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BOLDIZSÁR SZENTGÁLI-TÓTH
Eotvos Loránd University, Budapest, Hungary

ORGANIC LAWS IN AFRICA AND THE JUDICIAL BRANCH

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. Organic law appears in the French, the Spanish and the Hungarian legal system also as main models. Later, further European countries implemented organic law in their legal system, such as Portugal, Romania or Moldova. Organic law is also known in Latin-America.

In Africa, a total of 19 countries have implemented organic law: Algeria; Angola; Benin; Burkina Faso; Central African Republic; Chad; Djibouti; Equatorial Guinea; Gabon; Guinea; Ivory Coast; Democratic Republic of Congo; Republic of Congo; Madagascar; Mauritania; Morocco; Niger; Senegal; Togo; Tunisia; and Cape Werde Islands.

Although the fact, that organic law has been introduced in a huge number of African countries, this phenomena has not been researched in depth int he relevant African literature. Several questions might be raised: whether the implementation of organic law is a mere copy of European (French and Portugal) samples, or internal African reasons may be also identifiable? What is the role of organic law in African constitutional systems, could organic laws promote the stability of African constitutional frameworks? Is there any regional differences between organic laws? African organic laws differs remarkably from their European counterparts? Is there any African discussion or jurisprudence from the legal category of organic law?

My study will address such issues, and would provide a broad overview from African organic laws. I have three main purposes: to understand the characteristics of African organic laws; to compare the relevant African and the European models; and to analyse the perspectives of organic laws in Africa. My concept would be based on a combined strands of first and secondary African and European sources, which have been rarely used in this integrated manner.

Keywords:

Organic law; African constitutional law; qualified majority; legislation; stability of constitutions

JEL Classification: K00, K10, K39

I. INTRODUCTION

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 this study, I compare the experiences of six European and twenty-one African legal systems, which provide several different frameworks of qualified law. My aim is to identify the most contested issues from the legal nature of qualified laws, and to outline, what are the characteristics of this legal concept in Europe, and in Africa. Although the fact, that organic law has been introduced in a huge number of African countries, this phenomenon has not been researched in depth in the relevant African literature. Several questions might be raised: whether the implementation of organic law is a mere copy of European (French and Portugal) samples, or the internal African background may be also influentious? What is the role of organic law in African constitutional systems, could organic laws promote the stability of African constitutional frameworks? Is there any regional differences between organic laws? African organic laws differs remarkably from their European counterparts? Is there any African discussion or jurisprudence from the legal category of organic law?

My study will address such issues, and would provide a broad overview from African organic laws. I have three main purposes: to understand the characteristics of African organic laws; to compare the relevant African and the European models; and to analyse the perspectives of organic laws in Africa. My concept would be based on a combined strands of first and secondary African and European sources, which have been rarely used in this integrated manner. I have three main statements, which are intended to be proved in this study. Firstly, African organic laws are mostly inspired by European samples, however, the African organic laws are deemed to be independent legal concepts, not mere copy of European (French) constitutional provisions.[1] Although the fact, that the European approach of organic law is based on a proper balance between the institutional and the human rights approach, in Africa the fundamental right aspect has been almost completely neglected, organic laws cover generally the basic institutional framework of the state. Thirdly, African (and European) organic laws could rarely promote the endurance of the constitutional framework, consequently, the justification of their existence is not convincing. I will use the terms of “qualified law” and “organic law” in this study as synonyms.

[1] FOMBAD Charles M. (ed.) [2017]: Separation of Powers in African Constitutionalism. Stellenbosch Handbook in African Constitutional Law. (Oxford University Press: Oxford) p. 50-65.

II. THEORETIC BACKGROUND: THE DEFINITION AND SPREAD OF ORGANIC LAW

As a preliminary consideration, I will identify what I understand under the term qualified law. Different countries have constituted diverse concepts of qualified law, but we could outline the general content of this notion 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.[2]

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,[3] and the Spanish[4] 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.[5] In some countries, organic laws are referred as institutional acts.[6] 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 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. This approach referred to the political aspect of this concept: a wide consent was required from the deputies to enact a qualified law, the simple majority was not sufficient. The new Fundamental Law of Hungary have modified the terminology, and constituted the category of cardinal laws,[7], 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.[8]

France, Spain and Hungary represents three main European models of qualified law. However, the issue of qualified law concerns not only the three abovementioned countries, but a huge number of jurisdictions around the word, and most organic laws are adopted outside from Europe. The modern history of qualified laws dated back to 1958, with the Constitution of the Fifth Republic of France.[9] After the decolonization of Africa, from the inspiration of the French model, numerous African countries from the

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2 CAMBY Jean-Pierre [1998]: Quarante ans de lois organiques (Fourty years of organic laws) Revue de droit publique. 5-6. ed. p.: 1686-1698.; JAKAB András – SZILAGYI 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 parlamentaire (Parliamentary law). (Dalloz: Paris) p. 267-307.

3 art. 46. of the Constitution of France [04.10.1958]

4 art. 81-1 of the Constitution of Spain [07.01.1978]

5 N° 66-28, DC du 8 juillet 1966 (Rec., p. 15)., CHAGNOLLAUD Dominique Michel (ed.),[2012]: Traite international de droit constitutionnel (International treaty of constitutional law), vol. 1. (Dalloz : Paris) p. 340.

6 The Constitution of Comoros [23.12.2001]

7 *art. T*. of the Fundamental Law of Hungary [25.04.2011]

8 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.

9 art. 46. of the the Constitution of France [04.10.1958.]

francophone legal family,[10] accepted this legal solution, currently, the Constitution of twenty-one African countries contains the category of organic law such as Algeria,[11] Senegal,[12] or Tunisia.[13] The second wave of the spread of qualified law started after the fall of the authoritarian regime in Spain and Portugal:[14] qualified law was implemented in both constitutions, and later, from that legal family, several Latin-American countries followed this sample, like Ecuador,[15] or Venezuela.[16] Finally, as the third stage of spread of qualified law, this framework was added to the Hungarian, Romanian,[17] and Moldovan[18] 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.

From this brief analysis, it is perceptible, that apart from the European and the African branch of organic law, this legal category exist also in Latin-America: apart from Ecuador and Venezuela, certain further countries have also implemented organic law,[19] however the detailed assessment of this phenomena falls outside from the scope of the present study.

In Africa, a total of twenty-one countries have implemented organic law: most of them were inspired by European constitutional systems (mostly by France, but Portugal is also relevant). Similarly to the world-wide spread of qualified law, a categorization of African organic laws may be also conceptualized on historical and geographical basis. One may identify five larger group of African states, where organic laws has been applied. Firstly, certain countries of the Maghreb region followed the French constitutional development even after the decolonization, Algeria;[20] Mauritania;[21] Morocco;[22] and Tunisia;[23] have entrenched

the category of organic law at the end of the 1950-s. The second subgroup is constituted by most of the former West-African French colonies: Benin;[24] Burkina Faso;[25] Guinea;[26] Ivory Coast;[27] Niger;[28] Senegal;[29] and Togo.[30] Nevertheless, not all

10 DAVID René [1964]: Les grands systemes de droit contemporains (The major contemporary systems of law) (Dalloz: Paris) p. 630.
11 art. 123. of the Constitution of Algeria [28.11.1996]
12 art. 78. of the Constitution of Senegal [07.01.2001]
13 art. 65. of the Constitution of Tunisia [26.01.2014]
14 art. 169. (2) of the Constitution of Portugal (02.04.1976]
15 art. 133 of the Constitution of Ecuador [20.10.2008]
16 art. 203. of the Constitution of Venezuela [31.12.1999]
17 art. 73. of the Constitution of Romania [08.12.1991]
18 art. 72. (3) of the Constitution of Moldova [29.07.1994]
19 art. 63. of the Constitution of Chile [21.10.1980], art. 112. of the Constitution of the Dominican Republic [13.06.2015], art. 151. of the Constitution of Colombia [04.07.1991], art. 164. of the Constitution of Panama [1972], art. 106. of the Constitution of Peru [31.12.1993],
20 art. 123. of the Constitution of Algeria [15.05.1996]
21 art. 67. of the Constitution of Mauritania [12.07.1991]
22 art. 85. and 86. of the Constitution of Morocco [01.07.2011]
23 art. 65. of the Constitution of Tunisia [26.01.2014]
24 art. 97. of the Constitution of Benin [02.12.1990]
25 art. 155. of the Constitution of Burkina Faso [02.06.1991]
26 art. 83. of the Constitution of Guinea [07.05.2010]
27 art. 71. of the Constitution of Ivory Coast [08.11.2016]
28 art. 131. and 184. of the Constitution of Niger [10.31.2010]

French post-colonies introduced organic laws, for instance, the Constitution of Mali does not operate with this legal instrument. Thirdly, some further Francophone countries shall be mentioned from East-Africa, and from the African-related islands of the Indian-Ocean: the Comoros;[31] Djibouti;[32] and Madagascar.[33] The fourth region is Central-Africa, where some relevant countries belonged either to Belgium or France during the colonial era: Burundi,[34] Central African Republic;[35] Chad;[36] Equatorial Guinea;[37] Gabon;[38] Democratic Republic of Congo;[39] Republic of Congo;[40] and Rwanda.[41] Lastly, after the fall of the Salazar regime in Portugal, organic laws were implemented not only in Portugal, but also in Angola;[42] and Cape Verde Islands.[43]

The foregoing considerations give us some sense of the main constitutional issues, raised by the concept of qualified law in Europe and Africa. Each country have applied this solution to promote a clear constitutional aim, therefore, in the first chapter, I will compare the historical background of the European and the African emerges. The scope of qualified law differs significantly from country to country, consequently, in the second chapter, I will outline the scope of ordinary and qualified law in the different countries, and I will argue for a narrower scope of qualified law. Furthermore, qualified law may have a special position in the hierarchy of norms, somewhere between statutory and the constitutional level, so chapter three will cover this issue.[44] I will concentrate especially on the level of precision of constitutional articles in this regard.

It is also worth-contemplating, that the qualified subject matters are divided into two main categories: the fundamental rights, and the basic institutional framework of the state.[45] By general terms, the institutional function of organic law is the primary consideration, especially in Africa, therefore qualified law is used mostly as an indirect instrument for the protection of fundamental rights.

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29 art. 78. of the Constitution of Senegal [07.01.2001]
30 art. 92. of the Constitution of Togo [14.10.1992]
31 art. 26. of the Constitution of the Comoros [23.12.2001]
32 art. 66. of the Constitution of Djibouti [1992]
33 art. 88. and 89. of the Constitution of Madagascar [14.10.2010]
34 art. 175. of the Constitution of Burundi [28.02.2005]
35 art. 70., and 73 of the Constitution of Central African Republic [27.12.2004]
36 art. 127. of the Constitution of Chad [1996]
37 art. 104. of the Constitution of Equatorial Guinea [1991, amended in 2011]
38 art. 60. of the Constitution of Gabon [1991, last amended in 2011]
39 art. 124. of the Constitution of Democratic Republic of Congo [18.02.2006]
40 art. 125. of the Constitution of the Republic of Congo [2001, last amended: 25.10.2015]
41 art. 73. (1) of the Constitution of Rwanda [30.05.1991]
42 art. 166. (2) b) and art. 169. (2) of the Constitution of Angola [21.01.2010]
43 art. 173. (3) and 187. (2) b) of the Constitution of Cape Verde Islands [1980]
44 TROPER Michel – CHAGNOLLAUD Dominique (szerk.) [2012]: Traite international de droit constitutionnel (International Treaty of Constitutional Law (Dalloz: Paris) p. 346.
45 14/B/2002. ruling of the Hungarian Constitutional Court, ABH 2003, p. 1476; 4/1993. (II.12.) ruling of the Hungarian Constitutional Court, ABH 1993, p. 48.

III. HISTORICAL CONTEXT

Although the fact, that certain elements of the British constitutional development are close to the logic of qualified law,[46]and similar concepts have been also elaborated in the continental Europe,[47] modern organic laws were introduced firstly in France, by De Gaulle, who highlighted the institutional aspect, and almost neglected the role of organic laws, as an instrument for right protection.[48] Owing to this approach, the French organic laws covers mostly the basic institutional framework of the state.[49] As this will be demonstrated later, this approach is highly influentious in Africa. Firstly, since France had consistently a number of qualified norms even at the constitutional level,[50] not surprisingly, this country was the first which incorporated the concept of qualified law in its constitutional system in 1958. Organic law had been expected to be a proper instrument to promote the aims of the framers to weaken the Parliament and to rebalance separation of powers. De Gaulle had at least four considerations for playing down the legislature. Firstly, the Fourth Republic was suffered from a very serious degree of instability: governments were not able to survive even a year.[51] It was generally considered, that the over weakness of the government was the main reason of this discrepancy, consequently, the legislative branch had too broad margin of movement. De Gaulle and his colleagues intended to reduce the decisive role of the Parliament, accordingly, the distribution of public power was reconsidered in favour of the executive: Parliament would not have unlimited power to determine the organisation of state, the executive branch would have wider competences in these fields.[52]

Secondly, the significant laws were modified too frequently during the Fourth Republic, in light of the preferences of the actual parliamentarian majority. We have to take into consideration that the composition of the legislation changed rapidly, and there were not any safeguard on the stability of norms. Owing to the “rationalisation of the parliamentarism”,[53] certain subject matters would be protected from the unlimited power of the Parliament, the basic rules of the organisation of state would be not subject to actual political considerations.

Thirdly, the original constitutional framework of the Fifth Republic focused on institutional issues, the constitutional text do not contain any catalogue of fundamental

[46] LEYLAND Peter [2012]: The constitution of the United Kingdom: a contextual analysis (Oxford; Portland, Or., Hart Publishing), p. 25-42.

[47] POURHIET Anne-Marie le [2007]: *Droit constitutionnel* (Constitutional law) (Economica: Paris) p. 233-243.; HAURIOU Maurice [1918]: „Principes du droit public” An interpretation of principles of Public Law), *Harvard Law Review* 1918/31. 813-821.

[48] BLACHER Philippe [2012]: Le Parlement en France. [The Parliament in France]. *Etude (broché)*. Paru en 08/2012. p. 11-23.

[49] TROPER Michel [2008]: „Constitutional Law” in BERMAN George – PICARD Etienne (szerk.): *Introduction to French Law* (Wolters Kluwer) p. 13.

[50] 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.

[51] DEBRE Michel [1959]: La nouvelle Constitution (The new constitution). In: Revue française de science politique, 9e année, n°1, 1959. p. 7.

[52] BLACHER 2012.

[53] ARDANT Philippe – MATHIEU Bertrand [2014]: Droit constitutionnel et institutions politiques. (Constitutional law and political institutions) 26e Édition. p. 344-345.

rights.[54] This is the main reason, that the French model of qualified law is applied only in the field of the organisation of state fundamental rights are not covered by this concept. The founders of the Fifth Republic wanted to create a safeguard only for the basic institutions of the state, but the framers were not interested in other possible fields of introduction, such as fundamental rights.

Fourthly, as an implicit aspect, the fear from the dictatorship shall be mentioned, which was experienced during the Second World War, by the Vichy regime. Organic laws were able not only to protect the democracy from instability, but also exclude the future chances of an authoritarian regime.

On the contrary, in Spain, certain balance is applied between the fundamental right and the institutional approach.[55] Contrary to France, in Spain, a broad circle of fundamental rights are regulated by organic laws.[56] The Spanish Constitutional Court have elaborated consequently a restrictive interpretation of the organic legislative domain to avoid the unnecessary limitation on the governmental margin of movement.[57] Despite the Spanish approach, Portugal has introduced a more institutionalized approach, which falls closer to the French interpretation, than to the Spanish.[58]

Organic laws were added to the Spanish constitutional system by the Constitution of 1978, after the fall of the Franco regime, as part of the democratic transition of the country. Despite the clear French influence, the historical background of the constitution-drafting process was completely different, than in France. Spain had lack of democratic traditions, the two previous Spanish republics had very short life, these regimes failed to gain stability, and to create efficient mechanisms to prevent authoritarian aspirations.[59]

Moreover, a remarkable degree of uncertainty surrounded the transition: initially, it was very questionable, whether the new king was engaged to democratic processes, or try to maintain some sort of dictatorship. Regarding these circumstances, the drafters sought for such solutions, which were able to promote the self-defence of the democratic system. Indeed, the primary purpose of the framers was the emerge of democratic safeguards, and organic law was one of them. Due to the numerous parties,[60] and ethnicities,[61] the Spanish political life was very fragmented, thus, wide consent was essential to outline the new structure and to maintain the integrity of the country.[62] Despite the clear French influence,[63] the requirements of a democratic

54 TROPER 2008, p. 13.
55 SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2.
56 JCC no. 236/2007.
57 BARCELÓ I SERRAMALERA Merce [2004]: La ley Organica ámbito material y posición en el systema de fuentes [Organic laws, and their status within the hierarchy of norms]. Atelier Libros Juridicos, Barcelona, p. 30-31.
58 Constitutional Law, in AAVV. Portuguese Law – An Overview. Lisboa: Almedina, 2007, p. 75-89.
59 COMELLA Victor Ferreres [2013]: „The Framing of the Spanish Constitution" in COMELLA Victor Ferreres: The Constitution of Spain: A Contextual Analysis (Bloomsbury Publishing PLC: Oxford) 4-34.
60 BONIME – BLANC Andrea [2013]: Constitution Making and Democratization, p. 200.
61 CONVERSI Daniele [2002]: „The Smooth Transition" *National Identities* 2002/3. 223-244.
62 CONVERSI 2002, p. 230.

transition, the huge fear from authoritarian tendencies, the protection of integrity, and the demands of autonomous regions explain, that the scope of Spanish organic law is significantly broader, than its French counterpart.

The huge fear from the unlimited governmental power during the democratic transition explains why organic laws were introduced in certain Central-European countries.[64] A political transition may often lead to extended violence, or even armed conflicts, therefore, a further target was to exclude violent incidents, or at least take immediate control over agressive tendencies.[65] In Romania, the drafters of the Constitution could not rely mostly on national traditions one may could refer only to a document from the middle of the XIX. century which was called „organic law of Romania". However, this organic law had a constitutional status, rather than a special form of legislation.[66] Nevertheless, the French, and in certain respects the German, the Italian and the Belgian constitutional systems were also influentious during the drafting of the Romanian democratic framework.[67] Apart from this, from the 1980s, the Romanian society had several direct and painful experience from the overbroad power of the dictatorship, from the sistematic and serious breaches of fundamental rights. In Romania, instead of peaceful means, the transition was achieved by a revolution. This situation required serious carefulness from the drafters of the new Constitution: several legal instruments were considered, which could promote the stability of the constitutional system. Romania is the only European country, where qualified laws were implemented to the Constitution shortly after an armed conflict.

In Moldova, local constitutional traditions were apparently irrelevant an independent Moldovan State just existed during the last period of world war I, but, only for some months.[68] As a consequence, the foreign samples were highlighted: in the reality, the structure and the logic of the Romanian Constitution dominated the Moldovan constitution-making process.[69] It is also worth-contemplating, that the Moldovan society were divided by a great number of conflicts during the process of the democratic transition: the tensions between the Romanian and the Russian population, the claim for independence from the Transnistrian Territory, as well as the autonomous status of Gagauzia were also controversial issues. In the light of these concerns, it may have been justifiable to require a heightened level of parliamentary majority for the adoption of organic laws. The representatives of this theory state, that

63 TROPER 2012, p. 344.
64 BOZÓKI András (ed.) [1999]: The Roundtable Talks of 1989: The Genesis of Hungarian Democracy Central European University Press, p. 2478.
65 ELSTER John [2012]: Constitution-making and violence. *Journal of Legal Analysis* 4:7–39, p. 7-9. and 21-37.
66 On the basis of the interview with Prof. Simina Elena Tanasescu, and Prof. Stefan Deaconu, lecturers of the Constitutional Law Department at the University of Bucharest. [Bucharest, 23.01.2017]
67 DELEANU Ioan [2006]: Institutii si proceduri constitutionale. [Constitutional procedures and institutions]. Ed. CH Beck, Bucuresti, p. 220.
68 LENGYEL László [2011]: A Moldáv Köztársaság. [The Republic of Moldova]. Magyar Moldáv Baráti Társaság, Budapest, p. 55.
69 CARNAT Teodor [2005]: Constitutional law. Chisinau, State University of Chisinau, p. 129-130.

Moldovan organic Law were introduced due to the strong Romanian and Russian impact and several legal arguments were also raised.[70]

The Hungarian case is more complex in this regard it originates from the era of the historical constitutional development.[71] before 1945, the so-called cardinal laws meant the cornerstones of the Hungarian constitutional framework.[72] Nevertheless, the circle of cardinal laws was not outlined preciselly, and these laws were subject to the same legislative procedure, as ordinary acts.[73] In 1989, the six laws, which determined the character of the democratic transition were also often summarized as „cardinal laws".[74] Almost simultaneously with this development, the category of laws with constitutional force was established to suplement the democratic constitution: similarly to the constitution, for the adoption, or amendment of these laws, the two-third consent of all parliamentary members was required.[75] According to the contemporary approach, all legal rules, which concerned fundamental rigghts, shall have been covered by laws with constitutional force. The overbroad application of qualified majority requirement undermined the governance of the country, since almost all legislative fields concern - at least indirectly – fundamental rights.[76] The qualified majority requirement was stricter in 1989, than nowadays, and a wider circle of laws fall within its scope, than currently, under the Fundamental Law of Hungary. The concept of laws with constitutional force were created to decrease uncertainity: the participants of the political arena could not foresee the outcome of the forthcoming parliamentary elections, and the intentions of the future winners. As a consequence, almost every political actors had strong interest to establish an inclusive legislative process.[77] After having recognized the distortive effect of the overbroad qualified majority requirement, and after the first democratic elections, during the spring of 1990, the new government and the opposition concluded a compromise to reduce the domain of qualified law. The „laws with constitutional force" were replaced by the terminology of „laws adopted with two-thirds majority", and the qualified legislative subject matters were more or less exhaustively enumerated by the Constitution.[78] Instead of the „large qualified majority", only the two-thirds consent of such deputies was prescribed, who participated in the particular vote. This solution was close to the Spanish logic, which is based on a proper balance between the right protection and

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

[71] MARCZALI Henrik [1907]: Az 1790/1-diki országgyűlés. [The Hungarian Parliament in 1790, and act I. of 1790]. Budapest. A Magyar Tudományos Akadémia Kiadása. I. k., p. 110.

[72] HAJNÓCZY József [1791]: Magyarország Országgyűléséről. [From the parliament of Hungary] in HAJNÓCZY József közjogi-politikai munkái. Akadémiai Kiadó, Budapest, 1958, p. 236-240.

[73] DR. FERDINÁNDY Géza [1902]: Magyarország közjoga. [The public law of Hungary]. (Alkotmányjog) Budapest. Politzer Zsigmond és Fia kiadása, p. 77.

[74] ANTAL Attila – BRAUN István – FINTA László – TÖRÖK Zoltán [2011]: Sarkalatos kérdések. [Cardinal issues]. Méltányosság Politikaelemző Központ 2011. november 24, p. 5. www.meltanyossag.hu/files/meltany/imce/doc/kp_sarkalatos_kerdesek_111122.pdf

[75] art. 8. of Act XXXI. of 1989.

[76] ANTAL 2011, p. 20.

[77] SZALAI András [2011]: A kormányzati hatalom ellensúlyai Magyarországon. [The counterbalances of the government in Hungary]. www.propublicobono.hu/pdf/Szalai_2.pdf

[78] act XL. of 1990.

the institutional approach.[79] The Fundamental Law of Hungary entered into effect in 1 January 2012, which highlights the historical traditions by reinstating the term of „cardinal law", but the current content of this expression is not equivalent to the historical meaning.[80] Currently, the cardinal subject matters are enumerated exhaustively by the Fundamental Law, the required majority is always the two-thirds consent of the parlamentarians present. The cardinal acts, or legislative subject matters are provided expressly by the Fundamental Law,[81] but the fundamental rights have been almost disappeared from the list of cardinal fields under the new constitutional framework.[82] The current Hungarian interpretation is close to the French, as well as the Romanian/Moldovan approach, since the institutional side is dominant, and only a little number of fundamental rights and a narrow circle of indirect safeguards for right protection are regulated by cardinal laws.[83]

Hungary is a special model of European qualified legislation, because during less than 30 years, at least three different models of qualified law have been introduced. While in other countries, the established version of qualified law – with its advantages and weaknesses – determines the constitutional development during long decades, Hungary has experienced the regular reconsideration of the qualified law concept.[84]

The African historical experience is not only the mere copy of the European samples in this regard, but also the consideration of the local circunstances, which may have also justified the implementation of qualified law. The freshly-formed African countries could not rely on long-term cohesion, diverse ethnic groups were forced to live together due to the artificial borders created by the European colonisers.[85] The Maghreb region shall be distinguished here from other African jurisdictions, as an exception, since those states constituted more or less an unitary development for the ancient period. However, most African states expected to be threatened by the internal conflicts, therefore, all instruments were considered, which could promote the stability of these countries. Organic law provided political weight for a broader circle of political actors, than the ordinary legislative process, so the consensual legislation were supposed to strenghten the cohesion of the post-colonial countries. A further consideration is the post-traumatic effect of organic law. In the relevant European countries, organic laws were always introduced after a democratic transition to avoid

[79] CHOFRE SIRVENT J. F. [1994]: Significado y función de las leyes orgánicas. [The functions and significance of organic laws]. 1994, Madrid: Tecnos, p. 19-50 and 59-61.

[80] BARNA Dániel – SZENTGÁLI-TÓTH Boldizsár [2013]: Stabilitás vagy Parlamentarizmus? A sarkalatos törvényekkel kapcsolatos egyes jogalkotási problémák. [Stability or parliamentarism? Certain constitutional issues concerning cardinal laws]. *Ars Boni Law Review*, 14.02.2013. www.arsboni.hu/barnaszentg.html

[81] BODNÁR Eszter – MÓDOS Mátyás [2012]: A jogalkotás normatív kereteinek változásai az új jogalkotási törvény elfogadása óta. [The normative framework of law-making under the new act on legislation]. 2012/ 1, p. 33-34.

[82] SZENTGÁLI-TÓTH Boldizsár [2012]: Alapjogok új alapokon? (társszerzőkkel) [Fundamental rights on new basis?] With co-authors. in Változások a magyar alkotmányjogban. Tanulmányok az Alaptörvényről. [The Hungarian constitutional reform: studies from the Fundamental Law of Hungary]. (Ed..: BALOGH Elemér et al.), Hallgatói Közjogi Dolgozatok 1., FÁMA Zrt. - Nemzeti Közszolgálati és Tankönyv Kiadó, p. 53-79.

[83] JAKAB 2014; see footnote 3.

[84] KUKORELLI István [2006]: Tradíció és modernizáció a magyar alkotmányjogban. [Tradition and modernization in the Hungarian constitutional law]. Századvég Kiadó, Budapest, p. 155.

[85] FOMBAD 2017, p. 50-65.

the restoration of the authoritarian tendencies. This may have been also a relevant consideration for African constitution-drafters, especially in those countries, where organic laws were established after an armed conflict. Obviously, the long-term constitutional development of France or even Portugal provided also a proper point of reference, which could be also an emphatic argument in Africa. Apart from this, the long-term development of African organic laws shall be distinguished from most of the relevant European systems. Except from Hungary, in Europe, the basic concept of organic law has been elaborated for long-term, since from its introduction, it has not been amended in essence. By contrast, in several African countries, new consecutive constitutions were adopted, either as the outcome of violent or peaceful transitions,[86] therefore, the framework of organic law has been amended regularly. As recent examples, the constitution-drafting wave after the arab spring may be mentioned, or in Ivory Coast, the two-thirds majority system[87] were replaced by an absolute majority requirement in 2016, two-thirds consent remained only as a complementary element of the concept[88]. The North-African and the Ivorian experience demonstrate also, that the development of African organic law is an on-going process further improvements may be expected in the near future. In Europe, only the Hunggarian constitutional design has been amended such frequently, as the relevant African models. Consequently, it is at least doubtful, whether African organic law could fulfil their inherent function to promote the stability of post-colonial African constitutional frameworks. Finally, organic laws in Africa are generally considered strictly as the instruments to institutionalize the state, to secure wide consent behind the constitutional configuration.[89] Owing to this approach, African organic laws protect only fundamental rights in the Maghreb region, especially in Morocco[90] and Tunisia.[91]

IV. PROCEDURAL RULES

It is perceptible, that either in Europe or Africa, the majority of the relevant countries, which apply the absolute majority system, while other jurisdictions operate with two-thirds majority. In West-Europe, French, Spanish and Portugiese organic laws are subject to an absolute majority requirement.[92] In Romania, for the French sample, the absolute majority of both chambers are required instead of the two-thirds majority of the deputies present.[93] A further legal difference shall be also taken into consideration: any governmental decree could intervene in the organic domain only on the basis of parliamentary authorization. The urgent decrees might be approved by the Parliament

86 FOMBAD 2017, 50-65.
87 art. 71. of the previous Constitution of Ivory Coast [2000]
88 art. 102. of the Constitution of Ivory Coast [08.11.2016]
89 art. 97. of the Constitution of Burkina Faso [02.06.1991]; art. 71. of the previous Constitution of Ivory Coast [2000]
90 art. 15. and 29. of the Constitution of Morocco [01.07.2011]
91 art. 65. of the Constitution of Tunisia [26.01.2014]
92 art. 146. of the Constitution of France [04.10.1958], art. 81. (1) of the Constitution of Spain [07.01.1978], art. 169. (2) of the Constitution of Portugal [02.04.1969]
93 art. 76. (1) of the Constitution of Romania [08.12.1991]

a posteriory, these legal instruments could not interfere in the organic domain.[94] Concerning the level of required majority, similar logic is applied in Moldova, however, the Moldovan Parliament is an unicameral legislative body. Apart from this, the parliamentary stage of the organic legislative process is subject to stricter rules, than the ordinary legislation.[95] The Hungarian Parliament is also unicameral, but „small two-thirds consent" is prescribed for the adoption and the amendment of these laws.[96]

In Africa, the absolute majority system is dominant, it is often supplemented with mandatory a priory constitutional review,[97] like in France, while in Gabon, qualified laws are adopted with ordinary majority, the sole additional requirement is the mandatory a priory constitutional review.[98] However, some countries applies a heightened level of qualified majority. In Rwanda, three-fifths of the votes is needed for the enactment of an organic law,[99] while in Burundi,[100] in the Cape Werde Islands,[101] in the Comoros,[102] and in Guinea,[103] two-thirds consent is necessary. In Ivory Coast, two-thirds requirement,[104] was recently replaced with an absolute majority requirement, two-thirds consent remained in force only as a supplementary element[105]. In Tunisia, after political or constitutional veto of the president of the republic, organic laws shall be adopted with three-fifths majority.[106]

In the reality, the organic legislative process is not an unitary concept in most of the relevant constitutional systems. In France, certain financial organic laws have a quasi-constitutional status,[107] while organic laws concerning the organization of the Senate shall be adopted with identical terms by the two chambers. In Spain, the organic laws from the status of autonomous regions are subject to stricter legislative procedure, than other organic laws (mandatory a priory constitutional review is required).[108] A similar tendency may be experienced in Moldova, where the autonomous status of Gagauzia is covered by an organic law, which shall be adopted or amended by three-fifths parliamentary majority, instead of the mere absolute majority.[109] The Hungarian

94 VIDA Ioan [2006]: Legistica formala. [Formal legislation]. Ed. Lumina Lex, Bucharest, p. 52-62
95 art. 74. (1) of the Constitution of Moldova [29.07.1994]
96 *art. T.* (4) of the Fundamental Law of Hungary [25.04.2011]
97 art. 97. of the Constitution of Benin [02.12.1990]; art. 155. of the Constitution of Burkina Faso [02.06.1991]; art. 197. and 228. of the Constitution of Burundi [28.02.2005]; art. 127. and 161. of the Constitution of Chad [1996]; art. 124. (3) and 160. of the Constitution of the Democratic Republic of Congo [18.02.2006]; art. 66. and 78. of the Constitution of Djibouti [1992]; art. 117. of the Constitution of Madagascar [14.10.2010]; art. 132. of the Constitution of Morocco [01.07.2011]
98 art. 61. and 85. of the Constitution of Gabon [1991, last amended in 2011]
99 art. 73. (1) of the Constitution of Rwanda [30.05.1991]
100 art. 75. and 86. of the Constitution of Burundi [28.02.2005]
101 art. 173. (3) of the Constitution of Cape Werde Islands [1980]
102 art. 26. of the Constitution of the Comoros [23.12.2001]
103 art. 83. of the Constitution of Guinea [07.05.2010]
104 art. 71. of the previous Constitution of Ivory Coast [2000]
105 art. 102. of the Constitution of Ivory Coast [08.11.2016]
106 art. 81. of the Constitution of Tunisia [26.01.2014]
107 BRAIBANT Guy de M. [1996]: Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein. [Reference norms for constitutional review, and the respect of hierarchy of norms] p. 323.; N° 98-401, DC du 10 juin 1998.
108 SOSA WAGNER Francisco [1979]: Aproximación al tema de las leyes orgánicas. [Introduction to the system of organic laws]. *Revista española de derecho administrativo*. No. 21, p. 199-204.
109 art. 111. (7) of the Constitution of Moldova [29.07.1994]

concept also applies procedural distinction between qualified laws. The „small two-thirds requirement" means the two-thirds vote of the deputies present, while the „large two-thirds majority" emphasizes the two-thirds consent of all parlamentarians.[110] In the light of the abovementioned examples, procedural distinction are commonly accepted between qualified laws in the relevant European systems and especially the French distinction influenced also the African constitutional design. It is expressly provided in some countries, that the rules on public finances under a special procedure are covered by organic laws,[111] while in other countries, the basic financial regulations are subject to a special procedure, which is close to the organic legislative process. It is also incorporated by some African constitutions, that organic laws related to the senate shall be adopted by identical terms by the two chambers.[112]

V. THE SCOPE OF QUALIFIED LAW

As it was stated earlier, the two main branches of qualified legislation are the institutional and the fundamental right aspect.[113] The institutional aspect means, that in almost all relevant legal systems, the extra-constitutional rules on the functioning, on the organization, and on the relationship of basic state institutions shall be covered by qualified laws. As regard the fundamental right aspect, amongst the qualified subject matters, one may find fundamental rights, and institutions for the protection of fundamental rights. In my view, this ambiguity may be interpreted as the two levels of right protection by qualified laws. The direct level constitutes, that certain fundamental rights shall be covered by qualified law, while the indirect aspect provides, that the rules on the constitutional court, on the ombudsman, on the judicial system, and on the status of judges shall be adopted by qualified majority, as a safeguard of independence.

In France, most of the organic laws cover institutional fields: inter alia, the functioning of the Parliament,[114] the status of the members of the judiciary[115], the status of the Constitutional Council,[116] the functioning of the Economic, Social and Environmental Council,[117] the powers and actions of the Defender of Rights.[118] 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

110 *art. E*. (4) of the Fundamental Law of Hungary [25.04.2011]
111 art. 112. of the Constitution of Benin [02.12.1990]; art. 127. of the Constitution of the Republic of Congo [2001, last amended: 25.10.2015]; art. 88. (11) of the Constitution of Madagascar [14.10.2010]; art. 65. of the Constitution of Tunisia [26.01.2014]
112 art. 67. (4) of the Constitution of Mauritania [12.07.1991]; art. 85. of the Constitution of Morocco [01.07.2011]
113 1/1999. (II. 24.) ruling of the Hungarian Constitutional Court, ABH 1999, 25.
114 art. 25. (1) of the Constitution of France [04.10.1958]
115 art. 64. (3) of the Constitution of France [04.10.1958]
116 art. 63. of the Constitution of France [04.10.1958]
117 art. 71. of the Constitution of France [04.10.1958]
118 art. 71-1 (3) of the Constitution of France [04.10.1958]

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 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.[119] Apart from this, several articles of the Spanish Constitution prescribe organic law on further institutional matters: for instance, the organisation of military forces[120], the succession of the throne[121], the referendum[122], or the organization of the judiciary[123], and the functioning and organisation of the Constitutional Tribunal[124]. Accordingly, the scope of Spanish Organic Law covers two main fields: fundamental rights, and the most important institutional aspects, as the Spanish Constitutional Court have identified. The institutional framework is based on the statutes of autonomous communities, however, other fields are also crucial.

The Hungarian, Romanian and Moldovan constitutional system operate with qualified laws only in a very narrow circle as tool for the direct protection of fundamental rights. Two examples may be mentioned here: the freedom on religion,[125] and the citizenship.[126]

The qualified majority requirement concerns not only, and not primarily the fundamental rights, but also such institutions, which guarantee the prevalence of human rights. In the Hungarian, Romanian and Moldovan Constitutions, three such institutions are included within the qualified legislative domain: the constitutional court, the ombudsman,[127] and the judicial system. In the reality, qualified laws play a more complex rule as an indirect safeguard for the protection of fundamental rights: for instance, in Romania and Moldova, the system of public education also considered as a field of qualified legislation.[128]

The African approach of organic law by general terms is mostly French-influenced, but independent concept. Moreover, obviously, diverse solutions exist in the relevant African constitutional systems, however some characteristics are more or less general. The scope of African organic laws is considerably narrower (except from

119 art. 81-1 of the Constitution of Spain [07.01.1978]
120 art. 8. of the Constitution of Spain [07.01.1978]
121 art. 57. (5) of the Constitution of Spain [07.01.1978]
122 art. 93. of the Constitution of Spain [07.01.1978]
123 art. 122. (1) of the Constitution of Spain [07.01.1978]
124 art. 65. of the Constitution of Spain [07.01.1978]
125 *art. XIX.* (3) of the Fundamental Law of Hungary [25.04.2011], art. 73. (3) point S. of the Constitution of Romania [08.12.1991], art. 72. (3) point K) of the Constitution of Moldova [29.07.1994]
126 *art. G)* (4) of the Fundamental Law of Hungary [25.04.2011], art. 5. (1) of the Constitution of Romania [08.12.1991], art. 17. (1) of the Constitution of Moldova [29.07.1994]
127 art. 90. of the Constitution of Djibouti [1992]
128 art. 73. (3) point N) of the Constitution of Romania [08.12.1991], art. 72. (3) point K) of the Constitution of Moldova [29.07.1994]

Burundi), than their French counterparts, but a common point is, that either the French and the numerous African frameworks focus on the institutional aspect. Nevertheless, the African interpretation defines the institutional approach with narrower terms, than the French constitution. African organic laws concentrate on the legislative[129] and the judicial[130] branch, most constitutions prescribe qualified majority for the functioning and the organization of the parliament, and for the functioning, composition and competences of the highest judicial bodies (constitutional court, supreme council of magistrature, supreme court, court of audits, court of cassation, etc.). In addition to this, some further key institutions are often covered by organic law, such as the electoral committee,[131] the social and economic council,[132] the ombudsman,[133] the media authority,[134] local councils,[135] and as the expression of popular sovereignity and direct democracy: elections[136] and referenda[137]. One may argue, that on the basis of the French approach, fundamental rights are not protected directly by African organic laws. However, either in France, and in Africa, a great number of those institutions are concerned by organic laws, which are responsible for the protection of fundamental rights, such as the judiciary, the constitutional court, or the ombudsman. However, it would be a distortive and overgeneralized statement, that African organic laws do not protect fundamental rights directly, since in the Maghreb region, fundamental rights are expressly subject to qualified majority requirement. In Morocco, some fundamental rights of the citizens, as right to petition ,[138] or right to strike[139] are covered by organic laws. Furthermore, in Tunisia, a general clause of the 2014. Constitution refers the rights and duties of the citizens to the organic domain.[140] This solution correlates with the so-called laws with constitutional force in Hungary during 1989-1990, however the two concept shall be distinguished clearly. In Hungary, laws with constitutional force

[129] For instance: art. 103, 108, 112 and 115. of the Constitution of Algeria [28.11.1996]; art. 86. of the Constitution of Burkina Faso [02.06.1991]; Art. 148. 153. and 156. of the Constitution of Burundi [28.02.2005]; art. 37. and 62. of the Constitution of Gabon [1991, last amended in 2011]; art. 79 of the Constitution of Madagascar [14.10.2010]

[130] For instance: art. 123. cl. 5, art. 153, 157 and 158. of the Constitution of Algeria [28.11.1996]; art. 236. of the Constitution of Burundi [28.02.2005]; art. 77, 85, 89, 92, 93, and 99. of the Constitution of Central African Republic [27.12.2004]; art. 28. and 29. of the Constitution of Comoros [23.12.2001]; art. 90. (2), 96. (2), 100. (2) and 104. of the Constitution of Equatorial Guinea [1991, last amended in 2011]; art. 63. of the Constitution of Guinea [07.05.2010]; art. 125, 136, and 141. of the Constitution of Niger [31.10.2010]; art. 60. of the Constitution of Senegal [07.01.2001]

[131] art. 211. of the Constitution of the Democratic Republic of Congo [18.02.2006]

[132] art. 140. of the Constitution of Benin [02.12.1990]; art. 141. of the Constitution of Burkina Faso [02.06.1991]; art. 160. of the Constitution of Burkina Faso [02.06.1991]; art. 111. of the Constitution of Gabon [1991, last amended in 2011]; art. 97. of the Constitution of Mauritania [12.07.1991]

[133] art. 169. of the Constitution of Ivory Coast [08.11.2016]; art. 154. of the Constitution of Togo [14.10.1992]

[134] art. 24. and 143. of the Constitution of Benin [02.12.1990]; art. 212. of the Constitution of the Democratic Republic of Congo [18.02.2006]; art. 102. of the Constitution of Gabon [1991, last amended in 2011]; art. 126. of the Constitution of Guinea [07.05.2010], art. 163. of the Constitution of Niger [31.10.2010]; art. 154. of the Constitution of Togo [14.10.1992]

[135] art. 102. of the Constitution of the Central African Republic [27.12.2004]; art. 87. of the Constitution of Djibouti [1992]; art. 140. of the Constitution of Guinea [07.05.2010]; art. 88. (4) of the Constitution of Madagascar [14.10.2010]; art. 146. of the Constitution of Morocco [01.07.2011]; art. 65. of the Constitution of Tunisia [26.01.2014]

[136] art. 79. and art. 88. (3) and (10) of the Constitution of Madagascar [14.10.2010]; art. 48. (1) of the Constitution of Mauritania [12.07.1991]; art. 35. of the Constitution of Senegal [07.01.2001]

[137] art. 164. g) of the Constitution of Angola [21.01.2010]; art. 187. (1) c. of the Constitution of Cape Werde Islands [1980]; art. 176. of the Constitution of the Republic of Congo [2001, last amended: 25.10.2015]

[138] art. 15. of the Constitution of Morocco [01.07.2011]

[139] art. 29. of the Constitution of Morocco [01.07.2011]

[140] art. 65. of the Constitution of Tunisia [26.01.2014]

were adopted by two-thirds of all deputies, consequently, it was almost impossible to enact or to modify a qualified law. By contrast, in Tunisia, qualified laws on fundamental rights shall be passed with absolute majority, therefore, the system is more flexible and adaptable.

CONCLUSION

This study has provided a brief comparison between the European and the African organic laws, and as the outcome of this analysis, certain points may be highlighted to demonstrate the relevant similarities and differences between the two continents. Firstly, it shall be noted, that most organic laws of the world are adopted in Africa, where more, than twenty constitutions contain this legal concept. The most influentious models are provided by European countries, however, organic laws are more popular in Africa, than in any other continent of the earth. Secondly, organic laws fail to fulfil their inherent function in Africa to promote the stability of the constitutional frameworks. The prolongement of the constitution is sometimes provided expressly as the function of organic law,[141] nevertheless, in the reality, the basic consideration behind this legal instrument is always to extend the endurance of the existing constitutional framework. The great number of constitutional amendments and reforms demonstrates that this target has not been achieved in several African states. Organic laws are deemed to be more succesful in Europe, where except from Hungary, qualified laws are elaborated for the long-term. A further consideration is the greater weight of the absolute majority requirement, than the two-thirds system. Although the fact, that legislation with two-thirds majority exists in both continents, this solution remains exceptional, since it distorts remarkably the fundamental logic of parliamentarism. Instead of this heightened level of consent requirement, most of the organic laws shall be adopted by absolute majority. Apart from this, it shall be also highlighted, that the scope of African organic laws is generally narrower, than the European ones. The Constitution of Algeria,[142] Angola,[143] and the Cape Werde Islands[144] Madagascar[145] and Tunisia[146] provide an enumeration, whichlegislative matters shall be covered by organic laws, while other African constitutions provides in several articles, whether certain fields of legislation are classified as „organic”. It is also worth-contemplating, that in Europe, a clear distinction shall be made between the institutional and the fundamental right protection aspect of qualified law, in Spain, and earlier in Hungary, several fundamental rights were considered as qualified subject matters. Due to the strong influence of the French constitutional development, and the character of the African democratic transitions, the fundamental right aspect has been almost neglected in Africa, except from some Maghreb countries. Organic

141 art. 127. of the Constitution of Chad [1996]
142 art. 123. of the Constitution of Algeria [28.11.1996]
143 art. 160. and 164. c), g), h) and i) of the Constitution of Angola [21.01.2010]
144 art. 187. (1) of the Constitution of Cape Werde [1980]
145 art. 88. of the Constitution of Madagascar [14.10.2010]
146 art. 65. of the Constitution of Tunisia [26.01.2014

laws are considered primarily as an institutional instrument, which protect fundamental rights only indirectly, through providing stability for certain organs of the state. Lastly, the dogmatic background of organic laws has been conceptualized in depth in certain European countries, especially in France, and less detailedly in Spain, and Hungary. In other European countries and in Africa, the theoretic principles for or against qualified laws have not been researched, this legal instrument is often evaluated as a tool for stabilization. Similarly, in the practice of some constitutional courts, the character of qualified law is dubious as a legal source. On the contrary, the constitutional practice of several countries allocate qualified laws somewhere between the constitution, and the ordinary legislation. As for conclusion, a broad picture was provided from the different directions of the development of European and African organic laws, which enrich our experience from qualified law. All in all, in most cases, qualified law do not fulfil their original function as a factor of stabilization (especially when two-thirds majority is applied), therefore, their justification is at least dubious.