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THE SCOPE OF QUALIFIED LAW: COMPARATIVE ANALYSIS

Abstract:

During the last decades, several countries have entrenched a special subcategory of law, which is adopted by stricter procedural rules, than the requirements of the ordinary legislative process. These laws are enacted by qualified majority, by the consent of the two chambers of the legislation, they are subject to mandatory constitutional review before their promulgation, or additional safeguards are implemented in the ordinary legislative process. In my article, I would compare the experiences of three legal systems, France, Spain, and Hungary, which provide three different frameworks of qualified law. Nevertheless, I would provide further examples from Europe, Africa and Latin America to demonstrate better the diversity of legal concepts. 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.

-□Firstly, on the ground of different national experiences, I would seek for a broadly acceptable definition of qualified law.

-□Secondly, I would briefly compare the historical background of the three emerges. An important common point would be the role of qualified laws during any process of democratic transition.

-□Thirdly, the scope of qualified law differs significantly from country to country, consequently, I would continue with this issue by arguing for a narrower scope of qualified law.

-□Fourthly, qualified law may have a special position in the hierarchy of norms, somewhere between statutory and the constitutional level, so I would cover this aspect. I would focus on the level of precision of constitutional articles in this regard.

-□Furthermore, the separation of powers perspective of qualified laws would be taken into consideration: the neglect of two-third majority, and the mandatory a priori review.

-□As the main outcome, certain points would be highlighted for a potential constitution-drafting process.

Keywords:

Qualified majority, separation of powers, fundamental rights, scope of qualified law, democratic transition, rule of law, hierarchy of norms

JEL Classification: K00, K11, K40

Introduction

In this study, in the light of the comparative analysis, I will argue for a narrower scope of qualified law. As the main outcome, certain points will be highlighted for a potential constitution-drafting process.

The scope of qualified law has two aspect:

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

As a preliminary consideration, I will identify, what I understand under the term qualified law on the basis of national constitutions. Qualified law is a special category of statutes with clear constitutional background, which covers certain domain of crucial subject matters, and which is adopted with stricter procedural rules, than the ordinary legislative process.¹

Several expressions are used for the identification of qualified laws in the national legal instruments. These denominations shows the key functions of qualified laws, which are not only constitutional, but also political, historical, and have a clear sovereignty aspect also. Organic law appears in the French,² and the Spanish³ Constitution, this terminology focuses on the constitutional role of these texts. In Spain, these laws are part of the constitutional concept (constitutional bloc), and in most of the countries concerned, they are invoked during the constitutional review of ordinary laws.⁴ The name of laws with constitutional force was in force in Hungary after the fall of the communist regime, and it was considered that qualified laws has, the same legal value as constitutional provisions. The expression of „law adopted by two-third majority” was the common language of the Hungarian public discussion between 1990 and 2011. The new Fundamental Law of Hungary has again modified the terminology, and constituted the category of cardinal laws,⁵ with mostly similar content, as its predecessor, the ”laws adopted by two-third majority”. This symbolic step aimed to strengthen the historical rhetoric of the Fundamental Law.⁶

1. Historical references

France, Spain and Hungary represents three main models of qualified law. However, the issue of qualified law concerns not only the three abovementioned countries, but a

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

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

³ art. 81-1 of the Spanish Constitution

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

⁵ art. T. of the Fundamental Law of Hungary

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

huge number of jurisdictions around the word. The modern history of qualified laws dated back to 1958, with the Constitution of the Fifth Republic of France.⁷ After the decolonization of Africa, from the inspiration of the French model, numerous African countries from the francophone legal family,⁸ accepted this legal solution, currently, the Constitution of twenty-one African countries contains the category of organic law such as Algeria,⁹ Senegal,¹⁰ or Tunisia.¹¹ The second wave of the spread of qualified law started after the fall of the authoritarian regime in Spain and Portugal:¹² qualified law was implemented in both constitutions, and later, from that legal family, several Latin-American countries followed this sample, like Ecuador,¹³ or Venezuela.¹⁴ Finally, as the third stage of spread of qualified law, this framework was added to the Hungarian, Romanian,¹⁵ and Moldovan¹⁶ constitutional system after the democratic transition. Moreover, some former member states of the Soviet Union have also codified a concept of qualified law, but these initiatives have been repealed.

2. The scope of qualified law in France

In France, most of the organic laws cover institutional fields: inter alia, the functioning of the Parliament,¹⁷ the status of the members of the judiciary¹⁸, the status of the Constitutional Council,¹⁹ the functioning of the Economic, Social and Environmental Council,²⁰ the powers and actions of the Defender of Rights.²¹ Moreover, the limitation of sovereignty of France also falls under the scope of organic law. The most conspicuous phenomena here is the almost exclusive dominance of the institutional aspect. Since fundamental rights were not included in the original framework of the Constitution of the Fifth Republic, they are almost ineligible to fall within the scope of organic law. Since 1958, the scope of organic law was slightly extended by constitutional amendments, for instance, the defender of rights was referred to the qualified domain in 2008.

The organic character within the practice of the Constitutional Council is related to particular provisions and subject matters rather than certain laws, which regulates organic subject matters.²² As a consequence, there are several statutes, which contains organic as well as ordinary provisions. Accordingly, in case of legal doubt, it is the task of the Constitutional Council to determine the scope of ordinary and organic

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

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

⁹ art. 123. of the Constitution of Algeria

¹⁰ art. 78. of the Constitution of Senegal

¹¹ art. 65. of the Constitution of Tunisia

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

¹³ art. 133 of the Constitution of Ecuador

¹⁴ art. 203. of the Constitution of Venezuela

¹⁵ art. 73. of the Constitution of Romania

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

¹⁷ art. 25. sec. 1. of the French Constitution of 4 October 1958

¹⁸ art. 64. sec. 3. of the French Constitution of 4 October 1958

¹⁹ art. 63. of the French Constitution of 4 October 1958

²⁰ art. 71. of the French Constitution of 4 October 1958

²¹ art. 71-1 sec. 3. of the French Constitution of 4 October 1958

²² Camby [1998]: cited above, p. 1690.

law even within the same legal text. What is more, the scope of organic law is not only a technical circle of laws, but it has also strong constitutional protection, with the help of the notion of organic character.²³ Each law shall provide explicitly its character; organic laws may contain ordinary provisions, but this dispositions shall be declassified;²⁴ by contrast, organic provisions shall not be placed within ordinary laws.²⁵ This ambiguity shows that despite the primary role of principle of competence, some hierarchic elements are not alien from the relationship between organic and ordinary laws in France.

3. The scope of qualified law in Spain

The Spanish structure differs significantly from the French approach. A separate article determines the two main areas of organic law: the statutes of the autonomic communities, and the fundamental rights and freedoms.²⁶ Apart from this, several articles of the Spanish Constitution prescribe organic law on further institutional matters: for instance, the organisation of military forces²⁷, the succession of the throne²⁸, the referendum²⁹, or the organisation of the judiciary³⁰, and the functioning and organisation of the Constitutional Tribunal.³¹ Accordingly, the scope of Spanish Organic Law covers two main fields: fundamental rights, and the most important institutional aspect, as the Spanish Constitutional Court have identified. The institutional framework is based on the statutes of autonomous communities however, other fields are also crucial.

An organic law has been covered also the accession of Spain to the European Union,³² and organic law is also required for the limitation of the sovereignty of Spain in favour of international organisations.³³ It shall be noted here that the limitation on sovereignty is a qualified subject matter in almost all countries at least qualified majority is required even if the concept of qualified law has not been implemented in that country.³⁴ Going back to Spain, there is some sort of balance between the fundamental right, and the institutional aspect of organic law, the scope of qualified law is wider in Spain, as in France.

Regarding the extent of organic matters, the Spanish model is also based on particular matters, prescribed by the Constitution. For instance, in this regard, fundamental rights are exclusively those, which are regulated by art. 15.-29. of the Spanish Constitution.³⁵ Since the Spanish Constitution outlines the scope of qualified

²³ n° 84-177 DC du 30 aout 1984

²⁴ 75-62 DC du 28 janvier 1976, 87-228 DC du 26 juin 1987, 88-242 DC du 10 mars 1988

²⁵ 86-217 DC du 18 septembre 1986

²⁶ art. 81-1 of the Constitution of Spain

²⁷ art. 8. of the Spanish Constitution

²⁸ art. 57. (5) of the Spanish Constitution

²⁹ art. 93. of the Spanish Constitution

³⁰ art. 122. (1) of the Spanish Constitution

³¹ art. 65. of the Spanish Constitution

³² *Iliopoulos-Strangas* Julia. [2007]. Cours supremes nationales et cours européennes: concurrence ou collaboration? In memoriam Louis Favoreu. Bruylant. p. 153.

³³ art. 104. par. 1. of the Spanish Constitution

³⁴ art. 93. of the Constitution of Norway; art. 90. (1) of the Constitution of Poland

³⁵ SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2).

law with very broad terms, the main task of the Constitutional Tribunal is to give a rational interpretation in this regard. Within the practice of the Spanish Constitutional Court, the key term is not the organic character, or essential content of a subject, but the reserved constitutional domain for organic law.³⁶ If an ordinary law intervene to the organic domain, it would be strike down by the Constitutional Tribunal.

4. The scope of qualified law in Hungary

Hungary provides us again a special case from a qualified law perspective: the scope of qualified majority has been modified continuously since 1989. The laws with constitutional force covered all norms, which affected fundamental rights and freedoms³⁷, and it was also extended to an exhaustive list of institutional fields. After the compromise between the government and the opposition in the spring of 1990, the open-ended character of the enumeration of qualified subject matters was abolished, and instead of the phrase of „all norms which affects fundamental rights and freedoms”, a closed list of fundamental rights, which are protected by two-third majority was given with aproximety thirty subject matters.

Another characteristic of the Hungarian development is the changing role of qualified laws in the field of fundamental rights. After 1990, the institutional and the right protection functions of qualified laws were distinguished by the Constitutional Court,³⁸ because most of the qualified subject matters were selected from these fields. The Constitutional Court used the framework of essential content to outline the scope of qualified majority, the limitation of these aspects of fundamental rights were subject to qualified majority.³⁹ To set an example, the limitation on the freedom of religion, fall under the fundamental rights aspect, while the organisation of churches is covered by the institutional field. The Constitutional Court also distinguished ordinary and qualified provisions within the same legal text. For instance, the body found, that only certain provisions of the act on police forces fall under the qualified majority requirement.⁴⁰ Moreover, the Constitutional Court made clear, that the competences of the institutions concerned shall not be covered by qualified laws.⁴¹ During the following two decades, the scope of qualified law was slowly en broadened by constitutional amendments: some institutional issues, such as the status of the members of the judiciary, and the procedural rules for elections were recognized as qualified matters⁴². The other inspiration for the extension of the scope of qualified law was the reinforcement of international cooperation, and the accession to the European Union: the limitation on the sovereignty of Hungary was also incorporated within the scope of qualified law.⁴³ Moreover, two forms of qualified majority was identified: the „large qualified majority” (the two-third majority of all deputies) was applied for the statute on

³⁶ JCC no. 236-2007.

³⁷ art. 8. (2) of the Act XXXI. of 1989.

³⁸ 14/B/2002 Decision of the Hungarian Constitutional Court

³⁹ 4/1993. (II.12.) Decision of the Hungarian Constitutional Court

⁴⁰ 1/1999. (II.24.) Decision of the Hungarian Constitutional Court

⁴¹ 26/1992. (IV. 30.) decision of the Hungarian Constitutional Court; 1/1999.(II. 24.) decision of the Hungarian Constitutional Court

⁴² act XCVIII. of 1997

⁴³ act XLI. of 2002

the flag and the bearing of Hungary⁴⁴, while the „small qualified majority” (the two-third of the representatives who were present) shall have been conducted for every other qualified law.

The drafting of the Fundamental Law of Hungary in 2011 brought some new tendencies for the scope of qualified majority in Hungary. Firstly, as it was already noted, the fundamental right aspect of qualified law has been almost neglected. It was considered, that in light of the strong international monitoring, and the stable democratic political system, qualified majority has not place in the field of fundamental rights.⁴⁵ In the meantime, the role of qualified majority in the field of institutional issues have been reinforced with the establishment of independent regulatory authorities⁴⁶ and the extension of the circle of the institutions concerned. This tendency would be similar to the French approach, but this enlargement overstepped the organisation of state: a number of purely political matters were referred into the scope of qualified law, such as the protection of families⁴⁷, and the basic provisions of taxation and pension system.⁴⁸ Moreover, the Fourth Amendment of the Fundamental Law extended further the list of these matters by the acquisition of fields and forests⁴⁹. The addition of these matters is in conflict with the original function of the concept of organic law: it do not promote stability, but impose a heavy limit on the margin of movement of future governments. The forthcoming governments would be prevented from modify the system of taxation or the system of pensions, in spite of the fact, that these sectors are traditionally subject to the consideration of the actual government. One could argue, that the regulation of these subjects have crucial impact on fundamental rights, but on the basis of this logic, an extremely broad circle of acts would have been subject to qualified majority.

To sum up, the scope of cardinal laws from a quantitative perspective has not been significantly changed by the Fundamental Law: the number of qualified subject matters are, almost thirty. Nevertheless, substantial changes were made as regard the list of cardinal matters: on the one hand, fundamental rights were eliminated on the other hand, the scope of qualified law was extended to sensitive political matters.

I do not deal here on details with the extent of qualified laws, but to demonstrate this issue, I outline briefly the Hungarian interpretation. The Constitutional Court reviewed the constitutionality of qualified majority, or the lack of this requirement in a number of cases on the basis of the previous Constitution of Hungary⁵⁰. The Fundamental Law have attempted to clarify the scope of cardinal and ordinary laws with two main instruments. Firstly, every statute, which contains cardinal provisions, has a special component: a cardinal clause, which enumerates the cardinal provisions of the law

⁴⁴ art. 76. (3) of the previous Constitution of Hungary

⁴⁵ Balogh Elemér et al.[2012]: Változások a magyar alkotmányjogban. Tanulmányok az Alaptörvényről. (Fundamental rights in new basis? Changes in the Hungarian constitutional law. Essays from the Fundamental Law.), edited by.: FÁMA ZRT. National Press for Public Services and TanBooks, 2012. p. 53-79.

⁴⁶ art. 23. of the Fundamental Law of Hungary

⁴⁷ art. L. of the Fundamental Law of Hungary

⁴⁸ art. 40. of the Fundamental Law of Hungary

⁴⁹ art. P. (2) of the Fundamental Law of Hungary

⁵⁰ 1/1999. (II. 24.) Decision of the Hungarian Constitutional Court

concerned, and refers to the constitutional background of qualified majority. Secondly, instead of the legal practice of the Constitutional Court, constitutional articles describes, in what extent particular subject matters shall be regulated by qualified majority. For instance, a cardinal law shall cover the detailed rules of citizenship.⁵¹ On the contrary, only the fundamental rules of taxation fall within the scope of cardinal law. These modifications increased the accuracy of constitutional text from the scope of cardinal law, but the final word in this regard is still up to the constitutional court. Accordingly, the main part of the Hungarian solution is similar to the French model as regard the scope of qualified law, the main difference is the existence of explicit constitutional orientations from the extent of this requirement. The idea of such orientations has already existed in France, but without any practical relevance.⁵²

5. Analysis

As regard the scope of qualified law within the three countries, the main outcome here is the different proportion between fundamental rights and institutional aspects, and the arguments for a narrower scope of qualified law. Apart from this, the scope of qualified law is strongly related to the historical functions assigned to this concept. Where the promotion of democratic transition was the essential purpose, the role of qualified majority in the protection of fundamental rights is stronger (Spain, and the original Hungarian model). In case of priority of stability, and consent requirement, institutional issues are more important. In addition to this, the scope of qualified law would also have clear impact on the separation of powers. As a general remark, we can say that the basic rules of the organisation of state are adopted by a stricter procedure, especially by wider consent, and this would give some sort of stability for the political and administrative structure. Sometimes the relation between the central government and local entities are also concerned, as a further aspect within separation of powers.⁵³ For instance, the statutes of the Spanish autonomous communities or certain matters concerning overseas territories of France are covered by organic laws.⁵⁴ What is more, the distribution of competences in the field of fundamental rights is remarkably different in countries, where the scope of qualified law includes these rights (like in Spain).

The origin and scope of qualified law is strongly related to each other, the differences between each national jurisdictions could be explained mostly by historical circumstances. Fundamental rights, and institutional issues could be identified, as the main fields concerned, but the relation between these aspects varies significantly in the three countries. The French model concentrates on institutional issues, while the Spanish approach is based on proper balance between fundamental rights and institutional aspect. The original version of the Hungarian framework was closer to the

⁵¹ art. G. (4) of the Fundamental Law of Hungary

⁵² Ardant Philippe – Mathieu Bertrand [2014]: *Droit constitutionnel et institutions politiques*. (Constitutional law and political institutions) 26e Édition. p. 27.

⁵³ art. 72. of the French Constitution of 4 October 1958

⁵⁴ art. 73. of French Constitution of 4 October 1958

scope of Spanish qualified law, however in light of subsequent modifications, it moved in the direction of the French interpretation.

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. In light of the national context, the best introduction of qualified law may be slightly different, but as general standards these points may be appropriate to outline a new approach to qualified law.

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.

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

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

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