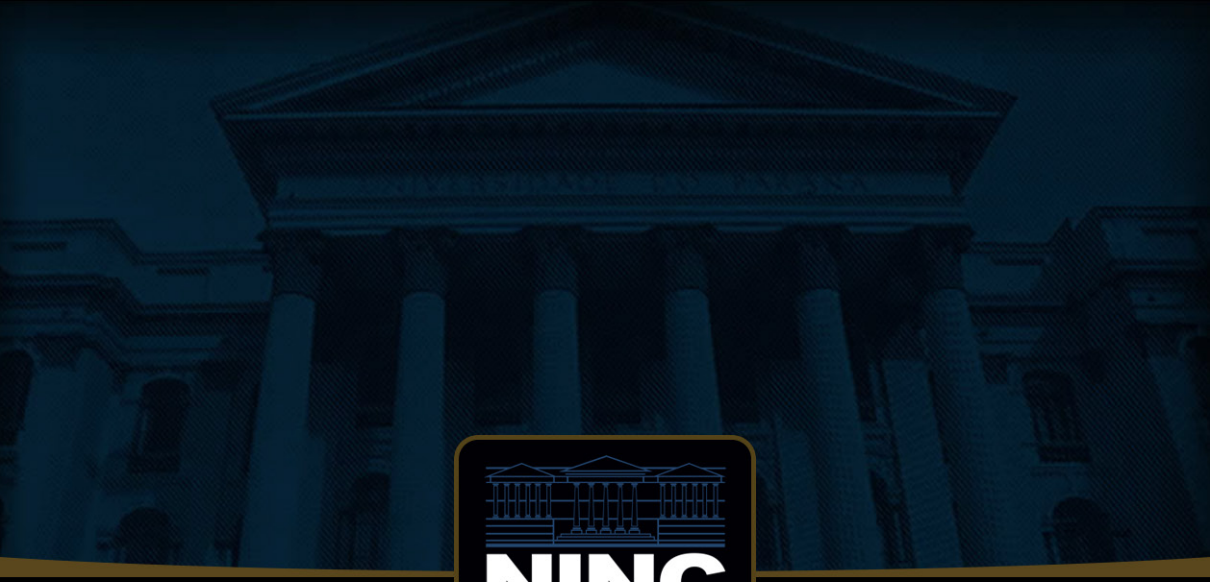

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REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

JOURNAL OF CONSTITUTIONAL RESEARCH

VOL. 10 | N. 3 | SETEMBRO/DEZEMBRO 2023 | ISSN 2359-5639

Articles

Revista de Investigações Constitucionais
ISSN 2359-5639
DOI: 10.5380/rinc.v10i3.89855

The sovereign minority: the qualified majority rule for constitutional amendments*

A minoria soberana: a regra da maioria qualificada para as emendas constitucionais

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Recebido/Received: 19.02.2023 / 19 February 2023
Aprovado/Approved: 15.09.2023 / 15 September 2023

Abstract

The paper challenges the widespread intuition according to which the constitutional amendment procedure normatively requires the application of the qualified majority rule as a collective decision rule. To this end, the relationship between majority rule and the qualified majority is clarified and the link between qualified majority and constitutional supremacy is questioned. The institutional role played by the qualified majority rule of the constitutional amendment in parliament is then clarified in order to discredit the widespread justification of the qualified majority based on the notion of precommitment.

Keywords: majority rule; qualified majority rule; constitutional amendment; precommitment; constitutional rigidity.

Resumo

Este artigo desafia a intuição generalizada segundo a qual o procedimento de emenda constitucional exige normativamente a aplicação da regra da maioria qualificada como uma regra de decisão coletiva. Para este fim, a relação entre a regra da maioria qualificada e a maioria qualificada é esclarecida, e a ligação entre a maioria qualificada e a supremacia constitucional é questionada. O papel institucional desempenhado pela regra da maioria qualificada da emenda constitucional no parlamento é então esclarecido com o objetivo de desacreditar a justificação generalizada da maioria qualificada com base na noção de pré-compromisso.

Palavras-chave: *regra da maioria; regra da maioria qualificada; emenda constitucional; pré-compromisso; rigidez constitucional*

Como citar esse artigo/*How to cite this article*: PARDO-ÁLVAREZ, Diego. The sovereign minority: the qualified majority rule for constitutional amendments. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 3, e247, set./dez. 2023. DOI: 10.5380/rinc.v10i3.89855

* This paper is part of the FONDECYT research initiation project No. 11200291 "Constitutional creation and constitutional amendment through qualified majority rules". It was elaborated thanks to a research stay granted by the German Academic Exchange Service (DAAD) at the Göttingen University (Germany). The author thanks Fernando Atria and Guillermo Jiménez for their comments on a previous version of this paper.

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What at first sight may seem a remedy, is in reality a poison
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1. INTRODUCTION

That democratic congresses, parliaments and representative bodies must reach their collective decisions using the majority rule seems to be beyond dispute. There is, however, one widespread exception: the qualified majority rule for constitutional amendments.[1] In most traditional democratic constitutions, it is common to find that a constitutional amendment is subject to a qualified majority rule —two-thirds or three-fifths are the typical ones—. And several new constitutions have not departed from the pattern of establishing a qualified majority rule for constitutional amendments.[2]

This is a peculiar situation because the simple majority rule and the qualified majority rule are opposite decision rules —one allows the majority to decide, whereas the other one allows the minority to do so—. The simple majority rule is the standard decision rule for parliaments in Western democracies, but for constitutional amendments, the minority rule is considered the standard. And neither the wide application of the parliamentary majority rule, nor the hegemony of the qualified majority rule for constitutional amendments, seems to have been the focus of attention in the constitutional theory literature.[3]

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[1] This paper adopts a broad sense of the word *amendment*, equivalent to that of constitutional reform or change. This broad concept does not distinguish between amendment and (complete) revision as does, for example, ALBERT, Richard. Amendment and revision in the unmaking of constitutions. In LANDAU, David E.; LERNER, Hanna (Eds). **Comparative constitution making**. Cheltenham, UK /Northampton, USA: Edward Elgar Publishing, 2019. p. 117-140.

[2] For example, the constitutions of Algeria (2020), Arts. 232 and 233; Angola (2010), art. 234.1; Armenia (1995), art. 202; Bolivia (2009), art. 411.2; Brazil (1988), art. 60 §2º; Cuba (2019), art. 226; Hungary (2011), Art. S.2; Myanmar (2008), art. 436; Ukraine (1996), arts. 155 and 156.

[3] With the exception of SCHWARTZBERG, Melissa. **Counting the many**: the origins and limits of supermajority rule. New York: Cambridge University Press, 2014, and my previous work, PARDO-ÁLVAREZ, Diego. **Das Rechtfertigungsdefizit des qualifizierten Mehrheitserfordernisses**: zugleich ein Beitrag zur Rechtfertigung der parlamentarischen Mehrheitsregel. Tübingen: Mohr Siebeck, 2020.

This paper aims to critically reconstruct the widespread hegemony of the qualified majority rule for constitutional amendments. The first part explains what the qualified majority rule consists of and how it differs from the simple majority rule (I). Then a propaedeutic issue is explained: there is no necessary conceptual connection between the qualified majority rule and the constitution, neither in a formal nor in a material sense. This makes us consider that the qualified majority rule for constitutional amendments is an institution whose justification should not be taken for granted (II). Then we reconstruct a functional explanation for the hegemony of the qualified majority rule for constitutional amendments (III) and we analyze a widespread normative argument in its favor: the qualified majority rule would be a precommitment mechanism to prevent that a parliamentary majority could alter the constitutional conditions of a government in times of weakness of will (IV). The problems of this justification support the idea of reconsidering the widespread intuition favorable to the qualified majority rule (V).

2. THE SIMPLE AND THE QUALIFIED MAJORITY RULES

The simple majority rule and the qualified majority rule are two collective decision rules. They differ structurally in the number of votes they require from a collegiate body. For the simple majority rule, a vote over half of the collegiate body is strictly enough to consider the most voted alternative as the group decision. The qualified majority rule, on the contrary, requires at least one vote in addition to the number of votes required by the simple majority rule.[4] For instance, in a group of 101 members, 51 votes in favor of an alternative will suffice for the simple majority rule to count as the group decision. For the qualified majority rule, those 51 votes would not be enough for a decision alternative (or both).[5]

This structural difference between both decision rules is significant from the point of view of their formal properties.[6] Following Kenneth O. May's celebrated contribution (1952), two properties can be considered particularly relevant. Firstly, the majority rule satisfies the property of "neutrality of alternatives": under this rule, the same number of votes is required for a collegiate body to decide between two alternatives

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[4] This structural difference is discussed in detail in PARDO-ÁLVAREZ, Diego. **Das Rechtfertigungsdefizit des qualifizierten Mehrheitserfordernisses:** zugleich ein Beitrag zur Rechtfertigung der parlamentarischen Mehrheitsregel. Tübingen: Mohr Siebeck, 2020. p. 9-22. The qualified majority rule is also usually called the supermajority rule. That denomination is avoided in this paper because it does not show that, strictly speaking, supermajorities are actually negative minority rules, not majority rules.

[5] SEN, Amartya. **Collective choice and social welfare.** San Francisco: Holden-Day, 1970. p. 70 ff. An additional vote may be required for one or both alternatives. This possibility explains the difference between "symmetrical" and "asymmetrical" qualified majority rules. See GOODIN, Robert E.; LIST, Christian. Special Majorities Rationalized. **British Journal of Political Science**, Cambridge, vol. 36, n. 2, p. 213-241, 2006.

[6] MAY, Kenneth. A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision. **Econometrica**, New Haven, vol. 20, n. 4, p. 680-84, 1952.

—for example, whether or not to approve a legal amendment.[7] The qualified majority rule for constitutional amendments, on the other hand, is not neutral: it favors the constitutional status quo over any change.[8] Approving an amendment requires more votes than a simple majority —a minority is enough to reject the amendment in favor of the status quo—. For example, Article 127 of the Chilean Constitution requires four-sevenths of the representatives *and* senators in office to approve a constitutional amendment. To reject a constitutional amendment, therefore, three-sevenths of the representatives *or* senators in office are sufficient.[9]

Secondly, the majority rule respects the "one-vote-responsiveness".[10] Robert Goodin and Christian List explain this property as follows:

> *'One-vote-responsiveness' states that, starting from a situation in which the decision is one of social indifference, the change of one vote in a certain direction should be enough to break the social indifference in the direction of the change. (…) 'One-vote-responsiveness' captures the idea that every single vote counts, by ensuring that in the case of a tie the change of a single vote determines the outcome.*[11]

In a situation where both alternatives are tied at 50 votes, under the majority rule, the last vote that remains to be counted will have a real impact on the group decision: if that last vote rejects the amendment, it will be considered rejected; if it approves it, the amendment will be adopted. The qualified majority rule is certainly responsive, but it is not *one*-vote-responsive: under the fourth-sevenths rule used for the Chilean constitution, an amendment will be rejected even if the last vote counted in a tie situation favors it.[12]

Both structural properties of the qualified majority rule for constitutional amendments interact in a rather distinctive way. The qualified majority rule favors, in the first place, one of the alternatives, typically keeping the constitutional (formal) status quo over the alteration of the constitutional provisions. Secondly, this preference is made effective by assigning a higher value to the parliamentary votes in favor of the

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7 See also RIKER, William H. **Liberalism against populism**: a confrontation between the theory of democracy and the theory of social choice. San Francisco: W.H. Freeman, 1982. p. 56 ff.

8 In this sense, ACKERMAN, Bruce. **Social justice in the liberal state.** New Haven: Yale University Press, 1980. pp. 274 ff.; WALDRON, Jeremy. **Law and disagreement.** Oxford: Clarendon Press, 1999. p. 113 ff.

9 The qualified majority rule, in conjunction with bicameralism, constitutes an intensified veto power when it is required in both houses of parliament.

10 See also WESCHE, Eberhard. **Tauschprinzip, Mehrheitsprinzip, Gesamtinteresse**: zur Methodologie normativer Ökonomie und Politik. Stuttgart: Klett-Cotta, 1979. pp. 87-88.

11 GOODIN, Robert E.; LIST, Christian. Special Majorities Rationalized. **British Journal of Political Science**, Cambridge, vol. 36, n. 2, p. 213-241, 2006. p. 218.

12 About this condition and the Chilean Constitutional Convention decision rule, see PARDO-ÁLVAREZ, Diego. Constitucionalismo calificado: la regla de la mayoría calificada del art. 133 inc. 3o de la Constitución Política de Chile. **Revista de Derecho Universidad de Concepción**, Concepción, vol. 88, n. 247, p. 13-43, 2020. p. 21-25.

constitutional status quo over the ones in favor of a constitutional change.[13] The constitutional status quo is favored by an unequal weighting of the parliamentary votes.[14] The qualified majority rule is, therefore, not only meant to favor the constitutional status quo over constitutional change, but it is also meant to establish an absolute veto —*i.e.*, a veto that cannot be opposed to— in favor of the parliamentary minority.[15] This veto attaches an unequal value to the vote and creates an imbalance in the relationship among the members of parliament. This paper analyzes the possible reasons that can explain the hegemony and self-evidence of this rather odd minority decision rule.

3. THE QUALIFIED MAJORITY RULE, CONSTITUTIONAL RIGIDITY, AND CONSTITUTIONAL SUPREMACY

The parliamentary qualified majority rule is, at least, a peculiar if not inequitable collective decision rule. However, its hegemony for constitutional amendments is undisputed: it is one of the most widespread "constitutional borrowings" in the world, it rules as a self-evident dogma and it hardly requires justification. This contrasts with the central place recognized to the simple majority rule in the ordinary legislative procedures.[16] In a democracy, congresses and parliaments generally make their decisions using the simple majority rule precisely because it guarantees the neutrality of alternatives and the equality of votes. The parliamentary minority can veto a constitutional amendment, but not ordinary legislation. Why does this difference take place?

A widespread line of thought considers that the hegemony of the qualified majority rule for constitutional amendments stems from the formal constitutional supremacy.[17] In the passages of the *Reine Rechtslehre* devoted to the tiered structure of legal systems, Hans Kelsen considers that the possibility of annulling or repealing a legal provision contrary to the constitution conceptually suppose that "the constitutional norm can only be modified or abolished under more difficult conditions, such as a qualified majority or a higher quorum". There is, Kelsen explains, a "constitutional form" over the "legal form": constitutional supremacy would presuppose that "the constitution

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13 On this matter, BESSON, Samantha. **The morality of conflict**: reasonable disagreement and the law. Oxford: Hart Publishing, 2005. p. 250 ff.; SADURSKI, Wojciech. **Equality and legitimacy**. Oxford/ New York: Oxford University Press, 2008. p. 73.

14 See RISSE, Mathias. Arguing for Majority Rule. **Journal of Political Philosophy**, New Jersey, vol. 12, n. 1, p. 41-64, 2004. p. 49 ff.

15 DAHL, Robert. **Democracy and its critics**. New Haven: Yale University Press, 1989. p. 153-154; HEUN, Werner. **Das Mehrheitsprinzip in der Demokratie**: Grundlagen, Struktur, Begrenzungen**.** Berlin: Duncker & Humblot, 1983. p. 100.

16 See PARDO-ÁLVAREZ, Diego. ¿Maior et sanior pars? Una justificación de la regla de la mayoría parlamentaria. **Ius et Praxis**, Talca, vol. 22, n. 2, p. 457-96, 2016.

17 In the German jurisprudence see for example DREIER, Horst. Art. 79 II. In DREIER, Horst (Eds.). **Grundgesetz Kommentar**, Bd. II. 2. ed. Tübingen: Mohr Siebeck, 2006, p. 2009-2024. p. 2012, p. 2018-2020.

prescribes its amendment or repeals a more complex procedure compared to the ordinary legislative procedure".[18]

Thus, Kelsen draws a formal connection between the constitutional hierarchy and the complexity of the constitutional amendment procedure. According to his position, it is a legal and formal property of the constitutional provisions that their amendment is more complex compared to ordinary legislation.[19] This greater difficulty in modifying the constitution is expressed in the mechanisms of constitutional rigidity considered for its amendment.[20] Kelsen mentions multiple mechanisms of constitutional rigidity,[21] and, in the quoted passage, he exemplifies the formal difference between the constitution and statutes using one of them: the qualified majority rule. Together with the other mechanisms, the qualified majority rule for constitutional amendments would be the primary formal expression of the hierarchical superiority of the constitution and, therefore, of constitutional supremacy over ordinary law.

This formal consideration, however, is not sufficient to prove the conceptual necessity of the qualified majority rule. As Kelsen himself explains, the legal system regulates its self-reproduction by granting a certain competence to an organism or authority so that, under a certain procedure, it can create, modify or repeal legal provisions.[22] All these conditions —authority, competence and procedure— may be aggravated or linked to more demanding requirements concerning constitutional amendments.[23] Typical mechanisms of constitutional rigidity, in addition to the qualified majority rule, are the call for new elections, the approval of constitutional amendments in two legislative periods, the consultation with other bodies or authorities, and, finally,

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18 KELSEN, Hans. **Reine Rechtslehre: mit einem Anhang: das Problem der Gerechtigkeit.** Studienausgabe der 2. Auflage 1960. Tübingen: Mohr Siebeck, 2017. p. 403. An example of the reduction of constitutional supremacy to constitutional rigidity can be found in FERRAJOLI, Luigi. Democracia constitucional y derechos fundamentales: la rigidez de la constitución y sus garantías. In FERRAJOLI, Luigi; MORESO, Josep Joan; ATIENZA, Manuel (Eds). **La teoría del derecho en el paradigma constitucional**. Madrid: Fundación Coloquio Jurídico Europeo, 2008, p. 71-116. p. 92: "Constitutions (...) are rigid by definition, in the sense that a non-rigid constitution is not really a constitution but an ordinary statute". See also the insightful critique of ATRIA, Fernando. **La forma del derecho**. Madrid: Marcial Pons Ediciones Jurídicas, 2016. p. 251-300.

19 JELLINEK, Georg. **Allgemeine Staatslehre**. 3. ed. Bad Homburg v.d. H.: Gentner, 1960. p. 531-539; BADURA, Peter. Verfassungsänderung, Verfassungswandel, Verfassungsgewohnheitsrecht. In ISENSEE, Joseph; KIRCHHOF, Paul (Eds.). **Handbuch des Staatsrechts der Bundesrepublik Deutschland**, Band XII: Normativität und Schutz der Verfassungs. 3. ed. Heideger: C.F. Müller, 2014, p. 591-612. p. 593.

20 The concept of constitutional rigidity and its relation to constitutional supremacy can be traced back to the famous work of BRYCE, James. **Studies in history and jurisprudence**. Oxford: Clarendon Press, 1901.

21 KELSEN, Hans. **Allgemeine Staatslehre**. Studienausgabe der Originalausgabe 1925. Tübingen: Mohr Siebeck, 2019. p. 596-597.

22 KELSEN, Hans. **Reine Rechtslehre: mit einem Anhang: das Problem der Gerechtigkeit.** Studienausgabe der 2. Auflage 1960. Tübingen: Mohr Siebeck, 2017. p. 268-288; p. 398-423.

23 See BRYDE, Brun-Otto. **Verfassungsentwicklung**: Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland. Baden-Baden: Nomos, 1982. p. 51-56. Some examples of the implementation of these different mechanisms of constitutional rigidity can be found in SCHILLING, Theodor. **Rang und Geltung von Normen in gestuften Rechtsordnungen**. Baden-Baden: Nomos, 1994. p. 194 ff.

the constitutional referendum.[24] Even if we assume the questionable Kelsenian premise that there is a conceptual relation between constitutional rigidity and the formal constitution,[25] the qualified majority rule is one among several mechanisms of constitutional rigidity:[26] The alleged normative requirement to make constitutional amendments more difficult does not imply specifically the introduction of a qualified majority rule.[27]

The need to justify the qualified majority rule as a specific mechanism of constitutional rigidity is also usually avoided based on an argument that is not formal, but material. The constitution, so the argument goes, represents a fundamental norm, and as such it cannot be amended by mere "circumstantial" parliamentary majorities.[28] The qualified majority rule, thus, would be the optimal and most adequate decision rule for constitutional amendments considering the material relevance or the importance of the constitution.[29] This persistent idea, which Carl Schmitt attributes to Jellinek,[30] Laband[31] and Zweig,[32] still exerts a significant influence on the intuitive self-evidence of the qualified majority rule for constitutional amendments.[33]

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[24] KLEIN, Claude; SAJÓ, András. Constitution-Making: Process and Substance. In ROSENFELD, Michel; SAJÓ, András (Ed.). **The Oxford Handbook of Comparative Constitutional Law**. Oxford: Oxford University Press, 2012, p. 419-441. pp. 434-439; GRIMM, Dieter. Types of Constitutions. In ROSENFELD, Michel; SAJÓ, András (Ed.). **The Oxford Handbook of Comparative Constitutional Law**. Oxford: Oxford University Press, 2012, p. 98-132. p. 111. On constitutional referendum and "consensual democracy", see LIJPHART, Arend. **Patterns of Democracy**: Government Forms and Performance in Thirty-six Countries. New Haven: Yale University Press, 1999. p. 219-223. Barber distinguishes among "formal constraints", "temporal constraints" and constraints in order to expand the decision group. BARBER, Nick. Why entrench? **International Journal of Constitutional Law**, Oxford, vol. 14, n. 2, p. 325-350, 2016. p. 329-330.

[25] See also BADURA, Peter. Verfassungsänderung, Verfassungswandel, Verfassungsgewohnheitsrecht. In ISENSEE, Joseph; KIRCHHOF, Paul (Eds.). **Handbuch des Staatsrechts der Bundesrepublik Deutschland**, Band XII: Normativität und Schutz der Verfassungs. 3. ed. Heideger: C.F. Müller, 2014, p. 591-612. p. 600; ROBERTS, John; CHEMERINSKY, Erwin. Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule. **California Law Review**, California, vol. 91, n. 6, p. 1773–1820, 2003. p. 1786.

[26] Gosseries' definition, then, according to which "a legal provision is 'rigid' if the rules of constitutional reform require more than a simple majority" is at least simplistic. GOSSERIES, Axel. The intergenerational case for constitutional rigidity. **Ratio Juris**, New Jersey, vol. 27, n. 4, p. 528-539, 2014. p. 528.

[27] Rightly, SCHWARTZBERG, Melissa. **Counting the many**: the origins and limits of supermajority rule. New York: Cambridge University Press, 2014. p. 162.

[28] ELSTER, Jon. Constitutionalism in Eastern Europe: An Introduction. **University of Chicago Law Review**, Chicago, vol. 58, n. 2, p. 447-482, 1991. p. 470.

[29] An overview in HEUN, Werner. **Das Mehrheitsprinzip in der Demokratie**: Grundlagen, Struktur, Begrenzungen. Berlin: Duncker & Humblot, 1983. p. 126 and p. 188.

[30] Also JELLINEK, Georg. **Gesetz und Verordnung**: staatsrechtliche Untersuchungen. Freiburg i. Br.: Mohr, 1887.pp. 261-276.

[31] LABAND, Paul. **Das Staatsrecht des Deutschen Reiches**: in vier Bänden. 5. ed. Tübingen: Mohr, 1911. p. 37-42.

[32] SCHMITT, Carl. **Verfassungslehre**. 3. ed. Berlin: Duncker & Humblot, 1957. p. 16-20.

[33] See for example, ALBERT, Richard. The expressive function of constitutional amendment rules. **Revista de Investigações Constitucionais**, Curitiba, vol. 2, n. 1, p. 7-64, 2015. p. 17-33.

Schmitt correctly pointed out that the fundamental meaning of the constitution does not stem from the difficulty of its amendment. In fact he defended the opposite reasoning: the fundamental importance of a constitution stems from its being a decision of the constituent power, not from the mere impossibility of a legislative majority to derogate its provisions.[34] Since the fundamental meaning of the constitutional text rests on its political character, the rigidity of constitutional law amendments is explained as a mere guarantee of its duration and stability.[35] The legislator is bound to the constitution based on its material importance as a sovereign decision, not because of its mere formal character, as in Kelsen's argument.[36] Both positions —Kelsen's and Schmitt's— seem to share, however, the same premise: that there would be an internal relation —either as a cause or as a consequence— between constitutional supremacy and constitutional rigidity. The importance of a constitution implies its rigidity, whether in formal or material terms.

However, this internal relation can be questioned. The obligation owed by the legislation and all the other state acts to what is prescribed by the constitution depends analytically on a criterion of recognition that may not rest on constitutional rigidity.[37] Constitutional rigidity, or constitutional entrenchment, represents one way —surely the most widespread one along with constitutional review— to guarantee the *effectiveness* of constitutional supremacy, but it should not be confused with constitutional supremacy itself.[38] Strictly speaking, the connection is contingent, not conceptual nor necessary. The qualified majority rule then represents one of the several mechanisms of constitutional rigidity. Its concrete connection with constitutional supremacy is therefore doubly contingent. It is an oversimplification, then, to think of constitutional supremacy and the fundamental character of a constitution as depending on the fact that its amendment is subject to a qualified majority rule. On the contrary, to consider constitutional supremacy as depending on the qualified majority rule is the very antithesis of asserting the political superiority of the constitution. The qualified majority rule for constitutional amendments cannot be explained normatively by appealing either to the formal concept of constitution nor to its political or material importance.

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34 SCHMITT, Carl. **Verfassungslehre**. 3. ed. Berlin: Duncker & Humblot, 1957. p. 20-36.

35 See also TUSHNET, Mark. Constitution. In ROSENFELD, Michel; SAJÓ, András (Ed.). **The Oxford Handbook of Comparative Constitutional Law**. Oxford: Oxford University Press, 2012, p. 218-232. p. 226.

36 See also BOEHL, Henner Jörg. **Verfassungsgebung im Bundesstaat**: ein Beitrag zur Verfassungslehre des Bundesstaates und der konstitutionellen Demokratie. Berlin: Duncker & Humblot, 1997. p. 99-104.

37 HART, Herbert Lionel Adolphus. **The concept of law**. Oxford: Clarendon Press, 1961. p. 97-120. See also SCHAUER, Frederick. Amending the Pressupositions of a Constitution. In LEVINSON, Sanford (Ed.). **Responding to Imperfection.** The Theory and Practice of Constitutional Amendment. Princeton: Princeton University Press, 1995, pp. 145-161.

38 About this difference, MARTÍ, José Luis. Is Constitutional Rigidity the Problem? Democratic Legitimacy and the Last Word. **Ratio Juris**, New Jersey, vol. 27, n. 4, p. 550-558, 2014.

4. THE HEGEMONY OF THE QUALIFIED MAJORITY RULE

Under the association between constitutional supremacy and the qualified majority rule lies an understanding of the political role that this decision rule would play in a democratic system. Why is there a tendency to assume that it would be necessary for constitutional supremacy that constitutional amendments were to be carried out under a qualified majority rule? A central aspect of the concept of constitutional supremacy is that the constitution is not within the reach of ordinary legislation, but on the contrary, it exercises a "special force or authority" unattainable to it.[39] James Madison considered this a central feature of the American constitutional system:

> *The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country.*[40]

Ordinary constituted politics could not be properly conducted, Madison argues, if the rules that constitute it are at its disposal. Constitutional rigidity would be, in this case, the gate that separates ordinary politics from constitutional politics. In this sense, a standard argument in favor of the qualified majority rule for constitutional amendments is to consider that the search for adequate constitutional stability —as a necessity proper to the superior hierarchical status of the constitution— presupposes that the constitutional making process is not within the reach of a legislative majority. The constitution "is no longer a matter, but a premise of politics". That is why constitutions, this argument goes, are protected by a qualified majority rule.[41]

In Madison's view, constitutional rigidity would have an enabling effect: to allow ordinary politics while avoiding the questioning of its constitutional premises. This enabling effect is justified, paradoxically, because of the inherent instability of the legislative majority rule.[42] Such instability would be a direct consequence of the structural properties of the majority rule —in particular, of the conditions of neutrality and one-vote-responsiveness. The equality of votes and alternatives constituted by the majority rule makes it possible for the relation between majority and minority to change

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39 BRYCE, James. **Studies in history and jurisprudence**. Oxford: Clarendon Press, 1901. p. 151-153.

40 MADISON James. Federalist No. 53. In HAMILTON, Alexander; MADISON, James, JAY, John. **The federalist papers**. New York: Dover Publications, Inc., 2014, p. 262.

41 GRIMM, Dieter. **Die Zukunft der Verfassung**. 2. ed., Frankfurt am Main: Suhrkamp, 1991. p. 302-303.

42 On this instability, in a similar context, TSEBELIS, George. **Veto players**: how political institutions work. Princeton: Princeton University Press, 2002. p. 2 ff.; p. 19 ff.

fluently.[43] Thus, each political group has an equal chance of political participation and of achieving power.[44] This principle of "equal chance of accessing power" is, therefore, a "prerequisite for the effectiveness of the majority principle",[45] or even a "condition for the majority rule".[46] Hannah Arendt considered it essential to apply the principle of majority decision because "under the modern conditions of political equality they show and represent the ever-changing political life of a nation".[47] Without a majority rule, on the contrary, the political system "rigidifies in a given group" and denies equal access to power. In Madison's view, accordingly, maintaining the validity of the constitution over time would allow it to exclude its content from ordinary politics and enable the continuous exercise of the majority rule by the government.

The key to a proper understanding of the widespread introduction of the qualified majority rule for constitutional amendments lies precisely in the distinction drawn by Madison between constitution and law. Under this dual model, the government cannot alter the constitution because it was dictated by a distinct and superior authority: the people. The distinction drawn by Madison, then, is one of authority: it expresses a radical separation between the authority that dictates a constitution and the one exercised by a government under a constitution.[48] However, paradoxically enough, the standard model of dual constitutionalism has attributed the competence for constitutional amendment to the same representative assembly competent for ordinary legislation. In Germany, the Weimar Constitution has established in its Art. 76 that constitutional amendments must be carried out "by means of legislation" but observing a rule of two-thirds of the parliament. The same was done by the German Basic Law in its Art. 79, by the Constitution of Chile in its Art. 127 and by the Constitution of Brazil in its art. 60. The Federal Constitution of the United States also distinguishes the constitutional amendment process from the ordinary statute, at least in part, by the requirement of

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43 The conditions of one-vote-responsiveness and neutrality imply that the change of a vote from one alternative to the opposite necessarily entails a change of the group's decision.

44 This is an important aspect of the German discussion on the majority rule. See KELSEN, Hans. **Vom Wesen und Wert der Demokratie**. Tübingen: J.C.B. Mohr, 1929. p. 26 ff.; SCHMITT, Carl. **Legalität und Legitimität**. 5. ed. Berlin: Duncker & Humblot, 1993. p. 28 ff.; BÖCKENFÖRDE, Ernst-Wolfgang. Demokratie als Verfassungsprinzip. In BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**. Frankfurt am Main: Suhrkamp, 1991, p. 289-378. p. 328 ff.

45 GUSY, Christoph. Das Mehrheitsprinzip im demokratischen Staat. In GUGGENBERGER, Bernd; OFFE, Claus (Eds.). **An den Grenzen der Mehrheitsdemokratie**: Politik und Soziologie der Mehrheitsregel. Opladen: Westdeutscher Verlag, 1984, p. 61–82. p. 71.

46 See also HEUN, Werner. **Das Mehrheitsprinzip in der Demokratie**: Grundlagen, Struktur, Begrenzungen. Berlin: Duncker & Humblot, 1983. p. 194 ff. See also BÖCKENFÖRDE, Ernst-Wolfgang. Demokratie als Verfassungsprinzip. In BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**. Frankfurt am Main: Suhrkamp, 1991, p. 289-378. p. 340 ff.

47 ARENDT, Hannah. **On revolution**. New York: Penguin Books, 2006. p. 163.

48 On this differentiation as a property of the American constitutional model, CARRÉ DE MALBERG, Raymond. **La ley, expresión de la voluntad general**. Madrid: Marcial Pons, 2011. p. 113-119.

a two-thirds qualified majority for the former. Throughout this political evolution, the constituent power of the people and the constituted governmental powers cannot be clearly distinguished as different authorities.

The attribution of the power for constitutional amendments to the same legislative assembly in charge of ordinary legislation lays its foundation in the principle of popular sovereignty. The paradigm of popular sovereignty recognizes the people as the sole origin of both constitutional creation and ordinary legislation.[49] The freedom and the changeable character of ordinary politics presuppose the stability of constitutive rules at a higher constitutional level;[50] but these rules, in turn, acquire their concrete political meaning only through the implementation of legislative plans and through the permanent exercise of political freedom by the government. Here lies an inherent tension: the law's only foundation is the people, but the democratic legal system is structured on two mutually controlling vertical authorities. This tension is expressed even more intensely within the legislative assemblies: the parliament must subordinate itself to the constitution —to the sovereign decision of the constituent power—, but it has the possibility of changing the constitution in its hands, by assuming the *pouvoir constituant dérivé*.

The parliament's ability to modify the constitution certainly impacts the vertical separation of constituent and constituted powers. The hierarchical distinction between constitution and legislation can no longer depend on a distinction of authorities. It ends up being based on the mere decision rule governing constitutional amendments.[51] Along these lines, then, the qualified majority rule performs a central function in the stabilization of constitutional norms considering a parliament that claims to be the constituted expression of popular sovereignty. On the one hand, constitutional politics must remain stable to enable a constituted government; but, on the other hand, it must also be subject to a lasting political deliberation through parliament.[52] The qualified majority rule appears to be precisely an instrument for dissolving the tension between constitutional politics and ordinary politics in parliament.

The hegemony of the qualified majority rule for constitutional amendments, then, seems to be an epiphenomenon of the competence acquired by parliaments

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49 BÖCKENFÖRDE, Ernst-Wolfgang. Demokratie als Verfassungsprinzip. In BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**. Frankfurt am Main: Suhrkamp, 1991, p. 289-378. p. 291-296.

50 HOHNERLEIN, Jakob. **Recht und demokratische Reversibilität**: verfassungstheoretische Legitimation und verfassungsdogmatische Grenzen der Bindung demokratischer Mehrheiten an erschwert änderbares Recht. Grundlagen der Rechtswissenschaft 36. Tübingen: Mohr Siebeck, 2020. p. 189-194.

51 JELLINEK, Georg. **Allgemeine Staatslehre**. 3. ed. Bad Homburg v.d. H.: Gentner, 1960. p. 534; LOEWENSTEIN, Karl. Über **Wesen, Technik und Grenzen der Verfassungsänderung**: Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 30. Juni 1960. Berlin: De Gruyter, 1961. p. 27 ff; KELSEN, Hans. **Allgemeine Staatslehre**. Studienausgabe der Originalausgabe 1925. Tübingen: Mohr Siebeck, 2019. p. 594-598.

52 ELSTER, Jon. **Ulysses unbound**: studies in rationality, precommitment, and constraints. Cambridge: Cambridge University Press, 2000. p. 100.

under the principle of popular sovereignty for constitutional amendments. Under this principle, both the amendment and the maintenance of the constitutional order must always be interpreted as the product of people's will, as the well-known formula of Ernst-Wolfgang Böckenförde.[53] They must be the result of the permanent process of democratic collective will formation, not the consequence of an external force or of a durability guarantee of the constitutional provisions independent of the electorate's will. The hegemony of the qualified majority rule does not only respond to the necessity of guaranteeing the stability of constitutional provisions, but also of maintaining the faculty of altering the constitution in parliament. In other words, it emerges to try to dissolve in parliament the tension between constitution and law, giving at least the appearance of not falling into the counter-majoritarian difficulty inherent to the judicial review.

5. THE ALLEGED JUSTIFICATIONS FOR THE QUALIFIED MAJORITY RULE

Reconstructing the function of the qualified majority rule for constitutional amendments under the paradigm of popular sovereignty may serve the purpose of understanding its widespread hegemony and its consideration as a self-evident truth. However, that is not sufficient to understand it properly. There are good reasons why parliaments take their legislative decisions under a simple majority rule: the neutrality of alternatives and the equality of votes are structural properties that contribute to legitimize parliament's legislative decisions under a constitution.[54] To properly understand the qualified majority rule for constitutional amendments, it is necessary to consider how the lack of neutrality of alternatives and the inequality of votes specifically contribute to the democratic legitimacy of the constitutional amendment process.[55] Thus the function fulfilled by the qualified majority rule could be satisfied by another less harmful deliberative means. Is it justified to establish a veto power in the hands of the minority in parliament to authorize parliament to amend the constitution? How can the decision to change or maintain the constitutional status quo be legitimized by the fact that it is adopted by a qualified majority of the members of parliament?[56]

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53 BÖCKENFÖRDE, Ernst-Wolfgang. Demokratie als Verfassungsprinzip. In BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**. Frankfurt am Main: Suhrkamp, 1991, p. 289-378. p. 291-296.

54 For a justification, see PARDO-ÁLVAREZ, Diego. ¿Maior et sanior pars? Una justificación de la regla de la mayoría parlamentaria. **Ius et Praxis**, Talca, vol. 22, n. 2, p. 457-96, 2016.

55 An overview on the arguments in PARDO-ÁLVAREZ, Diego. **Das Rechtfertigungsdefizit des qualifizierten Mehrheitserfordernisses**: zugleich ein Beitrag zur Rechtfertigung der parlamentarischen Mehrheitsregel. Tübingen: Mohr Siebeck, 2020.

56 Irrespective of his anti-pluralistic premises, this is a fruitful way to understand Carl Schmitt's criticism against the qualified majority rule for constitutional reform: "If one has no confidence in the simple majority, then, depending on the changing situation, much may be gained, but perhaps also very little, if a few percent

The consideration of the alleged function of the qualified majority rule for constitutional amendment, then, must be complemented by one of its justifications. In the discussion of constitutional theory on the majority principle, three general arguments have been put forward to justify the qualified majority rule.

5.1. The protection of minorities and their rights

The qualified majority rule grants a veto right so that political minorities can protect themselves against some eventual majority decisions.[57] This argument is based on the idea of individual consent: a decision adopted by a qualified majority (or unanimity) would maximize individual freedom, since it would give each individual or minority the possibility of opposing a collective decision.[58] Along these lines, the application of the qualified majority rule for constitutional amendments would be explained as a mechanism to maximize the freedom of the groups represented by the parliamentary minorities regarding decisions that seek to modify the constitution. This argument applies both to political partisan majorities and to the so-called "structural minorities".[59] It is also widely applied in "consociational democracy" theories and in "deeply divided societies".[60]

This liberal reading of the qualified majority rule incurs some misconceptions that make it ill-suited as an explanation of the widespread application of the minority veto regarding constitutional amendments. Firstly, a minority veto resulting from a qualified majority rule cannot be described as a "minority right". The minority rights argument seems to confuse the opposition's procedural rights, —which includes the right to participate in a plenary, immunity, indemnity, the freedom of speech, the right to vote and the possibility to resort to an external arbiter— giving a political minority the possibility to reject a constitutional amendment in the name of the whole group.[61] Thus, to characterize the qualified majority rule as a minority right is misleading, if not

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of votes have to be added. By what right can these restore the lost confidence?". See SCHMITT, Carl. **Legalität und Legitimität**. 5. ed. Berlin: Duncker & Humblot, 1993. p. 43, p. 38-57.

[57] For instance, HESSE, Konrad. **Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland**. 20. ed. Heidelberg: C.F. Müller Verlag, 1999. p. 64-65; BARBER, Nick. Why entrench? **International Journal of Constitutional Law**, Oxford, vol. 14, n. 2, p. 325-350, 2016. p. 339-340; KELSEN, Hans. **Vom Wesen und Wert der Demokratie**. Tübingen: J.C.B. Mohr, 1929. p. 61 ff.

[58] BUCHANAN, James M.; TULLOCK, Gordon. **The calculus of consent**: logical foundations of constitutional democracy. Michigan: University of Michigan Press, 2008. p. 171 ff.

[59] HEUN, Werner. **Das Mehrheitsprinzip in der Demokratie**: Grundlagen, Struktur, Begrenzungen. Berlin: Duncker & Humblot, 1983. p. 233 ff.

[60] LIJPHART, Arend. **Thinking about democracy**: power sharing and majority rule in theory and practice. London/New York: Routledge, 2008. p. 85. These cases are not common enough and therefore they do not have sufficient scope to explain the hegemony of the qualified majority rule.

[61] This is characterized by Jellinek as an "inverted world". See JELLINEK, Georg. **Das Recht der Minoritäten**: Vortag gehalten in der Juristischen Gesellschaft zu Wien. Wien: A. Hölder, 1898. p. 38-39.

completely inappropriate. Secondly, the minority rights logic does not suit the extent of application of the qualified majority rule for constitutional amendments. This would be a plausible explanation if the application of this rule was limited to the political minorities' substantive rights —for example, fundamental rights and the rights of procedure and participation. But the set of constitutional provisions subject to the qualified majority rule exceeds by far the minorities' rights. And lastly, this conception of the freedom protected by the qualified majority rule does not suit its function for constitutional amendments. Constitutional amendment procedures mediate between two principles: stability and responsiveness —to the democratic demand for a constitutional change. To explain the logic of the qualified majority rule exclusively from the point of view of the minorities favored by the constitutional status quo is one-dimensional. The need to protect minorities could explain the existence of a jurisdictional claim system before collective decisions are taken. But the possibility of a political minority to decide as if it were the majority cannot be adequately described as a right, much less as a mechanism for the protection of the minority rights.

5.2. Constitutional consensus.

The constitution would represent a consensus or an agreement between majorities and minorities.[62] Such an agreement, given the practical impossibility of being subject to unanimity, could only be revised by a qualified majority. This argument has even more remote origins than the one referring to the protection of minorities.[63] Its modern formulation lies within contractualism:[64] the constitution would represent a unanimous consensus,[65] so its modification would also require unanimity or being close to it. Subjecting constitutional amendments to the qualified majority rule would be explained as an attempt to recreate, for the *pouvoir constituant dérivé*, the supposed

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62 See with further references HEUN, Werner. **Das Mehrheitsprinzip in der Demokratie**: Grundlagen, Struktur, Begrenzungen. Berlin: Duncker & Humblot, 1983. p. 176-190; PARDO-ÁLVAREZ, Diego. **Das Rechtfertigungsdefizit des qualifizierten Mehrheitserfordernisses**: zugleich ein Beitrag zur Rechtfertigung der parlamentarischen Mehrheitsregel. Tübingen: Mohr Siebeck, 2020. p. 144-152.

63 Behind the idea of the qualified majority rule at the service of constitutional consensus lies the medieval belief in the legitimacy of unanimity. The validity of the majority decision would depend, along these lines, on the existence of an antecedent unanimous consensus. The rule of the qualified majority began to be used under this belief by the Catholic Church from the fourteenth century under the formula of *maior et sanior pars*: two thirds or three quarters spoke, according to this understanding, for *sanioritas*; for rationality and universal consensus. See JÄGER, Wolfgang. Mehrheit Minderheit, Majorität, Minorität. In BRUNNER, Otto; CONZE, Werner; KOSELLECK (Eds). **Geschichtliche Grundbegriffe**. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Band 3. H-Me. Stuttgart: Klett-Cotta, 1982, p. 1021-1062. p. 1025-1032

64 KELSEN, Hans. **Allgemeine Staatslehre**. Studienausgabe der Originalausgabe 1925. Tübingen: Mohr Siebeck, 2019. p. 594.

65 JELLINEK, Georg. **Das Recht der Minoritäten**: Vortrag gehalten in der Juristischen Gesellschaft zu Wien. Wien: A. Hölder, 1898. p. 9-13

conditions of unanimity at the moment of the original constitutional creation.[66] This argument (same as the former) is central to the rational choice positions,[67] but it has also been echoed in the democratic theory under the label of "agreement on fundamentals" and of "*Grundkonsens*" in the inter and postwar German and Anglo-Saxon discussions.[68]

There are three reasons why this explanation about the widespread hegemony of the qualified majority rule is implausible. Firstly, this explanation confuses the result of a particular vote with the decision rule. The argument assumes that a decision that approaches unanimity represents a broader consensus —one that integrates minorities and individuals. But a unanimous decision subject to a majority rule (free of minority veto) is certainly very different from a unanimous decision subject to a unanimity rule (forced by a minority veto).[69] To assume that a unanimous or two-thirds decision represents an inclusive consensus implies ignoring the fact that it was forced by a minority veto. Secondly, it is subject to the obvious risk of *petitia principi*. This argument considers that the amendment must be approved by a qualified majority as a form of recognition of the previous unanimous constitutional consensus. This takes what is under discussion as already proven: that the constitution must be approved unanimously or by a qualified majority. Thirdly, the argument is self-defeating: if the two-thirds decision (supermajority) represents a broad consensus, the one-third deciding to maintain the status quo would represent the contrary.[70] And lastly, this explanation about the qualified majority rule is implausible because it does not suit the function of the constitutional amendment decision rule. The qualified majority rule seeks to serve a mediating function between a responsive constitutional reform and the parliament's subjection to the constitution. But if such subjection is explained as a consequence of an antecedent unanimous agreement, the constitutional amendment competence itself loses its normative support. As Melissa Schwartzberg correctly points out: "…if a norm ought to command unanimous assent, the number of votes in support of it

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66 In this vein, SAGER, Lawrence. The Birth Logic of a Democratic Constitution. In FEREJOHN, John A.; RAKOVE, Jack N.; RILEY, Jonathan (Eds). **Constitutional culture and democratic rule**. Cambridge, UK; New York, USA: Cambridge University Press, 2001. p. 110-144. p. 118-125.

67 BUCHANAN, James M.; TULLOCK, Gordon. **The calculus of consent**: logical foundations of constitutional democracy. Michigan: University of Michigan Press, 2008. p. 85-88.

68 For instance, SCHEUNER, Ulrich. **Das Mehrheitsprinzip in der Demokratie.** Opladen: Westdeutscher Verlag, 1973. p. 55-56.

69 In this sense, DAHL, Robert. **Democracy and its critics**. New Haven: Yale University Press, 1989. p. 153: "…it is one thing to say that if everyone approves a policy it surely ought to be adopted (the Pareto principle). And it is quite another to say that a policy should be adopted *only if* everyone approves".

70 Alternatively, see BÖCKENFÖRDE, Ernst-Wolfgang. Demokratie als Verfassungsprinzip. In BÖCKENFÖRDE, Ernst-Wolfgang. **Staat, Verfassung, Demokratie**. Frankfurt am Main: Suhrkamp, 1991, p. 289-378, p. 339.

should be irrelevant. Even if a supermajority voted to overturn it, such a change should be deemed illegitimate".[71]

5.3. Constitutional stability

The qualified majority rule would be a central mechanism of constitutional rigidity, with the aim of stabilizing the constitutional content —understood in a certain very influential tradition as the constitutional "precommitment"— and of setting out enabling conditions to the constituted government that are favorable to the legal traffic.

This third justification emerges as particularly suitable for understanding the qualified majority rule in relation to its political function. The mechanisms of constitutional rigidity in general, and the qualified majority rule in particular, are conceptualized as mechanisms of precommitment with the aim of avoiding the (collective) *akrasia* or weakness of the (majority) will. The idea of precommitment seems to be particularly suitable for the understanding of constitutional reform as an expression of popular sovereignty because it constitutes a justification that seems to reinforce the democratic credentials for constitutionalism: it establishes a form of diachronic legitimation that does not run counter to, but seems to confirm, the people and their representatives' position as the origin and basis of the constitutional legitimacy. The arguments for both the protection of minorities and the consensus assume that a minority's will, distinct from the majority's will, seeks protection or to reach a broader consensus. The precommitment argument, on the contrary, does not assume the separation but a democratic continuity between the majority and the minorities: it is the same parliament, and the same majority, who commits itself to a higher form of rationality, extended over time, in the constitution.[72] In this way, the argument goes, the constitution can remain stable while enabling the regular exercise of government.[73]

6. THE QUALIFIED MAJORITY RULE AS A MECHANISM OF PRECOMMITMENT

[71] SCHWARTZBERG, Melissa. **Counting the many**: the origins and limits of supermajority rule. New York: Cambridge University Press, 2014.p. 130.

[72] In this vein, BEITZ, Charles R. **Political equality**: an essay in democratic theory. Princeton, N. J: Princeton University Press, 1989. p. 50-67.

[73] ELSTER, Jon. Constitutionalism in Eastern Europe: An Introduction. **University of Chicago Law Review**, Chicago, vol. 58, n. 2, 1991. p. 470.

The idea of precommitment as a way of understanding constitutionalism continues to exert a very significant influence.[74] But despite its extension and its relative success, the problems with this understanding of the qualified majority rule for constitutional amendments are manifold. Firstly, because the justification is limited in its scope. Not all the constitutive conditions of political stability are contained in the constitutional provisions, nor do all the matters whose durability is ensured by a qualified majority rule, represent constitutive conditions for political stability. And even if the analysis is restricted to the constitutional provisions on which political and constitutional stability is supposedly dependent on —such as the form of government or certain fundamental rights—, it cannot be definitively assumed that the conditions set out in the constitution, subject to constitutional rigidity, are the best possible and definitive formulation.[75] Additionally, this does not mean that the durability of certain constitutional provisions contributes to the stability of the democratic political system.[76] On the contrary, the perpetuation of a constitutional provision can lead to inactivity, immobility, and, thus, to the instability of the constitutional system.[77] The continuity of illegitimate political decisions certainly results in constitutional instability[78] —as any observer of the crisis of legitimacy of the Chilean Constitution could appreciate.[79] Preventing or hindering a reform generates a sense of political impotence that can produce a general

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[74] Tine Stein recently resorted to it to justify the need to subject constitutional reforms to a qualified majority rule. See STEIN, Tine. Selbstbindung durch Recht im demokratischen Verfassungsstaat. **Aus Politik und Zeitgeschichte**, Bonn, n. 37, p. 1-8, sep. 2021. p. 1-8. See also PREUSS, Ulrich Klaus. **Revolution, Fortschritt und Verfassung**: zu einem neuen Verfassungsverständnis. Frankfurt am Main: Fischer Taschenbuch, 1994. p. 102-106; Müller-Salo discussed this argument in his recent critique of the qualified majority rule. See MÜLLER-SALO, Johannes. **Diachrone Legitimität**. Die Beständigkeit politischer Ordnungen als Herausforderung der Demokratie. Frankfurt am Main: Campus Verlag, 2021, p. 287-303. For András Sajó and Renáta Uitz's introduction to legal constitutionalism, the metaphor of Ulysses and the Sirens is also central, to the point of including a reproduction of the Odyssey scene from the paperback cover, SAJÓ, András; UITZ, Renáta. **The constitution of freedom**: an introduction to legal constitutionalism. Oxford, U K: Oxford University Press, 2017.p. 41-51. See also DREIER, Hans. **Gilt das Grundgesetz ewig?** Munich: Carl Friedrich von Siemens Stiftung, 2008. p. 28-34; FEREJOHN, John; SAGER, Lawrence. Commitment and Constitutionalism. **Texas Law Review**, Texas, vol. 81, p. 1929-1963, 2003. p. 1954-1961.

[75] SADURSKI, Wojciech. **Equality and legitimacy**. Oxford; New York: Oxford University Press, 2008. p. 65 ff; MARTÍ, José Luis. Democracia y deliberación. Una reconstrucción del modelo de Jon Elster. **Revista de Estudios Políticos (Nueva** Época**)**, Madrid, n. 113, p. 161-192, jul-sep. 2001. p. 171-180. If the constitution was considered the definitive formulation of the justice principles of a political association, then the constitutional amendment procedure itself would have no reason to exist.

[76] See HOLMES, Stephen. **Passions and constraint**: on the theory of liberal democracy. Chicago: University of Chicago Press, 1995. p. 161-177.

[77] See ELKINS, Zachary; GINSBURG, Tom, MELTON, James. **The Endurance of National Constitutions.** Cambridge, Cambridge University Press, 2009. 99-103

[78] Correctly, TSEBELIS, George. **Veto players**: how political institutions work. Princeton: Princeton University Press, 2002. p. 3, p. 7-8.

[79] In Chile, the immobility produced by the qualified majority rule for constitutional reforms has been considered a "constitutional trap". In this regard, ATRIA, Fernando. **La Constitución tramposa.** Santiago: LOM ediciones, 2013. p. 44-56.

legitimacy crisis in the political system. Associating the qualified majority rule with political stability is, in this sense, overinclusive, and therefore implausible.

The Chilean example shows that there is a second problematic aspect that needs to be considered. The argument of Ulysses and the Sirens assumes the identity of the pre-committing agent. In the metaphor, Ulysses personally ties himself to the mast to avoid being seduced by the song of the sirens.[80] In Madison's ideal model of the two authorities, on the contrary, it is strictly speaking only one of them —the people represented by the founding fathers— that constrains any subsequent constituted authority —any future electorally elected government.[81] In the Chilean case, not the founding father but the dictator established the "precommitment" with respect to all other parliaments under the 1980 Constitution. In a rather obscene manner, Jaime Guzmán,[82] during Pinochet's dictatorship in Chile, described the purpose sought by Pinochet's Constitution as follows:

> *(…) if the adversaries come to govern, they will be constrained to follow an action not so different from the action that one would wish for, because —if the metaphor is valid— the range of alternatives that the playing field imposes on those who play on it is sufficiently reduced to make the opposite extremely difficult.*[83]

In these cases, the presupposition of the precommitting agent's identity is farfetched. The multiple mechanisms of constitutional rigidity contemplated in Pinochet's Constitution —including the qualified majority rule— precisely seek to narrow future political alternatives: the constitution can only be reformed in a sense approved by the Junta and its followers. In other words, constitutional rigidity does not function as a mechanism of precommitment, but of political pre-planning, so that the contingency of democratic politics, central to its legitimacy, is seriously restricted.[84] Democracy was

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80 BAYÓN, Juan Carlos. Derechos, democracia y constitución. **Discusiones. Derechos y Justicia Constitucional**, Bahía Blanca, vol. 1, p. 65-94, 2000. p. 79.

81 ELSTER, Jon. **Ulysses unbound**: studies in rationality, precommitment, and constraints. Cambridge: Cambridge University Press, 2000. p. 115.

82 Jaime Guzmán, in his position as a professor at the Catholic University of Chile, was the leading scholar of the military junta during the dictatorship in Chile. In addition to his intense work justifying the regime, Guzmán was appointed by the Junta as a member of the group of lawyers in charge of drafting what would become the Chilean Constitution of 1980. He was a senator for a short time until his assassination by an armed guerrilla group in 1991.

83 GUZMÁN, Jaime. El camino político. **Revista Realidad**, Santiago, n. 7, dic. 1979, p. 19.

84 WALDRON, Jeremy. **Law and disagreement**. Oxford: Clarendon Press, 1999. p. 260-266; see also HOHNERLEIN, Jakob. **Recht und demokratische Reversibilität**: verfassungstheoretische Legitimation und verfassungsdogmatische Grenzen der Bindung demokratischer Mehrheiten an erschwert änderbares Recht. Tübingen: Mohr Siebeck, 2020. p. 11-73.

supposedly enabled at the cost of eliminating the very reflexive contingency that contributes to its legitimization: by enabling democracy it becomes its opposite.[85]

Against this consideration, it could be argued that this is more of a local Chilean problem, not generalizable to the rest of the democratic systems. In general, on the contrary, the precommitment argument seems to naturally belong in the ideal model of the concentration of powers in parliament. In those cases, the argument seems to assume that a majority autonomously forced itself to respect the opinion of a minority in the future and, at the same time, it decided to confer the power to maintain this protection mechanism on the minority— insofar as the amendment of the qualified majority rule is reflexively subject to it.[86] The presupposition of identity is fundamental since without such identity the precommitment would become a mechanism of heteronomous political predetermination —as in Chile. If this were the case, the understanding of the qualified majority rule as a mechanism to bring constitutional amendment within the competence of parliament would be left behind and the democratic credentials for the qualified majority rule would be minimized.

However, the presupposition of the individual agent's autonomy is built on a paradoxical reading of the deployment of its own agency over time. The idea of precommitment assumes that a collective agent takes rational safeguards in the present against future irrational decisions of its own. In the concentration of powers model, the parliament, considering the danger of its future irrationality, rationally decides to subject itself to the minority's will. This assessment of its own rationality is significant: the recognition that present rationality is superior —in terms of deciding on rigidity— depends on the presupposition of future irrationality. The precommitment of a collective agent expresses a mistrust in future political deliberation that contradicts the very trust that was held at the time of the decision to establish a precommitment.[87] What makes

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[85] OFFE, Claus. Fessel und Bremse. Moralische und institutionelle Aspekte‚intelligenter Selbstbeschränkung'. In HONNETH, Axel; MCCARTHY, Thomas, OFFE, Claus, WELLMER, Alfred (Eds.). **Zwischenbetrachtungen – Im Prozeß der Aufklärung.** Jürgen Habermas zum 60. Geburtstag. Frankfurt am Main: Suhrkamp, p. 739-774. p. 751.

[86] When it comes to the parliament, however, the identity between the controller and the controlled one cannot assert itself naturally. Schmitt expresses this radically: "In this case (…) it is a question of an existing, current majority being bound by a former majority that no longer exists, as the constitutional fixation results in a fundamental disavowal and destruction of the majority principle", SCHMITT, Carl. **Legalität und Legitimität**. 5. ed. Berlin: Duncker & Humblot, 1993. p. 51. From a realistic point of view, it is not the parliament that commits itself, but rather an earlier and distinct power or authority that commits any future parliament to obey the blocking will of the parliamentary minority. Elster recognizes this. See ELSTER, Jon. **Ulysses unbound**: studies in rationality, precommitment, and constraints. Cambridge: Cambridge University Press, 2000. p. 92-94.

[87] This is what Sammantha Besson correctly calls the "precommitment paradox". See BESSON, Samantha. **The morality of conflict**: reasonable disagreement and the law. Oxford: Hart Publishing, 2005. p. 309 ff. See also LEVINSON, Sanford. The Political Implications of Amending Clauses. **Constitutional Commentary**, Minnesota, vol. 13, p. 107-123, jan. 1996. p. 112; LEVINSON, Sanford. Designing an Amendment Process. In FEREJOHN, John A.; RAKOVE, Jack N.; RILEY, Jonathan (Eds). **Constitutional culture and democratic rule**. Cambridge, UK; New York, USA: Cambridge University Press, 2001, p. 271-287.

a parliament confident when establishing its minority veto if it is not engaging in the very irrationality it claims to prevent in the future?

The problem of the qualified majority rule shows this paradoxical description of the parliament's collective agency in all its intensity. The precommitment argument must presuppose the general rationality of a constituted parliament, since the parliament cannot permanently suffer from *akrasia*. On the contrary, the weakness of the parliament will need to be conceptually regarded as exceptional.[88] Since the majority rule counts as the default parliamentary decision rule (at the ordinary legislative level), the argument of the precommitment must presuppose that a simple majority rule contributes, under normal conditions, to the rationality of the parliament. The argument for the qualified majority rule must demonstrate, with the help of the metaphor of Ulysses and the Sirens, that under the exceptional conditions of parliamentary *akrasia* —perhaps peculiar to the constitutional amendment procedure— the introduction of the qualified majority rule would specifically serve the purpose of rescuing the parliament from its weakness of will and, as a consequence, it would restore the regular rationality of it. In other words, it must demonstrate the contribution to the rationality of the qualified majority rule in a way that is compatible with the recognition of the overall rationality of the simple majority rule. The problem is severe because the simple majority rule and the qualified majority rule are mutually exclusive decision rules. The majority rule contributes to the rationality of the outcome of parliamentary decisions because it respects the conditions of one-vote-responsiveness and of alternative neutrality. How is it possible, then, that the qualified majority rule contributes to the rationality of the constitutional amendment decision when it precisely does not respect the constitutive rationality conditions of the simple majority rule?

An argument in favor of the qualified majority rule should demonstrate that it contributes not only to avoiding decisions but to overcoming the alleged weakness of will that the parliament suffers from when it decides on constitutional amendments. From the argument of precommitment, it is not possible to recognize any positive and concrete justification in favor of the qualified majority rule. It cannot be considered as a specific mechanism for overcoming parliamentary *akrasia* if the way in which it specifically contributes to the rationality of parliamentary decisions is not taken into account. In this sense, the precommitment argument is either incomplete or circular: it either assumes the enabling contribution to the rationality of the qualified majority rule, or it simply relies on the fact that its contribution lies in avoiding decisions supposedly motivated by the weakness of will.[89] Padlocking Congress would also contribute

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[88] Thus, for Donald Davidson, the very existence of the weakness of the will already represents a conceptual problem. See DAVIDSON, Donald**. Essays on actions and events**. 2. ed. Oxford/New York: Clarendon Press/Oxford University Press, 2001. p. 21-42.

[89] WALDRON, Jeremy. **Law and disagreement**. Oxford: Clarendon Press, 1999. p. 266-270.

to rationality along these lines[90] —the metaphor of Ulysses and the sirens does not provide any argument to consider the internal veto in favor of the minority as a specific mechanism of parliamentary rationality.

Even under the ideal model of the concentration of powers in parliament, the understanding of the qualified majority rule as a precommitment mechanism is implausible. The function of the qualified majority rule should be to place constitutional amendments and the government under the constitution in the hands of the parliament itself. But the qualified majority rule puts the constitutional amendment in the hands of the minority.[91] This is equivalent to saying that the government of the majority is under the constitution of a minority.[92]

7. CONCLUSION: "IS IN REALITY A POISON"

This paper seeks to understand the reason why the qualified majority rule is widely applied for constitutional amendments. This decision rule is common to the German, French and American Constitutions and has been exported into a large number of constitutions around the world. What explains the hegemony and self-evidence of the qualified majority rule for constitutional amendments?

The standard answer is that this mechanism of constitutional rigidity, or entrenchment, would serve constitutional stability and constitutional supremacy. The need to protect constitutional stability against the majority's untimely and irrational decisions is beyond doubt. However, the question this paper raises is why the protection against such decisions requires, instead of other mechanisms of entrenchment or procedural rigidity, the introduction of a veto power in favor of the parliamentary minority. The exploration of the arguments in favor of the qualified majority rule for constitutional amendments does not question whether constitutional stability, the political decision-making process or the rationality and stability of constitutional decisions regarding parliament's majorities should be protected or not. The question actually is, why such protection should be given to a minority of its members.[93] Should the minority in parliament be the defender of the constitution?

Now, the qualified majority rule not only serves the function of stabilization and rigidity. In addition, it responds to the competence acquired by modern parliaments to

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90 Kelsen distinguishes between "technical" and "physical" obstruction". KELSEN, Hans. **Vom Wesen und Wert der Demokratie**. Tübingen: J.C.B. Mohr, 1929. p. 64.

91 HAMILTON, Alexander. Federalist No. 22. In HAMILTON, Alexander; MADISON, James, JAY, John. **The federalist papers**. New York: Dover Publications, Inc., 2014, p. 102-104.

92 MADISON, James. Federalist No. 58. In HAMILTON, Alexander; MADISON, James, JAY, John. **The federalist papers**. New York: Dover Publications, Inc., 2014, p. 288.

93 Other possible mechanisms in LIJPHART, Arend. **Patterns of democracy**: Government Forms and Performance in Thirty-six Countries. New Haven: Yale University Press, 1999. p. 216 ff.

amend the constitution. Only in this scenario does the inherent tension of the amending power arise: subjecting the parliament to a constitution at its disposal. The qualified majority rule should not only block the amendments, but it should also allow amendments to the constitution in a responsive manner. A democratic constitutional system is about recognizing citizens' freedom from collective decisions and citizens' political freedom *to decide* and change the constitution.[94] However, this tension does not change the relevant question: how to explain that subjecting a parliament to the constitution requires endowing a minority with veto power? How does a minority veto increase the responsiveness of a constitutional amendment? Neither the formal position nor the material importance of the constitution explains the hegemony of the qualified majority rule. And its understanding as a precommitment mechanism is either circular or paradoxical.

Of course, this paper does not suggest that constitutional amendments should be adopted by a simple majority, nor that the qualified majority rule should be repealed from any democratic constitution. The deficit of justification for the qualified majority rule has a normative nature. But pragmatic considerations, such as the protection of certain electorally empowered insular minorities, the global competitiveness of the political system or the search for security in favor of the corporate investor,[95] may justify maintaining the qualified majority rule for constitutional amendments in certain political situations. Moreover, at the normative level, there may still be those who insist that the qualified majority rule constitutes a right of the political-partisan minorities, an expression of the constitutional consensus or a necessary mechanism for deeply divided societies. This paper, skeptical of those additional attempts of justification, invites the audience to acknowledge the purely pragmatic nature of the possible justification for the qualified majority rule. Institutions lacking normative justification do not last long: they run out of steam when political situations no longer make them necessary.[96] A healthy democratic system must acknowledge the foundations of its constitutional institutions. The majorities may rule in our constitutional democracies, but always under a sovereign minority that may have lost the election but controls the constitution.

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[94] See LUTZ, Donald S. Toward a Theory of Constitutional Amendment. In LEVINSON, Sanford (Ed.). **Responding to Imperfection**. The Theory and Practice of Constitutional Amendment. Princeton: Princeton University Press, 1995, p. 237-274. P. 242-243.

[95] ELSTER, Jon. Constitutionalism in Eastern Europe: An Introduction. **University of Chicago Law Review**, Chicago, vol. 58, n. 2, 1991. p. 417.

[96] It could be speculated that precisely the lack of accountability triggered by the qualified majority rule for constitutional amendments may have contributed to the crisis of democracy and the emergence of new forms of authoritarianism and populism. In this direction, LOUGHLIN, Martin. **Against constitutionalism**. Cambridge/Massachusetts: Harvard University Press, 2022. p. 191-202. For an analytical attempt in this direction, see GILBERT, Michael D. Entrenchment, incrementalism, and constitutional collapse. **Virginia Law Review**, Virginia, vol. 103, n. 4, p. 631-671, jun. 2017.

Democratic constitutionalism should advance towards the respect not only of minorities but also of majorities.

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