 19/2005. (V. 12.) of the Hungarian Constitutional Court; Decision No. 193/2010. (XII. 8.) of the Hungarian Constitutional Court.

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 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 the lack of such a hierarchic order, the role of the principle of competence shall be highlighted.[19]

Due to the essence of clarification, we shall distinguish three levels of legal instruments for this purpose. Firstly, constitutions may provide explicit rules for the legal value of qualified laws. Secondly, constitutional courts shall interpret the relevant constitutional articles. In case of the 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 experience will be analysed.

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,[20] but the details of this framework is highly debated.[21] 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 abstract debates of these issues. Due to this phenomenon, the theoretic aspects will be analyzed purely as the background of codified solutions.

19 CAMBY [1998], Cited above, p. 1693.
20 AVRIL [2014], Cited above, p. 271-273.
21 M. TUSHNET, 'Constitution-making: An Introduction' (1983) 91 *Texas Law Review* 1.

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.[22] 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 regards 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 broaden remarkably the competence of the constitutional court. This idea have been discussed for instance by some Hungarian authors.[23]

Another 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 does not constitute a separate legal framework, and ordinary law can even contradict with the qualified norms.[24]

These are the sharpest interpretations of the issue, but in reality, most of the theories are 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,[25] qualified law would have almost constitutional force.

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22 AVRIL [2014], Cited above, p. 271-273.

23 T. DRINÓCZY, 'Az Alaptörvény főbb elvei' (2011) 9 *Pázmány Law Working Paper* 12, http://www.plwp.jak.ppke.hu/images/files/2011/2011-09.pdf; A. Zs. VARGA, 'Néhány gondolat Magyarország új Alkotmányáról' (2010) 4 *Iustum Aequum Salutare* 21-25, http://www.jak.ppke.hu/hir/ias/20104sz/21.pdf.

24 C. SIRAT Charles, *La loi organique et la constitution de 1958* (1960 Paris) 153-160.

25 J-P. CAMBY, 'La loi organique dans la Constitution de 1958' (1989) *RDP* 1401.

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 then I will identify the key differences between the theoretical and practical interpretations

1.2. 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 includes: 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.[26]

In France, despite their clear constitutional background, the Council has clarified, that organic laws do not fall inside neither the constitutional framework, nor the constitutional bloc.[27] The Constitutional Council has improved its practice during the recent decades. The approach of the Council is based on three considerations.

Firstly, the Court has recognized the different legal character of organic and ordinary statutes, but has refused to create some sort of clear hierarchy between them.[28] This approach was also confirmed by the French Government,[29] and by the academic literature.[30] 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

26 CAMBY [1998], Cited above, p. 1688.
27 N° 84-177, DC du 30 aout 1984.
28 CAMBY [1998], Cited above, p. 1690.
29 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.
30 *Le Mire* (in *Luchaire* et *Conac*, La Constitution de la Ve République (The Constitution of the V. Republic), Economica, 1987, p. 179-207.

any interference in the other domain.[31] "From 1958, the term of organic law have been descriptive rather than normative."[32] 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 merely 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.[33]

Although an organic law could clarify and complete the constitutionally prescribed scope of statutes,[34] this authorization does 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,[35] nevertheless, the contradiction with an organic law has the same impact as a conflict with a constitutional provision.[36] Furthermore, the rules of the procedure of the two assemblies shall comply also with organic laws[37] as well as with other parliamentary acts.[38]

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 domains, but the Council would struck down such organic provisions which

31 N° 87-234, DC du 7 janvier 1988 (Rec., p. 2).
32 *Avril* [2014], Cited above, p. 274.
33 N° 96-386, DC du 30 décembre 1996.
34 Art. 34. of the French Constitution of 4 October 1958, last clause.
35 M. VERPEAUX – B. MARYVONNE, *Le Conseil constitutionnel* (2007 Paris, La documentation française) 101.
36 N° 60-8, DC du 11 aout 1960.
37 *Le Pourhiet* [2007], Cited above p. 379; N° 2006-537, DC du 22 juin 2006; N° 99-419, DC du 9 novembre 1999.
38 Art. 40. (5) of the Regulation of the National Assembly of France.

are adopted under the ordinary legislative procedure.[39] 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 outline the dividing line 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.

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 does not constitute a unified legal concept, some subgroups of organic law demand special treatment.[40] On the one hand, certain ordonnances (legislative acts adopted by the executive on the basis of parliamentary authorization)[41] are not allowed only in the field of ordinary law, but also within the domain of institutional acts.[42]

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[43] and has a quasi-constitutional character.[44] The theoretical background of this distinction is not very clear, generally, it is supported by some constitutional references. Moreover, the Constitution requires the limitation of the national sovereignty, and for the organic laws related to the Senate identical terms by the two Houses.[45] This classification opens up against a constitutional problem: which organic law is related to the Senate and which is not. The Constitutional Council interpreted this concept relatively restrictively, only the direct impact on the Senate

39 N° 84-177, DC du 30 août 1984 (Rec., p. 67); N° 86-217, DC du 18 septembre 1986.

40 CAMBY [1998], Cited above, p. 1695.

41 ARDANT [2014], p. 417-419.

42 Droit constitutionnel et science politique, (Constitutional law and political science), XVe édition, p. 379 ; also for instance : Organic ordonance of 24 October 1958

43 M. DE GUY BRAIBANT, *Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein* (1996 Paris) 323.

44 N° 98-401, DC du 10 juin 1998.

45 Art. 88-3. of the French Constitution of 4 October 1958.

is considered in this regard.[46] 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 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 and in France: organic laws as legal sources are bound by the Constitution,[47] and by the organic law from the constitutional court.[48] As a result, Spanish organic laws are subject to constitutional review.[49] Although some hierarchic elements between organic and ordinary laws,[50] the principle of competence is highlighted vis-a-vis principle of hierarchy, organic law is not a separate constitutional category.[51] However, some hierarchic aspects are also relevant, organic laws are considered during the constitutional review of ordinary statutes.[52] Nevertheless, the constitutional character of qualified laws has been rejected,[53] organic laws shall comply with constitutional provisions.[54] The Spanish approach is more pragmatic than the French one, the organic law is installed to a certain domain based on subject matters. As a consequence, the distinction within a particular legal instrument is not as strong as in France. However, the intervention in the ordinary domain shall be prevented, therefore, the Constitutional Tribunal strikes out ordinary and organic provisions which infringe the constitutionally prescribed distribution of competences respectively.[55] In spite of the fact that organic laws are incorporated within the constitutional bloc in Spain,

46 N° 85-195, DC du 10 juillet 1985.
47 Art. 9. (3) of the Spanish Constitution.
48 Organic Law No. 2/1979 of the Constitutional Court of Spain, Arts. 27. (2), 28. (2).
49 TROPER [2012]: Cited above, p. 344
50 TROPER [2012]: Cited above, p. 344-345.
51 JCC No. 236 of 2007.
52 TROPER [2012]: Cited above, p. 344-345.
53 L. PRAKKE – C. KORTMANN – H. VAN DEN BRANDHOF, *Constitutional Law of 15 EU Member States* (2004) 743.
54 JCC. No 53. of 1985.
55 JCC No. 236. of 2007.

they are infra-constitutional sources of law, and their legal value is clearly between the constitutional and the statutory level.[56]

The Hungarian constitutional practice is also very close to the French interpretation, however, slighter differences shall be highlighted. Despite the doctrinal concerns,[57] the principle of hierarchy has been consistently refused.[58] 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.[59] Under the previous Constitution, the Constitutional Court conceptualized the term of "essential content" of cardinal subject matters to draw the dividing line between qualified and ordinary law.[60] Nevertheless, there was only a few number of statutes which contained ordinary and cardinal provisions also.[61]

As I have outlined earlier, the Fundamental Law made some remarkable steps to create a more foreseeable framework of qualified majority. The cardinal clauses give 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.[62] Although the legislative 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 laws: 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" has been still required, however, this does not create any

56 TROPER [2012]: Cited above, p. 346.

57 P. CSERNE – A. JAKAB, A kétharmados törvények helye a magyar jogforrásihierarchiában (2001) 2 *Fundamentum* 40, 42, http://works.bepress.com/peter_cserne/25.

58 Decision No. 4/1993. (II.12.) of The Hungarian Constitutional Court; Decision No. 53/1995. (IX.15.) of the Hungarian Constitutional Court; Decision No. 3/1997. (I. 22.) of the Hungarian Constitutional Court.

59 Decision No. 1/1999. (II. 24.) of the Hungarian Constitutional Court.

60 CSERNE [2015], Cited above, p. 44.

61 For instance, Act XXXIV of 1994 on the Police Forces.

62 *Barna* [2013], Cited above.

legal hierarchy between qualified laws.[63] Another major change is that the Fundamental Law provides explicitly the principle of competence for the distinction between cardinal and ordinary domain.[64] As a consequence, the Constitutional Court hase recognized, that a qualified law shall not clearly contradict with an already existing ordinary law.[65]

1.3. Conclusion

This chapter has showed the main theoretical frameworks within qualified law and how these considerations have been applied by the relevant bodies in their practice. These issues concern 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 boundary of the 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 also play a significant role in this regard. Qualified character is mainly based on provisions, and not on texts, and in light of legal practice, qualified law is not a unitary concept. The comparison of theoretical and practical settings show 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 emphasizes in what extent this legal instrument would influence the political configuration.

2. Qualified laws from separation of powers perspective

This chapter analyses how, and to what extent, the emergence 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

63 Decision No. 1260/B/1997. of the Hungarian Constitutional Court.
64 Art. T. (1) of the Fundamental Law of Hungary.
65 Decision No. 43/2012. (XII. 20.) of the Hungarian Constitutional Court.

meant the essential motivation for the emergence 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.[66] 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.

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.

2.1. 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,[67] but as checks and balances, which provides interdependence for all relevant factors of the constitutional system.[68]

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66 A. SZALAI, *A kormányzati hatalom ellensúlyai Magyarországon* (2011) 20, http://www.propublicobono.hu/pdf/Szalai_2.pdf.

67 B. DE MONTESQUIEU, *The Spirit of the Laws* (1748 Paris).

68 The Federalist No. 51.

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.[69] 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 the end of the process[70] are 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.[71] Apart from this, since most of the democratic governments are coalitional, smaller groups in the government side could play a 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.[72]

However, within this model, non-political actors play a 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.[73] This statement is also valid for second chambers.[74] Another very contested issue especially in France, is whether a vote of no-

[69] For the purpose of the present study, the terminology of absolute majority means the support of the majority of all deputies.

[70] Art. 81.1. of the Spanish Constitution.

[71] N° 2007-559, DC du 6 decembre 2007.

[72] P. AVRIL, *Ecrits de théorie constitutionnelle et de droit politique* (2010 Paris, Éditions Université Panthéon Assas) 267.

[73] J. ARLETTAZ – J. BONNET, *Pouvoirs et démocratie en France* (2012 Montpellier, CRDP) 211.

[74] AVRIL [2014], Cited above, p. 292.

confidence could be initiated in the case of voting from organic law.[75] As a further consequence, minority governments are almost eliminated from those countries who follow an absolute majority model. In the case of a wider consent requirement (for instance: two-thirds majority), not only the minority government, but also a 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 show 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) does not operate with a wide circle of guarantees, organic laws differ 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.[76] This competence was founded as a compromise after expanding the right to vote to EU citizens in local elections.[77] In light of the traditional oppositional attitude of the French Senate, this is not only a theoretical consideration.[78] Another special case is the cohabitation, when the majority of the two chambers is different.[79] When the qualified majority requirement is stronger (two-third consent is needed), the concept of qualified law would be based on the consent aspect, and other potential elements are neglected.

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75 CAMBY [1998], Cited above, p. 1690.

76 N° 85-195, DC du 10 juillet 1985.

77 Amendment of the French Constitution of 25 June 1992.

78 ARDANT [2014], Cited above, p. 430.

79 P. AVRIL – A.-M. LE POURHIET, *Représentation et représentativité* (2008 Paris) 83.

Secondly, to continue with the stricter form of qualified majority, from a separation of powers perspective, the two-third majority, like in Hungary,[80] 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 have not been amended for twenty years, due to the lack of required consensus.[81]

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.[82] This approach is in conformity with the current interpretation of democratic representation[83] and this was a relevant consideration for the amendment of the French Constitution in 2008.[84] As a consequence, special rights were provided to the parliamentary opposition as part of this reform.[85] 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 a 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

80 Art. T. of the Fundamental Law of Hungary.

81 A. ANTAL – I. BRAUN – L. FINTA – Z. TÖRÖK, 'Sarkalatos kérdések' (24th Nov. 2011) Méltányosság Politikaelemző Központ 20, http://www.meltanyossag.hu/files/meltany/imce/doc/kp_sarkalatos_kerdesek_111122.pdf.

82 KILÉNYI [1994], Cited above, p. 208.

83 AVRIL [2008], Cited above, p. 7; European Council, Orientations from the status of the opposition in a democratic Parliament, doc. 10488, 31 march 2005.

84 Comite de reflexion et de proposition sur la modernisation et le reequilibrage des institutions de la Ve Republique, Une Ve Republique plus democratique, (The Committee of Reflection and proposals for the modernization and the rebalancing of institutions of the V. Republic, a more democratic V. Republic) Paris, Fayard'La documentation francaise, 2008, pp. 209.

85 ARLETTAZ [2012], Cited above, p. 78.

oppositional deputies, therefore the responsibility for the text is not very clear, and the basic logic of parliamentarism is breached.[86]

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, an 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.[87] These are not purely theoretical concerns: in Hungary, three such elections have taken place since the democratic transition, when the government had a two-third majority in Parliament.[88] The stricter form of qualified majority would also highlight the role of direct democracy as regards qualified laws, since not only ordinary, but also qualified laws are available for referendum.[89]

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,

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86 For instance, Decision No. 55/2010. (V. 5.) of the Hungarian Constitutional Court.

87 B. SZENTGÁLI-TÓTH [2014]: 'A minősített többséggel elfogadott törvények múltja, jelene és jövője a magyar jogrendszerben (2011-12)' *Parliaments Practicum* (edited by: I. SOLTÉSZ Parliamentary Methodology Office) (2014 Budapest) 71-101.

88 See at: valasztas.hu.

89 M. NÉMETH, 'Sarkalatos dilemmák' (2015) *Ars boni legal review* 1, www.arsboni.hu.

while the emergence of a two-thirds requirement is more risky. Usually, it does not serve real consensus-making, but requires from political parties unwanted compromises, which results inconsistent solutions.

2.2. 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 political actors.[90] Two main questions are 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 regards the first issue, the review is optional, and mostly a posterior in Hungary,[91] and in Spain.[92] 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,[93] and in case of any doubt, to bound the scope of qualified and ordinary law.[94] This mechanism raises the compliance not only with procedural, but also with substantial requirements.[95] The details of this theoretical framework have 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,[96] even if they are formulated by certain levels of precision. In other words,

90 P. AVRIL – B. SEILLER, Le controle parlementaire de l'administration (2010 Paris) 104.

91 Art. 24. of the Fundamental Law of Hungary.

92 Art. 28. of the Organic Law No. 2/1979. on the Constitutional Tribunal of Spain.

93 N° 89-263, DC du 11 janvier 1990.

94 For instance, N° 84-177, DC du 30 aout 1984; Decision No. 11/1981 of the Spanish Constitutional Court of April 8; Decision No. 1/1999. (II. 24.) of the Constitutional Court of Hungary.

95 N°60-8 DC du 11 aout 1960.

96 E. BODNÁR – M. MÓDOS, *A jogalkotás normatív kereteinek változásai az új jogalkotási törvény elfogadása óta* (2012) 33-34.

the constitutional court is entitled to control whether a qualified subject matter is covered exclusively by qualified law. Certain constitutional frameworks, like the French also protects the domain of ordinary law.[97]

This approach, which is the more popular version of qualified law, would open up significantly the scope in which it 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,[98] however, this strict distinction has been relativized.[99] Nevertheless, the Constitutional Council is still entitled to prevent the Parliament from overstepping this domain.[100] 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.[101] This system would prevent, at least theoretically, unconstitutional acts in some 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[102] would not be effective.

97 N° 75-62, DC du 28 janvier 1976.

98 Art. 34. of the French Constitution of 4 October 1958.

99 ARDANT [2014], Cited above, p. 425-476.

100 AVRIL [2014], Cited above, p. 271.

101 Arts. 46. cl. 5, 61. cl. 1 of the French Constitution of 4 October 1958.

102 T. JULIEN Thomas, L'indépendance du Conseil Constitutionnel (2010 PhD diss., Université libre de Bruxelles) 103; J.-P. CAMBY [2008], 'Les archives du Conseil constitutionnel: declaration d'independance' (2008) *LPA* n° 192, 6-14.

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,[103] and since 1974, a larger group of Parliamentarians[104] were eligible to initiate constitutional review of ordinary laws, only before the promulgation of these laws. 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, but it is still relatively difficult to refer a constitutional problem before the Council. 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 judicial bodies. Regarding this background, the mandatory review of organic laws is an essential task of the Council, which highlights 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,[105] except from the issues concerning the breach of distinction between the domain of organic and ordinary law.[106] Moreover, the continuous extension of the constitutional framework means that the legal background of a priori

[103] Art. 61. cl. 2. of the French Constitution of 4 October 1958.

[104] 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).

[105] N° 278 QPC du 5 octobre 2012.

[106] N° 2014-386 QPC du 25 mars 2014.

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.[107] Lack of democratic legitimacy is always a strong argument against any form of judicial review.[108]

Regarding the issue of initiatives, there is a clear boundary between the French system, where the prime minister is obliged to refer qualified laws before the Council without discretion,[109] and the other two approaches, 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.[110] 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.[111] In light of the case law of the Council, it seems, that this solution opens

[107] TROPER [2012], Cited above, p. 341-342.

[108] PRX » Piece » CBC - Sunday Edition: Justocracy, www.prx.org/pieces/72-cbc-sunday-edition-justocracy, accessed: 2nd February of 2015

[109] Ordonnance N° 38-1067 du 7 novembre 1958.

[110] THOMAS [2010]: Cited above, p. 108-109.

[111] M. TROPER, *La V Republique et la separation des pouvoirs* (2006) Droits, n° 43, 43.

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 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).

2.3. 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 from 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 put 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

3. 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 two main different perspectives within three legal systems. In the first 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. As a second chapter, the separation of powers aspect was highlighted, I argued against two-third majority, and for a priory constitutional review.

Another crucial outcome of the analysis is the requirement of precision as regards 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 constitutions 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.

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. 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.

4. Summary

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 often enacted by qualified majority, like in Hungary. In Spain and France the consent of the two chambers of the legislation is required, but the final word is up to the first chamber. In France, organic laws 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. I focus on two highly contested areas:

on the place of qualified laws within the hierarchy of norms, and on the impact of qualified law on the separation of powers. Although the three models are significantly different, they show several similarities, and the main issues as well as the given responses are not so far from each other as regards constitutional issues. Nevertheless, the comparative study could identify the advantages and the weaknesses of each model and provide a combination of the different approaches. This study argues for a narrow scope of qualified law; for a separate level for qualified law within the hierarchy of norms between the constitution and the ordinary statutes; for the neglect of two-third majority; for a mandatory a priory review as regards qualified laws, but with the possibility of initiatives. This is only a general model, and the national implementation is subject to the local circumstances. However, as a point of reference this suggestion may be helpful for constitution-makers.

SUMMARY

COMPARATIVE ANALYSIS OF QUALIFIED LAW: FRANCE, SPAIN AND HUNGARY

BOLDIZSÁR SZENTGÁLI-TÓTH

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 often enacted by qualified majority, like in Hungary. In Spain and France the consent of the two chambers of the legislation is required, but the final word is up to the first chamber. In France, organic laws 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. I focus on two highly contested areas:

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RESÜMEE

DIE VERGLEICHUNG DIE QUALIFIZIERTE GESETZE IN FRANKREICH, SPANIEN UND UNGARN

BOLDIZSÁR SZENTGÁLI-TÓTH

In den letzten Jahrzehnten führten einige Länder eine spezielle Unterkategorie von Gesetzen ein, die mit strengeren Prozessregeln beschlossen ist als der gewöhnliche Gesetzgebungsprozess. Diese Gesetze werden oft mit qualifizierter Mehrheit beschlossen, wie z.B. in Ungarn. In Spanien und Frankreich ist die Zustimmung von beiden Kammern erforderlich aber das letzte Wort liegt bei der Erstkammer. In Frankreich müssen die Organgesetze vor der Verkündigung durch Verfassungsmäßigkeitsprüfung geprüft werden oder zusätzliche Sicherheitsvorkehrungen sind in den gewöhnlichen Gesetzgebungsprozess implementiert. In dieser Studie vergleiche ich die Erfahrungen von drei Rechtsystemen – Ungarn, Spanien und Frankreich –, die drei verschiedene Typen von Regelung der qualifizierten Gesetze bieten. Mein Ziel ist, die umstrittensten Probleme von dem rechtlichen Charakter der qualifizierten

Gesetze zu identifizieren und eine gute Lösung für diese Probleme sowie ein optimales Modell der qualifizierten Gesetze zu suchen. Ich fokussiere auf zwei umstrittene Bereiche: auf die Stelle der qualifizierten Gesetze in der Normhierarchie und auf den Einfluss von qualifizierten Gesetzen auf die Gewaltenteilung. Obwohl die drei Modelle deutlich unterschiedlich sind, zeigen Sie einige Gemeinsamkeiten und sowohl die wichtigsten Fragen als auch die gegebenen Antworten sind – aus dem Gesichtspunkt des Verfassungsrechts – nicht so weit voneinander. Dennoch könnte die komparative Studie die Vorteile und die Schwäche der Modelle identifizieren und eine Kombination der verschiedenen Ansätze aufzeigen. Diese Studie argumentiert

• für einen engen Umfang der qualifizierten Gesetze;
• für eine eigene Stufe der qualifizierten Gesetze in der Normhierarchie zwischen der Verfassung und normalen Gesetzen;
• für die Vernachlässigung der Zweidrittelmehrheit;
• für eine obligatorische vorherige Verfassungsmäßigkeitsprüfung aber mit der Möglichkeit der Initiative. Es ist nur ein allgemeines Modell und die nationale Umsetzung muss auch die lokalen Umstände berücksichtigen. Jedoch kann dieser Vorschlag als Referenzpunkt hilfreich sein für die Erarbeitung neuer Verfassungen der Zukunft.