

QUALIFIED MAJORITIES IN COUNTER-MAJORITARIAN MECHANISMS: TOWARDS A NEW THEORY OF SUPERMAJORITIES IN JUDICIAL REVIEW

Abstract for the general audience

Modern democracies view Constitutions as means to control power. Constitutions guarantee a set of fundamental rights, establish the democratic rules for electoral procedures, and offer minorities protection from the “tyranny of majorities.” However, what prevents parliaments from violating the Constitution? What is the remedy against an unconstitutional statute?

Constitutionalism has concluded that judges offer an impartial scenario to guarantee the supremacy of the Constitution in what is called “judicial review.” Judicial review may be performed by every judge of a country (American model) or by a single Constitutional Court or other courts performing such duty (European/Concentrated model). Judicial review is conceived as a remedy to prevent the problems of “majoritarianism.” However, quite paradoxical, at the end of the deliberation, Courts performing judicial review vote to make a decision. The same mechanism (majoritarian vote), which is seen with mistrust in the parliamentary arena, is employed by judicial review.

Countries such as the United States (in Nebraska, Ohio, and North Dakota), Mexico, Peru, Czech Republic, or Poland (transitorily in 2015) have required qualified majorities to perform judicial review or continue to do so. The legal doctrine has created categories to explain every aspect of judicial review but has ignored the existence of qualified majorities. The absence of any theory to explain this phenomenon is the main reason to conduct the proposed research project.

Why is an important feature such as the majority to annul a statute gone unexplored? There are two main reasons. In the first place, no substantial theory has been developed to explain qualified majorities because simple majorities seem “natural.” In the second place, even though some legal scholars have written about the topic, they have done so from their local perspective. Thus, the existent bibliography explains how this mechanism works in a specific country but does not formulate a theory of what those mechanisms are, what its underlying conceptual background is, and whether or not such majorities fulfill their objective or hinder the functioning of the Courts. This research project intends to develop a new theory of constitutional control that explains this problem as a substantial result of the project.

The research will be developed in three phases. In the first phase, the project will create a theoretical framework for the phenomena, including categories, scientific terminology, and underlying reasons for employing qualified majorities. The project will try to prove that qualified majorities work as deferential mechanisms (measurements to ensure that Courts defer to the democratically elected parliament). The project will show that these mechanisms not only diminish the democratic tensions of judicial review but also obliges consensus building in constitutional adjudication. The second phase will be to apply all the categories created to the existent models of qualified majorities and to understand through analyzing their functioning whether or not they hinder judicial review and to what degree they force parliamentary deference.

The results will be presented in a monograph in both English and Spanish (published in open access), and two scientific papers published in open-access journals. The project will also feature the organization of two academic seminars to discuss the research findings and participation in two Conferences (ICON-S and the Ibero-American Conference on Constitutional Law) to present partial research results.