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The organic laws in francophone Africa and the judicial branch: a contextual analysis

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Abstract

Organic, qualified, or institutional laws are a special category of statutes that have a constitutional mandate to protect institutional frameworks and fundamental rights and freedoms. They operate using stricter procedural mechanisms than those available under ordinary legislative processes as they are usually passed by a supermajority. The three main models of organic laws are the French, Spanish, and Hungarian. There is arguably a fourth African model that is yet to crystallise as it is still in flux and ever-changing. Each of these models espouses unique constitutional, legal, and historical characteristics that set it apart from the other. Due to its origin, organic laws are more common in civil rather than common-law countries. Organic laws are vested with certain constitutional, political, and historical functions. For example, they are used to protect institutional frameworks and fundamental rights and freedoms. In Spain, organic laws form part of the Spanish Constitution and are only invoked during times of constitutional reviews of ordinary laws. In Africa, the institutional function of organic law is given primary consideration as a mechanism that indirectly protects fundamental rights and freedoms. Since organic laws are promulgated to promote clear constitutional objectives, its scope differs from state to state on account of varying historical contexts, despite sharing a similar origin. In the hierarchy of norms, organic law is said to be parched between statutory law and constitutional law. Organic laws in Africa were inspired by the decolonisation process especially in Francophone rather than Anglophone countries. They are arguably only variations of European versions but modified to suit local circumstances. Since newly formed African states after independence were not cohesive due to ethnicity, they were forced to co-exist while Francophone countries adopted organic laws as a mechanism to promote internal stability, strengthen

national cohesion, and avoid authoritarian tendencies. The main question that arises is whether Francophone countries' adoption of organic laws has led to better protection of institutions and fundamental rights and freedoms when compared to Anglophone countries? Existing evidence demonstrates that Francophone countries have experienced more violent constitutional and regime changes than their Anglophone counterparts indicating that the adoption of organic laws has not necessarily led to better outcomes.

Keywords: organic law; African constitutionalism; comparative constitutional law; qualified law; qualified majority; legislation; judicial branch; hierarchy of norms

1 INTRODUCTION

The concept of organic laws, sometimes referred to as qualified or institutional laws, apply in more than 50 countries worldwide. In the interest of consistency, this chapter shall use the term organic law. This chapter explores the scope of organic law and its role in the development of constitutionalism in Francophone Africa, specifically in the field of constitutional adjudication and the structure of the judiciary. The relevant European models will also be considered to contextualise this discussion and as crucial points of reference for African development. The main goal of this chapter is two-fold. On the one hand, because academic literature has not deeply analysed the characteristics of organic laws, this chapter provides an overview and a general descriptive framework of the issue. Consequently, the bulk of this chapter covers the background and the context of African organic laws. Some of the issues that will be addressed in this chapter include the history of organic laws, its spread into Francophone Africa especially its effect on the stability of key institutions and the protection of fundamental rights and freedoms on the continent. It shall further be investigated whether the African model of organic law offers any new insights or whether it is merely a variation of the European model. A comparative analysis between the different African organic laws and the European models is further conducted. On the other hand, specific issues or questions within this relatively broad field will be raised namely: how organic laws could influence the efficiency of constitutional adjudication; whether organic law would have any impact to the status of the judicial branch, and whether additional instruments are required to further develop the current system. The methodology to be used includes a comparative analysis between the constitutions of various states in Africa as well as an assessment of secondary literature, mostly published in Europe and North America.

Organic law is defined as a category of statutes having constitutional backing, covering at least theoretically, the most important legislative subject matters, usually the protection of institutional frameworks and fundamental rights and freedoms.[1] Organic laws operate using stricter procedural mechanisms than those available under ordinary legislative processes and are usually passed by at least absolute[2] or super[3] majority.[4] Organic laws are also underpinned by constitutional, political and historical functions.[5] Due to their origin, organic laws are more common in civil-law countries in Europe, such as France,[6] and Spain.[7] In Spain, for example, organic laws form part of the Constitutional bloc, which includes those norms that might be invoked during the constitutional review of ordinary laws.[8]

2 BACKGROUND

This section includes the origin and models of African organic laws to facilitate a better understanding of the concept. It further provides a historical, political, and legal overview of organic laws and its major classifications and models around the world.

1 Camby *Forty Years of Organic Laws* (1998) 1686 – 1698.
2 The majority of all deputies.
3 Two-thirds majority of all deputies.
4 Szentgáli-Tóth "Organic laws in Africa and the judicial branch" in Rotschedl & Cermakova (eds) *Proceedings of the IISES Annual Conference* (2018) 269.
5 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 269.
6 Article 46 of the Constitution of France (4 October 1958).
7 Article 81–1 of the Constitution of Spain (7 December 1978).
8 Chagnollaud *International Treaty of Constitutional Law, Vol 1* (2012) 340.

2 1 Models of organic laws

Generally, there are three main models of organic laws namely: the French, the Spanish and the Hungarian approach. The French and Spanish models have made a remarkable impact in Africa, mostly owing to the post-colonial influence of these countries. As will be demonstrated later in this chapter, since organic laws have been implemented across Africa, from Tunisia to Angola, it may be argued that there is indeed a fourth African model. However, this chapter argues that despite the fact that African organic laws show certain common characteristics, the African model has not yet crystallised into a unique subgroup or model as it is still in flux and ever-changing. Each of these models espouses unique constitutional, legal, and historical contexts that sets it apart from the other.

2 1 1 The French Model

Organic laws adopted by absolute majority first came into existence through the efforts of Charles de Gaulle, the founding President of the Fifth French Republic at that time.[9] He considered the role of organic laws as that of protector of institutions but not necessarily of fundamental rights and freedoms.[10] Organic laws were forthwith included in the French Constitution of 1958 to weaken the power of parliament to reorganise institutions and rebalance the separation of powers.[11]

De Gaulle had three main reasons for undermining parliamentary powers. First, the Fourth Republic, which was established after World War II, was not only weak but also unstable with frequent changes in government.[12] According to him, limiting parliamentary power and giving more power to the executive was the panacea for stability in France. Secondly, frequent political and legal changes caused instability and without any safeguards on stability norms arising from the parliamentary majority, organic laws were viewed as a check on the existing unlimited powers of parliament,[13] that held the state captive to political considerations.[14] Thirdly, and most importantly, organic laws were motivated by the sheer fear of dictatorship and the desire not to return to the authoritarian rule experienced during World War II during Nazi occupation.[15]

The French model inspired other European countries and the decolonisation of Francophone Africa.[16] Upon attainment of independence, more than 20 African countries have adopted this model.[17] From France, organic laws spread not only to Africa, but also to other European states such as Georgia, Hungary, Moldova, Portugal and Spain, and Latin America.

2 1 2 The Spanish Model

The Spanish concept of organic law traces its origin to the fall of the authoritarian regimes in Spain and Portugal.[18] This model is more recent as it was introduced in the 1978 Constitution as part of the democratic transition after the fall of Franco's regime. Although the French model influenced the Spanish one, it lacked democratic credentials. The republican tradition of Spain was usually short-lived due to instability since institutions were unable grow into a bulwark against authoritarian rule.[19]

The Spanish model was designed to balance its role of strengthening institutional frameworks on the one hand and protecting fundamental rights and freedoms on the other. The Spanish Constitutional Court has, however, provided a narrower interpretation of the organic laws so as not to limit government actions unnecessarily.[20] This contrasts sharply with Portugal whose institutional approach is closer to that of France.[21] Organic laws in Spain were therefore

9 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 269.
10 Blacher *The Parliament in France* (2012) 11–23.
11 Article 46 of the Constitution of France (04 October 1958).
12 Debre "The New Constitution" 1959 *Revue Française de Science Politique* 1, 7
13 Ardant & Bertrand "Constitutional Law and Political Institutions" 2014 *Édition* 344–345.
14 Troper "Constitutional Law" in G Berman & E Picard (eds) *Introduction to French Law* (2008) 13.
15 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 273.
16 David *The Major Contemporary Systems of Law* (1964) 630.
17 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 270.
18 Article 169(2) of the Constitution of Portugal (02 April 1976).
19 Assunção, Almeida & Piçarra *Portuguese Law: An Overview* (2007) 75–89.
20 Serramalera *Organic Laws, and their Status within the Hierarchy of Norms* (2004) 30–31.
21 Assunção *et al Portuguese Law* 75–89.

considered mechanisms with which to address the fragmented political climate caused by too many political parties and the ethnicisation of politics.[22] Thus, an absolute majority as a safeguard of broader consent was considered essential for the long-term provision of a new legislative framework, new governance structures and integrity that would stabilise the state.[23] Evidently, the scope of organic laws in Spain is broader due to its desire to protect democracy, its fear of totalitarianism, and the requirements of integrity and ethnic inclusion.[24] The Spanish model inspired the implementation of organic laws in the constitutions of several Latin-American countries,[25] as did the Portuguese model, which was considered by Angola, and the Cape Verde Islands during the 1970s.[26]

2 1 3 The Hungarian Model

The Hungarian model originated in an era of historical development where Cardinal laws formed the basis of the Hungarian constitutional regime.[27] However, these historical Cardinal laws have not been formulated precisely as a result of their dubious origin.[28] Moreover, these laws were subject to the same legislative processes as ordinary laws.[29] In 1989, modern organic laws were introduced in Hungary. Initially, this new category of organic law amounted to a quasi-constitutional force which was abolished in 1990.[30] Any adoption or amendment of these new laws required a two-thirds majority in parliament.[31] This form of qualified law was designed to create legislative certainty hence their denomination as Cardinal law in 2012 when the new Fundamental Law of Hungary came into effect. Fundamental rights and freedoms were omitted from the updated enumeration of cardinal laws, which brings the Hungarian model closer to the French one where institutional protection is the dominant factor.[32]

The Hungarian model is characterised by two-thirds majoritarian rule for the enactment of organic law. This approach demonstrates the political character of the model since broader consent would be required rather than a mere simple majority, which would provide certain political weight to the opposition. In this context, the term "cardinal law" is symbolic as it cemented the historical foundation of the fundamental law in Hungary.[33] In Central Europe, Romania,[34] Moldova,[35] and Georgia adopted a mixed model of qualified law which was inspired by the French, the Spanish, and Hungarian development.[36]

3 THE CONTEXT OF ORGANIC LAWS IN AFRICA

3 1 General overview

After having considered European models as an indirect but crucial component to the background of this chapter, this section turns to the direct assessment of the relevant African solutions. It commences by summarising the current tendencies of African organic laws before formulating more precise conclusions. Organic laws in Africa were mainly inspired by the

22 Bonime-Blanc "Constitution Making and Democratization. The Spanish Paradigm" in Miller & Aucoin (eds) *Framing the State in Times of Transition. Case Studies in Constitution Making* (2010) 200.
23 Bonime-Blanc (n 22 above) 200.
24 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 274.
25 Article 133 of the Constitution of Ecuador (28 September 2008); article 203 of the Constitution of Venezuela (20 December 1999).
26 Assunção *et al*_ *Portuguese Law* 75–89.
27 Marczali *Az 1790/1-diki országgyülés. 1. kötet* (*The Hungarian Parliament in 1790/1, and act I.)* (1907) 110; Hajnóczy 'Public dissertation on the Hungarian Parliament and its organization' ('Magyarország Országgyüléséröl és annak szervezetéröl szóló közjogi értekezés') in A Csizmadia *Hajnóczy József közjogi politikai munkái (József Hajnóczy's public policy work)* (1958) 236–240.
28 Molnár *Magyar közjog (Hungarian public law)* (1929) 29–44.
29 Ferdinándy *The Public Law of Hungary* (1902) 77.
30 Kilényi (ed) *Az Alkotmány alapelvei (The fundamental principles of the constitution) Alkotmányjogi Füzetek 1.* (1989) 18–32.
31 Article 8 of Act XXXI of 1989 (Hungary).
32 Kukorelli "Az új Alaptörvény bevezetö gondolatai" ("Introductory remarks to the new Fundamental Law") in Kubovicsné Borbély (ed) *Az új Alaptörvényröl - elfogadás elött (From the new Fundamental Law before its enactment*) (2011) 32–35.
33 Küpper "The Phenomena of Cardinal Laws in the Hungarian Legal System" 2014 *MTA Law Working Papers* 2–5.
34 Article 73 of the Constitution of Romania (08 December 1991).
35 Article 72(3) of the Constitution of Moldova (29 July 1994).
36 Article 66(2) of the Constitution of Georgia (24 August 1995).

decolonisation process. This explains why the concept is more common in Francophone than Anglophone countries. Even though heavily influenced by the European experience, the basic character of African organic laws was adapted to suit local circumstances. It includes most of the newly formed independent African states that were – in most cases – not cohesive as they were mere ethnic enclaves created by colonial governments and forced to co-exist. In this regard, the Maghreb region can be distinguished from other parts of Africa since those states constituted a more or less unitary development from the ancient period. However, since most African states are expected to be threatened by the internal conflicts, all instruments that could promote the stability of these countries were considered. In most Francophone countries, organic laws were adopted as a mechanism to promote internal stability, strengthen national cohesion, and avoid authoritarian tendencies.[37]

As stated above, an important characteristic of organic laws in Africa is that they are moderately diverse variants of European legal frameworks from mainly France, Spain and Portugal. A cursory glance at the five groups of African states where organic laws have been adopted reveals that they are regions that were formerly colonised by French or Portuguese empires and followed the French and in certain respects Portuguese constitutional model. First, some North-African countries from the Maghreb region have introduced organic laws, which survived even the Arab Spring.[38] Secondly, there are West African states that were colonised by the French,[39] with the exception of Mali, where this legal instrument has not been applied. However, that country is also marred by several sharp political and even armed conflicts. Thirdly, there are Francophone countries in East Africa and[40] fourthly, certain Central African countries were influenced by both France and Belgium.[41] Fifthly, and more importantly, after the fall of the Salazar government in Portugal, organic laws were implemented not only in Portugal but also in Angola and Cape Verde.[42] There are remarkable differences between each region, and even amongst the particular subgroups such as the required level of majority threshold for legislation; the existence or lack of prior judicial review; the detailed rules on the qualified legislative process; and the prescribed scope of organic law. These are key factors that result in considerable differences between the wide range of relevant African constitutional systems. One may also notice that organic laws have been introduced mostly in former French and Portuguese colonies. The concept is, however, not found in commonwealth African countries. Anglo-Saxon countries have remarkably less tradition on which they could rely in this regard. This phenomenon is therefore not only an African particularity but rather a global tendency, as common-law countries generally prefer parliamentary sovereignty rather than legislation with a qualified majority.[43]

The African context of organic laws has undergone numerous changes, First arising from the Rwandan genocide, an increased majority system of three-fifth of the vote is required for the enactment of organic laws.[44] The next important amendment is observable in the Maghreb region when the Arab Spring engulfed most of the North-African countries. For example, Tunisia introduced certain changes to the characteristics of organic laws that brought it closer to Rwanda's position.[45] If an organic law is subject to a presidential veto in Tunisia, the parliament can only overturn the veto with a three-fifths majority. Thirdly, another

37 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 277.

38 Article 123 of the Constitution of Algeria (15 May 1996); article 67 of the Constitution of Mauritania (12 July 1991); articles 85 and 86 of the Constitution of Morocco (01 July 2011).

39 Article 97 of the Constitution of Benin (02 December 1990); article 155 of the Constitution of Burkina Faso (02 June 1991); article 83 of the Constitution of Guinea (1991); article 71 of the Constitution of I'vory Coast (08 November 2016); articles 31 & 84 of the Constitution of Niger (31 October 2010); article 78 of the Constitution of Senegal (07 January 2001); article 92 of the Constitution of Togo (14 October 1992).

40 Article 26 of the Constitution of the Comoros (23 December 2001); article 66 of the Constitution of Djibouti (1992); articles 88 and 89 of the Constitution of Madagascar (14 November 2010).

41 Article 28 of the Constitution of Burundi (28 February 2005); articles 70 and 73 of the Constitution of the Central African Republic (27 December 2004); article 127 of the Constitution of Chad (1996); article 104 of the Constitution of Equatorial Guinea (1991, amended in 2011); article 60 of the Constitution of Gabon (1991, last amended in 2011); article 124 of the Constitution of Democratic Republic of Congo (18 February 2006); article 125 of the Constitution of the Republic of Congo (2001, last amended 25 October 2015); article 73(1) of the Constitution of Rwanda (30 May 1991).

42 Articles 166(2)(b) and 169(2) of the Constitution of Angola (21 January 2010); articles 173(3) and 187(2)(b) of the Constitution of Cape Verde Islands (1980).

43 Jowell & Oliver *The Changing Constitution* (2011) 92–114.

44 Article 73(1) of the Constitution of Rwanda (30 May 1991).

45 Article 81 of the Constitution of Tunisia (26 January 2014).

direction of change is evident since the end of the civil war in the Ivory Coast, where the two-thirds system was replaced by a mere absolute majority requirement. This made the framework of organic law more flexible, resulting the two-thirds requirement remaining only as a complementary element of the concept which will only apply to limit national sovereignty in favour of international organisations and override the political veto of the president.[46] The overall picture shows that in most African countries, qualified majority means absolute majority as regards legislation, while in Rwanda, three-fifths of the votes are required to enact an organic law. In Burundi,[47] the Cape Verde Islands,[48] the Comoros,[49] and Guinea,[50] two-thirds consent is necessary. Conversely, in Gabon, qualified laws are adopted with just an ordinary simple majority; the sole additional requirement is the mandatory prior constitutional review.[51] Gabon is the only country in the world where qualified or organic laws are subject to the simple majority consent of the legislative body. It is also important to note here that several African countries require a two-thirds majority for to adopt or amend their constitutions, which is clearly distinguished from the concept of qualified law. It is also important to note that similar to the European models, the required majority for certain organic laws may differ even within one constitutional system. For example, it is expressly provided in some African countries that organic laws will cover the rules on public finances under a distinct procedure,[52]while in other African countries, the basic financial regulations are subject to a specific procedure closely resembling the organic legislative process. It is also incorporated into some African constitutions that the two chambers shall adopt organic laws related to the senate by identical terms,[53] which is essentially a mere migration of a French constitutional provision.[54]

3 2 The subject matter and role of organic laws in Africa

In general, the subject matter of organic laws is twofold namely, the protection of institutional frameworks and fundamental rights and freedoms.[55] In Africa, the institutional protection afforded by organic laws is a primary consideration. The protection of fundamental rights and freedoms also serves a secondary function.[56] Since organic laws are always implemented under the pressure of particular circumstances to promote clear constitutional objectives, they differ from one state to the other on account of various historical and political foundations, despite sharing a somewhat similar origin.

The categorisation of organic laws into the defender of institutional frameworks and protector of fundamental rights and freedoms indicate its role in the entire constitutional dispensation. The next two subchapters will demonstrate these two directions to interpret the basic constitutional purpose of organic laws in Europe or Africa.

46 Article 102 of the Constitution of Ivory Coast (08 November 2016).
47 Articles 75 and 86 of the Constitution of Burundi (28 February 2005).
48 Article 173(3) of the Constitution of Cape Werde Islands (1980).
49 Article 26 of the Constitution of the Comoros (23 December 2001).
50 Article 83 of the Constitution of Guinea (07 May 2010).
51 Article 61 and 85 of the Constitution of Gabon (1991, last amended in 2011).
52 Article 112 of the Constitution of Benin (02 December 1990); article 127 of the Constitution of the Republic of Congo (2001, last amended 25 October 2015); article 88(11) of the Constitution of Madagascar (14 November 2010); article 65 of the Constitution of Tunisia (26 January 2014).
53 Article 67(4) of the Constitution of Mauritania (12 July 1991); article 85 of the Constitution of Morocco (01 July 2011).
54 Article 88(3) of the Constitution of France (04 October 1958).
55 14/B/2002. Ruling of the Hungarian Constitutional Court, ABH 2003, 1476; 4/1993. (II.12.) Ruling of the Hungarian Constitutional Court, ABH 1993, 48.
56 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 271.

3 2 1 Defender of institutional frameworks

All legal systems provide extra-constitutional rules on the functions, organisation and relationships of the crucial institutional framework of the state: organic laws were originally designed to create specifically strong, but extra-constitutional protection for the key institutions of the state. Organic laws regulate the functions of parliament, the status of the judiciary, powers and functions of defenders of rights, and the limitation of sovereignty.[57] Other roles include the organisation of the military forces, regulation of succession to the throne, or the way to elect the president of the republic, and the functioning of the constitutional courts. However, the introduction of organic laws in most African states has not been associated with stronger institutions, since the collapse of constitutional frameworks has been common in Francophone countries as well. If one might compare Francophone and Anglophone countries, there is not any evidence, that the institutions of the French-influenced regions, where organic laws are often concerned would produce a better record of stability or a higher level of right protection.[58]

Since the status and competences of the judiciary and constitutional courts are always covered by organic laws in Africa, organic laws might be potential safeguards of long-term stability and judicial independence, as will be demonstrated later. In addition, some further key judicial institutions are often covered separately by an organic subject matter, such as the functioning, composition and competences of the highest judicial bodies (constitutional court, the supreme council of magistrature, supreme court, court of audits, court of cassation, etcetera).

Besides, constitutional courts often have a mandatory task to check the constitutionality of enacted organic laws before their promulgation. This is crucial especially in Gabon, where organic laws are not distinguished by qualified majority from ordinary laws, just by the requirement of mandatory a priory constitutional review. A brief, but a systematic introduction to the relationship between African organic laws and the judicial branch will be considered later.

3 2 2 Protection of Fundamental Rights and Freedoms

Apart from the institutional field, organic laws adopted in Africa play a vital role in protecting fundamental rights and freedoms, especially in the Maghreb region. Although the French and Portuguese models heavily influence the African concept of organic laws, independent characteristics that differ from the original European concepts have emerged. For example, the scope of African organic laws is narrower and focuses purely on institutional frameworks. Organic laws in Africa concentrate primarily on the institution of the legislature[59] and the judiciary[60] but have also been extended to the regulation of electoral bodies,[61] elections,[62] and the conduct of the referendum.[63] Generally, even though organic laws do not directly protect fundamental rights and freedoms, the Maghreb is an exception. In Morocco, for example, organic law regulates the right to petition[64] or to take industrial action.[65] In other African

57 Wagner "Introduction to the System of Organic Laws" 1979 *Revista española de derecho administrativo* 199–204.

58 Human Rights Watch. Cameroon. Events of 2018. https://www.hrw.org/world-report/2019/country-chapters/cameroon (accessed 30-11-2020).

59 Articles 103, 108, 112 and 115 of the Constitution of Algeria (15 May 1996); article 86 of the Constitution of Burkina Faso (02 June 1991); articles 148, 153 and 156 of the Constitution of Burundi (28 February 2005); articles 37 and 62 of the Constitution of Gabon (1991 amended in 2011); article 79 of the Constitution of Madagascar (14 November 2010).

60 Articles 123, 153, 157 and 158 of the Constitution of Algeria (15 May 1996); article 236 of the Constitution of Burundi, (28 February 2005); articles 77, 85, 89, 92, 93 and 99 of the Constitution of Central African Republic (27 December 2004); articles 28 and 29 of the Constitution of Comoros (23 December 2001); articles 90(2), 96(2), 100(2) and 104 of the Constitution of Equatorial Guinea (1991 amended in 2011); article 63 of the Constitution of Guinea (07 May 2010); articles 125, 136, and 141 of the Constitution of Niger (31 October 2010); article 60 of the Constitution of Senegal (07 January 2001).

61 Article 211 of the Constitution of the Democratic Republic of Congo (18 February 2006).

62 Articles 79, 88(3) and (10) of the Constitution of Madagascar (14 November 2010); article 48(1) of the Constitution of Mauritania (12 July 1991); article 35 of the Constitution of Senegal (07 January 2001).

63 Article 164(g) of the Constitution of Angola (21 January 2010); article 187(1)(c) of the Constitution of Cape Werde Islands (1980); article 176 of the Constitution of the Republic of Congo (2001 amended 2015).

64 Article 15 of the Constitution of Morocco (01 July 2011).

65 Article 29 of the Constitution of Morocco (01 July 2011).

countries, substantial statutory rules on the protection and limits of certain fundamental rights usually fall outside the recognised scope of African organic laws. These countries focus on the protection of such institutions, which might strengthen the cohesive protection of fundamental rights. The judicial branch is crucial in this regard, as the enhanced level requirement for organic law might highlight the independence and the credibility of judicial bodies. Since powerful and impartial institutions would keep guard over the protection of fundamental rights, several constitutional actors could be concerned by the task of indirect rights protection. For instance, apart from the courts, organic laws also protect the constitutional court and the defender of rights as relevant institutions. A partial conclusion that can be drawn at this point is the fact that even though a relatively small number of fundamental rights are explicitly provided as organic subject matters, organic law acts as an additional safeguard of rights protection across Africa. By primarily following the French example,[66] the Constitutional Courts of Gabon and Senegal have expanded the constitutional framework for the protection of fundamental rights without explicit written constitutional background during cases concerning the mandatory prior review of organic laws.[67] During the constitutional review of an organic law concerning the status of the judiciary, the Constitutional Court of Gabon concluded that the preamble of the Constitution is of a normative character, and a violation of the main principles set by the preamble shall result in a substantial breach of the Constitution. In another example, the Constitutional Council of Senegal further extended the confines of the constitutional framework during the mandatory review of an organic law to include the African Charter on Human and Peoples' Rights.

In many African constitutions, the statutory rules on the competences, the structure, and the independence of the judicial system are subject to stricter procedural rules, than ordinary laws. For example, the Constitutional Chamber of the Supreme Court of Niger [68] examined two decrees for the initiative of the president of the Republic, which has narrowed the margin of movement of the head of state in the event of a cohabitation government. As part of the reasoning, the Constitutional Chamber enumerated the different types of initiatives and the requirements for the acceptance of each. The Constitutional Chamber provided that as far as organic laws are concerned, an increased level of the parliamentary majority would be necessary for their enactment. It further held that such laws shall not come into effect before completion of a constitutional review conducted by the Constitutional Chamber of the Supreme Court of Niger.

It is a well-founded principle in several African constitutions that whoever claims that his or her constitutional rights are breached, is entitled to initiate remedial procedures before the judiciary.[69] As organic law regulates the details of this remedial procedures, the remedies constitute remarkable safeguards for the potential plaintiffs, since the courts are effectively protected from direct political influence. This impact might be essential to diminish the vulnerability of citizens *vis-a-vis* the public administration, as in most cases, public authorities violate constitutional rights.[70] Citizens can receive improved protection since the judicial system is an impartial actor established by wide political consent, and its composition could not be modified easily regardless of the current political configuration.[71] As the stricter procedural requirements also concern the highest judicial bodies, which determine the functioning of the whole judiciary, the factor of trust could perhaps be relevant in case of particular judges or tribunals, and considering the judicial system as a whole.[72]

Moreover, African organic laws' indirect protection of fundamental rights has established additional instruments as safeguards. The Constitutional Court of Benin[73] protected the parliamentary minority and argued after a presidential initiative during the constitutional review of an organic law to prevent the legislation from adopting extra-ordinary measures. Amongst other instruments, the opposition could remarkably influence the content of organic laws,

66 *Décision Liberté d'association*, n° 71 – 44 DC *du* 16 *juillet* 1971.
67 The Constitutional Court of Gabon, *La décision no*. 002-CC du 28 *janvier* 1993; The Constitutional Court of Senegal, *décision no* 11/93 du 23 juin 1993.
68 Constitutional Chamber of the Supreme Court of Niger, no 95-08/Ch. *cons du* 22 *septembre* 1995.
69 Tabe Tabe. The Judiciary and the Enforcement of Constitutional Rights in Cameroon: Emerging Challenges. (2018). https://www.researchgate.net/publication/328099164_The_Judiciary_and_the_Enforcement_of_Constitutional_Rights_in_Cameroon_Emerging_Challenges (accessed 30-11-2020).
70 Mingst "Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect" 1988 *African Studies Review* 135–147.
71 The Constitutional Court of Benin, DCC 34-94 du 23 décembre 1994.
72 Tabe Tabe The Judiciary.
73 The Constitutional Court of Benin, DCC 08-171 *du* 4 *décembre* 2008.

which also cover those institutions that play a decisive role in the protection of fundamental rights.

It is prevalent in Africa for defenders of rights, parliamentary commissioners or ombudsmen that are elected or nominated, to investigate alleged violations of constitutional rights. In cases of well-founded complaints, these ombudspersons have the power to initiate certain measures. As these institutions are also often governed by organic law, their stability and independence offer a further safeguard that can be strengthened remarkably as a result of the stricter procedural rules. These ombudspersons are usually accessible directly to all citizens and represent a crucial and even emerging path to seek redress for right violations in Africa.[74]

Lastly, the role of the Constitutional Court as a further institution covered by organic laws is important for two reasons. On the one hand, according to the relevant constitutional and organic statutory provisions, constitutional courts have a general competence to review the substance and constitutionality of certain normative acts and individual decisions that concern the prevalence of fundamental rights in practice. Based on the constitutionally-determined framework, African organic laws outline who is entitled to turn to the Constitutional Court in case of individual complaints, or the alleged unconstitutionality of an act or measure. In this regard, several African constitutional courts serve as electoral courts and the roles applicable when adjudicating these disputes are also covered by organic law.[75] Apart from this, organic laws also safeguard the status of the Constitutional Court and the position of its members as individuals, since these guarantees could not be removed or amended without wide political support. As a last point for consideration it should be noted that most of the relevant African constitutions provide a mandatory prior constitutional review of organic laws before their promulgation by the Constitutional Court. Therefore, these laws could not enter into force if they do not comply with the appropriate protection standards stipulated by the constitutional norms. Consequently, organic laws do not typically cover the substantial statutory norms protecting fundamental rights, but it might contribute considerably to the establishment of such a legal surrounding, where the regulations and policies comply with constitutional standards of rights protection, and where the citizens can access effective remedies against a violation of constitutional rights. Considering these points, and despite the undoubted dominance of the institutional aspect, Francophone African organic laws can be regarded as indirect, but paramount important legal instruments with which to protect fundamental rights.[76]

4 CRITIQUE OF ORGANIC LAWS IN AFRICA

Whereas the concept of organic laws as originally conceptualised in Europe was meant to strengthen institutions, better protect fundamental rights and freedoms, militate against possibilities of dictatorship and ultimately usher in constitutional stability in Africa, organic laws have often failed to achieve these targets. In some states that have adopted organic laws such as Chad, the effect has been the perpetuation of the constitutional dispensation and extension of the endurance of existing constitutional regimes.[77] This is well demonstrated by the numerous constitutional amendments and reforms in the Francophone countries of the continent,[78] which undermines the hypothesis that organic law could serve as a factor of stability in Africa. This is also a consequence of the lack of long-term political and constitutional culture since organic law could function as a safeguard only if uncodified constitutional norms and conventions bound the margin of movement of the political and constitutional actors involved. Without these mechanisms, organic law has the potential to instead deepen the fragmentation of the political arena, and may even increase the motivation to amend the constitutional framework by violent means.[79] This is further exacerbated by certain derivatives of organic laws in Africa such as those practised in Rwanda and Tunisia that require an increased level of consent (three-

74 unpan1.un.org/intradoc/groups/public/documents/AAPAM/UNPAN029881.pdf (accessed 30-11-2020).

75 In these cases, the constitutional courts verify or annul the outcome of the legislative elections, or the bodies decide on certain electoral remedies. Organic law provides the substantial and procedural rules of these procedures. [The Constitutional Court of Ivory Coast, *décision* du 3 *décembre* 2010. 34/ 03-12/ CC/ SG; and 4 *Mai* 2011, N°CI-2011-036; The Constitutional Council of Senegal, *la décision* n° 1-E-2012 *du* 27 *janvier* 2012.]

76 https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2013-3-page-611.htm (accessed 30-11-2020).

77 Article 127 of the Constitution of Chad (1996).

78 Szentgáli-Tóth in *Proceedings of the IISES Annual Conference* 282.

79 Johnson "A Super Bad Idea: Requiring a Two-thirds Legislative Supermajority to Raise Taxes Protects Special Interest Tax Breaks and Gives Budget Veto Power to a Small Minority of Legislators" 2006 *Center on Budget and Policy Priorities*. www.revolvy.com/topic/Supermajority&item_type=topic.

fifths). The stricter form of qualified legislation, the two-thirds majority, which has been applied only by a small number of African countries have been criticised for distorting parliamentary democracy.[80] According to these concerns, the two-thirds requirement would usually result in a severe limit on the governmental margin of decision, or a case of strong parliamentary majority, it would almost eliminate the opposition from decision-making processes on the long term.

Moreover, the question as to whether organic laws have been better at protecting fundamental rights and freedoms in Francophone countries as in Anglophone countries in Africa is premature since Francophone countries have witnessed some of the worst violations of human rights on the African continent.[81] Examples include Burundi, the Democratic Republic of Congo (DRC), Ivory Coast and Rwanda. Bearing this in mind, and considering the fact that organic law has not been copied automatically from European models to Africa, the adaptation has not been properly carried out, and a partial or full reconsideration of the African framework of organic law might be necessary.

5 ORGANIC LAWS IN FRANCOPHONE AFRICA: ITS IMPACT ON THE CONSTITUTIONAL ADJUDICATION, AND THE JUDICIAL BRANCH

The task of this subchapter is just to conceptualise briefly, how organic laws could influence the African development of constitutional adjudication, and the judicial branch, and to outline certain recommendations for future constitution-making processes.

As regards the constitutional adjudication in Africa, organic laws can remarkably extend the competences of the Constitutional Court. Due to this phenomena, the separation of powers doctrine is also influenced by this legal concept in at least two respects.[82] First, the status and the competences of the Constitutional Court and the constitutional judges are covered not only by constitutional norms but also organic statutes. In practical terms, this means that the different political parties shall create broader consent to adopt and amend these rules, which could provide a certain level of permanence and stability for the Constitutional Court as far as the regulatory background is concerned. Moreover, the Constitutional Court is entitled to review any modification of its statutes, which could mean a crucial safeguard against any endeavour to weaken the role of the Court as a counterbalance. Especially within the African circumstances, these considerations are significant. Nevertheless, constitutional changes are often launched via extra-legal means, when organic laws are not able to fulfil their inherent tasks.[83] Secondly, the mere existence of organic law creates a new ground of constitutional review for the constitutional court, which broadens its margin of movement against the legislation. When a bill shall be passed as organic law, but it is enacted as an ordinary statute, the constitutional court might annul that particular act. If an ordinary law contains certain provisions, which have organic character, the constitutional court has again the power to rule these provisions out.[84] Apart from these issues, the value of organic laws as a legal source is always dubious, so the constitutional court shall clarify this issue also.[85] In Africa, this second point has less relevance, as the dogmatic background has been just rarely elaborated in-depth by the African case law or literature.[86]

Turning now to the judicial branch, it is essential to note that in several African states a wide range of judicial bodies are subject to stricter legislative requirement. For instance, apart from the ordinary courts, the court of audits, or the supreme council of magistrates all fall within the enumeration of organic subject matters. Consequently, the detailed constitutional status of the judicial branch is protected from daily political interventions, and the organisational model of the judiciary, or the status of the judges could be amended only in case of wide

80 Johnson 2006 *Center on Budget and Policy Priorities*.
81 Johnson 2006 *Center on Budget and Policy Priorities*.
82 Ginsburg *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* (2010).
83 Elster "Constitution-making and violence" 2012 *Journal of Legal Analysis* 7, 21.
84 Ducoulombier "Rebalancing the power between the Executive and Parliament: the experience of French constitutional reform" 2010 *Public Law* 688.
85 Alberts, Warshaw & Weingast "Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy" in Ginsburg (ed) *Comparative Constitutional Design* (2012).
86 The Constitutional Court of Madagascar, *décision* n°16-HCC/D3 *du* 3 *mai* 2018.

political consent, and only after a priory constitutional review of the proposed amendment.[87] This solution would strengthen the independence of this branch of power, as the legislature and the executive have considerably less opportunity to influence the structure of the judiciary unilaterally. This consideration shall be given particular weight in Africa, where the strong representation of the judiciary is widespread amongst the qualified legislative subject matters.[88] The reason for emphasising the judiciary is explained by the direct French influence, as the French Constitution declares a wide range of laws concerning the judiciary as organic.[89]

At this point, one might raise the question: how could organic law function more efficiently in Africa, especially with a view of promoting further independence of the judicial branch, and the credibility of the constitutional adjudication? It is arguable that it might be better to abolish organic law, as a separate legal concept, but in our view, due to its role as a safeguard, it has several advantages to maintain this legal framework. In this regard, we have three main recommendations, however, their potential implementation requires further research and professional discourse. First, mandatory prior judicial review should be combined with the different forms of qualified majority as an element of organic law. The increased majority requirement could force different political parties to negotiate with each other, which in itself might be an important achievement. However, , without honest intention, the outcome would be at the very least uncertain. In contrast, the mandatory prior judicial review could exclude unconstitutional content from the legal system, especially when initiations may also be sent to the Constitutional Court before its assessment. Secondly, the African legal literature should provide a more detailed analysis of the issue of organic law across the continent, in more than 20 countries, to provide a more broad picture from this legal instrument, and to gain a deeper understanding of its special African characteristics. Such research could also reveal valuable points from several dogmatic problems, such as the place of organic law within the hierarchy of norms. Thirdly, relatively narrow scope of organic law is advisable. A stricter form of legislation is justifiable for a narrow circle of key state institutions, but organic law could distort the parliamentary system, and restrict the competences of the government heavily.

6 CONCLUSION

As concluding remarks, although organic laws originated in Western- and Central Europe (France, Spain and Hungary), its influence has spread to other parts of the world especially Latin America and Africa. Many African states still follow the French model owing to the colonial past of these countries. However, organic law as a legal concept, although not wholly adopted, has been modified remarkably by specific local circumstances to fit regional requirements. Organic law adopted with a three-fifths majority, which has been introduced in Rwanda and Tunisia, is a uniquely African concept since similar solutions might not be susceptible in other continents. Although organic laws have influenced constitutional development in Africa, due to its relatively broad scope, its influence was less prominent than in Europe. From the discussion in this chapter it is evident that Francophone countries that adopted organic laws have not performed better in terms of protecting human rights than those that did not. Countries in the Great Lakes region still suffer from weak institutions, massive violations of human rights, and a poor record of the rule of law.

In sum, four main propositions were put forward in this chapter First, African organic laws are mostly inspired by European samples, however, the African organic laws are considered independent legal concepts, not mere copies of European (French) constitutional provisions.[90] Secondly, despite the fact that the European approach to organic law is based on a proper balancing of the institutional and human-rights approach, in Africa the fundamental rights aspect has been almost completely neglected; organic laws only cover the basic institutional framework of the state. Thirdly, African (and European) organic laws are rarely able to promote the endurance of the constitutional framework. Consequently, the justification for their existence is unconvincing. Fourthly, on the basis on this experience, it is arguable that organic laws may be more influential in Francophone Africa, when the judicial branch becomes more concerned with this legal framework: the constitutional adjudication might have more respect,

87 Landau "The Importance of Constitution-Making" 2011 *Denver University Law Review* 611–614.
88 The status, composition, competences, and functioning of the highest judicial bodies; the rules to initiate and conduct a judicial proceeding; the structure safeguards of the judicial independence
89 Troper in *Introduction to French Law* 1–34.
90 Fombad (ed) *Separation of Powers in African Constitutionalism* (2017) 50–65.

and judicial independence might be protected better.

To facilitate a further analysis of the increased level of protection, this chapter recommends preferring mandatory prior judicial review over qualified majority; diminishing the scope of organic law; and conducting more academic research to enable an even deeper understanding of African organic laws and their impact on the judicial branch. We are aware of the fact, that our contribution leaves more question opened than closed. However, our primary purpose was not to give exclusive answers, but to raise proper, contextualised questions which will ultimately encourage in-depth professional discussion on this topic.