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Legal transplant during democratic transition: The regional migration of a constitutional idea. The spread of qualified law in the central and Eastern European regions

Recepcja prawa w okresie transformacji ustrojowej: regionalna migracja idei konstytucyjnej. Upowszechnianie ustawodawstwa o szczególnej mocy prawnej w Europie Środkowej i Wschodniej

Abstract: This academic contribution analyses the recent migration of a constitutional idea as a legal transplant in Central and Eastern Europe: the implementation of qualified law in several countries during their democratic transition. A cursory glance at the regional dimension of this constitutional instrument provides new insight into the role of qualified legislation during political transitions and leads to valuable experience regarding the migration of constitutional ideas in Central and Eastern Europe. It is demonstrated how

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the external, mainly Western European examples influenced the constitutional development of this region, and how the new democratic frameworks inspired each other within Central and Eastern Europe.

Keywords: qualified majority, legislation, constitutional law, democracy, parliamentarism

Abstrakt: Celem niniejszego opracowania naukowego jest analiza migracji idei konstytucyjnej w ostatnich dekadach w Europie Środkowej i Wschodniej traktowanej jako swoisty przeszczep prawny. Szczególną uwagę zwrócono na sposób wdrożenia ustawodawstwa o szczególnej mocy prawnej w wybranych państwach w okresie transformacji ustrojowej. Pobieżny ogląd regionalnego wymiaru tego instrumentu konstytucyjnego pozwala na pogłębienie wiedzy dotyczącej roli ustawodawstwa o o szczególnej mocy prawnej podczas przemian ustrojowych, co przekłada się na cenne doświadczenie w zakresie migracji idei konstytucyjnych w Europie Środkowo-Wschodniej. W artykule przedstawiono również wpływ zewnętrznych, głównie zachodnioeuropejskich wzorców na rozwój konstytucyjny objętych analizą państw oraz wzajemne oddziaływanie nowych ram demokratycznych w Europie Środkowo-Wschodniej.

Słowa kluczowe: większość kwalifikowana, ustawodawstwo, prawo konstytucyjne, demokracja, parlamentaryzm

1. Introduction

My study concentrates on a recent legal transplant[1] in Central and Eastern Europe:[2] the implementation of qualified law in several countries during their democratic transition. A cursory glance at the regional dimension of this constitutional instrument provides new insight into the role of qualified legislation during political transitions and leads to valuable experience regarding the

[1] A. Watson, *Legal Transplants. An Approach to Comparative Law*, Scottish Academic Press, Edinburgh 1974.

[2] Instead of legal transplant, other forms are also known, but this is the more well known version commonly used in the literature, so my study uses this term. See e.g. J. Husa, *A New Introduction to Comparative Law*, Oregon Hart Publishing, Oxford and Portland 2015, p. 107.

migration of constitutional ideas in Central and Eastern Europe.[3] I attempt to demonstrate how the external, mainly Western European examples influenced the constitutional development of this region, and how the new democratic frameworks inspired each other within Central and Eastern Europe.

For this purpose, firstly, I describe the Western European models which were taken into account during the Central and Eastern European constitutional-making wave, as regards the implementation of qualified law; the French, Spanish and Austrian models are highlighted. In the next subchapter, those local traditions are conceptualised, which means the historical background behind the quick spread of qualified law. Then, the diversity of procedural regimes is analysed to prove that legal transplant does not mean and did not mean thirty years ago the automatic copying of foreign samples. Apart from the historical circumstances and the current political configuration, the margin of movement of the constitution-drafters should be also considered. Finally, it is also worth contemplating the conclusion that the diverse scope of qualified majority legislation in the various countries and the exact form of legal transplant depend mostly on the functions assigned to this particular legal instrument. From the countries of the region, the constitutions of Croatia,[4] Georgia,[5] Hungary,[6] Moldova,[7] Montenegro[8] and Romania[9] are taken into consideration, since these include the concept of qualified law.

2. Theoretical background

As a preliminary consideration, a definition of qualified law should be given. The relevant national legal systems outline the category of qualified law dif-

[3] S. Choudry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge 2006, p. 1–35.

[4] The Constitution of Croatia [22.12.1990], www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf [access: 13.09.2022].

[5] The Constitution of Georgia [24.08.1995], matsne.gov.ge/en/document/view/30346?publication=36 [access: 13.09.2022].

[6] The Fundamental Law of Hungary [25.04.2011], net.jogtar.hu/jogszabaly?docid=a1100425.atv [access: 13.09.2022].

[7] The Constitution of Moldova [29.07.1994], www.constituteproject.org/constitution/Moldova_2006.pdf [access: 13.09.2022].

[8] The Constitution of Montenegro [25.10.2007], www.wipo.int/edocs/lexdocs/laws/en/me/me004en.pdf [access: 13.09.2022].

[9] The Constitution of Romania [08.12.1991], www.wipo.int/edocs/lexdocs/laws/en/ro/ro021en.pdf [access: 13.09.2022].

ferently; however, certain commonalities may be found between the various approaches. Qualified law is a constitutionally prescribed subcategory of statutory norms which covers at least in principle the most important fields of legislation, and which is subject to stricter procedural requirements than the ordinary legislative process.[10]

The different national legal systems apply different expressions for qualified law. It is beyond doubt that terminology is generally not an important factor of a substantial analysis, but in this concrete case it might be worth assessing this aspect at the start, since the terms conceptualise well the different functions of qualified law: its complex constitutional and political role.

The term 'organic law' is used in Europe by the Constitutions of France,[11] Spain,[12] Georgia, Croatia, Moldova and Romania. This terminology focusses on the constitutional aspect. In Spain, organic laws form part of the extended constitutional design, the so-called constitutional bloc, and in most of the relevant constitutional systems, organic laws may be invoked during the constitutional review of ordinary laws.[13] The category of law with constitutional force was introduced in Hungary during the democratic transition in 1989; these laws had the same legal force as the constitutional provisions.[14] The term of law, adopted with a two-thirds majority, was used in Hungary for over two decades between 1990 and 2011. This approach highlighted the political significance of this legal instrument: a higher level of parliamentary consent than a simple majority is required to enact and amend qualified laws.

The Fundamental Law of Hungary established – or even reinstated – a legal concept which did not exist during the previous two decades: the logic of the modern cardinal laws[15] was very close to the former laws adopted with a two-thirds majority. This symbolic step served to reinforce the historical

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10 J. P. Camby, *Quarante ans de lois organiques*, "Revue de droit publique" 1998, No. 5–6, p. 1686–1698; A. Jakab, E. Szilágyi, *Sarkalatos törvények a magyar jogrendszerben* [Cardinal laws in the Hungarian legal system], "*Új Magyar Közigazgatás*" 2014, No. 3, p. 96–110; P. Avril, J. Gicque, *Droit parlamentaire*, Dalloz, Paris 2014, p. 267–307.

11 Art. 46. of the Constitution of France [04.10.1958.], www.constituteproject.org/constitution/France_2008.pdf?lang=en [access: 13.09.2022].

12 Art. 81. (1) of the Constitution of Spain [07.12.1978], www.constituteproject.org/constitution/Spain_2011.pdf?lang=en [access: 13.09.2022].

13 *No. 66–28, DC du 08.07.1966, (Rec., 15),* [in:] M. Troper, D. D. Chagnollaud (eds), *Traité international de droit constitutionnel,* Dalloz, Paris 2012, Vol. 1, No. 5, p. 346.

14 G. Kilényi, *Az alkotmányozási folyamat és a kétharmados törvények* [The constitution-drafting process, and the qualified laws], "Jogtudományi Szemle" 1994, No. 5, p. 201–209.

15 Art. T) (4) of the Fundamental Law of Hungary.

rhetoric in the Fundamental Law; however, there might be only very distant similarities between the current and the historical concept of cardinal law.[16]

Finally, it is also noteworthy that Montenegro undoubtedly provides the legal instrument of qualified law in its constitution, but without a separate category. Only three different forms of qualified majority and the application scopes of each are outlined.[17]

3. The French, Spanish and Austrian examples

Since the introduction of qualified law was motivated considerably by three points of reference from outside the region, it is worth evaluating briefly what qualified law means in these constitutional systems. However, qualified laws concern not only these three countries, but also a huge number of further constitutional systems from around the world. Although the fact that certain elements of the English constitutional development were close to the logic of qualified law,[18] the history of modern qualified law dates back only to 1958, when the Constitution of the Fifth French Republic was enacted.[19] After the decolonisation of Africa, several countries implemented qualified laws into their constitutional systems;[20] currently, more than 20 African constitutions have qualified law, including Algeria,[21] Senegal[22] and Tunisia[23] and several other countries of the continent.[24]

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16 A. Horváth, *A magyar történeti alkotmány tradíciói* [The traditions of the historical constitution], [in:] A. Téglási (ed.): *Történelmi tradíciók és az új Alkotmány* [Historical traditions and the new constitution], Országgyűlés Hivatala, Budapest 2011, p. 120–131.

17 Art. 91 of the Constitution of Montenegro.

18 P. Leyland, *The constitution of the United Kingdom: a contextual analysis,* Hart Publishing, Oxford–Portland 2012, p. 25–42.

19 Art. 46 of the Constitution of France.

20 D. René, *Les grands systèmes de droit contemporains,* Dalloz, Paris 1964, p. 630.

21 Art. 123. of the Constitution of Algeria [15.05.1996], www.constituteproject.org/constitution/Algeria_2016.pdf?lang=en [access: 13.09.2022].

22 Art. 78 of the Constitution of Senegal [07.01.2001], www.constituteproject.org/constitution/Senegal_2009.pdf?lang=en [access: 13.09.2022].

23 Art. 65 of the Constitution of Tunisia [26.01.2014], www.constituteproject.org/constitution/Tunisia_2014.pdf [access: 13.09.2022].

24 Art. 166 (1) point b), and art. 169 (1) of the Constitution of Angola [21.01.2010], www.constituteproject.org/constitution/Angola_2010.pdf [access: 13.09.2022]; art. 97 of the Constitution of Benin [02.12.1990], www.constituteproject.org/constitution/Benin_1990.pdf?lang=en; art. 155 of the Constitution of Burkina Faso [02.06.1991], www.constituteproject.org/constitution/Burkina_Faso_2012.pdf?lang=en [access: 13.09.2022]; art. 127 of the Constitution of Chad [1996], www.constituteproject.org/

The second wave of qualified law was attached to the fall of the nationalist dictatorships in Spain and Portugal.[25] Both post-transition constitutions have introduced qualified law;[26] moreover, this example was later followed by a number of Latin American countries, such as Ecuador[27] or Venezuela,[28] among others.[29] Finally, the third wave came after the fall of the communist dictatorships, when some Central and Eastern European countries also introduced qualified law.

After the main directions of the spread of qualified law around the world are outlined, the circumstances which increased its popularity are analysed. First of all, the French and Spanish backgrounds are conceptualised, since these

constitution/Chad_2005.pdf; art. 66 of the Constitution of Djibouti [1992], www.constituteproject.org/constitution/Djibouti_2010.pdf?lang=en [access: 13.09.2022], art. 104, of the Constitution of Equatorial Guinea [1991]; www.constituteproject.org/constitution/Equatorial_Guinea_2012.pdf?lang=en [access: 13.09.2022]; art. 71 of the Constitution of Ivory Coast [08.11.2016], constitutionnet.org/sites/default/files/Cote%20D'Ivoire%20Constitution.pdf [access: 13.09.2022]; art. 60 of the Constitution of Gabon [1991], www.constituteproject.org/constitution/Cote_DIvoire_2016.pdf?lang=en [access: 13.09.2022]; www.constituteproject.org/constitution/Gabon_2011.pdf?lang=en [access: 13.09.2022]; art. 83 of the Constitution of Guinea [07.05.2010], www.constituteproject.org/constitution/Guinea_2010.pdf?lang=en [access: 13.09.2022]; art. 124 of the Constitution of Democratic Republic of Congo [18.02.2006], www.constituteproject.org/constitution/Democratic_Republic_of_the_Congo_2011.pdf?lang=en [access: 13.09.2022]; art. 125 of the Republic of Congo [2001], constituteproject.org/constitution/Congo_2015.pdf?lang=en [access: 13.09.2022]; art. 52, 70, 73, 77, 80, 85, 87, 89, 92, 93, 99, 101, 102, 103, and 105, of the Constitution of the Central African Republic [27.12.2004], www.constituteproject.org/constitution/Central_African_Republic_2010.pdf; art. 88 and 89 of the Constitution of Madagascar [14.11.2010], www.constituteproject.org/constitution/Madagascar_2010.pdf [access: 13.09.2022]; art. 85 and 86 of the Constitution of Morocco [01.07.2011], www.constituteproject.org/constitution/Morocco_2011.pdf; art. 67 of the Constitution of Mauritania [07.12.1991], www.constituteproject.org/constitution/Mauritania_2012.pdf [access: 13.09.2022]; art. 131 of the Constitution of Niger [31.10.2010], www.constituteproject.org/constitution/Niger_2010.pdf [access: 13.09.2022]; art. 92 of the Constitution of Togo [14.10.1992], www.constituteproject.org/constitution/Togo_2007.pdf?lang=en; art. 73 (3) and art. 86 (2) point b) of the Constitution of the Cape Verde [1980], www.constituteproject.org/constitution/Cape_Verde_1992.pdf?lang=en [access: 13.09.2022].

25 Art. 81 (1) of the Constitution of Spain; art. 133 (3) of the Constitution of Portugal [02.04.1976], www.constituteproject.org/constitution/Portugal_2005.pdf [access: 13.09.2022].

26 D. Conversi, *The Smooth Transition*, "National Identities" 2002, No. 3, p. 223–244.

27 Art. 133 of the Constitution of Ecuador [28.09.2008], pdba.georgetown.edu/Constitutions/Ecuador/english08.html [access: 13.09.2022].

28 Art. 203 of the Constitution of Venezuela [20.12.1999], www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en [access: 13.09.2022].

29 Art. 63 of the Constitution of Chile [21.10.1980], www.constituteproject.org/constitution/Chile_2015.pdf?lang=en; art. 112 of the Constitution of the Dominican Republic [13.06.2015], www.constituteproject.org/constitution/Dominican_Republic_2015.pdf; art. 151 of the Constitution of Colombia [04.07.1991], www.constituteproject.org/constitution/Colombia_2005.pdf; art. 164 of the Constitution of Panama [1972], www.constituteproject.org/constitution/Panama_2004.pdf?lang=en; art. 106 of the Constitution of Peru [31.12.1993], www.constituteproject.org/constitution/Peru_2009.pdf?lang=en [access: 13.09.2022].

two countries influenced the constitution-drafting process of several other countries. After this, characteristics of the Austrian constitutional framework are highlighted, whose logic is close to qualified law and which had a remarkable impact on the Central and Eastern European development due to the geographical proximity.

In France, organic law was introduced by de Gaulle, who concentrated on the institutional aspect and underestimated the importance of qualified law as a tool for protecting fundamental rights.[30] Owing to this approach, French organic laws cover primarily the most important institutions of the state.[31] On the contrary, a certain balance exists between the institutional and the fundamental right aspects in Spain.[32] Nevertheless, a wide range of fundamental rights are covered by the qualified majority requirement in Spain.[33] However, the Spanish Constitutional Court interpreted the scope of organic law to avoid any unnecessary limitation on the margin of movement of the government.[34] The parliament is bicameral in both countries; an absolute majority is required in both chambers to enact or amend an organic law.[35] Apart from this, before the promulgation of organic laws in France, they must be sent to the Constitutional Council for constitutional review.[36] In Spain this requirement is only applied for the status of autonomous communities.[37]

The Austrian system represents a different approach than the French or the Spanish model. The Austrian framework does not use the term organic law, while in practice the Austrian constitutional regime includes several elements of the concept. The Austrian constitutional development has a special historical background due to the partial legal continuity with the former Austrian Empire. In addition, despite the proximity of Central and Eastern Europe and the decade-long Soviet military presence, no communist system was established. Therefore, the country was not concerned by the Central and Eastern European constitution-making

30 P. Blacher, *Le Parlement en France,* "Broché" 2012, Vol. 21, p. 11–23.

31 M. Troper, *Constitutional Law*, [in:] G. A. Bermann, E. Picard (eds), *Introduction to French Law*, Kluwer, Paris 2008, p. 13.

32 Ruling of the Constitutional Tribunal of Spain SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2.

33 *Constitutional Court Judgment*, No. 236/2007, https://www.tribunalconstitucional.es/ResolucionesTraducidas/236-2007,%20of%20November%207.pdf. [access: 13.09.2022]

34 M.B. i Serramalera, *La ley organica: ámbito material y posición en el systema de fuentes.* Atelier, Barcelona 2004, p. 30–31.

35 Art. 46 (3) of the Constitution of France art. 81. (2) of the Constitution of Spain.

36 Art. 46 (5) of the Constitution of France.

37 J. F. Chofre Sirvent, *Significado y función de las leyes orgánicas* [The significance and function of organic law], Tecnos, Madrid 1994, p. 215–224.

wave. As a consequence, the qualified legislative majority did not support the peaceful political transition in Austria, but completed the historically elaborated, inherently fragmented constitutional framework. Due to these differences, the Austrian experience does not constitute a separate model of Central European qualified law; this was rather a close point of reference for those lawyers and politicians who argued for the introduction of qualified laws.[38] Nevertheless, the Austrian statutory norms with quasi-constitutional force play a crucial role in the protection of certain fundamental rights, and this inspired the Central and Eastern European constitution-drafters to consider legislation with qualified majority as a potential safeguard of fundamental rights and human dignity.

4. The historical context as an actor of legal transplant

Besides the aforementioned foreign examples, it is also noteworthy that some of those Central and Eastern European countries which introduced qualified laws during the 1990s could rely on certain elements of their constitutional history during the implementation. These historical points of reference were probably not inevitable for the reception, since organic laws have also been popular in Africa without clear historical reasons.[39] Nevertheless, the role of these actors should not be underestimated. Amongst these examples, Hungary might be mentioned firstly, where the historical, uncodified constitution was based on cardinal laws until 1949.[40] These laws were enacted with the same legislative process as ordinary laws; it was public opinion and the most prestigious legal scholars that conferred constitutional significance on these laws.[41] During the democratic transition in 1989–1990, these historical cardinal laws served as an important argument for the implementation, though the French, Spanish and Austrian examples were also referenced during these discussions. Due to the strong historical link between the two countries, the Austrian model was probably the most influential for the framers; the application itself and the broad scope of the two-thirds legislative majority also come from the Austrian Constitution.[42] The Hungarian development is

38 The personal interview with István Somogyvári, former Hungarian secretary of state, 27.10.2016.

39 C.M. Fombad (ed.), *Separation of Powers in African Constitutionalism. Stellenbosch Handbook in African Constitutional Law,* Oxford University Press, Oxford 2017, p. 50–65.

40 H. Küpper, *Cardinal laws in the Hungarian legal system,* "MTA Law Working Papers" 2014, Vol. 46, p. 2–5.

41 Kilényi, *Az alkotmányozási…*, p. 201–209.

42 G. Kilényi (ed), *Az Alkotmány alapelvei* [The fundamental principles of the Constitution], ÉGSZI, Budapest 1989, Vol. 1, p. 18–32.

special from a historical perspective, since four different models of qualified law have been established there.

The constitutional revision in 1989 created the first version of modern qualified law in Hungary, which should have been enacted or amended just with a two-thirds majority of all deputies.[43] The Constitution stipulated that all laws concerning the fundamental rights and duties of the citizens should be covered by laws with constitutional force.[44] It is interesting to note that at the moment similar constitutional provisions exist only in Croatia, Montenegro and Tunisia. The first two models will be detailed later, while Tunisia applies the absolute majority model with some corrective elements.[45]

The concept of law with constitutional force meant a strict constraint on the governmental margin of movement, since almost every act concerns the fundamental rights and duties of the citizens; therefore, this model was followed in May 1990 with the laws adopted with a two-thirds majority. With the exhaustive enumeration of the qualified matters of legislation, the new approach narrowed the scope of qualified law and prescribed that the two-thirds consent of the deputies was sufficient to enact and amend qualified law. The only such statute which was still subject to the two-thirds majority of all deputies was the act on the national flag and the national coat of arms.[46]

Hungary is the only country in Central Europe to adopt a new constitution during the last decade; as part of this project, the need for and exact form of qualified law were also discussed.[47] The Fundamental Law reinstated the category of cardinal law,[48] while the scope of the qualified majority requirement was partly extended and partly narrowed.[49]

From Romanian history, the organic laws of Wallachia and Moldavia from 1832 should be highlighted. They functioned as quasi-constitutional norms, but officially did not serve as the constitutions of their respective countries.[50]

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43 G. Kilényi, *Az alaptörvény stabilitását szolgáló garanciák a külföldi alkotmányokban és nálunk* [The safeguards for the stability of the constitution in Hungary and elsewhere], "Jogtudományi Közlöny" 1996, No. 3, p. 110–124.

44 Ruling of the Hungarian Constitutional Court, no. 4/1990. (III. 4) ABH. 1990, 28–30.

45 Art. 64 of the Constitution of Tunisia.

46 Art. 75 (3) of act. XX. of 1949 on the Constitution of the Republic of Hungary, https://net.jogtar.hu/jogszabaly?docid=94900020.TV&txtreferer=00000001.txt [access: 13.09.2022].

47 For instance please see: Gy. Koi, *A sarkalatos törvények kérdése az Alaptörvényben* [The issue of cardinal law in the new Fundamental Law], "*Új Magyar Közigazgatás*" 2011, No. 6–7, p. 2–9.

48 Art. T), (4) of the Fundamental Law of Hungary.

49 Jakab, *Sarkalatos…*, p. 96–102.

50 N. Djuvara, *Între Orient și Occident. Țările române la începutul epocii moderne* [Between the east and the west. Modern Romanian constitutionalism], Humanitas, Bucharest 1995.

The other important experience of Romanian society was the revolution of 1989, which required exceptional care from the drafters of the new constitution, who considered organic law a potential long-term safeguard of the democratic transition. Moreover, the French constitutional development was traditionally monitored closely by Romanian scholars and politicians. Especially in the light of the concrete framework, this was probably also an important source of the Romanian model of qualified law.[51]

In Moldova, two special circumstances determined the priorities of the constitution-drafters. Firstly, Moldova followed the Romanian example in more respects; this likely meant an important inspiration for the implementation of qualified law.[52] However, it will be detailed later that the organic laws in Moldova differ remarkably from their Romanian counterparts. Secondly, society has been divided deeply in Moldova, and the Romanian and Russian communities have held inherently different visions for the future of the country. Furthermore, the autonomous status of Gagauzia is special, which must be provided by an organic law.

As regards Croatia, the main motivation for the implementation came from outside the Central European region. The main principles of the Croatian Constitution, the catalogue of fundamental rights and the safeguards of their protection emanate from the German constitutional tradition,[53] while the organisational framework is based mainly on the French constitutional design.[54] Although the introduction of organic law and the establishment of a special subcategory of law are obvious examples of French influence, Croatian organic laws exist in a unicameral parliamentary system, while France applies a semi-presidential framework with bicameral legislation. It should also be noted that the original Croatian Constitution after independence stipulated a bicameral parliament, which was abolished in 1998. Apart from these external sources, historical reasons might also explain why organic law was considered a potential guarantee of inclusive legislation in Croatia. Similarly to Romania, the democratic transition was surrounded by violent

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51 I. Deleanu, *Institutii si proceduri constitutionale* [Constitutional institutions and procedures], Beck C.H., Bucuresti 2006, p. 220.

52 T. Carnat, *Constitutional law*, State University of Chisinau, Chisinau 2005, p. 129–130.

53 S. Baric, *The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU.* "Working Paper" 2016, No. 6, http://bib.irb.hr/datoteka/971606.constitutional_court_croatia.pdf [access: 13.09.2022].

54 Z. Đurđević, M. Mataija, *The Constitution of Croatia in the perspective of European and global governance*, [in:] A. Albi, S. Bardutzky, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law,* Springer, Berlin and Heidelberg 2019, p. 1155–1160.

incidents and the long war against Serbia, so this experience highlighted the potential safeguards of a stable constitutional order.

Montenegro reclaimed its full independence in 2006, and its constitution entered into force in 2007, just over a decade later than the other constitutions of the region. There are three levels of qualified legislation in Montenegro, but otherwise the relevant constitutional provisions are very similar to the Croatian concept of organic law. However, the Constitution of Montenegro does not delineate a separate category of organic law, only those fields of legislation on which certain forms of heightened parliamentary majority should be applied.

Georgia is the most eastern country of Europe where organic law exists. The historical background of the Georgian constitution was a bit similar to the Spanish example, but when this analogy is used, the important differences between the two countries should be also taken into account. The other country which may be comparable to Georgia is Moldova. The most important characteristic of Georgian society was its fragmentation: the tensions between the different political interest groups and the movements of the nationalities threatened the peaceful transition and the territorial integrity of the country. For a short period in 1992, there were violent incidents and for some months a temporary military government led the country. Besides this, South Ossetia and Abkhazia targeted full independence, or at least an extension of their autonomy. Because of these uncertainties, all relevant stakeholders expressed a willingness to enact the final constitution of the country and to conclude the transition peacefully. Organic law was seen as a proper instrument for these aims.[55]

A cursory glance at the historical background demonstrates how the circumstances of democratic transition could entail the introduction of qualified law in these countries. When the local constitutional development includes such elements, which had a similar logic to the modern concept of qualified law, this increases the chance of the topic being discussed while drafting a constitution. Most of these points of reference may be found in recent history, but in certain cases arguments might be invoked from the Middle Ages, and these references also strengthen the legitimacy of the current qualified laws.

The concrete political environment of a democratic transition might be also relevant. When the risk of an armed conflict is considerable, the territorial integrity of the country is jeopardised or the final outcome of the political transition is uncertain, qualified law is a popular instrument for reinforcing the inclusivity of the legislative process. The higher parliamentary majority

[55] I. Aladashvili, *Guide to Georgian legal research*, GlobaLex 2005, https://www.nyulawglobal.org/globalex/Georgia.html [access: 13.09.2022].

required may force the interested stakeholders to negotiate regularly with each other, and as a consequence, the compromises grounded on these discussions may represent the interests of broader social layers. To set a concrete example: the transition was inherently peaceful in Hungary, but the final outcome of the first pluralistic parliamentary election was truly unforeseeable for all stakeholders, so each political party sought safeguards of oppositional rights.[56] In most of the cases, the influential points of reference came from outside the region; the relevant Western European models had the most obvious impact. In the meantime, the countries of the region also borrowed constitutional ideas from each other. The origin of Moldovan organic laws demonstrates this excellently.

5. Different procedural regimes: the margin of movement of national decision-makers

During the elaboration of a qualified law concept, one of the key issues is to identify those procedural safeguards which distinguish these statutes from the ordinary parliamentary legislative process. This is not only an important factor from the perspective of qualified law, but also an excellent instrument to prove that legal transplant should not mean an automatic, literal copy of foreign solutions in Central and Eastern Europe.

The countries of this region frequently copied foreign constitutional instruments, though they properly adapted them to the local circumstances. Despite the fact that only three external models guided the constitutional experts and politicians participating in the constitution-drafting process, different procedural regimes have been elaborated, since the concept of qualified law has been amended during each implementation. The migration of constitutional ideas and the harmonisation of the legal systems correlate with the margin of movement of the national decision-makers; therefore, despite the similar starting points, different solutions have been reached in each country.

As mentioned above, Hungary has introduced three different procedural regimes of qualified law during the last three decades; this is probably the

[56] I. Kukorelli: *Az MDF és az SZDSZ megállapodása utáni alkotmánymódosítás és következményei* [The constitutional amendment after the compromise of the MDF and the SZDSZ and its consequences], [in:] I. Kukorelli, K. Tóth, *A rendszerváltozás államszervezeti kompromisszumai, Antológia Kiadó*, Lakitelek 2016, p. 5–185, https://library.hungaricana.hu/hu/view/RetorkiKonyvek_013/?pg=4&layout=s [access: 13.09.2022].

conclusion of the continuous political instrumentalisation of qualified law.[57] The procedural framework was inspired initially mostly by the Austrian example, according to which a two-thirds majority is required for a broad range of crucial legislative decisions. However, in Austria, qualified laws are distinguished from ordinary laws on two grounds. Firstly, the quorum for ordinary laws is one third of the members of the parliament, while for qualified laws it is half of the representatives.[58] Secondly, the required majority for legislation is two thirds of the votes cast instead of a simple majority. By contrast, in Hungary, the quorum is half of all deputies for both qualified and ordinary laws;[59] the difference always comprised the level of consent required. The subsequent Hungarian models of qualified law have been detailed elsewhere; here just one more element of the current cardinal law concept is highlighted, demonstrating well that its implementation goes hand in hand with at least an attempt at adaptation.

In almost all countries concerned, it is dubious whether the qualified and ordinary provisions might be incorporated into the same statute, and if this is permitted, how one should distinguish the two types of legislation? Hungary provided a new answer to this question: so-called cardinal clauses were added to each statute which includes at least one cardinal provision, and they are subject to the two-thirds legislative majority requirement. In practice, this means that the cardinal clause enumerates those provisions of the act which should be covered with a qualified parliamentary majority. Nevertheless, this classification may be reviewed by the Constitutional Court. This concept originates from the law of the European Union, since national laws should declare explicitly in a clause which legal instrument of the European Union a particular act serves to comply with.[60]

Romania operates with an absolute majority system in a bicameral framework: the majority of all deputies and all senators must support a bill for it to be enacted.[61] This procedural safeguard comes from the French Constitution, but the Romanian approach does not include the further safeguards which complement the absolute majority requirement in France. Amongst these guarantees, the most important is the mandatory a priori constitutional review of organic

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57 K. Tóth, *A kétharmados törvények* [The laws adopted with two-third majority], [in:] I. Kukorelli, *A rendszerváltozás…*, p. 187–253.

58 Art. 31 and 44 (2) of the Federal Constitution of Austria.

59 Art. 5 (5) of the Fundamental Law of Hungary.

60 E. Bodnár, M. Módos, *A jogalkotás normatív kereteinek változásai az új jogalkotási törvény elfogadása óta* [The new normative framework of legislation since the adoption of the new act on law-making], "Kodifikáció" 2012, No. 1, p. 33–34.

61 Art. 74 (1) of the Constitution of Romania.

laws, but this element has not been borrowed by any of the Central or Eastern European countries.[62] This can be explained by the fact that the primary competence of the French Constitutional Council is a priori constitutional reviews, but in most European countries, the German constitutional tradition was considered more attractive. In Africa, where the French influence was stronger and the local traditions played a less important role, mandatory a priori constitutional review has been transplanted by a huge number of countries.[63]

Moldova relied mostly on the Romanian model when the procedural safeguards of organic law were outlined, but the absolute majority requirement should be interpreted in a unicameral system,[64] so its weight is remarkably less than in Romania. However, a special exception should be highlighted, which was probably inspired by certain elements of the French and Spanish systems. The organic law about the status of the Autonomous Community of Gagauzia should be adopted by at least a three-fifths majority in the parliament, instead of the generally applied absolute majority requirement for organic laws.[65] The French Constitutional Council was the first to identify a hierarchy between organic laws themselves: the organic law on public finances has been vested with a quasi-constitutional force.[66] A closer analogy from Spain might be mentioned, where only the organic laws on the statutes of autonomous communities should be subject to mandatory a priori constitutional review. This is not valid for the remaining Spanish organic laws.

Croatia combined the two-thirds and absolute majority models. The Constitution prescribes that the organic law on the rights of the national and ethnic minorities may be enacted or amended with a two-thirds majority of the parliamentarians,[67] while for other organic laws an absolute majority is sufficient.[68] Some similarities might be identified with the Austrian constitutional concept as well, apart from the fact that after the constitutional amendment in May 1990, the Hungarian Constitution stipulated a two-thirds majority of the deputies present for the amendment of qualified laws, apart from the act on the national flag and the national coat of arms, which was subject to a two-thirds majority of

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62 B. Szentgáli-Tóth, *Organic laws and the principle of democracy in France and Spain,* "Pro Futuro - A jövő nemzedékek joga" 2020, Vol. 9, No. 4, p. 62–74.

63 J. Gitiri, B. Szentgáli-Tóth, *The organic laws in francophone Africa and the judicial branch: a contextual analysis,* "Speculum Juris" 2021, t. 35, No. 1, p. 107–117.

64 Art. 74 (1) of the Constitution of Moldova.

65 Art. 111 (7) of the Constitution of Moldova.

66 No. 98-401, DC du 10 juin 1998.

67 Art. 82 (1) of the Constitution of Croatia.

68 Art. 82 (2) of the Constitution of Croatia.

all parliamentarians.[69] Moreover, the aforementioned distinction of the status of autonomous communities amongst organic laws may have had also an impact on the Croatian framework.

Montenegro established a procedural regime close to the Croatian approach, but with even more sophisticated content. Qualified laws have three different classes: most of them should be adopted by an absolute majority of the members of the parliament, while the act on the political rights and the properties of foreigners should be enacted with a two-thirds majority of the deputies. Finally, between these two categories, a third one was also established in the Constitution of Montenegro: the rights of the national minorities and the use of the Montenegrin armed forces abroad should be supported in the first vote by at least two thirds of the parliamentarians, while in the second vote, by at least a majority of all deputies.[70]

Similarly to Romania, Georgia introduced an absolute majority system in a bicameral structure, but with additional safeguards.[71] If the president submits a veto against an adopted organic law, the parliament may only uphold the earlier version with a three-fifths majority of the deputies.[72] It is interesting that a similar solution exists only in Tunisia.[73] Moreover, the Georgian Constitution contains one further element, which might be worth considering in other countries as well. It is not always obvious how the two-thirds requirement should be calculated or what exactly should be understood by the phrase 'all deputies'. This may be problematic in the case of temporary vacancies due to the resignation or death of certain parliamentarians. In addition, the counting of abstentions is also questionable, as we have seen in the recent practice of the European Parliament.[74] The Constitution of Georgia expressly provides that a qualified majority should be calculated on the basis of the deputies on the current nominal list.[75] The calculation is therefore not based on the constitutionally prescribed number of the representatives, but on those seats which are actually filled at the given moment.

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69 Art. 75 (3) of act XX. from 1949 on the Constitution of the Republic of Hungary, https://net.jogtar.hu/jogszabaly?docid=94900020.TV&txtreferer=00000001.txt [access: 13.09.2022].

70 Art. 91 of the Constitution of Montenegro.

71 Art. 66 (2) of the Constitution of Georgia.

72 Art. 68 (4) of the Constitution of Georgia.

73 Art. 81 (5) of the Constitution of Tunisia.

74 www.lawoforderblog.com/2018/03/4-things-most-people-get-wrong-about-abstentions/ [access: 13.09.2022].

75 I. Aladashvili, *Guide to Georgian*....

The procedural rules of qualified law show a huge diversity across the Central and Eastern European region, and lead us to the conclusion that this legal instrument arrived from outside the region, but was adapted remarkably to the local demands. Most of the legal transplants in Central and Eastern Europe should be seen as attempts to elaborate a special form of well-functioning external constitutional solutions.

6. The scope of qualified law: the functions assigned to qualified legislation

Qualified legislation may be divided into two main groups: basic institutions of the state and fundamental rights. Qualified laws often cover a wide range of fundamental rights, for instance, freedom of assembly, freedom of association, freedom of expression and fundamental political rights. The regulatory framework of the main constitutional actors and the basic institutions of the state also fall within the circle of qualified law. When a country decides to implement qualified law, it should be determined which fields of legislation will be covered by this safeguard; it depends mostly on the function assigned to qualified laws. Five main theories are identifiable in the practice of the Hungarian Constitutional Court: qualified laws may prolong the constitution,[76] serve the stability of the constitution,[77] be considered inherently political instruments,[78] be seen as a strong safeguard for the protection of fundamental rights[79] and influence the separation of powers.[80] The scope of qualified law is determined by those functions which are attached to this concept during its implementation.

In Hungary in 1989, qualified law was considered such an instrument, extending the constitutional protection to what were considered the most important statutes. Following the constitutional revision in 1990, the political approach of qualified law prevailed. Instead of the overly general description of the scope of qualified law, similarly to Spain, the Constitution enumerated those fundamental rights which should be covered by qualified laws.

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76 Ruling of the Hungarian Constitutional Court, No. 1/1999, (II. 24), ABH 1999, 25.

77 Ruling of the Hungarian Constitutional Court, No. 43/1992, (VII. 16), ABH 1992, 374.

78 Ruling of the Hungarian Constitutional Court, No. 66/1997, (XII. 29), ABH 1997, 397.

79 Ruling of the Hungarian Constitutional Court, No. 4/1993, (II. 12), ABH 1993, 48.

80 Ruling of the Hungarian Constitutional Court, ABH 2001, 31/2001, (VII. 11) 258.

The Fundamental Law reconsidered the scope of qualified law: most of the fundamental rights were removed from the list of cardinal matters, while the institutional aspect remained dominant.[81] Currently, the Fundamental Law classifies around 35 fields of legislation as cardinal, most of which concern the basic institutions of the state, such as the status, competences and functioning of the president of the republic,[82] the parliament and its members,[83] the Constitutional Court,[84] the ombudsman and the vice-ombudsmen,[85] the judicial system[86] or the National Bank[87] as well as the detailed rules on the parliamentary[88] and municipal elections.[89] The Fundamental Law defines cardinal law as a general term[90] and prescribes in several provisions each cardinal field of legislation. This method for allocating qualified majorities is relatively close to the Austrian model.

Similarly to the Spanish solution,[91] Art. 72 (3) of the Constitution of Romania enumerates most of the organic legislative matters, but several other constitutional provisions require a qualified majority for the regulation of certain issues. Each statute declares its character, regardless of whether it is a qualified or an ordinary law, but according to the Romanian Constitutional Court there may also be ordinary and organic provisions within the same act.[92] The scope of Romanian organic law, especially in the institutional aspect, is remarkably broader than its Hungarian counterpart, but the required majority is lower in

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81 B. Szentgáli-Tóth, *A sarkalatos törvényalkotás egyes alkotmányossági dimenziói: a sarkalatos törvényekkel kapcsolatos hazai alkotmánybírósági gyakorlat múltja, jelene, jövője* [Certain constitutional dimensions of the cardinal legislation: the past, present, and future of the Constitutional Court case law on qualified legislation], "Alkotmánybírósági Szemle" 2019, No. 1, p. 10–19.

82 Art. 12 (5) of the Fundamental Law of Hungary.

83 Art. 2 (2), art. 4 (4) and (5) of the Fundamental Law of Hungary.

84 Art. 24 (2) point g) and (3), (7) and (9) of the Fundamental Law of Hungary.

85 Art. 30 (5) of the Fundamental Law of Hungary.

86 Art. 25 (6) and (8), art. 26 (1) and (2) of the Fundamental Law of Hungary.

87 Art. 41 (6) of the Fundamental Law of Hungary.

88 Art. 2 (1) of the Fundamental Law of Hungary.

89 Art. 35 (1) of the Fundamental Law of Hungary.

90 Art. T) (4): „Cardinal Acts shall be Acts, the adoption and amendment of which requires the votes of two thirds of the Members of the National Assembly present."

91 In this regard, the Romanian approach follows exceptionally the Spanish logic instead of the French one.

92 From the relevant Romanian practice please see: ruling of the Constitutional Court no. 88/2.06.1998, Official Gazette 207/3.06.1998; ruling of the Constitutional Court No. 442/10.06.10, Official Gazette 526/2015.07.15; ruling of the Constitutional Court No. 568/2015.09.15, Official Gazette 844/2015.11.12; ruling of the Constitutional Court of Romania, No. 622/2016.10.13, Official Gazette 60/20.01.2017.

Romania so its impact on the whole legal system is less significant. In Romania and Moldova, partly the civil,[93] and also the criminal[94] Code are considered organic laws. In Hungary, these acts are not covered by the qualified majority requirement, since it makes it more difficult to adapt these main codes to the frequently changing social demands.

As with Moldova, it should be noted that the real circle of organic laws may not be determined solely from the Constitution itself.[95] Similarly to Romania, Art. 72 (3) provides an extensive list of organic legislative fields, but other constitutional articles also stipulate qualified majority requirements for certain issues.[96] Apart from this, the parliament may also adopt organic laws on matters which are not classified by the Constitution as an organic legislative field, but for which the application of the stricter procedural regime may be justified.[97] This margin of movement of the parliament is not only a theoretic competence: on the ground of this authorisation, the parliament adopted organic laws on the public prosecutor, the organisation of the armed forces, the status of the judiciary, lawyers and the security forces, among others.[98] In reality, these characteristics of the Moldovan constitutional system mean that besides the Constitution, the Moldovan constitutional framework is based on organic laws. Unlike in all other countries, qualified laws are not exceptional; this is the ordinary way of legislation. Since Moldovan organic laws are applied broadly due to the aforementioned reasons, ordinary laws are remarkably fewer and less significant than in the other countries concerned. This background explains why the necessity of organic law has not been contested in Moldova; the priority of organic laws over ordinary laws is also beyond doubt. Organic law is considered only a safeguard; these norms are seen as the prolongation of the Constitution, while the procedural regime provides sufficient flexibility in case of attempted

93 Art. 72 (2) point L) and P) of the Constitution of Romania; art. 72 (3) point H) and I) of the Constitution of Moldova.

94 Art. 72 (3) point F) of the Constitution of Romania; art. 72 (3) point N) of the Constitution of Moldova.

95 Carnat, *Constitutional…* p. 114–115; 129-130; art. 73 (3) point R) of Constitution of Moldova.

96 Art. 72 (3) point P) of the Constitution of Moldova.

97 Art. 72 (3) point R) of the Constitution of Moldova.

98 Interview with Teodor Carnat, the member of the Judicial Council of Moldova and the professor of the State University of Moldova, Department of Constitutional Law [14.09.2017].

reforms.[99] In Moldova, only the substantial constitutionality of organic laws may be challenged; dogmatic debates on this topic are not typical.[100]

Croatia and Montenegro represent a different model to Romania and Moldova; their constitutions do not include a complete list of the organic fields of legislation, but only some general clauses are provided from the scope of qualified law. For instance, the Croatian Constitution stipulates that 'laws (organic laws) which elaborate the constitutionally defined human rights and fundamental freedoms, the electoral system, the organisation, authority and operation of government bodies and the organisation and authority of local and regional self-government shall be passed by the Croatian Parliament by a majority vote of all representatives.'[101]

The reference to the constitutionally provided fundamental rights and freedoms and the organisation of governmental bodies make this list open-ended. It would be the task of the parliament, and on the final instance the Constitutional Court, to interpret which statutes or statutory provisions fall under organic law.

The Montenegrin Constitution also refers to the fundamental rights and freedoms provided by the Constitution, but the list of qualified legislative matters is longer and more detailed.[102] This regulatory method is very close to the Hungarian solution applied during the 1989 constitutional revision: this is grounded on a very broad reference to fundamental rights and duties and on the exhaustive enumeration of institutional matters.

Last but not least, the Georgian model is again closer to the French and the current Hungarian solution: organic law and the subsequent safeguards are outlined by the Constitution.[103] Apart from this, the Constitution provides expressly, on a case-by-case basis, which acts should be adopted as organic. A special temporary rule was also drafted, stating that all organic laws should be passed no later than the end of the second year after the enactment of the Constitution.[104]

As mentioned above, the two main types of qualified legislation are fundamental rights and the institutional aspect.[105] In Central and Eastern Europe, the institutional approach prevails, which is similar to the character of the French

[99] Interview with Rodica Secrieru, the general secretary of the Constitutional Court of Moldova [Chisinau, 15.09.2017].

[100] For instance, ruling 2013/36. of the Constitutional Court of Moldova [05.12.2013.].

[101] Art. 82 (1) of the Constitution of Croatia.

[102] Art. 91 of the Constitution of Montenegro.

[103] Art. 66 (2) of the Constitution of Georgia.

[104] Art. 106 (3) of the Constitution of Georgia.

[105] Ruling of the Hungarian Constitutional Court, No. 1/1999, (II. 24), ABH 1999, 25.

organic laws. However, it is different from the French model in that qualified laws protect fundamental rights in two ways, as demonstrated below.

In almost all the constitutional systems concerned, the statutory rules on the functioning, organisation and relationships of the most important constitutional actors should be covered by the qualified majority requirement. Where qualified law exists – acts on the president of the republic,[106] the parliament,[107] the Constitutional Court,[108] the ombudsman,[109] the legislative[110] and municipal[111] electoral systems and on referenda[112] – it is always subject to a higher level of legislative majority.

Regarding the protection of fundamental rights, some fundamental rights may be also found amongst the qualified subject matter, but it is more popular to confer qualified majority on the statutory framework of those institutions which are responsible for the protection of fundamental rights. In my view, this ambiguity may be interpreted as the two levels of qualified law's function of safeguarding fundamental rights. The direct level means that certain fundamental rights are covered by the qualified majority requirement, while the indirect aspect suggests that acts on the constitutional court, the ombudsman, the judicial system and the status of judges should be enacted with a qualified majority as a safeguard of independence.

The relevant Central and Eastern European constitutional systems operate only in a very narrow circle with qualified law as a direct instrument for protecting fundamental rights, except for Croatia and Montenegro, where according to the general clause the statutory rules on fundamental rights should be covered by organic laws. Nevertheless, freedom of religion[113] and the right to citizenship is classified as a qualified field of legislation in most of the relevant constitutional frameworks.[114] The requirement of a qualified majority does not only concern

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106 In the foregoing, these qualified legislative fields will be shown on the sample of the Constitution of Georgia. As regard the president of the republic, art. 70 (1) prescribes the organic legislative procedure.

107 Art. 50 (5) of the Constitution of Georgia.

108 Art. 83 (1), and art. 89. (1) of the Constitution of Georgia.

109 Art. 43 (3) of the Constitution of Georgia.

110 Art. 4 (4) and art. 50. (5) of the Constitution of Georgia.

111 Art. 2 (4) of the Constitution of Georgia.

112 Art. 74 (1) and (3) of the Constitution of Georgia.

113 Art. XIX (3) of the Fundamental Law of Hungary; art. 73 (3) point S) of the Constitution of Romania; art. 72 (3) point K) of the Constitution of Moldova; art. 12 (3) of the Constitution of Georgia.

114 Art. G) (4) of the Fundamental Law of Hungary; art. 5 (1) of the Constitution of Romania; art. 17 (1) of the Constitution of Moldova.

the fundamental rights themselves, but also those institutions which safeguard the protection of these rights. Most of the relevant constitutions contain three such institutions amongst the qualified legislative subjects: the constitutional court, the ombudsman and the judicial system. In reality, the role of qualified laws is more complex with regard to the indirect protection of fundamental rights: for instance, the education system is also an organic field of legislation in Romania and Moldova.[115]

7. Conclusions

The aim of my study was to consider certain aspects of legal transplants in Central and Eastern Europe. For this purpose, I analysed a sample of qualified laws which spread across the region after the fall of the communist regimes, and which was introduced by numerous countries around 30 years ago. The popularity of this constitutional instrument in the region shows that the legal transplant was more than a mere copy of foreign models: they were adapted to the local circumstances. As a result, the outcome of the reception is diverse, with the influential models differing from country to country. It is also noteworthy that the constitutional traditions of the countries concerned had a remarkable impact on the concrete concept of qualified law, while in some countries the elements of more foreign models were likely combined. In certain cases, apart from the obvious impact of the Western European models, the Central and Eastern European countries also inspired each other: so legal transplant may also exist within the region, the new constitutional democracies borrowed constitutional ideas from each other.

If we focus on the alleged perspectives of qualified law in Central and Eastern Europe, despite the serious concerns regarding the distortive effect of this constitutional instrument, the advantages are usually considered stronger, and this concept will likely be used for the long term. However, several aspects of the ideal procedural regime and the scope of qualified law are still uncertain, so the current concepts of qualified law might be reconsidered in the near future. A recent constitutional drafting wave is not expected in the region at the moment, but in case of any constitutional reforms in the region, the French, Spanish and Austrian models will probably again be the most influential. As a concluding remark, it should be highlighted that neither of these implementations are based

[115] Art. 73 (3) point N) of the Constitution of Romania; art. 72 (3) point K) of the Constitution of Moldova.

on a careful assessment of the existing models, so these solutions have not always been well-grounded. Therefore, in my view, it would be an important task for constitutional law research to analyse the safeguards potentially attached to qualified law, and to rumour what kind of consequences would be entailed by the introduction or the neglect of each model.

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