Veto Rights in Power-Sharing Democracies: A Justificatory Test

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Veto rights are a prominent institutional feature in ethnically divided societies, especially power-sharing democracies. Yet while vetoes are intended to protect the vital interests of each ethnic community, they can give rise to serious concerns about political deadlock and instability. In response, we argue that vetoes should be subject to a justificatory test grounded in public reason. On the face of it, one troubling consequence of this approach is that a community's assessment of its own vital interests cannot be decisive. Yet as we explain, the critical issue is not who should be the arbiter of an interest but the need to be fair to the interests of all concerned. To illustrate how a public reason approach of this sort might be rendered sufficiently specific to be of practical use, we take human rights law as our example. Having considered a number of potential difficulties that this example throws up, we conclude by noting how a justificatory test can help to deliver not just greater political stability but a more democratically progressive form of politics.

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Veto rights are a prominent institutional feature in ethnically divided societies, especially power-sharing democracies.[1] In these democracies, political parties representing different ethnic groups or communities share governmental power equally or proportionally. Prominent examples include Belgium, Bosnia, Burundi, Lebanon, and Northern Ireland. Veto rights take different institutional forms in each of these cases, but the basic idea is to ensure that minorities do not find themselves permanently outvoted by majorities concerned only to press their own advantage.

Vetoes therefore put a break on majority rule. More specifically, vetoes are intended to protect communities from decisions that adversely affect their "vital" interests—that is, interests a community considers basic to its identity (for example, its language, culture, or religion) or fundamental to its members' life chances (for example, in the areas of education, housing, or employment) (Lijphart 1977, 25, 36; Norris 2008, 107).[2] There is, however, a snag. In theory, vetoes can give parties a greater sense of confidence, and hence foster compromise, democratic commitment, and political stability (Ram and Strøm 2014, 351). Yet in practice, vetoes may also give them a real incentive to frame more and more issues as matters of vital communal interest (Horowitz 2014, 11–14). The more that parties respond to this incentive, the greater the risks of institutional deadlock and political instability.

Indeed, the problem is not just that vetoes may encourage parties to frame more and more issues as vital communal interests, but that vetoes may also be used to pursue narrower party-political interests or broader ideological

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goals. In Lebanon, for example, vetoes have in the recent past been used to stymie electoral reforms needed to counter pervasive clientelism and corruption, while in Northern Ireland vetoes were used for many years in an attempt to block the introduction of same-sex marriage (Evans and Tonge 2016; MacQueen 2016). Examples of this sort suggest that vetoes can be not just overused but also misused, the cumulative effect of which is an increased likelihood of political paralysis and dysfunction. Vetoes may be intended to promote democracy by protecting the vital interests of each community, but in practice they may have exactly the opposite effect.

In response, some commentators argue that communities should be required to state in advance what their vital interests are (e.g., McEvoy 2013). In other words, on this view, the best way to deal with the problems of overuse and misuse is to restrict communal vetoes to a predetermined list of issues. By contrast, others start from the observation that a community's vital interests are never set in stone but are socially constructed and internally negotiated; since they can be difficult to anticipate in advance, a more permissive approach is therefore required.

Proponents of this latter approach also recognize the problems of overuse and misuse (McCulloch 2018; cf. Bieber 2005, 97). In response, they contend that veto mechanisms should include a justificatory test governing their use. At a general level, the notion of a justificatory test supposes that parties should be formally required to explain why they think that vetoing a decision is warranted. Yet the issue that remains to be addressed in the literature is on what terms they should be required to do so. What general principles should govern, or should identify as legitimate, the use of vetoes? How might these principles be justified and how can they be rendered sufficiently specific to be of practical use? To address these questions—the principal burden of this paper—we proceed as follows.

We begin in the first section by setting out the theoretical case for vetoes in democratic power-sharing systems in ethnically divided societies. Vetoes are designed to ensure that communities' vital interests are treated with equal concern and respect within executive or legislative decision procedures.[3] In practice, however, vetoes need to be handled very carefully if they are not to create more problems than they solve. To illustrate this worry, we focus on the use of vetoes within the Northern Ireland Assembly. We also highlight a set of intriguing reforms, introduced in 2020, designed to encourage an other-regarding, public point of view.

In the second section, we address the question of what principles should govern the use of vetoes, locating our discussion of this issue within the public reason tradition of political thought.[4] That tradition has a number of different strands and public reason theorists disagree on several important points.[5] However, the basic idea is that important decisions of law or public policy should be justifiable to everyone whom they are to bind (Quong 2011, 256).[6] Some public reason theorists insist that parties should therefore refrain from appealing to religious or other controversial views and should instead seek to couch their arguments in terms of broad public considerations. In democratic societies, including power-sharing democracies, those considerations may include respect for human dignity, freedom, equality, the rule of law, and the good of democracy itself. While it follows that a community's assessment of its own vital interests cannot be decisive, the critical consideration, we argue, is not who should be the arbiter of an interest but what it means to be fair to the interests of all concerned.

In the third section, we turn to the question of how a public reason approach might be rendered sufficiently specific to be of practical use. As we point out, the meanings people attach to democratic principles such as freedom and equality can both differ and conflict. However, the scope for interpretative dispute is constrained by existing institutional rules and procedures, including standing orders and ministerial codes of conduct, and bodies of law. The relationship, or interplay, between these different procedural and substantive variables is likely to be complex (McCulloch and Zdeb 2022). Yet for the purposes of illustration, we focus on human rights law, the content and practice of which offers a plausible means of scaffolding a commitment to public reason.[7] One might doubt that vital-interest issues would all be covered by human rights; human rights law might be silent on issues communities wish to veto. But as we show, worries of this sort overlook the nuanced nature of human rights standards and their application. Finally, in this third section, we discuss the difficult practical issue of who should decide whether a proposal is incompatible with human rights law. The courts, as we explain, are one possibility, but equality and human rights commissions may be a better option.

We conclude by suggesting that a public reason approach to vetoes may pave the way not just for a more stable politics but also for a more egalitarian and progressive politics.

Vetoes and Political Deadlock

It is generally assumed that if an ethnically divided society is to make the transition from conflict to peace and stability, it must do so within democratic power-sharing structures.[8] It is further assumed that those structures must contain veto rights or powers that enable the main ethnic communities (usually, in practice, the parties elected to represent them) to block decisions that stand to impinge upon their vital interests (as we described those interests above).[9] But how is this latter assumption justified?

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An important part of the answer to this question has to do with the relationship between democracy and majority rule. Normally, we tend to think that if there is a clash of views, and if each vote counts equally, the view of the majority ought to prevail. To allow the will of the minority to prevail would be to give greater weight to the votes of the minority than to the votes of the majority, which would violate the principle of political equality (Jones 1983, 160). But while this suggests a certain naturalness to the relationship between democracy and majority rule, actual voting patterns in ethnically divided societies are typically such that majority rule has to be carefully circumscribed.

In ethnically divided societies, party formation and party voting typically break down along communal lines: voters vote for their "own" political parties (Garry 2016; Horowitz 2014). But while elections in democratic power-sharing systems normally take place under some form of proportional representation rule, a proportionate share of seats in the legislature or executive does not necessarily ensure that a community will not be persistently outvoted. No matter how proportional the system, decisions on matters of common concern must still be made by majority rule. But when "such decisions affect the vital interests of a minority segment, such a defeat will be regarded as unacceptable and will endanger intersegmental elite cooperation" (Lijphart 1977, 36).

Vetoes are therefore intended to protect communities' vital interests. More broadly, they are intended to foster compromise, democratic commitment, and political stability (Ram and Strøm 2014, 351).[10] The empirical record suggests that vetoes can, at least in some cases, serve these ends. In Belgium, for example, the federal House of Representatives is divided into two main language groups, Dutch and French, and normally decides by majority rule.[11] However, if a language group thinks that a proposed decision will harm its vital interests, it can activate the "alarm bell" veto procedure. Perhaps unsurprisingly, this procedure has rarely been used. Once triggered, the legislative process is suspended for a period of 30 days, during which time the federal government (or Council of Ministers) must try to find a solution. This puts enormous pressure on the government: with parity in its composition and unanimity as the decision rule, the solution must be acceptable to both language groups. If no solution is found, the government will almost certainly have to resign (Adams 2014, 285; Deschouwer and Van Parijs 2013, 120).

Belgium's alarm bell procedure is "suspensive" rather than "absolute" (Lijphart 1995, 279; McCulloch and Zdeb 2022, 420). The point is to oblige the two main language groups to find a negotiated solution rather than to stop the proposed legislation in its tracks (Deschouwer 2006, 902). What it does not oblige them to do, however, is to meet a prior justificatory test (of the sort that we will defend) governing the procedure's legitimate use. Since the alarm bell is hardly used at all, one might say that this consideration does not matter all that much.[12] Yet in other cases, or other states, regions, or countries, groups and communities are far less circumspect in their willingness to collapse the government—or far more willing to see the political process deadlocked if that is what they think will serve their own particular interests best.

There are several contenders. For example, while Bosnia and Herzegovina's power-sharing system contains several different veto points, the Bosnian House of Representatives' "entity voting" mechanism in particular has been deployed on numerous occasions by Bosnian Serb parties seeking to weaken the central state and strengthen their own region's (or "entity's") autonomy (Bahtić-Kunrath 2011, 910–12).[13] Here, however, we focus on Northern Ireland's power-sharing system. We do so partly because this example offers a graphic illustration of the problems of overuse and misuse, and partly because of a number of recent reforms that are especially relevant to our concerns in this paper.

While the term "veto" appears nowhere in the text of the 1998 Belfast Agreement or in its amendments or supporting legislation, a number of different mechanisms serve this role. Most obviously, within the executive, the largest unionist or nationalist party can, if it so chooses, walk out and collapse the Assembly as a whole.[14] This has been done with striking regularity, resulting in a series of lengthy, multiyear suspensions—2002 to 2007, 2017 to 2020, and again from 2022 to early 2024—leaving the running of Northern Ireland largely to the Northern Ireland Civil Service (with some decisions being made by the secretary of state for Northern Ireland) (Flanagan 2022).

The reasons behind this sequence of executive vetoes and suspensions are both manifold and complex. Ironically, however, one important factor is the legislature's "petition of concern" veto mechanism—essentially, a petition signed by at least 30 Assembly members from at least two parties submitted to the Speaker's Office that then potentially triggers a cross-community vote on a given bill or proposal. Over the course of time, petitions were submitted with increasing frequency (McCulloch 2018, 746–48). Yet while increased frequency need not logically entail overuse, at assembly and executive committee level the main parties long regarded it as a major source of concern.[15] In fact, the committee was concerned not just about overuse but also about misuse—and with good reason.[16]

Many of the 159 petitions submitted between 1998 and 2017 seem to have been motivated by a genuine concern to protect vital communal interests—including 13 petitions seeking to block decisions on justice matters, 10 on local government reform, nine on the Irish language, four on flags, and two on the Bill of Rights process. But many

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others did not seem to have this same intent—including 19 on welfare reform, seven on planning reform, five on same-sex marriage, four on travelers' rights, and two on abortion law.[17] The latter two petitions were tabled by the Democratic Unionist Party (DUP) which has consistently opposed changes to abortion law in Northern Ireland. Crucially, however, its stance on abortion cannot plausibly be cast as a vital interest of unionism. On the contrary, its former leader, Arlene Foster, claims that Irish nationalists have emailed her "saying they will be voting for the [DUP] because they believe we're the only party that supports the unborn" (*BBC News* 2018).

Problems with the petition were also widely reported in the local media and led eventually, in May 2019, to the establishment of a working group, agreed by the British and Irish governments and the major political parties, dedicated to the petition's reform. The working group's discussions were not public; we know little about how they arrived at their recommendations. However, the reforms that eventually made their way into the New Decade, New Approach agreement that led to the restoration of power sharing in 2020 are both intriguing in themselves and have potentially far-reaching implications for power-sharing vetoes generally.

The parties agreed that "the use of the Petition of Concern should be reduced, and returned to its intended purpose."[18] They agreed, moreover, to "publicly commit to tabling or supporting Petitions of Concern only in the most exceptional circumstances and as a last resort, having used every other available mechanism."[19] From January 2020 to January 2022, no petitions were tabled.[20] However, in February 2022 the DUP once again collapsed the executive in protest over post-Brexit trading arrangements.[21] This, in turn, paralyzed the legislature, rendering the petition moot (Edgar and Flanagan 2022). Even so, the agreement does contain a further set of stipulations that are particularly germane to the notion of a justificatory test.

The parties agreed not only to be more circumspect in their tabling of petitions, but also that "a Petition must be accompanied by a statement of the grounds and rationale upon which it is being tabled."[22] They further agreed that a "valid Petition of Concern shall trigger a 14-day period of consideration, including on any reports on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights."[23]

Since no further petitions have been tabled, these latter stipulations have yet to be tested in practice. They nevertheless point to an approach to vetoes that requires parties to take a broader view of political decisions than merely consulting their own interests in them. There would, presumably, be little point in requiring parties to set out the grounds or rationale upon which a petition is being tabled unless they were also required to do so in terms that others could reasonably accept. Similarly, there would be little point in triggering a 14-day period of consideration unless the aim were to capture a more encompassing, other-regarding point of view (whatever else that period might be used to do). Finally, there would be little point in stressing the importance of equality requirements and human rights provisions more generally unless the aim were to take account of those in society who do not, or cannot, frame their interests in communal terms.

In the next section, we seek to offer a general theoretical argument that accounts for clauses of this sort and locates them within a broader normative or philosophical framework. More particularly, the section offers a normative justification for the exercise of the veto that renders it compatible with treating all parties fairly.

The Justificatory Test

As we have said, vetoes are intended to protect communities from decisions that may harm their vital interests. Yet while this is how their role is normally understood, it gives rise to a difficult question. Do we first establish what each community's vital interest is and then allow that to determine when its veto may be used? Or do we instead establish the conditions under which a community's veto would be justified and allow those conditions to be decisive?

On the face of it, the first option offers a straightforward solution to the problems of overuse and misuse. In essence, it seeks to delimit vetoes to a predetermined, constitutionally enumerated list of issues (see, e.g., McEvoy 2013, 260). This might encourage the parties to a constitutional agreement to draw up the longest lists possible, which could itself lead to difficulties later on. But a more fundamental consideration is that constitutional provisions are intended to be difficult to amend (Elster 1995, 366–67; Levy, O'Flynn, and Kong 2021, 96). While some interests are likely to remain basic, others may need to be revised, potentially leading to ongoing calls for change (McCulloch 2018, 749). Reopening constitutional provisions can be politically challenging at the best of times. In ethnically divided societies, doing so may result in the very deadlock or instability we are seeking to avoid.

One might reasonably respond that concerns of this sort always need to be empirically tested. But even if the need for ongoing constitutional change did not result in political deadlock or instability, the idea that vetoes should be delimited to a predetermined list would still be subject to a democratically important, principled objection—one which bears directly on the question posed above and which goes to the heart of the justificatory test that we wish to elaborate and defend in this section.

As it is normally defined, what is in someone's interest is what makes for their good: it benefits or advantages them in some way (Jones 2022). Similarly, what is contrary to someone's interest disbenefits or disadvantages them. Interests can be relatively trivial or profound. Moreover,

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while people can have interests of their own, they can also share interests with others, though "share" here is ambiguous. We might share an interest in an efficient transportation network or we might share an interest in being able to speak our own language in public life. While the first is most readily intelligible as an interest that we share severally (or side by side), the second is most readily intelligible as an interest that we hold collectively. Yet while collective interests may need to be collectively protected if those protections are to be effective, collective interests may not be the only interests involved.[24]

For example, many power-sharing systems contain institutions and policies that enable each community to exercise control over its own internal affairs on a functional or territorial basis (Lijphart 2004, 97; O'Leary 2005, 11). Often discussed under the heading of "segmental autonomy," the intention here is not just to reduce the scope for political conflict between communities—"good fences make good neighbors," as O'Leary (2005, 11) puts it—but to enable each community to protect its traditional institutions or way of life (Hadden 2005, 176). Yet the trouble is that not everybody in the community may share this aim; they may have interests of their own that conflict with the collective interest. Collective interests may rightly outweigh individual interests in law and policy. But we cannot simply assume that this is always, or necessarily, so (O'Flynn 2003).

What is true for segmental autonomy is arguably even more so for communal vetoes. While vetoes are intended to protect the vital interests of each community, they also bear on the interests of others in society (and not just on the interests of their own individual members). In short, when a community exercises a veto against a public proposal, they are demanding or blocking something for the whole society. But since, in a democracy, everyone has the right to have their interests treated with equal concern and respect, it follows that vetoes should be exercised fairly.

The idea that vetoes should be exercised fairly can be interpreted in different ways. There are, therefore, different possible justificatory tests. But if we take fairness to mean that people should be fair not just to their own interests in a decision but also to the interests of everyone concerned, there is a good case for saying that vetoes should be defensible from a public point of view. That is, the reasons on which the veto rests ought to be broadly acceptable from a whole-society perspective. Of course, in some cases a community may be adversely affected by a decision in a way that other communities are not. The issue might arise, at least in the eyes of the vetoing community, as a direct attack on its interests. Or it might arise as the consequence of a policy or measure that has a bona fide public purpose but which, as a side effect, adversely affects a particular community. However, the reasons a community gives for vetoing should still take due account of the interests of all concerned and seek to attend to them fairly (see Miller 1992, 55).

To say that vetoes should be defensible from a public point of view is to say, therefore, that vetoes should be justifiable in terms that anyone committed to exercising vetoes fairly should accept. This way of thinking about the use of vetoes is fundamentally normative. In the first instance, it is concerned not with what people will (or can be reasonably predicted to) accept, but with what they ought to accept given a shared commitment to using vetoes fairly. In more philosophical terms, this way of thinking treats the justification of vetoes from the perspective of an idealized public whose character as a public determines what the public point of view is. As an empirical matter, practical correlates may be (more or less) thin on the ground. But if we are to reform the use of vetoes, normative thinking is unavoidable.

Our indebtedness to Rawls's (1996, 212–54; 1997) treatment of the idea of public reason will be immediately obvious. Granted, Rawls's basic concern is far broader than ours. While his interest is in the legitimate use of political power in a democratic society, we are interested in the idea of public reason only insofar as it furnishes a possible solution to the veto problem. Nevertheless, we can draw on Rawls's treatment of the idea of public reason to deepen the analysis on which our argument depends.

For Rawls, public reason is concerned with the question of how the members of a plural democratic society ought to reason about fundamental questions of law and public policy.[25] The critical idea is that public reason consists of reasons that the members of a plural democratic society can share as free and equal citizens, as distinct from nonpublic reasons stemming from religious and other comprehensive doctrines that they do not share and cannot share. Principles or values (for Rawls, there seems to be no systematic difference between the two) such as freedom and equality, inclusion, or the rule of law are therefore likely to feature prominently. But public reason may also include (political) civility, reciprocity, toleration, and stability. It may even include science and common sense, where these are well established or not especially controversial.

Public reason, or public reasoning, is also an activity that people engage in—a process in which people offer and exchange reasons for their political views. While much might be said about the nature of that process (people's motivations, the range of issues to which public reason applies, control of the agenda, etc.), the content of public reason has got to be our principal concern here. The arguments that a party gives in support of a proposed veto should be of a public reason kind. This is a central part of the public reason process. But it remains to be established whether the substance of those arguments *vindicates* the veto. The reasons that parties give must be suitably shared.

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Yet what also matters is whether those arguments are substantively adequate to settle the matter at hand—which is to say that there can be reasonable disagreement about what public reason requires.

The question of vindication features prominently in the second half of this paper where we focus, among other things, on the question of who, or what, should decide this question. First, though, it is important to specify the Rawlsian justificatory framework that we have in mind in greater depth. Consider, to begin with, a contrasting view of the content of public reason. Notably, Gaus and Vallier (2009, 58) argue for a conception of public reason in which citizens "may arrive at common laws by reasoning based on diverse values and concerns." This form of public reason holds that each person needs to have sufficient reason to comply with the laws and policies that will bind them, but those reasons might be their own nonpublic reasons. I agree for my reasons, you agree for yours.

"Convergence" views of this sort may be suitable for some political purposes or questions, but power-sharing vetoes require something more.[26] After all, in ethnically divided societies, nonpublic reasons and the different comprehensive doctrines with which they are bound up are often central to the conflict.[27] Communities should be able to pursue their own interests, but the fundamental challenge in ethnically divided societies is typically that of encouraging a more inclusive, other-regarding approach to political life (O'Flynn 2017). Since, as we have said, a veto blocks a decision for the whole society, the reasons that a community gives should be acceptable from a public point of view.

On a Rawlsian approach, then, it is not the vitalness of the interest that justifies the veto, but the justification of the veto that tells us whether the veto's use or exercise is sufficiently warranted. A community that wishes to veto a decision should first give reasons that are broadly shared. Instead of simply looking at the matter from their own perspective, they should couch their arguments in terms of widely endorsed political principles or other suitably shared considerations. If they cannot do so, they should refrain—or be obliged to refrain—from exercising their veto. The veto should be deemed invalid or unjustified, and the decision should then be taken in the normal way, by majority voting in the executive or legislature.

What we can therefore say is that a veto can be used if and only if there is sufficient public justification for the veto. However, one might also hold that a veto can be used if and only if a proposed law lacks sufficient public justification. These claims may seem different, but in practice they go hand in hand. Say a new law is introduced in the legislature. The minister in question sets out the reasoning on which the law rests and that reasoning is then tested. The minister may say that the law is sufficiently compatible with public reason. However, a community may disagree, arguing that it is not sufficiently compatible with public reason and should therefore be vetoed. Logically, to make this case, the community must itself appeal to public reason. It is then up to an authoritative body to decide whether it is sufficiently compatible or not. If the body decides that the law lacks sufficient public justification, or perhaps any public justification at all, the law may then be legitimately vetoed. Or as we put it above, the proposed veto will be vindicated.

We will return to more practical issues of this sort in just a moment. For now, though, there is a further theoretical issue that needs to be addressed. On the face of it, one seemingly troubling implication of this approach is that a community's assessment of its own vital interests cannot be decisive. One might even see this as a form of justificatory overreach and even (ironically enough) as a threat to democratic power sharing. In an ethnically divided society, each community will almost certainly demand to be the arbiter of its own interests and to reject any suggestion that others should be entitled to judge for it. Why else would they be demanding vetoes? Granted, the vitalness of the interest (i.e., the weight or urgency or significance a community attaches to it) must play some part in justifying its protection through a veto, since a veto is an exceptional instrument and therefore not one to be used for a slight or trivial reason. Yet the critical issue is not who should be the arbiter of an interest but, as we put it above, the need to be fair, so far as possible, to the interests of everyone concerned.

The point here is worth stressing. There is nothing in our approach to suggest that communities should not be free to determine for themselves what is in their vital interest. As we have just said, we also think that vitalness should be a feature of the interests a veto should protect. Yet while the vitalness of an interest may be a necessary condition for the exercise of a veto, it is not a sufficient condition. There are other independent tests that also need to be satisfied before a veto can be considered justified or legitimate. The potential costs of a veto power to the efficient functioning of the political system must obviously play a part in determining the scope of issues over which there should be a veto. But at a more fundamental level, the potential costs to democracy itself must be considered. Ethnically divided societies are typically characterized not just by deep conflicts of identity but, bound up with that, by the failure of one part of the society to treat the interests of another with equal concern and respect—or the failure of the political system to encourage or oblige them to do so (Zartman 1995, 5).

It is therefore reasonable to hold (1) that an interest's being a vital interest is a necessary condition for defending that interest via a veto and (2) that the issue of the vitalness of the interest requires a judgment only with reference to how important the interest is for the relevant community. For that community, the judgment is self-regarding. Yet since vetoes also bear on the interests of others in society,

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their exercise should be subject to an other-regarding test. We have described and defended one such test, drawing on the work of Rawls. Public reason, as Rawls defines it, has to be other-regarding and therefore it is an exercise separate from judging an interest's vitalness.

The obvious question to ask at this point, however, is how this account can be rendered sufficiently specific to be of practical use. We turn to this issue in the next section.

From Theory to Practice

Public reason, or public reasoning, is reasoning that takes a whole-society perspective. It seeks to attend to the interests of all from a public point of view and tries to provide for them in a fair way. Yet while one might wonder about the relevance of public reason to ethnically divided societies, broadly accepted democratic principles feature prominently in democratic power-sharing agreements. For example, in the preamble to the 1998 Belfast Agreement, the parties proclaim their commitment to "the achievement of reconciliation … partnership, equality and mutual respect … to exclusively democratic and peaceful means … and [their] opposition to the use or threat of force."[28] Similarly, the signatories to the 1995 Dayton Peace Accords committed themselves to the principles of "respect for human dignity, liberty, and equality … peace, justice, tolerance, and reconciliation,"[29] as well as to "free and fair elections … freedom of expression and of the press … freedom of association [and] freedom of movement."[30]

As Zartman (2008) and others have shown, broad agreement on the meaning of such principles can be crucial to getting a peace agreement off the ground and to setting the terms within which subsequent negotiations will take place.[31] However, once power sharing is up and running and ordinary legislation needs to be enacted, the precise meaning or import of these principles may be subject to reasonable disagreement or challenge. Principles such as freedom and equality, the separation of powers, and the rule of law may be normatively powerful. They may also be widely shared across different cultures or religions or communal ways of life. Yet their precise meaning, along with their implications for practical reasoning about important matters of law or policy, may still be highly contentious.

Semantic indeterminacy can be a real problem for public reason approaches, including the public reason approach to vetoes that we set out in the previous section (see, e.g., Reidy 2000, 63–67). Yet as we have also suggested, in democratic political institutions, including power-sharing systems, the scope for interpretation is constrained by procedures within the executive and legislature, such as standing orders and ministerial codes of conduct.[32] It is also constrained by a concern for human rights.

Human rights are derived from a set of universal norms that, as such, apply equally to all. On a human rights view, no category of human person matters more than any other category of human person. No one starts off life with a greater entitlement to concern and respect than any other human being. We are all, to paraphrase the Universal Declaration of Human Rights, born free and equal in recognition of our inherent dignity and inalienable rights.[33] Since human rights apply equally to all, they should be acceptable to all—or should be acceptable from a public point of view, to reuse a phrase from earlier. This is not to suppose that, since human rights apply equally to all, we can reasonably project that they will be accepted by all. Nor is it to suppose that a putative human right needs to be accepted by all before it can be classed as a genuine human right. But it is to suppose (or, better, to observe) that, from a public reason point of view, no one could have good reason for finding human rights unacceptable. We can therefore think of human rights as representing public reason in action, by which we mean thinking or arguing in terms of human rights, rather than in terms of every last detail of human rights substantively. Human rights may form part of the content of public reason, but that does not mean that people will not disagree over their interpretation or application.

The question of vindication remains a live one. One might even worry that human rights are simply too broad and general in nature to be consistently of use. But human rights law, particularly through treaties, conventions, and case law, provides a framework that both clarifies the meaning of these rights and outlines how they can be rendered sufficiently specific for practical purposes. Consider again the "petition of concern" reforms. As already noted, a valid petition must be accompanied by a statement of the grounds and rationale upon which it is being tabled. That statement is subject to a 14-day period of consideration, which may include a review of its conformity with equality requirements. This emphasis on equality requirements, which were already a prominent feature of Northern Ireland's legal landscape, is consistent with a public reason approach, as is, arguably, the broader commitment to consultation within which this clause is situated. Just as importantly, reference to the European Convention on Human Rights points in the direction of those provisions contained within the international human rights treaties to which the Assembly is already subject by virtue of the United Kingdom's ratification of them. In addition to the European Convention on Human Rights (ratified by the UK government in 1951), these include the International Covenant on Civil and Political Rights (1976), the International Covenant on Economic, Social and Cultural Rights (1976), the Council of Europe Framework Convention for the Protection of National Minorities (1998), and the European Charter for Regional or Minority Languages (2001). When we add to this the jurisprudence of both the domestic courts and the European Court of Human Rights, the problem of semantic indeterminacy becomes much more tractable.

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Human rights law and jurisprudence can therefore reduce (though admittedly not eliminate) the scope for reasonable disagreement about the meaning and application of our human rights, and hence the content of public reason in this regard. However, one might still wonder whether vital-interest issues would all be covered by human rights (Schwartz 2014, 5–6). That is, one might wonder whether the scope of human rights is sufficiently encompassing to deal with the many issues communities might seek to veto. Of course, human rights can set a background so that whatever violates human rights is placed off limits (an issue we touch on briefly in our concluding remarks). Yet given the particularity of the circumstances of different ethnically divided societies and the particularity of the interests of different communities, the worry is that human rights may prove of limited use in dealing with the kind of law and policy disagreements vetoes are designed to cater for. More especially, the worry is not so much that human rights may deliver an answer that is subject to reasonable disagreement, but that human rights may fail to deliver any answer at all. If human rights were silent on issues communities wished to veto, it might not fatally undermine the case for a justificatory test grounded in public reason (there are other ways of thinking about, or specifying, its content), but it might weaken that case or cast a doubt over it.

We respond to this issue next before then considering the equally important question of who decides.

Is Human Rights Law up to the Job?

The issue, then, is not about the degree to which human rights are embedded in power-sharing systems. As McCrudden and O'Leary (2013, 485) point out, "Bills of Rights and equivalent mechanisms tend to be omnipresent" in power-sharing agreements.[34] Nor is it necessarily about the degree to which human rights are subject to reasonable disagreement. Patently they are, though, as we have noted, the scope for interpretation and application is constrained by human rights law and jurisprudence. Rather, the issue is the actual, practical contribution that human rights might make to a justificatory test grounded in public reason. In some veto cases—perhaps even many cases—human rights may fail to give any answer at all. While this possibility cannot be discounted, the following example seeks to paint a more nuanced picture by way of a response. Though hypothetical, the example will have resonance for many ethnically divided societies.

Suppose a bill or proposal is put forward to devolve responsibility for the allocation of social housing from the legislature to local councils. Suppose also that parties from one community are seeking to block the bill from going forward. What, on our account, should happen next? First, the parties would need to justify on human rights grounds the claim that, if passed, the bill would be inimical to the vital interests of their community. The obvious human right engaged is the right to an adequate standard of living, which includes the right to adequate housing, protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights. This right has been substantially elaborated upon in various places, including in General Comment No. 4 of the United Nations Committee on Economic, Social and Cultural Rights. This comment sets out an authoritative interpretation of the Covenant, addressing issues such as legal security of tenure, affordability, habitability, and accessibility. However, the comment is silent on the question of where responsibility for the allocation of social housing should properly lie. The proposal to devolve responsibility from the legislature to local councils would therefore be compatible with the Covenant and could not be vetoed on such grounds.

This conclusion may do little to assuage the concerns that motivated the veto in the first place. The community's desire to veto the proposal may be rooted in historical discrimination in local decisions about social housing. Yet the comment's silence on the (obviously important) question of where political responsibility should lie for decision making should not be taken to mean that human rights law is therefore silent on the (obviously important) question of housing. Human rights law clearly has a great deal to say on this subject; it is far from indeterminate or (worse) indifferent. The conclusion that the proposal is compatible with the Covenant may not be the answer the community wishes to hear. But it is, substantively, the answer that the jurisprudence around this question currently delivers; it is entailed by the decision to ratify the Covenant, its monitoring, and its development.

Granted, once responsibility for housing is devolved to local councils, there could be a violation of human rights law. In that case, the community's worst fears might be realized. Public reason would seem to have let them down. But at the time the veto power was triggered, there was no sure way of knowing that this would be the case. And since the proposal was not at that point incompatible with human rights standards, there was no independent reason to stop the democratic process from moving forward to a decision. Is this an inherent weakness of an approach grounded in public reason and tested, or scaffolded, via human rights? We do not think so. Even human rights-compliant legislation cannot prevent human rights violations.

Who Gets to Decide?

No approach to constraining vetoes is likely to be perfect (the alternative, of course, is not constraining them at all).

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But the advantage of using human rights is that they are both commonly accepted (and hence can form part of the content of public reason) and independently defined (communities cannot simply make them up as suits their purposes). The obvious question at this point, however, is who exactly gets to decide whether a bill or proposal is incompatible with human rights standards? Who polices the exercise of public reason?

One possible answer is the courts, though again the case of Bosnia counsels caution. As already mentioned, Bosnia has several different veto mechanisms. While "entity voting" in the lower House of Representatives is common, the upper House of Peoples' "vital national interest" veto mechanism is deployed far less frequently (Bahtić-Kunrath 2011, 908–9). Arguably, this is because of the adjudication processes that attach to it: the issue first goes to a legislative committee and then to the Constitutional Court if no resolution is found (McCulloch and Zdeb 2022, 436).

Like Belgium's alarm bell procedure, the vital national interest veto is suspensive rather than absolute, permissive rather than restrictive. Yet while the alarm bell obliges the parties to find a negotiated solution, the vital national interest veto goes further in obliging them "to offer justifications [before the Court] for their veto deployments" (McCulloch and Zdeb 2022, 436). One might therefore see the Court as an instrument of public reason or as an institution that facilitates or supports its use—that is, on the assumption that the nature of a constitutional court is such that it requires a public point of view.[35] Yet while this may be true in theory, there is reason to worry that, in practice, matters may not play out this way.

As Polovchenko (2023, 415) argues, the Bosnian Constitutional Court has not limited itself to matters of procedure (as per the Bosnian Constitution) but has actively sought to rule on what is or is not a vital national interest. In response, Bosnian Serb parties in particular have both contested its decisions (most recently, suspending its rulings in the Bosnian Serb-dominated Republika Srpska federal region or entity) and questioned its legitimacy. They have also hindered the process of appointing replacement judges to the Court and, as part of that, made the reform process conditional on achieving their own goals (Išerić 2024).[36] Arguably, this is simply a particular instance of a more general trajectory or phenomenon: the more the courts are asked, or take it upon themselves, to settle contentious political issues, the more the courts will be viewed as "political" or partial. In turn, this raises worries not just about the functioning of the courts, but also about transparency and accountability and, ultimately, the rule of law.

These worries should lead us to consider other possible institutions. Equality and human rights commissions—common features in many ethnically divided societies—may be better placed to issue judgments on questions of incompatibility.[37] Equality and human rights commissions do not (normally) have decisional authority. Yet while their judgments may not be legally binding, their standing as independent institutions lends them considerable legitimacy nonetheless. It can also shield them from charges of any undue involvement in the political process. On the other hand, a commission's judgments may simply be ignored, especially if communities decide they do not suit their interests. Yet much will depend on how a commission is viewed generally—its reputation for competence, fairness, and impartiality. Much will also depend on how its advice is institutionalized and, as part of that, publicized. Once promulgated, the judgment of an equality or human rights commission may be difficult to disregard.

Granted, one might wonder why communities would be willing to give commissions such a pivotal role in the first place (why tie their own hands in advance?). Yet besides the fact that commissions already are a prominent institutional feature in many ethnically divided societies, as indeed they are in a great many countries right across the world, their ability to exercise quasi-judicial authority is already internationally recognized. For instance, human rights commissions are created in compliance with the 1993 UN General Assembly Resolution 48/134, otherwise known as the "Paris Principles." Notably, these principles not only set out the role that human rights commissions may play in advising government, but also recognize the ability of such institutions to exercise quasi-judicial authority.[38]

There will be risks with any institution, and any institution can become politicized. Yet the fact remains that some institution must be charged with the task of deciding or advising on compatibility. The courts remain a possibility, but other institutions may be just as feasible, if not more so. While much is likely to depend on the case to hand—the history of its institutions, the perceptions of legitimacy they enjoy, the nature of their personnel, and so forth—what would not be feasible would be to leave such determinations to the communities themselves. That, in effect, would send us back to square one.

Concluding Remarks

We have defended a Rawlsian-inspired public reason approach to justifying the use of vetoes in ethnically divided societies with democratic power-sharing institutions. We now wish to conclude with a number of brief remarks about why we think this approach can help to deliver not just greater institutional stability but also a more democratically progressive form of politics.

Vetoes are necessary to provide reassurance to minorities in ethnically divided societies but they are open to overuse and misuse. This, in turn, can lead to political

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instability. In response, we have looked to the idea of public reason insofar as it offers a particular solution to this problem. Admittedly, our use of the idea of public reason is somewhat narrow or even instrumental. We have focused on a specific problem, and we have sought to show how public reason might help. One could, of course, argue that the political system as a whole should satisfy the conditions of public reason, in which case the minority veto would only apply to laws and policies that fail to satisfy those conditions. In that case, the minority veto would lose a great deal of its significance: it would only be when there is a general failure of the political process that the veto could be used at all. As one might expect, there is no settled answer to the question of the scope of public reason: should the constraints of public reason apply to a broad range of political questions and institutions or to some narrower subset of them (cf. Quong 2011, 273–89; Rawls 1996, 214)? But while it is at least possible to imagine a democratic society in which laws and policies are typically justified in terms of public reasons, and while one might also allow for the sake of argument that such a state of affairs would be desirable, the obvious question is the practical one of getting from here to there.

This practical question is especially (though, we should stress, not uniquely) pertinent for democratic politics in ethnically divided societies. Power sharing is generally conceived of as a mechanism for managing conflict and for allowing democratic practices and norms the chance to bed down. Yet while the realities of political life in ethnically divided societies are often such that grander democratic ideals or visions cannot always be immediately pursued, incremental changes may make all the difference in the longer run. Subjecting vetoes to a justificatory test grounded in public reason and, as we have suggested by way of illustration, scaffolded via human rights may contribute to democratic deepening. They may serve as an illustration of what is achievable across the system as a whole or, more modestly, demonstrate what is institutionally possible. As such, this paper's argument points, we believe, in the direction of a more progressive politics. A justificatory test of the sort that we defend may lend greater political stability to the system as a whole. But it may also create greater space for a form of politics in which the interests of everyone in society are treated equally or fairly—or at least may point in that direction. Ethnic divisions may be highly durable. Ethnic interests may have to be our primary concern. But they need not be our only concern and they need not be viewed as impermeable.

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Notes

1 The term "power sharing" covers a broad range of institutional designs, which can make it hard to generalize. While the literature on power sharing is correspondingly broad, in this paper we mainly have in mind the literature on consociation, a form of power sharing characterized by a grand governing coalition, mutual vetoes, proportionality, and segmental autonomy. For major statements, see Lijphart (1977); O'Leary (2005).

2 The term "vital interest" is commonly used in the literature on power-sharing democracy. It signals an interest that is in some sense "fundamental" or "basic" or "essential" or "urgent" or "significant," and hence deserving of special protection. The term "vital interest" also appears in some power-sharing agreements—for example, the General Framework Agreement for Peace in Bosnia and Herzegovina (1995), Annex 4, Article IV (Parliamentary Assembly), para. 11(e), and Annex 4, Article V (Presidency), para. 7(d).

3 This claim should be qualified. Vetoes can be formal (e.g., Northern Ireland) or informal (e.g., Belgium). While they are normally positioned within the executive or legislature, they need not be—for example, in Switzerland, the use of the optional referendum effectively places the veto within the broader voting public (Kriesi and Trechsel 2008, 58).

4 For major contemporary statements, see Gaus (2011); Larmore (1996); Quong (2011); Rawls (1996; 1997).

5 For a comprehensive overview, see Quong (2022).

6 In the words of Charles Larmore (1996, 41), "If the principles of political association are to be rooted in a commitment to equal respect, they must be justifiable to everyone whom they are to bind." As we indicate later, we also think that public reason can be grounded in a commitment to equal respect—or, more precisely, in a democratic commitment to equal concern and respect. By contrast, other public reason theorists have pointed to ideals of autonomy, community, civic friendship, and so forth. Whether these different groundings have a bearing on the case that we present in this paper is something that we do not have space to address (though our view is that they do not).

7 In saying that, we recognize that human rights are an integral (principled) part of democratic constitutional systems generally (Habermas 1996). They ensure our equal standing within the democratic process and underpin the rule of law.

8 The literature on power sharing is vast. Important works include Cederman, Hug, and Wucherpfennig (2022); Hartzell and Hoddie (2020); Horowitz

(1991); Lijphart (1977); O'Leary (2013); Norris (2008).

9 Specifically, this idea is a prominent strand in the literature on consociation, the most prominent power-sharing model (Lijphart 1995; 2004; O'Leary 2005).

10 Cederman, Hug, and Wucherpfennig (2020, 80) show that "if a mutual veto is prescribed then the share of the included population is on average considerably larger than in the absence of such a provision." So, on this evidence, vetoes not only protect communities but also help to ensure their inclusion in the first place.

11 Members of the smaller German-speaking community are also represented, but they are not considered a separate group.

12 While Burundi might also be cited as a power-sharing system in which vetoes are only rarely deployed, this example needs to be treated carefully. Among other considerations, the "Tutsi minority's ability to use its veto power is constrained because political decision making has, in part, moved outside the ambit of formal institutions" (McCulloch and Zdeb 2022, 430). It is also constrained by "an institutional design feature, which disconnects the Tutsi electorate from Tutsi politicians who, in addition, are internally divided" (McCulloch and Vandeginste 2019, 1187). Arguably, what we see here are systemic failures rather than the judicious use of vetoes.

13 Bosnia and Herzegovina is divided into two highly autonomous federal regions or "entities": Republika Srpska, which is predominantly Bosnian Serb, and the Federation of Bosnia and Herzegovina, which is shared by Bosniaks (or Bosnian Muslims) and Bosnian Croats. "Entity voting" refers to a specific veto mechanism designed to protect each group's interests. In principle, every decision in the House requires the support of at least one-third of the representatives elected from each entity. For a discussion, see Bahtić-Kunrath (2011, 902); McCulloch and Zdeb (2022, 436–37).

14 Section 16C(9) of the Northern Ireland Act (1998) contains what is essentially a "one falls, both fall" provision. See also the Agreement at St. Andrews (2006), Annex A (Practical Changes to the Operation of the Institutions), para. 9.

15 While, as we note above, matters came to a head in 2019, the question of veto reform was on the radar of the Assembly and Executive Review Committee well before then. See, for example, Northern Ireland Assembly and Executive Review Committee (2014a).

16 See Northern Ireland Assembly and Executive Review Committee (2014b).

17 This figure, retrieved from *Hansard*, includes multiple petitions on the same bill, four petitions not accepted by the Speaker's Office, and three lacking the necessary number of signatures.

18 New Decade, New Approach (2020), Part 2 (Northern Ireland Executive Formation Agreement), para. 9.

19 New Decade, New Approach (2020), Part 2 (Northern Ireland Executive Formation Agreement), para. 9.

20 See the secretary of state's four reports to the UK Parliament on the use of the "petition of concern" mechanism. The fourth, for example, can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054277/PoC_report_4.pdf.

21 For whatever reason, the New Decade, New Approach agreement did not simultaneously seek to reform vetoing by the executive.

22 New Decade, New Approach (2020), Annex B, para. 2.2.1.

23 New Decade, New Approach (2020), Annex B, para. 2.2.7. See also Levy and O'Flynn (2024, 8).

24 The right to vote is perhaps the quintessential collective interest—one that, in a democracy, needs to be protected collectively if it is to be effective—even though it is a right we possess and exercise individually.

25 Rawls explicitly frames his treatment of the idea of public reason in normative terms: "[I]t presents how things might be, taking people as a just and well-ordered society would encourage them to be" (Rawls 1996, 213). In this sense, the "constituency" of public reason (i.e., the set of individuals to whom political decisions must be justified) is an ideal. For a discussion, see Quong (2011, 258–59, 290–314).

26 For a general critique of such "convergence" views, see Quong (2011, 261–73).

27 Arguing against those who maintain that common standards of justification are unnecessary, Macedo (2010, 33) remarks: "Public declarations of commitment to common standards … should provide mutual reassurance and strengthen the sense of shared commitment. Such practices can make for a more intelligible and predictable social order, and also one in which trustful cooperation can flourish." The relevance of these remarks for ethnically divided societies should be clear.

28 The Agreement (1998), "Declaration of Support," paras. 2, 3, and 4.

29 The General Framework Agreement for Peace in Bosnia and Herzegovina (1995), Annex 4 (Constitution of Bosnia and Herzegovina), Preamble.

30 The General Framework Agreement for Peace in Bosnia and Herzegovina (1995), Annex 3 (Agreement on Elections), Article 1(4).

31 See also, e.g., Albin and Druckman (2012); Issacharoff (2013, 220).

32 On the relationship between standing orders, procedural reforms, and the substantive (or otherwise) nature of ministerial replies to parliamentary questions, see Conley (2013, 82, 95–96).

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33 Universal Declaration of Human Rights (1948), Preamble and Article 1.
34 As McCrudden and O'Leary (2013, 485) also point out, many power-sharing advocates "see strong human rights protections as an important safeguard for liberal values in such arrangements."
35 The Court's composition—two Bosnian Serbs, two Bosniaks, and two Bosnian Croats, joined by three international judges appointed by the European Court of Human Rights—lends further support to this view.
36 For example, Bosnian Serb politicians have made the removal of the Court's three international judges a condition of appointing new Bosnian Serb judges.
37 On human rights commissions and legislative delegations to them of the power to interpret rights, see, e.g., Howe and Johnson (2000, 37–69).
38 General Assembly Resolution 48/134 (1993), Section 3.

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