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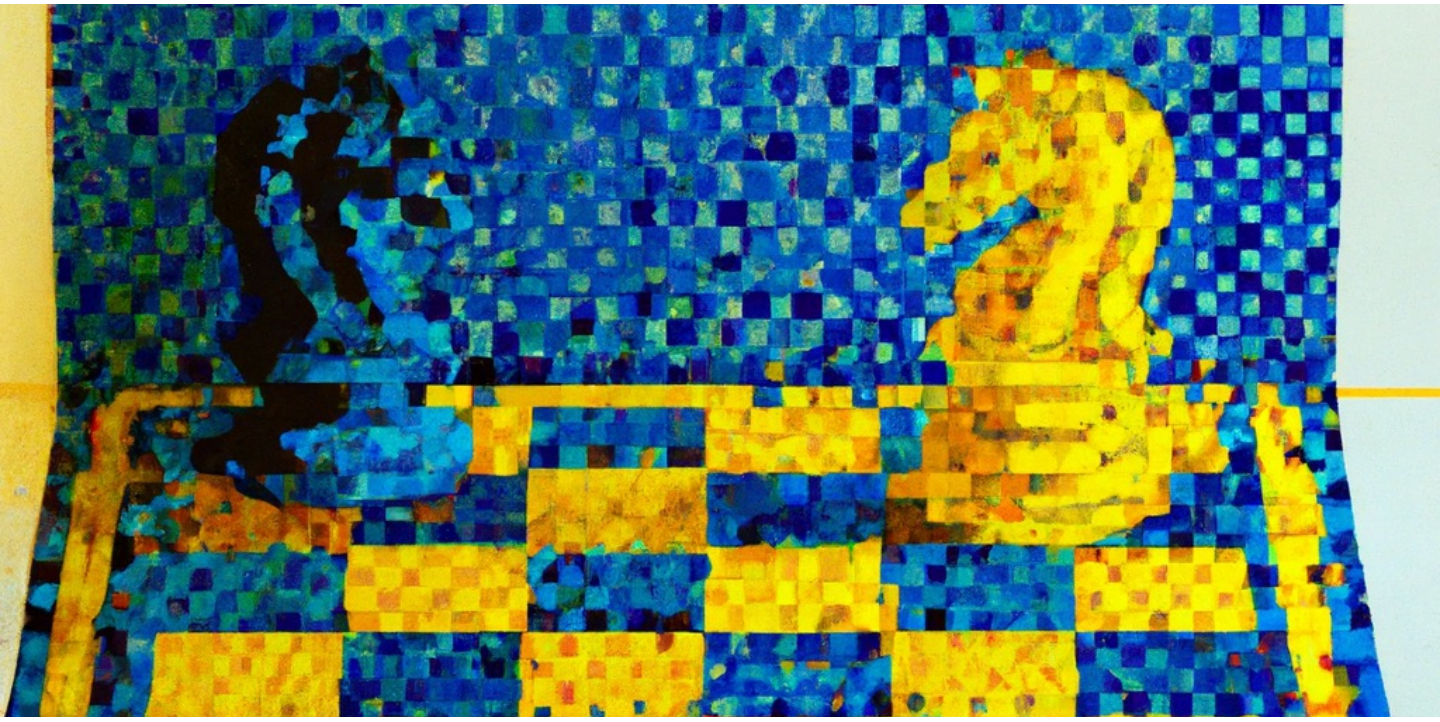
Dangerous Game

The Weaponisation of Rule of Law and the Attack on the Veto



A briefing from MCC Brussels

Prof. Frank Füredi
Prof. Dr. Werner J. Patzelt

Summary

The concept of Rule of Law is now central to the EU's political identity. It underpins many of the most contentious and important disputes within the Union – most notably disagreements with Poland and Hungary. So important has the EU's Rule of Law mission become that many now discuss removing the (limited) veto that national governments have in the European Council as a way of supposedly ensuring greater adherence to Rule of Law principles. This briefing argues for two important points:

1. Discussions about the Rule of Law are in fact a ploy, a cover for disagreements about values and the EU project of imposing so-called EU values on sovereign countries
2. The removal of the veto in the Council is a dangerous step which would seriously undermine the ability of sovereign countries to protect their national interests

The two arguments are inseparable, because the removal of the veto would amount to the removal of one of the last checks on the EU's project of imposing its values on sovereign states.

CONTENTS

SECTION 1

THE RULE OF LAW AS A FORM OF CULTURE WAR

Rule of Law as a Culture War

Despite the protestations of EU officials that the Rule of Law is a fundamental and historic part of the Union, the EU's embrace of the rule of law as its pillar is in fact a relatively recent development[1]. Why has the Rule of Law come to play such a crucial role? We argue that the Rule of Law has become a medium through which a dispute about fundamental values plays out.

In the case of disputes between the EU and Hungary or Poland, what is really at stake are differing cultural values. Instead of the EU engaging in an open and explicit debate about these values, it has increasingly adopted a narrow, legalistic format to chastise nation-states who display the 'wrong' values. This process turns the narrow, legal concept of the Rule of Law into an ideological weapon – a weapon aimed against the sovereign decisions of nations about their cultural values.

In the case of Rule of Law disputes, what is really at stake are differing cultural values

This process is underpinned by the fundamental hostility of European elites to national sovereignty. Increasingly, European peoples are not allowed to simply disagree on certain questions of values, as might be expected in relations between sovereign governments. Instead, the erosion of the principle of national sovereignty paves the way for the 'backward' countries to be re-educated, with the idea of 'Rule of Law' violations providing the legal basis for this re-education.

We briefly illustrate this process in three stages.

I. Elite hostility to national sovereignty in the post-war period

II. The rise of legalism within the EU

III. The Culture War between EU elites and national populaces

I. Elite hostility to national sovereignty in the post-war period

The missionary zeal of the EU with regards to notionally sovereign governments like Poland or Hungary is based on a fundamental belief that national populaces hold little to no sovereign right to determine their own affairs. Whether the debate is about fundamental values or Rule of Law violations, the moral underpinning of attacks on the governments in question is the belief that national sovereignty is at best an optional and minor consideration. Given that, at least in theory, sovereignty is a key pillar of international politics (as those who criticise Russia's invasion of Ukraine rightly point out) – how has this principle become so undermined in practice?

It is well-established that the legacy of two world wars had left the political classes of Western Europe apprehensive about the dynamics of mass politics. Such concerns led them to adopt institutional and constitutional arrangements that were designed to insulate them from the volatility of public opinion and the pressure of the masses. As Jan Werner Müller observed, 'insulation from popular pressures and, more broadly, a deep distrust of popular sovereignty, underlay not just the beginnings of European integration, but the political reconstruction of Western Europe after 1945 in general'[2]. The architects of the EU were not simply suspicious of popular sovereignty, as Müller explained, these elites 'also had deep reservations about the idea of parliamentary sovereignty'[3].

The legacy of two world wars left the political classes of Western Europe apprehensive about the dynamics of mass politics

The post war constitutional arrangements sought to limit the role of parliaments through assigning significant power to the judiciary and newly constructed constitutional courts. As the landmark study by Peter Mair has shown[4], bureaucratic institutions also gained significant influence, especially through the medium of the European unification. The establishment of the European Economic Community (EEC) in 1958 followed by the ratification of Maastricht in 1993 (formally establishing the EU) continued with the tradition of depoliticising contentious issue and adopting a form of governance driven by bureaucracy, technocracy, and legal institutions. In the mainstream academic literature, this period is well-known as the period of 'post-democracy'[5].

This trend towards side-lining national governments and national populaces is now central to the operation of the EU. Indeed, advocates of European Unity have explicitly sought to depoliticise national sovereignty and constrain democracy. There have been two key drivers of this in recent years.

Rule of Law as a Culture War

1. The first is the claim that in a modern, globalised world, national parliaments and constituencies are ill suited to deal with the complex challenges of governance. The challenges of today, we are told, transcend borders and are global in character. If this is true, it is only rational to replace the focus on national democracy with a reliance on wise technocrats attuned to the operation of globalisation.

2. The second driver is the concern that liberal democracy lacks the normative foundation to inspire the loyalty and affection of ordinary citizens. In recent years, transnational elites, such as those within the EU, have used international institutions to avoid the need to engage with the electorate and to convince citizens to adopt views that are generally unpopular in wider society. They rely on the authority of transnational or international institutions to side-step having to win the argument on contentious issues[6].

The EU developed an institutional aversion to national sovereignty and democratic politics. This set the scene for interference in the matters of states

The workings of these trends were well-illustrated during the Eurozone crisis of 2009-2010. Indeed, the concern that people would be looking for national solutions to the economic crisis led to an escalation of the anti-nationalist rhetoric of EU leaders. According to one study of this reaction:

'These were far more than exaggerated attempts at fear mongering by those frustrated with public opinion which seemed to be reverting back to national narratives. They were evocations of one of the most enduring political beliefs of the European Union: that only an integrated Europe stood between stability and peace, on the one hand, and a return to the nightmare of twentieth-century instability and war fuelled by ideology, particularly nationalism, on the other. European leaders sought to transform a complex economic and governance crisis into simple, understandable terms which provided reasons why governing should take place at the European level. It was the past, symbolised by war and nationalism, which gave reason for the present and the future status quo of European integration' [7]

It is notable that the very same words could have been written about the response to the Covid-19 pandemic.

In sum, the initial fears of European leaders facing the aftermath of the Second World War – fears of mass politics – have driven the evolution of the EU. Supported by arguments about how national sovereignty is a 'thing of the past' and fears about the inability of elites to win the argument at the national level, the EU has developed an institutional aversion to national sovereignty and democratic politics. This fundamentally sets the scene for increasing interference in the matters of no-longer sovereign states.

II. The rise of legalism within the EU

The developments noted above have given rise to a particular form of governance at the EU level. This form of governance we term legalism.

Legalism captures the way that the EU often uses the legal form to communicate its political choices. By framing policies in legal terms, the EU is relieved from the burden of having to take democratic responsibility for its actions. We saw that the EU reflects a widespread hostility towards democracy among European elites, and the use of legal language provides an alternative form of justification. In effect, the EU relies on the law to avoid explicitly being seen to being involved in political issues. This covert and opportunistic use of legal processes turns lawfulness into what the political philosopher, Judith Shklar's termed the ideology of legalism[8] – an orientation in which moral conduct is reduced to the matter of following rules. Hiding behind judicial processes, the moral and political content of policymaking becomes hidden from view and more difficult to expose to democratic contestation. This is precisely the strategy required for a Bloc which needs to make a number of political decisions but, as we saw above, cannot rely on explicit democratic or political justification.

By framing policies in legal terms, the EU is relieved from the burden of having to take democratic responsibility for its actions

The prime case study in this process is the rise of the European Court of Human Rights and its central role within EU policy and political discussions. One reason why the West

Rule of Law as a Culture War

European political establishment is prepared to endow the European Court of Human Rights (ECHR) with a quasi-sacred authority is to ensure that fundamental questions touching on moral norms are taken out of the realm of politics. The outsourcing of moral and political authority to an apparently independent institutions like the ECHR, Constitutional Courts, or Courts of Justice, is symptomatic of the difficulty that post-war liberal democracy has in dealing with the realm of values.

It is in this context that all discussions about the Rule of Law must be understood. In recent years the rule of law has been endowed with character of a foundational value by the EU oligarchy. The appearance of judicial decision making as politically neutral obscures the ideological application of EU pronouncements on the working of the rule of law in nation states.

There is an important difference between the institutionalisation of the rule of law through an independent judiciary and the fiats issued by the European Court of Justice (ECJ). In a democratic society, the rule of law requires an independent judiciary and a clear separation of power between the courts and political institutions. This separation is often hard to maintain, given that the law inevitably touches on political considerations. But this only goes to show the importance of maintaining the distance between politics and the law, lest the authority of the law, which rests on its impartial character, is brought into question by apparent politicisation.

EU elites regard courts as instruments for the promotion of political interests and do so via pronouncements about the Rule of Law

Unfortunately, the EU regards the courts - both those part of the EU institutions like the ECJ and others such as the ECHR – as instruments for the promotion of its political interest and does so via pronouncements about the Rule of Law. This threatens to the impartial authority of the law, but most fundamentally is an unsatisfactory basis for political decisions. Despite the attempt to portray clashes between the EU and sovereign states as 'Rule of Law' disputes, it is increasingly obvious to European citizens that the real disputes are moral, cultural and political. It is to these we now turn.

III. Culture War

In contemporary Western political discourse, nationalism and its cognate terms – national attachments, national identity, national sentiments – have acquired the kind of negative qualities that usually invite moral condemnation. One of the criticisms mounted against Hungary is that this society has not moved with the times and is disoriented by its continued adherence to out-dated national attachments. Indeed, the claim that Hungarian nationalism possesses uniquely disturbing psychological features serves to validate what we characterise as the theory of Hungarian exceptionalism.

Conflicting views about the status of national values and identity underpin the cultural tension between Hungary and the leaders of the EU

EU policy makers often give the impression that they believe that national loyalties constitute an outdated prejudice and prefer attachments that are directed at rules and legal principles. Their references to national loyalties imply that if these sentiments are held too strongly, they will provide a cultural terrain where chauvinist tendencies are likely to flourish. From this perspective, the Fundamental Law of Hungary, particularly its National Avowal, represents an unwelcome throwback to an irrational pre-modern past. Their issue with the National Avowal lies essentially in its unapologetic celebration of loyalty to the nation. The preference of European federalist intellectuals for a de-nationalised form of civic identity is the polar opposite of the approach adopted by the authors of the Fundamental Law, who self-consciously uphold the ideal of loyalty to the nation. We see that conflicting views about the status of national values and identity underpin the cultural tension between Hungary and the leaders of the EU.

A key case study for the clash of values between sovereign nations and EU elites has been immigration. EU elites often draw a sharp contrast between their 'humanitarian' policies and those motivated by nationalist concerns. As one framing of the clash between Angela Merkel and Hungary on the question put it, Merkel in effect forced 'believers in Europe to choose between her own brand of

TABLE A: COMPETING CULTURAL VALUES

The clash between the EU oligarchy and Hungary has touched on a variety of issues. But the most fundamental difference between the two sides is their contrasting positions on the status of national sovereignty. The table below outlines the key points of difference between the two sides in Europe's Culture War

National Culture	"EU Values"
Uphold tradition	Post-traditional
Historical continuity	Year Zero history
National culture and sovereignty	De-nationalized identity
Attachment to nation state	Attachment to transnational institutions
Community	Diversity
Popular sovereignty	Authority of the expert

"compassionate conservatism" and the "Christian national" vision of Fortress Europe propounded by leaders such as Hungary's Viktor Orbán and Poland's Jaroslaw Kaczynski'[9].

Despite the familiar attempt to portray cultural clashes as a matter of good vs evil, there is a measure of truth to this framing. The difference separating Germany and Hungary on the migration question is not simply about the status of national borders. For what is at stake are fundamental differences between the way that the sense of nationhood is understood. When Orbán stated that EU member states 'should not be afraid of being good patriots' and added the 'idea of nationalism as a danger for Europe is an idea I cannot accept' he implicitly drew attention to the sentiments that divide the two camps[10]. The term 'good patriot' no longer translates into a positive vision in the political vocabulary of the EU elites. For the political elites who are invested in European unification, nationalism represents the 'bad old days'. For a significant section of East European and Hungarian society, the sense of nationhood is still fundamental to its identity.

One reason why foreign critics of Hungary fail to characterise the politics of the Orban Government accurately is perhaps because they very rarely encounter traditional conservatives in their own societies. Most parties that are associated with conservatism in Western Europe – such as the British Tories or the German Christian Democrats – have become estranged from the traditional values of their movement. Back in the 1970s they still self-consciously promoted traditional conservative values and frequently argued for going back to basics. Going back to basics meant upholding the traditional family, affirming religious morality and loyalty to nation. As a result of the setback suffered in the Culture War, West European conservatives went on the defensive and became hesitant about arguing for traditional values[11]. That is why periodic attempts to relaunch the

Rule of Law as a Culture War

conservative project often concluded with the plea to get rid of the old ideological baggage and to modernise.

The central issue is the principle of national sovereignty. A foundational norm of democratic society is that sovereign people of a sovereign nation get to decide what are the values that prevail in their society

In contrast to Western conservatives, Hungary's Fidesz Government is unapologetically traditional. Its celebration of religion, the traditional family and patriotism echoes the narrative that European conservative parties actively promoted as late as the 1970s. That is why – unlike Western conservative parties – they are unashamedly right-wing. Whereas in Western Europe conservatives are reluctant to call themselves right wing, their Eastern European counterparts have no inhibitions on this score.

Conclusion: The rule of law as a weapon

We would suggest that the shift from economic co-operation as a key emphasis of EU political orientation to the rule of law is driven by ideology rather than disinterested commitment to judicial independence. Attacks on countries like Hungary on the ground that they suffer from a 'rule of law deficit' serve as a medium for contesting the values promoted by the Hungarian Government. The main objective of rule of law lectures is to promote a form of regime change in Hungary and elsewhere.

The central issue at stake here is that of the principle of national sovereignty. One of the foundational norms of a democratic society is that it is the sovereign people of a sovereign nation that gets to decide what are the values that prevail in their society. Foreign governments and transnational institutions like the EU have every right to disagree with the Hungarian government's policy on migration, transgenderism or judicial governance but from the standpoint of the principle of sovereignty they do not have the right to impose their views on this nation.

Thankfully, the neo-colonial tone adopted by the EU towards the values associated with the Hungarian Government is likely to provoke a backlash. If western supporters of freedom demonstrate support for Hungary's right to self-determination, then it is likely that this act of neo-colonial political sabotage will be thwarted.

Attacks on countries like Hungary on the ground that they suffer from a 'rule of law deficit' serve as a medium for contesting the values promoted by the Hungarian Government

SECTION 2

THE COUNCIL VETO AS AN ESSENTIAL PROTECTION FOR NATIONAL SOVEREIGNTY

The Veto and National Sovereignty

It would be expected from the above analysis that advocates of deeper European federalisation, seeking to promote a common set of 'EU values' at the expense of national sovereignty, would seek to reshape the legal arrangements of the European Union to remove opportunities for countries to legally resist decisions that they feel are prejudicial to their national interests, values, and cultures. The recent discussions about removal of the veto for national governments in the European Council fit precisely this pattern.

The removal of the veto would be a fundamental reshaping of the EU and would severely undermine its consensual underpinnings

The rhetoric has truly exploded in recent weeks. As Guy Verhofstadt argued in a statement for Renew Europe, 'Unanimity rules are making a mockery of EU politics … literally everything that matters to Europeans is subject to vetoes by one government or another. Our sovereignty is handicapped by our own outdated rules.'[12] Not to be outdone, the S&D Group President García Pérez MEP reached for the incendiary language of blackmail: 'what Orbán is doing today, proposing blackmail in the Council, cannot be allowed. And that should make us reflect on the need to put an end to the principle of unanimity in the Council.'[13] Such statements reflect what increasingly is becoming a consensus view among EU leaders and many national governments. Olaf Scholz also joined the chorus, calling the use of the veto 'selfish blockades of European decisions by individual member states'[14].

However, the removal of the veto would amount to a fundamental reshaping of the European Union and would severely undermine the consensual underpinnings of the Union. In the below, we examine and defend the principle of the veto in three parts:

I. The conceptual underpinnings of the veto

II. The history of the veto in European affairs

III. The contemporary role of the veto in strengthening European cohesion

I. The conceptual underpinnings of the veto

Whenever decisions are based on a simple majority, the bargaining power of each individual voter is small. Yet their power increases tremendously when unanimity is required. While plurality voting can lead to what Alexis de Tocqueville called the "tyranny of the majority" , the principle of unanimity allows for a "tyranny of any minority". In the first case, permanent dissenters are inclined to leave; in the second case, effective cooperation may cease. Both effects put an achieved level of integration at risk. Hence, any institution needs to look for a middle ground that allows for sustainable integration as well as for collective action. Such middle ground can be created by voting rules that have different majority requirements depending on the significance of a decision for those actors who try to cooperate. Under such rules, a requirement for unanimity would trigger a process of deliberation and bargaining in which all relevant interests of all partners are fairly considered.

Any institution needs to look for a middle ground that allows for sustainable integration as well as for collective action

It is often considered rational to run a political organization based on the simple majority principle because the overuse of a veto can paralyze institutions[15]. Yet the majority principle relies on a degree of institutional cohesion: it makes sense so long as members cannot leave. For example, a section of citizens will rarely emigrate in the case of losing a majority vote, an outvoted parliamentary party group seldom leaves the national assembly, and neglected regional interests do usually not lead to separatism. Without significant exit risks, majority rule neither endangers basic cohesion nor harms the outside relations of a collective actor. One may even claim that majority rule makes both for effective internal leadership and for strong positions towards other actors. Therefore, leading EU powers, like Germany and France, currently call for majority decisions in matters of foreign policy.

However, today's EU is no nation-state[16]. There cannot be said to be a 'European people' who would continue to regard themselves as such if one part thereof were repeatedly pushed aside by a majority of other EU citizens. By contrast,

The Veto and National Sovereignty

the EU is a club of nation-states that have shared or pooled their sovereignty to realize common goals better than could be achieved by the states individually[17].

Many nations in the EU do not want to evaporate sovereignty within the EU's legal framework

These goals include peace and prosperity, freedom and democratic self-determination. Certainly, some nations seem to seek in the EU something more than pooled sovereignty – the eradication of sovereignty as such within the structures of the EU's legal system[18]. For example, some suggest that a deeply traumatized nation like Germany hopes to get rid of her country's historical legacies by disbanding in the overarching framework of a purely supra-national EU[19]. Yet this is certainly not the path that France and Italy, or Finland and Poland, are willing to take. Nations like these insist on subsidiarity as a guiding idea in the EU's multi-level system of government.

In case of conflict over shared responsibilities and competences, veto power is the most expedient means for defending the principle of subsidiarity[20]. It is simply true that bigger member states like Germany and France are inclined to equate their own interests with those of the EU[21]. Whenever their governments claim to know what is best for the EU, they tend to brand dissenting opinions as misleading, and deviating interests as illegitimate. From such a position, abolishing the veto power which goes along with the principle of unanimity may appear as an indispensable step forward to an "ever closer union".

Bigger member states like Germany and France equate their own interests with those of the EU

However, smaller (but self-confident) member states like Hungary usually do not desire a future as 'junior partners' – especially when the senior partners adopt a patronizing tone and do not hide their ambitions to reshape the junior. For many Hungarians, therefore, "Brussels" today is not liked more than "Vienna" before 1867, or "Moscow" until 1989. A country as proud as the United Kingdom has even preferred to leave the European club instead of being bound to play indefinitely by unwelcome rules.

II. The history of the veto in European affairs

The EU's central guiding idea has always been to build an entirely new political entity and to provide it with institutional structures that match ever new challenges. Such structures have to strengthen both cohesion within Europe and the Union's ability for collective action. For this reason, the dialectics of majority rule and self-protective veto-power came into the game from the outset.

When the process of European integration started in 1951 with the European Coal and Steel Community, the emerging institutions – a Commission (then called "High Authority"), a Council of Ministers, and an embryonic parliament (simply called the "Assembly") – were clearly meant to be supra-national. Yet they were limited to their assigned policy fields and had to act under veto power by the member states. The legal basis was an international treaty ratified by national parliaments. The goal was nevertheless to move towards more integration. The first attempt at this goal was to setup a European Defence Community. It failed in 1954 with French resistance against the intended Europeanisation of security policy. Much more successful was the European Economic Community, created in 1957 as a "replacement institution" for the Defence Community (which never turned into reality). The present EU has arisen from it, yet not without quarrels about the proper balance between national sovereignty and supranational claims.

The EU's central guiding idea has always been to build an entirely new political entity and meet ever new challenges

These disputes started openly in July 1965, when – under German leadership – the Commission suggested that the principle of unanimity in the Council of Ministers should be replaced by qualified majority rule. After eight years, a period for transition to this new voting rule was to end, just as had been determined in the EEC founding treaty. The French government as a result practiced "empty chair politics" in the Council of Ministers for half a year, preventing any decision to be taken. In January 1966, this stalemate was ended by the "Luxembourg compromise". It meant that the

The Veto and National Sovereignty

member states should seek unanimity even in those cases where voting along the majority rule was legally or technically possible, namely as soon as a member state had claimed that important national interests were at stake.

This *de facto* veto power of each government was practically conjoined with the duties of giving factual evidence and presenting political arguments. This made it quite different from the 'liberum veto' of past eras[22]. But such national veto power made sure that the EEC could not gradually shift towards ever more supranationalism on ever more policy areas. In particular, the Luxembourg compromise committed the Commission to consult with the member states before adopting any new policy proposals. This gave it a much weaker position than national cabinets have in federal systems of government, even though the Commission kept its privilege to suggest European legislation.

The central virtue of the veto was to provide a recourse for nations in cases where they believed important national interests were at stake

It is true that the real development from the EEC over the European Community of 1993 (created by the Maastricht Treaty) to the European Union of 2009 (created by the Treaty of Lisbon) went in a different direction. The inter-governmentalism once preferred by France was consensually replaced by the supranational approach pursued by Germany[23]. This was reflected in changing voting rules in the European Council and in ever more procedural relationships between the Council and the European Parliament.

III. The contemporary role of the veto in strengthening European cohesion

Since the Treaty of Lisbon, a big part of what had remained under the rule of unanimity is now under the rule of majority voting, currently possible on more than three dozen policy areas. As mapped out already by the Luxembourg compromise, unanimity is still required on matters that the member states consider to be very sensitive for them. Unanimity – and, hence, veto power – is still applicable when it comes to common foreign and security policy, or to EU membership and citizenship. Moreover, unanimity is stipulated for the harmonization of national legislation on social security and on indirect taxation, for EU finances at large, and for some provisions in the field of justice and home affairs, including family law and police cooperation. Simple majority is required only for Council decisions on procedural matters, or for requests to the Commission to submit policy and law proposals. On all other policy fields decisions are taken by qualified majority (see Table B).

Negotiating around the veto generates much more legitimacy than overriding a minority

Today, the standard voting method in the Council is qualified majority. In ordinary legislative procedure, with the Council acting at the side of the Parliament as the EU's 'other legislative chamber', about 80% of EU legislation are adopted by the Council with qualified majority. For the period between December 2009 and June 2022, the Council's website documents 1334 decisions taken by qualified majority, and no more than 113 instances of required unanimity[24]. In only nine such cases there were abstentions, seven by the UK which later left the EU, and one each by Belgium, Bulgaria, Estonia, and Germany. In eight cases countries did not participate in voting, mostly Denmark and the United Kingdom. At the end, all proposals requiring unanimity were approved.

But these figures do not tell the whole story. First, not all decision-making in the Council is about EU legislation, since there are also concrete policy decisions like on imposing sanctions. Secondly, veto power quite often does not need to be exerted formally to be effective. Usually, mere anticipation of the possible use of a veto will suffice to trigger bargaining processes that, finally, avoid the actual use of veto power. Either the controversial item is removed from the agenda, or this item is used to bring about a package deal which gives compensation for abstaining from a veto. It is clear that without formal veto power such informal bargaining processes simply would not take place. Hence, they could not make the crucial difference between a really supported decision and one imposed by majority rule. Seen from this angle, avoiding a possible veto generates much more legitimacy than overriding a minority.

TABLE B. THE WORKINGS OF QUALIFIED MAJORITY AND VETO

- Under present rules, a qualified majority is reached if 55% of the member states, namely 15 out of currently 27, vote in favour of a proposal, and if the supporting member states represent at least 65% of the total EU population
- If the Council is to vote on a proposal not coming either from the Commission or from the High Representative for Common foreign and security policy, then a 'reinforced' qualified majority is required, composed of 72% of the member states (currently 20 out of 27) and representing at least 65% of the EU population
- A bypass to this 'double majority rule' is the failure to stop a decision by a 'blocking minority'. Such a minority must include at least four member states. If a veto of no more than three states can be mobilized, then a qualified majority is deemed attained even if the states voting for a proposal account for less than 65% of the EU population
- In cases where a 'reinforced' qualified majority is needed, the blocking minority has not only to comprise four member states but must additionally represent more than 35% of the EU population
- Some special rules apply if not all Council members participate in the vote due to opt-out clauses for certain policy areas.
- Abstentions are possible by any member at any time, yet under qualified majority voting they are counted as votes against a proposal.

It is true, however, that legitimacy is not the sole concern of decision-making processes. Ensuring capability for collective action is hardly less important. Therefore, it is understandable that those countries which, for instance, desired a digital text to be introduced in 2019, or who wanted Belarus punished by the EU for faking an election victory in 2020, were outraged by the ability of Cyprus or Ireland and Sweden, respectively, to practically veto these initiatives. Nevertheless, there is a significant difference between a country's capacity to dictate its will to other states, and any member's veto power hindering foreign determination on a nation's sensitive policy areas. As a result, it does not come as a surprise that less powerful countries oppose giving up unanimity - whereas powerful member states (who can more easily mobilize a followership) are generally in favour.

The question is simply this: what, in the long run, will do less harm to the EU's achieved degree of institutional and emotional cohesion: providing a space through the veto for smaller players to voice their concerns about issues they see as fundamental, or allowing the EU to press ahead on major projects?

Certainly, no more than an oversimplistic answer would result from simply equating majority voting with the articulation of the general interest of the Union as a whole, and unanimity with just protecting anti-European special interests.

The Veto and National Sovereignty

Conclusion: Why the veto must remain

The European Union's history does not provide convincing reasons for the belief that the current extent of majority voting might be insufficient for any further good functioning of the EU. Neither does it prove that veto powers of member states are really used to impede decisions for the best of the Union. Nevertheless, there are now attempts at extending majority voting, particularly when such decisions would concern human right violations by EU member states, EU sanctions against other countries, or the Union's foreign policy in general.

Such demands might be acceptable if the national interests of EU member states in matters of foreign policy were reliably parallel or complementary. But often they are not. This has been demonstrated quite recently when Germany was in favour of Nord Stream II for economic reasons, but with East European states strongly opposing this project for security reasons. It is also unrealistic to assume that such differences in national interests would simply evaporate after unifying foreign policy. More likely, we would either see oligarchical leadership structures like in NATO, or witness growing tensions among EU member states on foreign policy issues. Neither such tensions nor oligarchy in matters of war and peace will strengthen the EU.

It might make sense to abolish the veto if the national interests of EU member states were always complementary. But often they are not

A similar story is told by our current experiences with the economic sanctions imposed by the EU on Russia for its barbaric war against Ukraine. These sanctions cause quite different collateral damages in different EU countries, and not all of their governments can handle these damages with similar ease[25]. This is particularly relevant when it comes to threats for a member country's economy or for the sustainability of a nation's social security system. The same will hold true for future economic sanctions by the EU against China or the USA. Is it fair, and will it permanently be accepted as legitimate, to have rules that prevent sovereign countries from protecting themselves against damages that they would deem fundamentally unacceptable, or even unbearable?

In addition, is there any guarantee that majority decisions by the Council on human rights issues would not be used as a free pass towards more straightforward political interference on issues of domestic politics over which different countries with different cultural experiences may legitimately disagree? As we have seen above, recent developments between the EU and Hungary show that human rights issues can be quite intentionally weaponised by EU politicians to exert pressure on important national matters like family politics and public education.

Removing the veto would jeopardize the cohesion and legitimacy of the EU

In sum, we argue that it is necessary and desirable to retain the veto in the European Council for cases of conflict over important national interests or essential values. Removing the veto would jeopardize the present level of cohesion and cooperation and do damage to beliefs in the legitimacy of EU decisions. The EU is much too important for peace and prosperity in Europe for us to put at risk what has been achieved.

Underpinning this is the belief that *shared interests* are a much more reliable resource for togetherness than coercion. The theory and practice of pluralistic democracy – one of Europe's most valuable legacies – suggests that coercion should be kept away from questions about fundamental values. At the level of individuals, peoples or nations, it is preferable to give a wide latitude of choice and sovereignty for these questions to be worked out internally. In the context of the EU, the veto and principle of unanimity provide a safeguard for these fundamental questions: majority for concrete policy questions, unanimity for existential questions. We would meddle with this good rule of thumb at our peril.

The veto provides a safeguard for the fundamental, existential values and interests of nation states

SECTION 3

CONCLUSION – THE CASE FOR A EUROPE OF STRONG NATIONS

CONCLUSION: A EUROPE OF STRONG NATIONS

The European project – which has its origins in the common history of European peoples and the achievements of European culture – currently finds itself at an impasse. The institutional form of the EU attempts to answer the question of Europe's future with reference to ever closer union and seemingly unstoppable integration. Yet the values and history that underpin the European project are based on the ideas of nationality, sovereignty and pluralism. These ideas run counter to those dominant expressions of EU institutions.

At a fundamental level, the variety of national histories, cultural ideas and particular interests of the countries of the EU should remind us that there is and cannot be a one-size-fits-all approach to the idea of Europe. Indeed, if there is an enduring strength to the idea of European values it is because there are *numerous* forms of these values. Each European nation will have its own answer to the question of what these are, within the broad yet inclusive framework of our shared history and culture.

Time and again, the difficult question of *what makes us European* is avoided through a tendency to legalism, a demonisation of dissent, and a reliance on federalist expansion.

Today, the institutions and main ideologues of the European Union attempt to wage cultural battles through the institutions of the law. Those with unique or contrasting answers to cultural questions are presented as rogue states, undermining the framework of law on which prosperity rests. This abuse of the law, its weaponisation, over the long term serves only to politicise the courts and risks destroying the distinction between legal and political spheres. There is a genuine danger that the authority of the law, resting on its claim to impartiality, is undermined – to the detriment of us all across the continent.

In such a climate, the veto power still held on 'existential' questions by national governments in the European Council amounts to an essential protection for sovereign national democracies. The demonisation of the veto is in effect a demonisation of the very idea of national interests and of national sovereignty. Instead of holding Europe back from realising its goals, the veto provides a guarantee of the very thing that provides Europe with its power: due respect for important national interests and the possibility of dialogue between nations in the pursuit of shared goals. Put bluntly, the end of the veto would move Europe closer to the domination of the smaller by the larger.

It is only natural, and is indeed desirable that, on occasion, European peoples will disagree on important questions. A strong Europe is based on a respect for genuine differences and an open-minded attitude to the question of differing national interests. Only by returning to a culture of respect for national sovereignty and its expressions will a Europe be able to be built that is adequate to the coming challenges of a radically changed world order.

About

About the authors

Professor Frank Füredi, executive director, MCC Brussels

Frank Füredi is an internationally renowned sociologist and social commentator. Since the late 1990s, he has been widely cited about his views on why Western societies find it so difficult to engage with risk and uncertainty. He has published widely about controversies relating to issues such as health, parenting children, food, and new technology. His latest book, T*he Road to Ukraine: how the West lost its way*, argues that Russia's invasion of Ukraine exposed how the West attempted to ignore the importance of History – leaving it confused and unprepared to deal with the current crisis.

Professor Dr. Werner J. Patzelt, research director, MCC Brussels

Professor Patzelt was the founding professor at the Dresden Institute for Political Science and held the professorship for Comparative Analysis of Political Systems from 1991 to 2019. His teaching and research activities focus on the comparative analysis of political systems, comparative legislative research, political communication, the comparative historical analysis of political institutions and evolutionary models in political science. He was member of the executive committee of the International Political Science Association and visiting professor at various universities. In addition to publishing 15 monographs, 16 edited volumes, more than 100 journal articles, more than 260 book chapters and more than 300 journalistic texts, he has been active as a political commentator on radio and TV.

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At a time of unprecedented political polarisation, MCC Brussels is committed to providing a home for genuine policy deliberation and an in-depth exploration of the issues of our time. It will provide an opportunity for intellectuals and experts to debate and assess the conceptual and normative status of European policy making. Drawing on MCC's outstanding pool of expertise it will attempt to acquaint and influence European policy makers with its distinct approach towards the political, socio-economic and cultural issues of our time. The centre will offer a challenging and stimulating environment for visiting young students to acquaint themselves with the policy and decision-making process in Brussels. It will provide short educational courses and seminars on matters pertaining to European thought and EU policy making.

T: @MCC_Brussels

E: info@brussels.mcc.hu

Press enquiries

Mr John O'Brien, head of communications, MCC Brussels

john.obrien@brussels.mcc.hu

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