From US Slavery Defence to Article 19 TFEU: Treaty Reform in the Scales of History

By Mohamed Moussa

The European Parliament’s recent proposal to remove the unanimity requirement from Article 19 TFEU (non-discrimination legislation) echoes a centuries-old US debate on voting and minority rights. James Madison, the ‘father’ of the US Constitution defended majority voting as a necessary condition for impartial law-making and minority protection in multi-state unions. Conversely, John C. Calhoun, the then Vice US President and a key advocate of slavery, sought to maintain the racial status quo through advocating for a unanimity-based structure.

The purpose of the blog is twofold. First, it utilises US constitutional history to show how unanimity voting can function as a tool to perpetuate the unjust status quo to the detriment of minority rights. In this regard, partial similarities are drawn between the current Article 19 TFEU and Calhoun’s voting model. Secondly, it contrasts the pragmatic nature of the travaux préparatoires of Article 19 TFEU with the principled approach of the US debate. This juxtaposition underscores the importance of anchoring the proposed treaty changes in the foundational principles of Western constitutionalism. Specifically, it highlights the nemo judex rule — ‘not being the judge in one’s own cause’ — a principle that shaped the US constitutional debate but was surprisingly absent in the drafting history of Article 19 TFEU. The blog shows why this particular principle should be considered in the debate on the European Parliament’s proposal to amend Article 19 TFEU. Addressing the foundational role of this principle in Western constitutional theory provides additional support for removing the unanimity requirement from Article 19 TFEU. This change could help ensure better protection of minority rights in line with the values enshrined in Article 2 TEU. It is important to clarify that the term ‘minorities’ here refers to underprivileged segments of societies based on racial or ethnic origin, religion, or belief, among the
main grounds protected under Article 19 TFEU – aligning with the EU Commission’s definition.

The Madison (majority) vs. Calhoun (unanimity) debate

In making the case for a union over unitary states, Madison argued that in unitary states, the majority’s control of legislative bodies enables them to effectively ‘be the judge of their own case’ and legislate in a manner that serves their interests, often to the detriment of minorities. The best means to counteract majoritarian biases is for states to integrate within a larger union, where diverse majorities can balance each other, compelling agreement on common principles that are more likely to lean towards egalitarianism. Madison’s argument from the nemo judex rule is complex and rests on certain assumptions, but the chart below visualizes the essence of his argument.

Assume there are five similarly populated states, each dominated by a racial majority with other dispersed racial minorities. The states then come together into an integrative union. For simple arithmetical reasons, strong state majorities get diluted at the union level (for instance, group A in the chart shifts from 90% domestically to 18% at the union level). With majority-based voting, no single group can dominate independently. Rather, groups must compromise to address common interests. This mutual check on state majorities can provide some protection for minorities by ensuring that no single domestic group unilaterally decides matters for the whole union.
This Madisonian argument has been tested in many cases, as shown by Halberstam, among others. Minority rights in America have improved significantly in the so-called ‘Civil Rights Era’ when these rights were decided at the federal level rather than left to the majorities of states. Other examples in the US include various fiscal and economic legislation, where voting at the union level broke the abusive control of local majorities and provided more balanced outcomes.

The most (in)famous challenge to Madison’s argument came from Calhoun, the twice US Vice President and the American South’s ‘evil genius’. Calhoun was known for shifting the slavery debate from being a ‘necessary evil’ to being a ‘morally good’ practice and his theory on voting is closely related to his position on slavery. While accepting the advantages of multi-state union, he feared that majority voting would lead to the emancipation of slaves and disturb the ‘racial hierarchy’. He thus offered a competing voting mechanism rooted in unanimity or what he termed ‘concurring majorities’. To challenge Madison’s reasoning, he employed two arguments which may resonate with EU lawyers: the indivisibility of sovereignty and its concomitant ‘no demos’ thesis. Calhoun noted that sovereignty is ‘an entire thing;—to divide, is,—to destroy it’. To him, this indivisible sovereignty lies with ‘the people of several states’ because there is ‘no other people’ at the union level. Therefore, his concurring majority model means that majority is only acceptable within states (because people there are sovereign) but not at the union level (where there is no demos nor sovereignty) and thus the union must function on the basis of unanimity.

Space precludes a full discussion of Madison’s reply to Calhoun (which is discussed elsewhere). It is worth noting here that unanimity voting undermines the ‘nemo judex’ rule by allowing one state majority to judge its own case and block legislation favourable to minorities across the entire union. In this sense, it amounts to the tyranny of the few. The Madison-Calhoun and their majority vs unanimity debate was ultimately resolved in Madison's favour in two ways. First, the outcome of civil war relegated Calhoun to the history ‘dustbin odium’.

Second, many comparative case studies attest to the effectiveness Madison’s argument that majority voting in a multi-state union tends to, subject to some conditions, provide more egalitarian outcomes. Extensive literature covers this issue, citing examples such as the improvement of minority rights in the US when regulations shifted to the federal level compared to the state level, as previously discussed. In the EU, some highlight how the regulation of sex equality in the workplace became more
egalitarian through joining the European Community compared to leaving the matter to domestic law. Other examples abound as discussed by Halberstam among others.

With this comparative and historical background in mind we can now explore how this debate influences Art 19 TFEU and the proposed treaty revision.

Calhoun vs Article 19 TFEU’s present

While the issue of slavery has receded into the annals of history, the rationale behind Calhoun’s unanimity theory has found echoes in the EU’s Article 19, albeit inadvertently. Article 19 mandates unanimity among Member States in the Council to ‘combat discrimination based on sex, racial or ethnic origin’ among other grounds. It must be noted that the similarity between the EU’s approach and Calhoun’s is only partial because of the divergent socio-political circumstances that he laboured under compared to today.

Nonetheless, this partiality does not exclude some similarity in essence and consequence. In essence, his mechanism aimed to ensure that the union would act only through consensus, this is comparable to Article 19 TFEU’s requirement for consensus to ‘combat discrimination’. In terms of consequence, the similarity lies in perpetuating the status quo. At the heart of Calhoun’s theory is the desire to insulate the status quo from change as much as possible. Yet, the status quo, as Sunstein notes, is often ‘neither neutral nor just’. To insulate the status quo from change is to perpetuate the injustices befalling many of the underrepresented parts of the society. Article 19 TFEU insulates the status quo of EU minorities and its concomitant injustice.

While Calhoun's model was not applied, Article 19 TFEU has been applied. Since its adoption, the legislative reliance on Article 19 TFEU has been exceedingly rare. The only two measures enacted using the article date back to 2000 and were induced by the Haider Affair as an ‘unusual twist of political fate’. Nonetheless, after more than two decades, the consequence of Article 19 TFEU, as many have noted, has rendered the EU ‘minority agnostic’ and its contribution ‘limited’ to ‘all but the most anodyne of actions’, leaving minorities at the mercy of the ‘tyranny of veto’.

An example of the impact of unanimity in perpetuating inaction is highlighted in the recent report of the EP’s Committee on Civil Liberties, Justice and Home Affairs. It laments the 16-year failure to pass the EU Horizontal Directive on equal treatment across different grounds in respect of goods and services which remains unadopted since the 2008 Commission proposal due to a ‘blockage’ at the Council level. The
Council’s approach is in stark contrast to the Parliament, which, unshackled by unanimity, approved the proposal as early as 2009.

The impact of unanimity is also shown by comparing Art 19 TFEU to areas or institutions where unanimity is not required. Most obviously, sex equality, generally unshackled by unanimity remains the most protected ground where nine directives have been successfully enacted and transposed.

While space precludes a full analysis of the substance of EU non-discrimination law beyond gender, it suffices to say that unanimity has been criticised for slowing the development of this area of law to the detriment of racial, ethnic and religious minorities. For instance, the Commission blamed Article 19 TFEU’s unanimity requirement for leading to ‘an inconsistent legal framework and an incoherent impact of Union law on people’s lives’. Moreover, de Búrca remarked the Race Equality Directive is a ‘more genuine framework in nature, in so far as it contains a general prescription … to which States must commit themselves, but without prescribing in detail how this is to be achieved’. Relatedly, the existing directives, as Bell argues, almost exclusively rely on the ‘passive’ protection through ‘complaints-based’ enforcement, which is particularly insufficient to rectify historical inequalities of racism. According to the Commission’s own reckoning, the existing legislative framework ‘is not enough to resolve the deep-rooted social exclusion’. Many has referred to the failure to prevent the ill-treatment of Roma minorities in many member states. Kornezov has showed that dangers of unanimity for minority rights extends even beyond inaction as it can make things worse for minorities domestically through disincentivizing states from providing any special advantages for its local minorities. He remarked that ‘virtually any right reserved for a special group of citizens of a particular Member State who belong to a minority must be opened up to any EU citizen from other Member States’. Thus, others have lamented the lack of EU legislative response to fix these hurdles as well matters such as affirmative actions and other proactive measures needed to combat non-discrimination.

Another example is related to how the inability to pass further legislative measure contributes to hindering jurisprudential development. Considering the failure to pass the horizontal 2008 directive, as EU law currently stands, it would be ‘lawful’ to deny services for someone manifesting a religious symbol, be it a Sikh turban, a Jewish yarmulke, or a Muslim headscarf. The Court cannot simply extend the protection here to those minorities. As Advocate General Mazák noted, ‘Article 19 TFEU is simply an empowering provision’ and as such ‘it cannot have direct effect’. He cautioned that any judicial activism in this area ‘[n]ot only would … raise serious concerns in relation
to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general’. Circularity and the ‘constitutional catch 22’ is obvious here. Unanimity cannot be interpreted away, and the Council with its current 27 Member States cannot easily agree to expand legislations beyond the existing measures.

Overall, the negative impact of unanimity of Art 19 TFEU is well-documented in the Commission’s communications as well as scholarly work to warrant summary here. This dissatisfaction lies at the core of the proposed amendment of Art 19 to which we now turn.

Travaux préparatoires and Article 19 TFEU’s Future

Following the conference on the Future of Europe, which gathered input from European citizens and resulted in forty-nine proposals, the European Parliament tasked the Committee on Constitutional Affairs (AFCO) with finalising a report on the draft proposed amendments. In November 2023, the Parliament voted in favour of a wide range of amendments and called for a convention to revise the treaty.

The vote included approving a draft proposal to amend Art 19 TFEU through introducing majority voting instead of unanimity as well as expanding ‘non-discrimination protections to gender, social origin, language, political opinion and membership of a national minority’. While this a commendable step, the absence of reasoning from first principles in the accompanying Parliamentary reports raises an alarm from the travaux préparatoires of Art 19 TFEU (ex-Art 13 TEC). The drafting history of the article channelled Calhoun (unanimity as a concomitant of indivisible sovereignty) but not Madison and his use of the European sources citing the nemo judex rule.

Archives show that the original draft of Article 19 (ex 13 TEC) in the Amsterdam Treaty contained qualified majority voting but pressure from a few Member States led by the UK managed to weaken the Article by requiring unanimity for its use. The UK Parliament’s archives demonstrates that the British view, which concurring member states hid behind, saw much like Calhoun, that the ‘the defence of sovereignty is bound up with the concept of veto’.

While certain parallels can be drawn between Calhoun’s argument from sovereignty and the position of the UK-led faction, it is essential to underscore an important distinction between the position of Member States endorsing majority voting and that of Madison. Whilst Madison made a clear recourse to first constitutional principles, representatives of European states supporting majority voting relied only on pragmatic
arguments which were described as lacking a clear ‘direction’. Commentators noted that the Irish Presidency ‘failed to push the negotiations along’ and to articulate compelling criteria to determine which matters should be subject to qualified majority voting.

What is surprising is that Madison directly engaged with sources of European constitutional theory using the *nemo judex* rule. The very same principle has been overlooked in the allocation of decision-making procedure within the Article negotiation. This oversight is striking considering that the principle was leitmotiv many foundational text of European Constitutional theory (e.g. in Locke and Hobbes). More recently the maxim has been invoked before the CJEU and lays the foundation of the right to an impartial tribunal enshrined in Article 47 of the Charter. The absence of foundational principles allowed the unanimity side to prevail on pragmatic grounds, without fostering the constitutionally enriching debate witnessed in the US.

The *nemo judex* argument and its history shows unanimity’s particularly disproportionate cost for racial, religious and ethnic minorities. Opting for unanimity for non-discrimination legislation speaks volumes about the priority of this domain. This demonstrates either complete discard for foundational constitutional theory or intentional discard of minorities. Whilst Article 2 TFEU upgrades minority rights to an EU value, the unanimity choice relegates its protection to the lowest level.

Advocates of reform should not be discouraged by their opponents wielding the sovereignty argument to defend unanimity. This argument would have been convincing had Article 19 not been directly preceded by Articles 18 (discrimination on grounds of nationality) which requires majority voting, as does 157 TFEU (equal opportunities of men and women). Moreover, recourse to majority does not threaten states and there are safeguards to states which I detail here. Even in sovereignty-guarding states like the UK, since the *Factortame II* judgment, courts have reconciled EU powers with sovereignty on the premise that Member States have voluntarily transferred some powers to the EU and sovereignty is preserved through retaining the ultimate power to exit. Additionally, as Triantafyllou noted, despite the EU’s claim to being a ‘new legal order’ it is lagging behind in many international organisations, which now use majority voting rather than unanimity to amend their own charter.

To be clear, while the *nemo judex* rule is crucial for minority rights, it does not necessitate the removal of unanimity in areas such as the Common Foreign and Security policy (CFSP). Such area, for instance, does not necessarily involve a direct conflict between racial majorities and minorities where the *nemo judex in causa sua* rule applies. Therefore, addressing which voting procedure is suitable for this area may
require balancing various competing factors, extending beyond the scope of the current blog and as explained elsewhere.

To conclude, the blog uses insights from comparative constitutional history to show how unanimity can function as a tool to perpetuate the unjust status quo to the detriment of minority rights. This analysis aims to support the European Parliament’s proposal of moving Article 19 to majority voting akin to articles 18 and 157 TFEU. This would allow the EU to strengthen its much-needed role in this area and to avoid the pitfalls that befell Calhoun’s racially motivated model. This can also enable the EU to uphold the values outlined in Article 2 TFEU, which explicitly include minority rights, and to respect the centuries-long history of the *nemo judex in causa sua* principle in Western constitutional theory. Overall, understanding the interlinkages between the constitutional principle of *nemo judex* and the unanimity versus majority debate is of timely relevance to larger debates within the EU.

Admittedly, treaty amendment is complex and difficult to secure, but history may counsel against despair. The introduction of the EU’s competence to include non-discrimination beyond gender in the first place was only made possible after relentless activism, contributions from the Kahn Commission Report, and the political efforts of the European Parliament. Now, revising the treaty seems to be ‘gradually gaining ground’ — possibly in anticipation of the EU’s further enlargement. If the Parliament’s call for a convention is materialised, heeding lessons from comparative history and reasoning from first principles of western constitutionalism can provide intellectual ammunition to the reform endeavours against Calhoun-like thinking.