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„HAS LEGISLATION WITH TWO-THIRDS MAJORITY ANY PERSPECTIVE? THE PAST, PRESENT, AND FUTURE OF LEGISLATION WITH TWO-THIRDS MAJORITY IN HUNGARY"

THESIS OF PHD DISSERTATION

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Table of contents

I. THE SHORT SUMMARY OF THE RESEARCH TASK

Cardinal laws are applied in the Hungarian legal system in almost all branches of law: from the organization of the General Accounting Office to the acquisition of fieldlands; from the detailed rules on citizenship to the basic framework of pension scheme. This overbroad scope of cardinal laws shall be considered in the light of qualified majority requirement attached to this category of statutes. In general terms, the parliament enacts a law with simple majority of deputies, who are present, while the amendment of Fundamental Law is subject to two-thirds consent of all members of the Parliament. The notion of cardinal law shall be allocated between these two constructions: Legislation with qualified majority shall be distinguished clearly from the two-thirds majority required for constitutional amendments. If qualified majority is prescribed for constitutional amendments, this is a safeguard of stable constitutionalism, while legislation with qualified majority has several further functions the primary purpose is not the protection of the constitution.

Accordingly, cardinal laws are such laws, which do not constitute a separate level within the hierarchy of norms. Nevertheless, due to the different scope, procedure, and several further characteristics, qualified law as a subcategory shall be distinguished clearly from ordinary law. Most of the issues concerning legislation with qualified majority are generated by this tension: while by practical terms, cardinal law means a separate framework from ordinary law, the jurisprudence has not recognized the inherently different character of qualified- and ordinary laws. This approach is shared not only by the Hungarian literature, but also by the experts of other relevant countries. It shall be also noted, that the legal relationship between the constitution, and qualified laws is still to be clarified. While some experts classify qualified laws as mere laws, the constitutional character of these norms is also often rumoured.

Cardinal laws are discussed regularly by the literature oof constitutional law, but the research has been always focused on a specific aspect of the issue. My aim is to provide a possibly complete analysis from the legal issues concerning legislation with two-thirds majority, and to provide potential answers to these problems:

- Does cardinal law constitute a separate category of legal norms?
- Could be cardinal laws referred during the constitutional review of ordinary laws?
- Could an ordinary law contradict to a cardinal law?
- What is the extent of constitutional authorization for qualified legislation?
- Could an ordinary law amend a qualified law?
- Could an ordinary law contain qualified provisions?
- Is there any hierarchy between ordinary and qualified laws?
- Are cardinal laws necessary and justifiable in the legal system, which are the advantages and disadvantages of this legal concept?

I try to answer such and similar questions. Evidently, a great number of contributions have reflected on these dilemmas. The scientific analysis of cardinal laws is equivalent with their existence in the Hungarian legal system the basic idea was outlined by István Verbőczy at the XVI century. However, my research covers broader scope, and more aspects, as previous academic pieces from this topic. The legal literature from the XVIII-XIX century made considerable efforts to determine the exact definition, and the exclusive enumeration of cardinal laws, but the approach of each author has differed remarkably. After 1989 legislation with qualified majority was considered as a potential safeguard of peaceful transition, however this concept remained in the legal system even after the consolidation of democracy. Since the justification, scope and legal/political impact of qualified laws has been dubious from the democratic transition, almost all prestigious Hungarian constitutional lawyer participated at the professional discourse on this matter during the last three decades: *András Bragyova, Márta Dezső, András Holló, András Jakab, Géza Kilényi, István Kukorelli, Imre Papp* and *Péter Schmuk* dedicated a great number of academic contributions to this issue. Their views influenced significantly my theories. Apart from the legal literature, constitutional court rulings shall be also mentioned as relevant sources, which conccerns almost all issues, which have been highlighted.

The discussion on cardinal laws were intensified by the adoption of the Fundamental Law, during the constitution-making process, several experts suggested the neglect of qualified legislation, or the diminution of its scope. Finally, these proposals were rejected, and the scope of cardinal law was slightly extended. As it wil be demonstrated later,

the Fundamental Law modified slightly the theoretic background of the cardinal framework, which has influenced also the jurisprudence of the Constitutional Court.

The qualified legislation is analysed not only by the Hungarian legal literature, but it is also popular in other countries, where qualified laws are applied. The most detailed concept of qualified law has been elaborated in France, the contributions of *Jean-Pierre Camby*, *Pierre Avril*, *Michel Debré* and *Michel Troper* shall be highlighted. In Spain, numerous studies dealt with the almost 40-years-long history of organic law, while the practice of the Spanis Constitutional Court is also worth-contemplating. Organic laws were also examined by Latin-American constitutional lawyers. Qualified legislation is alien from common law systems consequently English sources may, haveless weight in this dissertation, as in other fields.

Although the fact, that distinguished authors were interested to cardinal laws, their sistematic and complete analysis has not been conducted.

The relevant contributions focused mainly on the practical issues, the deep conceptualization of theoretic and dogmatic background has not been assessed. As a consequence, the scientific analysis of cardinal law concentrated always on particular aspects, the broader context of this legal concept has not been considered sistematically. My dissertation aims to cover as much aspects of qualified legislation, as possible. A complete and full analysis of cardinal law is unachievable however such a wide research shall be targeted to provide a detailed overview from the advantages and disadvantages of the current Hungarian model of cardinal law, and from possible alternatives of the actual concept. My contribution is based on certain hipotheses my goal is to disprove the potential arguments against these ideas.

The background of this dissertation may be summarized by three main statements.

On the one hand, In my view, it is well justified to make a clear distinction between cardinal and ordinary laws, strong arguments support that logic, that stricter procedural rules shall be provided for certain crucial matters of legislation. However, these safeguards shall not provide such strong protection, as the instruments for the protection of the constitution. On this basis, I could not agree with the idea of wholy neglecting cardinal laws. On the other

hand, the current concept of qualified law covers an overbroad list of legislative matters, either in Hungary and elsewhere. I argue with the enumeration of different paradigms for a narrower scope of cardinal law to take out the distortive consequences of the current concept. Several arguments could be mentioned for and against qualified legislation, in my view, the counterarguments have greater weight. The qualified majority requirement shall be maintained exclusively for the basic institutions of the state, where the wide consent of political and constitutional actors is crucial. However, in other fields, qualified majority is even an overrigid element of the system, as the safeguard of stability.

My third point emphasises, that the current Hungarian concept of cardinal law is not an ideal framework from procedural respects, other instruments might highlight better the function of cardinal laws as safeguards, instead of their current limitative character. In the light of international examples, several alternatives might be suggested for the further development of the current concept of cardinal law, apart from narrowing the coverage of this framework, the three main proposals are the mandatory a priory constitutional review, the bicameral Parliament and the reconsideration of the legislative process. In these regards, *de lege ferenda* suggestions are also recommended by my dissertation.

My topic is commonly considered as a frequently researched field, so this dissertation is mainly based on the Hungarian and international legal literature of the recent years. Moreover, my contribution maybe niche suppletory, neither in Hungary, nor elsewhere it has been attempted to analyse qualified laws by a sistematic, interdisciplinary methodology. Thies does not mean, that the interdisciplinarity of the issue of qualified law would be an inherently new idea, Particular aspects of qualified law has been researched separately, for instance, the comparative approach has been concerned by numerous relevant contributions. However, this dissertation aims to integrate the different paradigms, and it tries to make some general statements from cardinal laws, and provide multi-level justification of these statements.

I was inspired by the fact, that in Hungary the foreign models of qualified laws has not been examined accuratelly, the relevant legal literature and constitutional practice has noot been researched in depth. It shall be highlighted, that this tendency is true from the other side also: we cannot mention any French, or Spanish research, which which would have compared the French/Spanish experience with the Hungarian developments. Nevertheless, the

parallel between the French and the Spanish organic laws has been rumoured by more authors. The comparative approach may open up new perspectives in this field. Hungary has a special status amongst those countries, which have introduced qualified legislation, since in Hungary, almost three different models of qualified law has been applied during the last three decades. Moreover, the historical concept of cardinal law shall be also considered, which was relevant in the Hungarian legal system until 1945. While in France and Spain, the concept of organic law has been inherently permanent since its inception, in Hungary, the terminology, and substance of qualified law were amended continuously. The comparison may provide new aspects for the clarification of the special Hungarian development.

II. THE SHORT DESCRIPTION OF RESEARCH AND METHODOLOGY

The dissertation begins with the introductory remarks, than it advances with a descriptive chapter, which outlines the domestic Hungarian history of cardinal laws. From the historical points of references, the sources from the early modern period were highlighted, and then, the academic literature of the XIX century respectively, afterwards, the latest developments and direct antecedents of current cardinal concept are analysed. Three legal notions shall be examined: the term of „cardinal law" which covered the most important acts during the democratic transition. As the outcome of the constitutional amendment during autumn 1989, this concept was followed by acts with constitutional force, which were close to the Spanish framework. The introduction of „acts adopted with two-thirds majority" meant a remarkable movement towards the French sample, qualified laws focused mainly on institutional fields. This tendency was strenghtened by the adoption of the Fundamental Law, and by the implementation of the current concept of cardinal law. The historical analysis concludes with the assesment of the relevant constitutional provisions, the Fourth Amendment of the Fundamental Law of Hungary, as well as the enumeration of the main reforms.

In the comparative chapter, the three vaves are detailed, by which qualified legislation spread around the world, the main models of qualified law are also conceptualized: especially particular highlight is given to France, Spain and Hungary. Since the international examples form indirect antecedents of current cardinal laws, I shall have dedicated a separate chapter to the foreign models at the beginning of my contribution. The Hungarian developments might not be understood without the consideration of most influentious foreign samples.

The next major part enumerates such paradigms, which have been elaborated by the Hungarian and international legal literature for the justification of qualified laws. In this respect, the different interpretations are not detailed in depth my purpose was to distinguish clearly the different approaches, and to identify such arguments, which cause the differences between the relevant paradigms. The enumeration of the paradigms provides opportunity to identify the different functions of qualified law, since the background of these interpretations

is the multiple function of qualified law. After having summarized the main part of each paradigm, separate chapter is dedicated to the different point of views.

From a constitutional law perspective, certain experts consider qualified law as the prolongement of the constitution. Due to the limited coverage, all essential rules may not be included within the constitution, it might be necessary to create a constitutional, or quasy constitutional category of laws. According to this logic, qualified laws are included within the broad constitutional framework they are over the ordinary laws within the hierarchy of norms. On this basis, qualified laws may be referred during the constitutional review of ordinary laws, by other means an ordinary law shall not contradict with a qualified law. The practical implementation of this principle is demonstrated well by the Hungarian laws with constitutional force, which existed between October 1989 and April 1990. These acts were enacted by two-thirds majority of all deputies, as the constitution, their name demonstrates well, that according to the contemporary approach, these laws had equivalent legal force, as the constitution itself. The theory of prolonged constitution may be a proper tool to release the constitution, and to implement further safeguards. Nevertheless, it shall be noted, that such a solution would weaken the status of the constitution as the basis of the whole legal system, moreover, the distinction between the constitution and other legal sources might be relativized.

Qualified laws contribute to the stabilization of the constitutional system, since the norms, which have been adopted under stricter procedural regime may not be amended later, like ordinary laws. This point is based on that consideration that qualified laws cover the most crucial fields of legislation, so additional requirements are needed for the amendment of these acts. In the reality, the list of qualified laws is not equivalent with the laws with paramount importance, especially in the light of the fact, that the weight of a particular act is necessarily not subject to objective standards. However, it is undoubted, that a separate level between the ordinary laws and the constitution provides additional protection from three respects:

On the one hand, the constitution determines only the basic rules other important rules may be implemented by qualified laws. On the other hand, owing to the qualified laws, the fundamental institutions of the state and the rules on fundamental rights are enacted with a broad consent. It is supposed, that the political and constitutional actors accept the basic

constitutional design. The discussion do, not contest the main framework, political debates focus on the actual social and economic issues.

Thirdly, since the constitution provides only the basic framework, the details are provided by qualified laws, consequently, minor amendments would concern only the qualified laws, but the constitution would remain untouched. Owing to this aim, the number of constitutional amendments may be reduced remarkably in comparison with such countries, where qualified laws have not been introduced. It shall be noted, that tthe relevance of this statement depends on the rules on adopting constitutional amendments in particular countries.

If qualified law is considered as an inherently political concept, it shall be highlighted, that qualified law influences the relationship between political parties. In the light of the parliamentary logic, the actual majority has the opportunity to adopt or amend acts however, the responsibility for such decisions is imposed exclusively on the governmental side. On the contrary, the opposition shall check the parliamentary majority during parliamentary debates and by further influentious legal means. It is not obvious that the government and the opposition do not agree on certain matters, but if this is the case, the opposition targets to prevent the governmental legislation.

In case of qualified laws, different mechanisms shall be identified. Without qualified majority, the government needs the support of the opposition consequently, during the preparation of bills the points of the opposition shall be taken into consideration. Furthermore, qualified laws are more important than ordinary acts, consent is always recommended between different political actors.

It shall be also noted, that not only the qualified legislative procedure, but also the preparation of qualified bills is more complex, than similar mechanisms for qualified laws. Long-term political negotiations are often needed to adopt or amend qualified laws this could improve the substantive level of legislation within ideal circunstances. In the practice, the amendment of qualified laws is often subject to political compromises. In the field of political consent-making, I focus on such tendencies, how the logic of parliamentarism is undermined by qualified laws, whether professional engagement and political inclusivity are strenghtened or weakened by this concept. It shall be highlighted again, that the relationship between qualified laws and the electoral system are also considered within this chapter.

According to a further aproach, qualified laws are important means of right protection, they suplement well the system of mechanism for the protection of fundamental rights. This approach is represented by the Spanis example, until the adoption of the Fundamental Law the Hungarian concept followed also this interpretation. Qualified laws have particular function in the field of right protection this legal concept has been often implemented after the fall of dictatorships, for the support of peaceful democratic transition on a consensual basis. During transitory periods, public attitudes are linked to the recent practices of the dictatorship, which have neglected fundamental rights, and any safeguard for the protection of fundamental rights. It is riskful to provide unlimited margin of movement for the governmental side to create the framework for right protection, since the unwanted practices of dictatorships were based on their unrestricted power. On these grounds, it is justifiable to involve the actual opposition in the creation of the framework for the protection of fundamental rights.

In a stable democratic system, where fundamental rights are protected by the courts, by the constitutional court, by ombutspersons, further authorities, NGO-s, and by several international treaties, qualified law is not considered as an essential tool for right protection. A further risk factor is the too extensive interpretation of qualified laws as instruments for right protection, since theoretically, almost every legal norms concern fundamental rights, so according to this logic, almost every field of legislation would fall within the domain of qualified law. As a last point, qualified laws modify remarkably the system of separation of powers, especially in three respects.

Qualified laws influence the balance between the government and the constitutional court, since it is up to the constitutional court to decide, whether in case of legal doubt, a legal matter fall under the scope of qualified, or ordinary legislation, and whether such classification was constitutional. This would open up a new, and formalistic ground of constitutional review, which would embroaden the margin of movement of the constitutional court, and which would strenghten the political character of that body. These tendencies are even stronger, when the constitutional court reviews mandatorily a priory the constitutionality of all qualified norms, as in France.

The relationships between the government and the parliament, and the government and the opposition are also concerned.

The third aspect of separationn of powers is the link between the actual and the forthcoming governments, since a currently adopted act might be an untouchable limit for a future government. This is particularly true, when such matters are subject to qualified legislation, as the basic rules of tax system and pension system.

After the analysis of different paradigms, I put forward my *de lege ferenda* recommendations.

III. THE ASSESMENT OF RESEARCH OUTCOME AND POTENTIAL BENEFITS

The main elements of my alternative cardinal law model are the following:

a) The qualified majority would not mean the two-thirds of deputies present, but the absoluty majority of all representatives. The weakened qualified majority requirement would be balanced by two new legal instruments. On the one hand, a standing parliamentary committee would be created, which would deliberate exclusively on qualified laws. In this committee, the governmental and the oppositional side would have equal representation. Within this framework, the seats would be distributed on the basis of the weights of parliamentary factions. In general terms, the committee would decide on each qualified bill by simple majority, when the bill is supported by 50 % of the committee members, the president of the parliament could submit the bill to the plenary session. This competence of the parliamentary speaker would be limited, since othervise, the resolutions of the cardinal committee could be practically overruled. The role of the parliamentary speaker should be rationalized, by maximizing, how much he could exercice this power during a term of sitting. Similarly it would be determined, how many times could a parliamentary faction, could initiate the plenary debate of a bill, which enjoyed 50 % support. Probably this opportunity would be relevant for governmental factions, but in case of wide oppositional consent, the 50 % support would be achievable. The independent deputies would be treated as a separate parliamentary faction in this committee. Since the number of cardinal laws would be reduced, the new body would focus on relatively little number of bills this would provide opportunity for more detailed discussions. The president of the cardinal committee would be selected from the governmental side one vice-president would be delegated from the governmental, and from the oppositional side respectively. This committee would have so complicated procedural rules to avoid a further mechanic parliamentary filter, which do not provide additional legislative safeguard. This is also unwisheable, that the opposition would block the governmental bills for the amendment of qualified laws to gain political benefits. The cardinal committee would be a standing committee, however it would not be a specialized committee, since its competence would not be determined by certain matters, but by a particular category of laws. Its function would be close to the current legislative committee however it would deal exclusively with qualified laws. The competent specialized committees would also

discuss the qualified bills. The new committee would be denominated as „cardinal committee", however, this is not an essential issue. It would seat as occasion requires, depending on the number of qualified bills, which would be referred before the cardinal committee after the decision of the competent standing committee(s).

b) A qualified bill, which were supported by the cardinal committee, and by the plenary session, and which was signed by the speaker of the House, cannot enter into force until the constitutional court has not been reviewed its constitutionality. The speaker of the House would send the adopted bill to the constitutional court within 5 days, and also for the president of the republic. In the mean time, the bill would be sent to the ombutsperson, to the chief justice of the highest court, to the prosecutor general. Within 15 days after the final parliamentary vote on the bill, each deputy, the president of the republic, the ombutsperson, the chief justice of the Curia, and the prosecutor general may inform the constitutional court from his opinion on the constitutionality of the adopted bill. The submission of such an opinion or initiation is facultative, not compulsory. The constitutional court has 30 days to review the constitutionality of the bill this deadline is calculated from the day, when the bill is received from the speaker of the House. When the constitutional court do not identifi constitutional concern, this fact is declared by a constitutional court ruling, and the act shall be published after presidential signature, within 5 days from the publication of the constitutional court ruling. If the constitutional court declares, that the text of the cardinal law is not in conformity with the constitution, the bill is sent back to the parliament, which will reopen the discussion from the bill within 30 days. From the perspective of this deadline, only the terms of parliamentary sittings shall be taken into consideration.

c) If the parliament do not, reopen the discussion within this deadline, the bill shall not be deliberated again by the parliament, the only possibility is to launch again the whole legislative procedure. After the potential second discussion, the constitutional review shall be repeated respectively, however, in case of unconstitutionality, the bill shall not be sent back to the Parliament.

Within 30 days from the enactment of the law, those, who are authorized to submit initiation during the priory constitutional review, may request the posteriory constitutional review of the legislative procedure, within a 30-days-deadline. If the outcome of the review is

the declaration of unconstitutionality, the constitutional court strikes the act down, since it is constitutionally invalid.

d) The new system would be based on the clear distinction between qualified and ordinary laws. There would be only one cardinal law for each cardinal matter, which would contain all relevant norms concerning qualified majority. All acts would determine undoubtedly, whether it is a qualified or an ordinary law. A cardinal law could contain exclusively qualified provisions, while the ordinary law would include only „simple" norms. The constitutional court would outlaw such legislative provisions, which were classified unjustifiably or unconstitutionally as qualified or ordinary norms, after that, the parliament would have to adopt a new legislation in conformity with hierarchy of norms. We may not face with such situation, when certain chapters of a statute are subject to qualified majority, while other parts are considered as „simple" provisions, since qualified majority would not attached to certain matters of legislation, but to certain acts. It would be also the task of the constitutional court to check, whether the domain of qualified law do not extend over the constitutionally prescribed arena, and from an, other perspective, whether the constitutional scope of qualified law is respected. The constitutional court would have even broader grounds of constitutional review as regard cardinal laws, but the current dogmatic and practical contests from the scope of qualified law would be abolished. There would be around 8 cardinal laws in total: from the parliament, from the ombutsperson, from the president of the republic, from the constitutional court, from the general account office, from the electoral system, from the independence of the judicial branch, and from the limitation of sovereignity. Each cardinal matter would mean a separate cardinal law. The mandatory a priory constitutional review would allow the proper distinction of cardinal and ordinary provisions during the legislative process.

In my study, I would not targget the elaboration of a final concept I would open up new perspectives, which could improve the Hungarian model of cardinal law. For well-founded amendments, it is necessary to establish inclusive professional and political dialogue from the future of cardinal laws during the forthcoming years. In this process, political parties, constitutional experts, NGO-s, and other stakeholders may have key role. For the further development of the current Hungarian model of cardinal laws, the national traditions, the international experience, the general and concrete statements of constitutional science, and

new, mould-breaking solutions would result a potentially ideal solution. This dissertation would be a modest contribution to this process.

The history of cardinal laws, demonstrate well the characteristics of the Hungarian constitutional development. This tendency shows well the lack of long-term constitutional concept, which was rumoured by *Jenő Szűcs*. Due to the regular political transitions the constitutional framework has been quite uncertain during the last century, each generation survived such a political and constitutional transition, which restructured the whole public life. Obviously, the constitutional framework shall be adapted to the changing circunstances, however, amendments may not be permanent, and may not be used as political instrument, which was frequent after the democratic transition. The concept of cardinal law shall be inherently stable to serve the long-term constitutional framework, and to fulfil its constitutional, political and other functions. The best instruments of stability are the well-founded amendments. My main conclusion is the following: through a broad professional and political dialogue, a new model of cardinal law shall be established, which could function for long-term.

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