



Consensual Decision-Making Without Voting
The Constitutive Mechanism, (Informal)
Institutionalisation and Democratic Quality of the
Collective Decision Rule of ‘Tacit Consent’

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Abstract

Joint group decisions are very often achieved via a decision rule that is usually neglected in theory, though familiar to all of us from social settings and committee experiences: decision-making by 'tacit consent', i.e. by the absence of any open opposition. Widely known examples of its application in 'High Politics' are the Council of the European Union, the European Council or the World Trade Organisation, where decisions are made 'consensually', while voting is avoided.

Building on theories of decision-making, deliberation, conversation and institutionalism and with reference to empirical cases from various different settings in international and domestic politics, the paper depicts the constitutive mechanism of this decision rule and spells out the mode's institutional, though usually informal nature as well as its enforcement via social norms. On these grounds the democratic quality of the decision mode is discussed. It is argued that consensual decisions taken by tacit consent differ substantially from unanimous votes and that, contrary to conventional wisdom, the veto option in these procedures is in fact in many ways constricted and very often de facto deactivated. It is shown that in normative terms, this decision rule is by no means superior to voting mechanisms, but suffers from power asymmetries and opacity, first and foremost.

Keywords

Consensus - Decision Rule - Informal Institutions - Interpretive Decision Analysis - Tacit Consent

Introduction

Joint group decisions are very often generated by use of a – usually unwritten – decision rule that differs substantially from the unanimity rule of full, active group consent: With all kinds of empirical variations, political organisations as different as intergovernmental organs of the European Union and the United Nations (Buzan 1981; Lewis 2010; Lockwood Payton 2012; Novak 2013), expert advisory committees (Brown 2008; Krick 2013; Urfalino 2014) or ‘assambleas’ of the global justice movement (della Porta 2009; Graeber 2013; Haug 2012; Nail 2013) *avoid voting* and instead *take collective decisions by tacit consent and the absence of open opposition*. The use of this ‘tacit consent-procedure’ has also been described for the Italian Constitutional Court (cf. Pasquino 2007), the EU Commission (Thiele 2008: 286) and the British Cabinet (Steiner 2001), amongst other cases. Such tacit consent procedures are also the usual way of decision-making for *ex ante* coordination on the working levels of political organisations,¹ within informal settings such as fireside chats or dinner meetings and within communes and clans (El Hakim 1978; Wiredu 1998; Yngvesson 1978). It is also a well-established practice for deciding certain – e.g. procedural – matters within political arenas that usually use voting mechanisms (Schmidt/Werle 1993; Urfalino 2014: 327f). In fact, to avoid an infinite regress of voting, all decision entities rely on informal collective mechanisms to establish their rules of procedure (cf. Urfalino 2014: 328). Collective decision-making without voting can therefore be found in even the most formal majoritarian voting arenas, such as parliaments.²

Yet: how exactly does this way of decision-making work? For instance, how do joint decisions materialise if there is no voting? How is the mode enforced as a rule, if it is mainly applied informally? And how do the procedure and its outcomes score in normative terms, regarding equal participation, accountability and bindingness, for example?

¹ Examples of such institutions on the working level are COREPER and the committees and working groups of the Council of the EU (cf. e.g. Ismayr 2012; Nugent 2003). See also interview conducted by the author in January 2012 with a former state secretary in Berlin’s Senate Department for Education, Youth and Science on decision-making in the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic).

² Even these traditional majoritarian voting arenas rely on more or less institutionalised groups, such as rounds of parliamentary party secretaries and parliamentary steering committees (like the German Bundestag’s Council of Elders), for aggregating consensual agreements without voting by tacit consent (Ismayr 2012: 155ff.; Petersen 2000). Decision-making without voting – ‘voting by assent’ – is also reported to be used as a time-saving device when there is only one proposal in the parliaments of Denmark, Norway, Spain, Sweden and the UK (Saalfeld 1995: 532).

Despite its prevalence – not only in informal, social collective settings, such as families, but also in a large variety of political decision entities – as a rule of decision-making this procedure is usually neglected, overlooked or underestimated. It is virtually absent within decision theory that leans strongly towards formalist approaches. Yet, the rule of tacit consent tends to attract researchers' attention when empirical contexts are studied that apply this rule of decision-making first and foremost. These case studies are however scarcely interconnected, which is underlined by the fact that they use a multitude of terms for the mode itself, as will be shown below. So far, there are few attempts at going beyond the single case or single context with its specific characteristics. Exceptions are the contributions by James Coleman (1990) and Philippe Urfalino (2014): Within his large volume on Social Choice that mainly concentrates on formal decision making, Coleman acknowledges the existence of 'decision-making by consensus' as a typical 'process of decision-making' for small groups on a handful of pages. Building mainly on El Hakim's (1978) analysis of Sudanese village communities, Coleman spells out some of the main characteristics, albeit very briefly, but as a good and concise starting point that is embedded in formal decision theories and therefore bridges the gap between interpretive depictions of informal settings and formalised decision-making procedures. Philippe Urfalino has recently presented a theoretical account of the rule of tacit consent, which he calls 'decision by non-opposition' (2014). Urfalino spells out the prevalence of the mode by assembling case studies from all kinds of disciplinary backgrounds and by summarising the most insightful thick descriptions of arenas that decide jointly without voting (e.g. Yngvesson 1978; El Hakim 1978; Steiner/Dorff 1980). He provides explanations for the rarity of stalemate and calls attention to the legitimacy of decisions made under this rule. He also generally contrasts the logic of voting and not voting in terms of collective agreement.

Yet, we still lack a precise and succinct depiction of the core constitutive mechanism of this kind of decision-making, which is key to identifying its application in empirical contexts, to understanding the *modus operandi* of the mode – and to differentiating it from similar phenomena, such as voting. In addition, it is important to show how this mechanism becomes a rule, i.e. how it is institutionalised albeit its usually informal nature. After all, when the tacit consent logic shapes whole decision-making entities as a rule, this influences agents' expectations and the quality of the outcomes decisively. Finally, a thorough analysis of the democratic quality of this mode of decision-making is needed, not least since the mode is considered a superior, inclusive and participatory decision-making procedure by some (cf. Nail 2013), while its tendency to reinforce power imbalances and its opacity are stressed by others (cf. Coleman 1990). The paper answers to these deficiencies, as will be shown in the following.

Table 1: Empirical applications of the rule of tacit consent

Types of political organisations (and tentative explanations)	Cases (and evidence)
International Organisations Intergovernmental co-ordination: Protection of national sovereignty under conditions of pronounced power imbalances	European Council, Council of the EU, WTO, IMF, World Bank, subcommittees of the UN etc. (Buzan 1981, Lockwood Payton 2010, Novak 2013, Lewis 2010)
Expert advisory committees Social norms of convincing others by reasoning and deliberation	French Drug Approval committee, German Commission on the Reform of the Labour market, German Technology Transfer Union etc. (Krick 2013, Urfalino 2012)
Committees of the global justice movement and the civic rights movements Shared identity, pronounced justice and equality standards	Zapatista, Occupy, some Attac networks etc. (Haug 2012, Nail 2013, Polletta 2002)
'Colleges' (collective organs following the collegiality principle, i.e. joint responsibility for decisions taken) Necessity to speak with one voice externally	British Cabinet, EU Commission, Italian Constitutional Court etc. (Pasquino 2007, Steiner 2001, Thiele 2008)
Working level of political organisations Preliminary and procedural issues	EU: COREPER and the subcommittees and working groups of the Council of the EU (Lewis 2010) Germany: Conferences of the heads of departments of the ministers coordinating the standing conferences of education and of cultural affairs of the Länder in the Federal Republic (<i>Amtscheftkonferenz</i>), 'Fireside-chats' of German Councils of Ministers ³ Rounds of parliamentary party secretaries or the parliamentary steering group, the Council of Elders (Ismayr 2012, Petersen 2000)
Social settings Close social relations, trust and reciprocity, recognition of power imbalances	Families, communes, clans etc. (El Hakim 1978, Wiredu 1998, Yngvesson 1978)
Types of issues (within elsewise voting arenas)	Evidence
Technical, procedural, self-referential, urgent ⁴	CME (2008), Dorff/Steiner (1981), Saalfeld (1995), Schmidt/Werle (1993), Steiner/Dorff (1980), Thiele (2008), Urfalino (2014) ⁵

³ See also interviews conducted by the author in January 2012 with a former state secretary in Berlin's Senate Department for Education, Youth and Science on decision-making in the German Intergovernmental Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic as well as with a head of department in one of the Länder Ministries of the Environment, responsible for preparing and coordinating the German Intergovernmental Standing Conference of the Ministers of the Environment.

⁴ A written form of the tacit consent procedure has been reported to be used particularly for *urgent* matters (but also to reduce the agenda in general), for instance in German Councils of Ministers (cf. interview conducted by the author in January 2012 with a head of department in one of the Länder Ministries of the Environment, responsible for preparing and coordinating the German Intergovernmental Standing Conference of the Ministers of the Environment). When using this written consent procedure, proposals are passed by way of circulation, without face-to-face interaction, i.e. in written documents. A decision is understood to be reached when and if nobody shows open opposition, indicating the reasons

Before turning to a description of the study's approach, i.e. its organisation, theoretical framework, aims and terminology, an overview of empirical applications of the tacit consent rule is given to provide background knowledge and to contextualise the procedure that the text deals with in theoretical terms mainly. The overview in Table 1 draws up types of tacit consent use – within entire political arenas and for certain issues within arenas that otherwise vote – and points to tentative explanations for the respective cases on the basis of existing research.⁶

As Table 1 indicates, application of the rule of tacit consent seems to be an answer to quite different preconditions within the different types of arenas. From what is known from case studies, we cannot identify one single condition that triggers the use of the rule of tacit consent; Rather, one has to apply a logic of equifinality, or 'conjunctural causation' (Berg-Schlosser et al. 2009: 8), whereby several causal paths may lead to the same outcome. What actually triggers the use of tacit consent seems to be rather complex and multi-dimensional and has more to do with an established culture of consensual deliberation than with institutional features of a decision-making body.

1. The study's approach

The paper aims at seizing what is often called 'consensus decision-making' in theoretical terms by depicting the core mechanism of this kind of decision-making (section 2) and by elaborating its 'rule-like', institutional nature (section 3). Both sections are rounded up by a discussion of the respective implications of these two defining features of the tacit consent rule for the decision process and the outcome. With reference to empirical cases, section 3.1 additionally differentiates between the formal, written use of the tacit consent rule and the informal, unwritten use, which the paper concentrates on. Section 4 builds on these analyses and evaluates the normative value of tacit

within three weeks (CME 2008: 4). The regulation clearly qualifies as the rule of tacit consent: decisions are made by the absence of open opposition and no clear preference orders are produced. Cf. also the usual decision-making rule for the EU Commission: 'Most Commission decisions, however, are not taken at its weekly meetings, but are adopted by 'written procedure' – a proposal or draft document is circulated to all Commissioners, who can make comments within a certain time frame' (European Commission 2015: 1).

⁵ Steiner and Dorff (1980, 1981) mention the use of the rule within their cases (political parties) for issues concerning the committee itself; Saalfeld (1995) mentions it as time-saving device in several European parliaments; and Schmidt/Werle (1993), Thiele (2008) and Urfalino (2014) describe it for technical/procedural issues.

⁶ This is not to say, of course, that every International Organisation or every expert committee uses the tacit consent procedure, nor that the explanatory factors in any way determine this decision procedure.

consent decision-making from a perspective of democratic theory, that considers input- as well as output-related criteria of democratic legitimacy.

Two analytical frameworks are drawn upon to describe the informal social decision practice in focus here: The three-step P-A-C-scheme, which delineates a typical sequence of expressive social acts of producing group commitment and which has been applied and advanced by Nullmeier and Pritzlaff (2009), is used in section 2 to exemplify how collective bindingness is produced under the tacit consent rule without the use of formal techniques of preference aggregation. It thus allows to theorise non-formal social practices of producing group bindingness and sheds light on the dividing line between voting and not voting that is considered essential to the definition of the tacit consent procedure. The second section of the study is expected to add to the knowledge on decision rules and mechanisms, first of all. Although there are several detailed descriptions of variations of this mode of decision-making in real-life cases (cf. Lockwood Payton 2012; Steiner/Dorff 1980; Yngvesson 1978), we lack a clear description of its core mechanism. Yet, it is important not only to describe the typical characteristics of consensual decision-making in an additive fashion or to describe varieties of empirical phenomena, but to grasp the constitutive core, the main defining features of this mechanism. First, this allows a clear differentiation from other, neighbouring empirical phenomena, such as unanimous voting or deliberation. Second, it facilitates the differentiation between the underlying rule or technique of voice aggregation from typical implications that follow from it and thus helps to clarify how collective bindingness can be produced without voting.

Section 3 draws on a theoretical framework that has been developed by Helmke/Levitzky (2004) and refined by Azari/Smith (2012) and that takes a perspective of comparative institutional analysis on unwritten rules. The framework helps to identify informal, unwritten rules, to describe their enforcement mechanisms and behavioural patterns, and to clarify their interaction with formal rules. The two studies also provide the means for explaining the emergence and change of informal institutions, which is however not the focus of this study. The third section of the study aims at contributing to the knowledge about informal rules of decision-making, in particular their violation and enforcement as well as their relationship to formal rules. It explains under which circumstances tacit consent shapes entire decision-making entities and what follows from such regular, institutionalised social practice for the process itself and its decisions. This is a necessary and overdue endeavour, since the rule-like nature of many tacit consent decisions is usually not acknowledged in research, although such decision-making is similarly prevalent as voting. The reason for overlooking the institutional quality of tacit consent decisions lies in the nature of the rule itself – it is difficult to observe for two reasons that distinguish it from other phenomena:

(a) It is usually used informally, and then enforced as a social norm; since it isn't codified, there is no written document from which the application of the rule can be deduced unambiguously; (b) It is precisely the absence of an observable act – the avoidance of any ordered and active expression of group preferences – that constitutes its aggregation mechanism. Therefore, its logic is not grasped and implications of this aggregation technique for the nature and quality of decision-making are underexposed. However, if we fail to realise the (institutional) nature of this way of decision-making in certain contexts, we may take its outcomes for unanimous decisions and wonder why critical voices did not use their alleged veto right in the respective decision-making contexts. Or we will assume that all participants of a decision-making process fully support the apparent consensus decision and be surprised when the decision turns out to be less binding than we thought. Yet, decisions without voting are very often not defective outcomes of the unanimity rule, but outcomes of a *decision-making rule in its own right*, which follows certain patterns and differs in important respects from unanimous voting. If we understand that there are a lot of contexts in which the absence of voting is by no means arbitrary but stands for patterned behaviour – structured by social norms and shaping social situations (Azari/Smith 2012: 38; Helmke/Levitzky 2004: 726) – we improve our understanding of decision-making contexts in general and may be able to predict and even plan certain political decisions more accurately.

The normative analysis in section 4 draws on democratic theory, mainly from the field of deliberative democracy (cf. Karpowitz/Mansbridge 2005; Manin 1987; Mouffe 2000; Young 2000), but also on case studies of consensual decision-making and more general analyses of informal decision procedures insofar as they ponder normative questions (cf. Coleman 1990; Lewis 2010; Novak 2013; Steiner/Dorff 1980; t'Hart et al. 1997; Urfalino 2014). This normative discussion builds on the preceding analyses of the rule's modus operandi and takes an encompassing perspective of democratic theory that considers the norms of equality and inclusion, transparency and accountability, as well as efficiency and bindingness of political decision-making. It is, however, no more than a first outline of the democratic legitimacy issues surrounding the tacit consent procedure.

In addition to this, the study refers to a range of empirical case studies of tacit consent procedures (cf. e.g. Buzan 1980; Lockwood Payton 2012; Novak 2013; Vignes 1975) and on decision and negotiation analyses for illustrating and explaining characteristics of collective decision-making (cf. della Porta 2009; Hopmann 1996; Raiffa et al. 2007; Zartman 2008). The paper does not build on the broad body of *formal* decision and group theory, because these approaches primarily rely on rational choice perspectives and simplify decision-making to an extent that is not helpful for describing and theorising real-life informal

social practices and rules (cf. for instance Pettit 2007). Most importantly, there are very few decision analyses that acknowledge the specific practice in focus here at all and that do not equate decision rules with voting rules (an exception being Coleman 1990).

The study refers to the decision rule described here as the 'tacit consent rule' even though in theory as well as in political practice it is most often referred to as decision-making by *consensus* (cf. Buzan 1981; Coleman 1990; della Porta 2009; Haug 2012; Lewis 2010; Lockwood Payton 2012; Thiele 2008; Vignes 1975; Wiredu 1998; Yngvesson 1978). This is particularly the case when decision arenas are studied that rely on a codified 'consensus rule', i.e. when the use of a consensus rule is laid down as such in written documents (cf. section 3). However, several scholars have suggested alternative descriptions such as the 'rule of apparent consensus' or 'rule of non-opposition' (Urfalino 2014), 'decision by interpretation' (Steiner/Dorff 1980; Dorff/Steiner 1981), 'near-unanimity' (Scharpf 1997: 145; cf. also Beatty/O'Moore 2010) or 'informal unanimity' (El-Hakim 1978). Rejection of the term 'consensus' for describing the decision-making practice in focus here, is due to the fact that the term 'consensus' is deeply rooted in a normative tradition of democratic theory where it denotes a democratic ideal as opposed to conflict and pluralism. Within democratic theory, the value of consensus has been contested, of course, with deliberative theorists emphasising the supreme democratic legitimacy of consensual decisions (cf. Cohen 1989; Dryzek/Niemeyer 2006: 634; Manin 1987: 340f; cf. also Buchanan/Tullock 1962) and with pluralists criticising the anti-democratic, oppressive and conservative nature of an overemphasis of consensus (cf. Mouffe 2000; Young 2000). To complicate matters further, social choice theory, which is concerned with the formal modelling of decision-making processes and the explanation of collective decisions, usually equates consensus with *unanimity*, i.e. decisions that have been given 100 per cent of the votes, i.e. full active group consent (e.g. Buchanan/Tullock 1962; Raiffa et al. 2007; cf. also Coleman 1990: 861). Therefore, there is a certain danger of sending the wrong message when applying the term 'consensus' to the outcomes of tacit consent procedures per se. As will be shown in more detail, tacit consent decisions can neither be *equated* with the 'rational consensus' (Mouffe 2000: 9) of truth theories nor with unanimous voting results. Rather, a tacit consent decision *by its very nature* conceals the actual degree of consent and can cover de facto unilateral and majority decisions as well as very broad agreement (cf. section 2.3). For these reasons, and because the author considers it both memorable and descriptive, the term 'tacit consent' is preferred for the informal rule of decision-making in focus here. Yet, the term 'consensus' will also be applied where appropriate, i.e. where the likelihood of confusion is low and where it can help to clarify the argument. In these cases, *consensus* is defined as an outcome of a collective decision-making process that nobody opposes to openly. The absence of open

opposition is the minimal requirement. This corresponds to Vignes (1975: 124) who defines consensus as ‘not [...] unanimity but a very considerable convergence of opinions and the absence of any delegations in strong disagreement, however few in number’.

2. The constitutive mechanism of decision-making by tacit consent

2.1. The aggregation mechanism under the rule of tacit consent

The core of any decision rule is its technique of producing collective bindingness or group commitment – or its aggregation mechanism. The author considers the core characteristics of this decision-making technique to be vote avoidance and the absence of any open opposition, i.e. tacit consent. These two features are interdependent, i.e. one emanates from the other. In fact, they can even be considered as two sides of the same phenomenon and together they establish a social mechanism: Since no voting technique is used, decisions are not taken by active consent, but passively, by tacit consent or non-opposition (cf. also Coleman 1990: 857). Turned around: since the absence of any open opposition suffices, voting can be avoided.

This peculiar technique raises questions as to the procedure of decision-making and the boundaries of the concept, i.e. the exact understanding of its two defining features: (a) How do decisions arise if there is no voting technique? Do they appear out of thin air? How do we know a decision (and *which* decision) has been taken, if there is no cast of votes? (b) What counts as the absence of open opposition or tacit consent? Do we count bodily acts of disapproval? How tacit or silent does the outcome have to be? (c) What exactly is (not) voting? After all, voting techniques cannot be confined to formal balloting but surely have to comprise hand signs as well and possibly even more informal gestures like nodded approval. Where do we draw the line between voting and not voting?

2.2. Generating collective bindingness without voting

While the term ‘non-opposition’ certainly hits the mark (Urfalino 2014), the informal mechanism of voice aggregation in focus here can be described more precisely and in positive terms: In fact, it is of course usually not simply ‘nothing’ that constitutes a decision, but a typical sequence of acts that establishes a process of decision-making. These general decision-making practices have been described by help of the P-A-C-scheme (Nullmeier/Pritzlaff 2009) and can be identified in formal as well as informal methods of decision-making. For our focus, the scheme is particularly insightful, as it helps to illustrate the informal procedure of growing group

coherence or producing bindingness without voting. The P-A-C-Scheme differentiates between three types of expressive social acts – *proposal* act, *acceptance* act and *confirmation* act that usually constitute a sequence that leads to binding group decisions. A proposal-act is a request directed towards the whole of the group ‘to serve as the basis for a mutually binding decision. [...] By making a proposal, the proposing agent provides a content basis for a potential decision’ (ibid: 365). Acceptance acts ‘signal approval, refusal or other forms of response (even indifference) to a proposal’ (ibid.), i.e. reaction to the content of a proposal. Acceptance acts can be subdivided into individual and accumulative acts; for a group decision it is necessary to link individual acts of acceptance (via ‘practices of relatedness’), e.g. the technique of proposal re-narration, whereby participants ‘integrate the proposal into their own, differing background assumptions and evaluative standards, into their individual “web of meaning”’ (ibid.: 368) or of self-authorisation, whereby group members reassure each other as decision makers (ibid.: 367f). This is usually followed by a *confirmation act*, which confirms the bindingness of a result in an additional step and whose essence ‘lies in the proclamation of the result in the name of the committee as a whole’ (ibid.: 366). It is usually performed by the head of the group (ibid.: 368) who states: ‘I take it, we have reached consensus then’ or even ‘if there is no further objection, I consider the decision to be taken’. All these acts can be performed verbally, particularly the acceptance act however can also be performed as a bodily act in the form of nodding, laughter, frowning or tutting.

With the help of this scheme, the characteristics of achieving group commitment under tacit consent rule can be described and contrasted with voting techniques: Under tacit consent rule, a decision is understood to be taken when there is no obvious act of disapproval that neutralises the final confirmation act. The respective threshold of such disapproval is of course open to interpretation and depends on the specific situation. While some groups and committee chairs may not accept mumbling and frowning as below the threshold of open opposition, for others only well-argued contestation will count as dissent. Beside the absence of open disapproval, a tacit consent procedure is also characterised by the absence of a systematic expression of preferences (cf. also Urfalino 2012: 186). A tacit consent procedure will usually be prepared by sequences of acceptance acts and topped off by a confirmation act, but it differs from voting techniques in that there is no *systematic* cast and count of votes – or in the words of the P-A-C-scheme: no systematic inquiry of an act of acceptance (or disapproval) by every single participant. This applies a broad definition of voting that does not confine voting to balloting, but includes more informal procedures like hand signals or acclamation e.g. However, all voting procedures are always characterised by a clear expression of preferences of all participants, including abstentions; Acceptance acts are counted and assessed on the grounds of the

applicable decision rule and will constitute a clear preference order. By contrast, if votes or positions are not or cannot be registered explicitly and individually, there will be uncertainty or ambiguity regarding the positions of every single group member. Unless all group members position themselves clearly with regard to a proposal and the group is small enough for all informal acts of approval to be registered, such a way of decision-making should not be considered voting, but as more of less tacit consent.

2.3. Implications of the tacit consent practice for the decision outcome

From the tacit consent rule's method of voice aggregation, i.e. the absence of any systematic expression of opinions as well as the absence of any open disapproval, follows the *ambiguous preference order* of the group – or, as Steiner/Dorff (1980: 7) put it, the certainty or uncertainty of the degree of consent that can be derived from the outcome. The degree of aggregation or actual consent that is represented by a consensual decision cannot be determined simply by looking at the decision itself (*ibid.*; Kacprzyk/Fedrizzzi 1988). This distinguishes it clearly from decisions taken by unanimous voting. By no means can such a decision be generally equated with unanimity in terms of full active group consent. Rather, the joint decisions that are the outcomes of the rule of tacit consent cover *various degrees of actual agreement* (Hopmann 1996: 248), or various distances from the 'ideal case' of unanimity (Kacprzyk/Fedrizzzi 1988: 317), ranging from full informed consent of a group to decisions that are actually backed only by a majority over to extreme cases of unilateral domination (cf. Hopmann 1996: 248; Schmidt/Werle 1993: 19).⁷ Put more positively, in contrast to voting rules that rely on the principle of 'one man-one vote', the rule of tacit consent is *sensitive to the different intensities of preferences* (Lijphart 1981: 358).

The unclear preference order also leaves *scope for interpreting the exact content* (and the particular point of time) of a decision taken by tacit consent. This room for interpretation lies predominantly in the hands of the spokesperson or head of committee (or other kinds of 'notables' in less institutionalised settings (Urfalino 2014)), who is responsible for mediating and leading the debate and often for supervising the taking of minutes and drafting of preliminary results, which *strengthens his/her position to influence the outcome* remarkably (cf. Buzan

⁷ Since voting is avoided, there is no need for full, active unanimity; 'partial unanimity' or 'joint acceptance' to not argue further but 'let something stand as the position of the group' can suffice (Moore/O'Doherty 2014: 302). Some scholars mention (tacit!) supermajorities of 70 or 75 per cent as thresholds for stable consensus (cf. della Porta 2009; Schmidt/Werle 1993). The extreme of de facto unilateral decisions in the disguise of a consensus decision usually occur in very hierarchical groups. Cf. the situation of university seminars when the lecturer applies a soft mode of persuasion for establishing 'consensual' decisions and is not challenged due to his or her dominant position.

1981: 326, 332; Steiner/Dorff 1980: 5f; Nullmeier/Pritzlaff 2009: 368; Urfalino 2012: 198).⁸

3. The informal institutionalisation of decision-making by tacit consent

3.1. The formal and informal use of the tacit consent rule in political practice

Like all decision rules, the rule of tacit consent can be applied formally or informally, i.e. it can be a written rule of decision-making or an unwritten rule that builds primarily on social norms. Codified, written versions of the tacit consent rule are relatively widespread within intergovernmental decision-making, particularly international organisations, where majority voting is usually provided as a fall-back option (Lockwood Payton 2010: 2): In the *World Trade Organisation*, 'the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting where the decision is taken, formally objects to the proposed decision' (UN 1995: 5). In the *International Monetary Fund* and the *World Bank*, the chair of meetings is supposed to register the position of the group, to 'ascertain the sense of the meeting in lieu of a formal vote' (IMF 2009). Only if consensus cannot be reached, votes shall be taken. With the Treaty of Lisbon, the European Council has likewise codified its formerly informal use of tacit consent for some issues in Art. 15, par. 4 TEU (Council of the EU 2012). The tacit consent or 'consensus rule' is also regularly written down for certain social movement organisations (cf. e.g. Graeber 2013; Seeds for Change 2009) or within 'negotiated rule-making' of US American government agencies, where consensus usually refers to 'an outcome that is at least minimally acceptable to all the parties to the negotiation' (Fiorino 1997: 67). While the institutional nature of the mode is probably uncontested in these cases of codification, the paper argues that its informal version is very often similarly institutionalised and thus follows the same logic. The paper concentrates on showing the institutional aspects of the more prevalent, but at the same time less visible, cases of *regular informal use*, i.e. cases where an unwritten, non-codified tacit consent rule applies.⁹ The succeeding section tries to answer to

⁸ The prominent position of the head of a committee applies to negotiation procedures in general (cf. Krick 2013), yet the scope for interpretation under the tacit consent rule strengthens the position further.

⁹ A by now thoroughly investigated example of informal consensual decision-making without voting is the *Council of the European Union* (cf. Farrell/Héritier (2004), Lewis (2010) and Novak (2013) for further references). While formally, qualified majority voting has been expanded continuously to more and more areas and now applies to the majority of decisions within the Council, it continues to decide consensually, i.e. tacitly, without voting. Since the majority rule constitutes the fallback option, such consensual decisions cannot be equated

the following questions: (a) what constitutes an institution or a rule in general and an informal rule in particular and how do we detect it? (b) Under which conditions can we consider decision-making by tacit consent a rule?

3.2. The constitution and enforcement of (in)formal rules

In line with historical and sociological institutionalism, *institutions* are here understood synonymously to *rules* as ‘formal or informal procedures, routines, norms, and conventions’ of a collective (Azari/Smith 2012: 38; cf. also Crawford/Ostrom 1995: 583; Helmke/Levitzky 2004: 727), ranging from ‘the rules of a constitutional order or the standard operating procedure of bureaucracy to the conventions governing trade union behaviour or bank-firm-relations’ (Hall/Taylor 1996: 938).

Institutions produce predictable behaviour patterns and structure collective expectations (Azari/Smith 2012: 38) and ‘social interaction by constraining and enabling actors’ behaviour’ (Helmke/Levitzky 2004: 727). It is by sanctioning mechanisms, the ‘punishment of non-conformers’ (Azari/Smith 2012: 40) that behavioural regularities are institutionalised or the rule is constituted (Crawford/Ostrom 1995: 584; Helmke/Levitzky 2004). Of course, ‘not every unwritten (or, indeed, written) rule is enforced vigorously, but the consistent absence of sanctions applied to observed violators would suffice to demonstrate the nonexistence of a rule’ (Azari/Smith 2012: 40).

As indicated before, rules can be *formal*, i.e. they are governed by written or codified regulations and violations are punished through ‘officially sanctioned channels’ (ibid.: 39). Unwritten, *informal* institutions, by contrast, can be understood as ‘socially shared rules (...) that are created, communicated, and enforced outside of officially sanctioned channels’ (Helmke/Levitzky 2004: 727) and that are chiefly governed by social norms and expectations. ‘Informal sanctioning mechanisms are often subtle, hidden, and even illegal. They may range from hostile remarks, gossip, ostracism, and other displays of social disapproval to extrajudicial violence’ (ibid.: 733) and can be summarised as *practices of withdrawing recognition of the other*. We can speak of an *informal* rule or institution to be in place, if a certain behavioural regularity is *usually* shown in certain contexts and if we can be sure that this is neither arbitrary nor an uncoordinated reaction to a common stimulus (ibid.; 727) – like the (collective) act of leaving the office building in case of fire – but a social practice whereby people relate to each other. Since the informal rule is *usually* applied and is therefore to be expected while deviant behaviour is likely to be considered a violation and be sanctioned, it shapes social behaviour.

with full, inclusive consent, but often de facto resemble majority decisions in terms of their degree of actual consent, as Novak (2013) illustrates.

Rules can develop in settings that exist over time or are paradigmatic such as 'expert advisory groups' or 'steering groups', because participants will *expect* a certain way of decision-making out of experience. Yet, the rule of tacit consent does not always characterise a whole institutional entity; it can also apply to particular, albeit procedural and organisational issues of decision-making within arenas that normally use voting techniques. If it is the usual way of making *certain* decisions we can again assume that at least the more experienced participants expect this mode of decision-making in the respective situation, which helps to enforce it and constitutes it as a rule in these situations.

3.3. The institutional character of the informal rule of tacit consent

Now, under which conditions can we consider decision-making by tacit consent a rule? If a decision-making entity usually decides collectively without voting and by absence of open dissent, i.e. participants would *expect* such a mode of decision-making, we can speak of the rule of tacit consent or the 'consensus mode' to be in force. Surely, this does not mean that expectations are always met or that the rule is always respected. Yet, it means that violation usually has consequences. A violation of the informal consensus rule – or in other words 'inappropriate behaviour' – would be to press for a vote or to veto a decision while arguments are still put forward and delegations show commitment to compromise (Lewis 2010: 171f), without good reason or albeit growing coherence of the group.¹⁰ Such rule-breaking behaviour can be expected to be sanctioned by the group via withdrawal of recognition. This can happen internally and cognitively, but it can also take the form of open withdrawal of compliance or outright confrontation. In any case, enforcement via sanctions can affect status, project success, and other valued outcomes (Azari/Smith 2012: 40). Thus, rule-breaking will usually only be ventured by very inexperienced, very audacious or very powerful actors (Novak 2013: 1101; Schmidt/Werle 1993). In the cases in focus here, pressing for a vote during deliberation will probably be rejected by the group or else be sanctioned by confrontational orientations in the future – a serious sanction in permanent joint decision-making groups that rely on reciprocity and trust (Scharpf 1997: 144).¹¹

¹⁰ What constitutes appropriate behavior depends on the respective arena's consensual culture, of course; for instance, Lewis (2010: 170) lists the avoidance to call for a vote, to threaten with vetoes, to organize blocking minorities or to appeal to the Luxembourg Compromise as key elements of the Council of the EU's consensual culture.

¹¹ In International Relations, actors who do not play by the rules but engage in power politics will not be able to accomplish their goals in the long run but run the risk of undermining their state's reputation (Lewis 2010: 180). While it can be more rational to remain silent and not draw attention to one's own weakness, Novak (2013: 1100) notes for the Council of Europe that 'negative votes and abstentions can be useful tools for ministers to communicate with lobbies or their electorate or to escape responsibility for an unpopular decision'. Cf. the

If voting occurs within consensus arenas, i.e. arenas that are *usually* shaped by the rule of tacit consent, this is not generally to be equated with a rule violation, however; rather, the group may have adapted the rules of the game for a particular decision, meaning it has replaced the tacit consent rule by a voting rule. Indeed, the rule of tacit consent is often complemented by voting mechanisms, which constitute the fall-back option in cases of severe obstruction; if a group is unable to agree on a joint decision tacitly despite intensive debate, a (usually majoritarian) vote constitutes the last resort.¹² While tacit consent is the preferred option, this fall-back option constitutes the 'shadow of the vote' (Lewis 2010: 181), which works as 'a threat, an inducement to achieve a consensus' (Vignes 1975: 120).¹³ The relationship of the two rules can be described as accommodating, following Helmke/Levitzky's (2004: 728) typology.

In fact, while majority rule is the much more prevalent fall-back option, both majority and unanimity voting can indeed work as threats to achieve consensus: the first because a majority vote (instead of a tacit agreement) entails the possibility of being outvoted,¹⁴ the latter because it makes successful decision-making much more difficult and will be avoided in collectives that identify with the performance of their institution.¹⁵

intriguing case of the British Prime Minister David Cameron who in June 2014 threatened to call for a vote and veto the European Council's decision on the Commission Presidency (cf. Corbett 2014), which was formally subject to qualified majority voting, but, as we know, informally follows the tacit consent rule (cf. also section 3.4).

¹² Not always is voting a fallback option in tacit consent arenas; cf. for instance, the Ashanti in Ghana, who, according to Wiredu (1998: 3), will never use voting mechanisms and whose language does not provide an expression for this act.

¹³ The fall-back option usually disciplines participants to play by the rules and show cooperative behaviour and contributes to stabilising the consensus rule. Sometimes, however, e.g. because time is up or because of ongoing and indissoluble conflicts, voting does occur in consensual arenas. This does not mean, however, that the arena as a whole is no longer shaped by the rule of tacit consent.

¹⁴ Therefore, calling for a vote in the Council of the European Union, where tacit consent is the informal rule that replaces qualified majority voting in most policy issues today, is considered highly inappropriate if more than one faction voices concerns (Lewis 2003) and thus very rarely happens. In addition to his 'logic of appropriateness', Novak (2013: 1100) points to a 'logic of consequences' according to which participants expect that their open opposition may cause criticism from their constituents, which triggers a 'strategy of blame avoidance' by silently consenting to adopted measures.

¹⁵ This would be the case in institutions that are guided by the 'collegiality principle', i.e. institutions that operate as a college, are characterised by collective responsibility and a common interest, like the EU Commission or the Cabinets of Germany and the UK (cf. Beatty/O'Moore 2010; Steiner 2001; Thiele 2008). Since their impact relies on unity, they strive to appear united externally. Identification with the group allows its members to comply with decisions that they personally reject (cf. Beatty/O'Moore 2010).

3.4. Implications of an institutionalised use of the tacit consent rule for the deliberation process

When entire political arenas (or specific issues) are characterised by the use of tacit consent, i.e. when the tacit consent procedure is the general rule of decision-making, further characteristics can be observed that concern behavioural patterns as well as institutional features:

Tacit consent procedures are likely to flourish and be used regularly in arenas with particular institutional attributes: Coleman has described the *small group* as a typical arena for consensual decision-making (1990: 381), because its participants typically engage in 'face-to-face interaction', that (in contrast to mediated communication) allows agents to 'mutually rely on multi-layered expressive acts through which they can evaluate the decision options at hand' (Nullmeier/Pritzlaff 2009: 363). In such settings, participants can develop 'dense relationships' (Coleman 1990: 857) that rely on trust and 'diffuse reciprocity' (Farrell/Héritier 2004: 10) and are committed towards joint decision-making (Scharpf 1997).¹⁶

In tacit consent arenas, certain *behavioural patterns* that follow from the institutionalised use of the rule, can also be observed: For example, for tacit consent arenas to arrive at decisions without voting, the group will have to *debate excessively* in order to develop jointly acceptable policy solutions, i.e. decisions that are tacitly approved by the group. Participants of consensus procedures will typically show *cooperative attitudes* and a collective *commitment towards consensus*, or in other words towards a joint group decision.¹⁷ For this matter, they will engage in *intensive communication* and largely *inclusive deliberation* (Coleman 1990: 381), and ensure that all *serious concerns* have been *allayed* (Urfalino 2014).¹⁸ By way of 'internal' and 'external' deliberation agents develop their initially incomplete and incoherent set of preferences (Manin 1987: 350-352), adapt their own individual position as well as the group's

¹⁶ Yet, networks with their loose relationships and usually non-existent formal decision rules, may also represent cases where tacit consent decisions are taken. One case in point may be the decision rules of the Wikipedia community. The written consent procedure, mentioned above, is another example for tacit consent decision without face-to-face interaction that might be comparable in certain respects to networks.

¹⁷ 'While actually reaching consensus is not a requirement of deliberative reason, participants in discussion must be *aiming* to reach agreement to enter the discussion at all' (Young 2000: 24). In fact, while consensus orientation is an important precondition of deliberation, compulsory consensus is fraught with authoritarian tendencies and an overemphasis of consensus threatens to undermine particularly weaker interests and marginalised groups (Mouffe 1999: 756; Young 2000: 125f).

¹⁸ Of course, this assumes that the group is committed to making joint decisions because it identifies with it or depends on its performance. A deeply divided decision-making unit will not be able to produce results under the rule of tacit consent and would have to be considered defunct.

positioning and a joint decision can assert itself. Possible objections become apparent during the process and can be dealt with in communication. The final confirmation act will usually only be performed when – after intensive discourse – no new and incontestable counter-arguments are put forward and group coherence has reached a stable level. The deliberative nature of the procedure is reflected by the term ‘communicative consensus’ (Lewis 2010: 168) for these kinds of decisions.

This deliberative quality de facto *undermines the veto right* that has often been attributed to decision-making by tacit consent: Urfalino (2012: 187) asserts that ‘in apparent consensus decision-making, each participant has veto power since she can contest the synthesis proposal and thereby prevent it from becoming the decision’. Similarly, Moore and O’Doherty (2014: 305) state that ‘any member of the group can effectively veto a consensus proposal simply by expressing disagreement’ (cf. also Thiele 2008: 296).

The author questions this popular assumption of a general veto option under tacit consent rule, since it is in fact limited in various ways:

First of all, we need to clarify what we mean by veto power, particularly in less formalised interaction contexts where such conduct would not be codified. In general a veto refers to a unilateral refusal of assent to a proposal that stops a decision, while the absoluteness of these stopping powers varies; In constitutional law, one differentiates minimally between suspensive vetos that postpone and absolute vetos that ultimately end decision-making. As we will see, this distinction is not very useful in this context, which is why a distinction between expressions of disagreement with a suspensive effect and effective vetos that end decision-making will be suggested.

Under tacit consent rule, and in other deliberation processes, an expression of disagreement will usually have what you could call a suspensive effect – it continues and extends the process of reason-giving and deliberation, sometimes putting off decision-making to the next meeting and thus postponing decision-making. It characterises efficient tacit consent arenas on principle, is usually not intended to end the process and therefore should not generally be called a veto. By contrast, expressions of disagreement that aim at stopping the process and do not show commitment to argue any further, would, by definition, stop a tacit consent decision from being taken if they are accepted as valid by the group and thus qualify as vetos. Yet, such modes of behaviour would in most cases breach internal social norms and therefore very rarely happen: since a systematic expression of preferences is not intended under tacit consent rule, and a consensus orientation prevails, participants of these procedures are expected to voice their vital interests and concerns *during the process* so that objections can be allayed. Trying to block a

decision that is already emerging by showing sudden disagreement at the end of a decision process, without putting forward further convincing arguments and showing commitment to find a solution, is likely to be met with contempt by the group. Such behaviour would be a strong, disruptive statement and therefore usually be avoided in tacit consent settings, which tend to be closely-knit face-to-face groups that rely on trust and reciprocity (Coleman 1990; Scharpf 1997; Farrell/Héritier 2004) and where social norms are therefore pretty powerful. Nullmeier and Pritzlaff (2009) point to social dynamics that make it more and more difficult to utter rejection when group coherence about a proposal grows. Once started, 'acceptance loops' (ibid.: 368) and 'spirals of silence' (Moore/O'Doherty 2014: 306) constitute 'self-reinforcing process[es] of collective belief-formation' (Kuran/Sunstein 1999: 683) that can be de facto impossible to breach.

You could argue, of course, that an option or a right is still existent even if it is made difficult to exercise or benefit from it. Yet, for one thing, the power to use this veto option will be rather unequally distributed under tacit consent rule, and we should therefore be careful to assume effective or absolute individual veto powers without further differentiation. When calling for a veto that stops the decision process breaches the social norms of the collective, not all actors will dare to use this right alike – it will probably be exercised more often and easily by the more powerful actors. While this is a normative argument that calls attention to the unequal distribution of this power, there is another, empirical, argument that shows that there usually is no effective veto power under tacit consent rule: As mentioned before, the tacit consent rule is typically accommodated by a majority voting rule as a fall-back option. If majority rule is the fall-back option, there is no absolute veto power: if you oppose a decision ultimately and insist on stopping it, the respective decision will not be taken by tacit consent. Yet, you will not stop the decision itself from emerging, because a majority decision will be taken on the issue in question without your approval. While such a move can hardly qualify as an effective veto, it can be politically rational as it reduces group commitment, amongst other things. Compare the interesting case of the British Prime Minister David Cameron who in June 2014 threatened to call for a vote *and* veto the European Council's decision on the Commission Presidency (cf. Corbett 2014), which was obviously a strategic move to communicate with his electorate at home (cf. Novak 2013: 1100).¹⁹ Calling alternately for a vote and threatening to veto the respective decision is of course contradictory, because a vote on the

¹⁹ With his pronounced and very open opposition David Cameron undermined the institution's decision rule and this was met with open contempt by his fellow leaders (and weakened his position in the collective) and with criticism by parts of the political forces at home. Yet, this move may well have contributed overall to his electoral victory in May 2015, and it seems he has overall managed to strengthen his negotiation position in the European Union.

presidency would have been and was formally subject to majority rule, which does not give room for vetoes. This led to an application of the formal voting rule (the fall-back option) of qualified majority voting and resulted in David Cameron and the far right Hungarian Prime Minister Viktor Orbán voting together against the candidate. It did not give Cameron veto powers, however, since the decision went through without his approval, which also supports the above made point of the fall-back option deactivating any absolute veto power.

In sum, while expressions of disagreement with a suspensive effect occur all the time under tacit consent rule and indeed characterise efficient deliberation processes, effective vetoes with the power to end the decision process will usually violate the social norms of collective belief formation. Besides, the power to use this option is de facto very unequally distributed. Most importantly, however, an attempt to stop a decision by ultimately opposing a tacit consent process, in many contexts leads to a switch to majority voting and does not stop the decision from being taken.

Table 2: Characteristics of the decision rule of tacit consent

The tacit consent method of voice aggregation = vote avoidance + absence of open opposition vis-à-vis a particular decision issue
Usually applied informally and within small, closely-knit groups
Implications of the method of voice aggregation: <ul style="list-style-type: none"> • Non-systematic expression of opinions • Ambiguous preference order of the group • Gradations of actual group agreement • Sensitivity to different intensities of preferences • Scope for interpreting the exact content of a collective decision • Powerful position of the head of the group
Implications of an institutionalised use of tacit consent decision-making: <ul style="list-style-type: none"> • Excessive debate, intensive communication and largely inclusive deliberation • Cooperative attitudes and a collective commitment towards consensus • Deactivated individual veto power

4. The democratic quality of decision-making by tacit consent

How is the rule of tacit consent to be interpreted from a normative angle of democratic legitimacy? After all, Nullmeier and Pritzlaff (2009: 369) ask at the end of their discussion of informal forms of collective decision-making in face-to-face groups whether non-formal committee decisions may be the democratic ideal. Similarly, Urfalino (2014: 321, 337ff) raises the question whether the tacit consent rule has the potential to allow more equal participation in debates, as indicated by deliberative democrats. The

normative discussion of the tacit consent rule takes an encompassing perspective of democratic legitimacy that comprises equality, transparency and accountability as 'input-related' criteria of democratic self-determination as well as efficiency, bindingness and problem-solving as 'output-related' criteria of system effectiveness (cf. Dahl 1994). The aggregation logics of majority and unanimity, as in Buchanan/Tullock (1962), are used for illustration.

Comparing the equality of participants under 'consensus rule' with unanimity voting where the rule of one-man-one-vote applies, Coleman states that 'the explicit allocation of rights given by the unanimity rule over the events in question makes more egalitarian, at least in principle, the power distribution among members of the decision-making body' (1990: 861). Thus, *imbalances of power* can take much more hold under tacit consent rule: Powerful agents, i.e. those with access to informational, constitutional or monetary resources (Zartman 2008: 42f), can influence the decision more than others (Coleman 1990: 381, 858). Due to the extended discussions of the tacit consent rule, the intensity of interest or strength of preference additionally determines an agent's weight (ibid.: 858). Structural inequalities between group members can be further reinforced by the deliberative culture of consensus arenas that usually relies on epistemic standards of rationality and privileges calm reasoning over other forms of communication (Young 2000: 37).

Paradoxically, the unclear distribution of preferences represented by consensus decisions can also *protect minorities*. The soft aggregation mode and the de facto dissenting opinions that can be covered by a consensus decision avoids inflicting an explicit loss on a minority (Urfalino 2014: 333). In other words: remaining silent saves the minority from losing face in competitive voting and facilitates blame avoidance (Novak 2013: 1100), because the externally apparent distribution of preferences is unanimity.²⁰ Urfalino (2014: 339) very rightly points out that the consensus rule obscures and accommodates the fact of inequality, which is problematic from a Western-democratic point of view, but that it works well in arenas and in cultures that emphasise cohesion and solidarity (cf. also Wiredu 1998). It can also be suitable in contexts where the inequality of consensus processes are deemed legitimate because of the different statuses of participants, like in expert committees or very hierarchical groups such as school classes.

In contrast to voting rules, the tacit consent rule suffers from opacity. While 'a formal vote, usually taken by hand, creates the highest possible degree of

²⁰ The majority rule, by contrast, tends to highlight divergences and builds on competition. Urfalino (2014) points out, that for these reasons the majority rule is not compatible with all cultures. It is suitable for pluralist, individualist societies that build on efficiency principles and believe in competition as one of their chief coordination mechanisms.

transparency of opinions in a context of a face-to-face meeting, simply by its clarity of signs' (Nullmeier/Pritzlaff 2009: 366), tacit consent decisions are precisely characterised by the ambiguity of the group's preferences. If the decision-making unit is in some way representative, this feature undermines the accountability relationship of decision-makers towards the represented severely.

According to Steiner and Dorff (1980), decision-making by the absence of open opposition also tends to produce less commitment by the individual group member than voting procedures. They show that these decisions are likely to be discussed in informal settings afterwards and are usually less stable and binding (ibid.: 8). Especially in contrast to unanimous voting, the larger room for interpretation about the content of a decision taken under tacit consent rule will probably *reduce the bindingness of a decision* slightly. Also, individual participants can hide behind group decisions that were made without voting and feel less committed individually, since they have not actively and clearly expressed their support.²¹ Yet, one has to acknowledge that consensus decisions are often backed by alternative sources of authority and legitimacy that lend them validity. For instance, tacit consent processes are usually characterised by processes of deliberation and negotiation, i.e. ongoing processes of reason-giving and arguing for an outcome, whereby agents create a normative foundation for the authoritative character of a decision (Nullmeier/Pritzlaff 2009: 358, 368). Besides, as mentioned above, when tacit consent decision-making is applied as an informal rule, it is subject to the bindingness of social norms, which can be just as powerfully enforced as formal rules (Lewis 2010: 180; Thiele 2008).

The rule of tacit consent is characterised by relatively high overall efficiency: In comparison to the unanimity rule, the tacit consent rule generates relatively low costs of 'decision-making' (Buchanan/Tullock 1962), because individuals usually do not have effective veto power.²² In comparison to voting techniques that require everyone to state their position clearly, the lower level of individual commitment allows sceptics to 'let a decision stand as the position of the group' (Moore/O'Doherty 2014: 302), which lowers decision-making costs. At the same time, when compared to majority voting, the rule comes with relatively low 'external costs' – i.e. 'costs that the individual expects to endure as a result of the actions of others over which he has no direct control'

²¹ By contrast, in voting systems participants have to make a clear commitment; each one of them can be bound to his expression of preference later on, which can stabilise a collective decision.

²² Decision-making costs are the 'costs which the individual expects to incur as a result of his own participation in an organised activity' (Buchanan/Tullock 1962: 45), in the form of time or other resources. 'These costs will increase as the size of the group required to agree increases' (68).

(Buchanan/Tullock 1962: 45) – because of the general orientation towards consensus and the deliberative nature of the process. These characteristics add to the inclusiveness of tacit consent procedures – all voices have the chance of being heard during the process and, in case of very severe reservation, may utter at least suspensive objection. Thus, the rule of tacit consent strikes a balance between the two types of costs of collective decision-making: the group concedes a certain degree of deviance (external costs) for the sake of collective problem-solving within reasonable time (decision-making costs).

There is a chance that orientation towards consensus and the deliberative quality that characterise the rule of tacit consent promotes *better, more adequate policy solutions* to problems (in comparison to the competitive majoritarian mode), because problems are likely to be looked at from different angles in deliberative processes (Young 2000: 6, 29, 76) and because of the ‘double dimension’ of deliberation that promotes processes of *internal* deliberation or learning alongside *external* collective exchange of reasons and perspectives (Manin 1987: 350-352).²³ Yet, the powerful silencing effect of growing group coherence can also undermine the quality of a consensus decision (Nullmeier/Pritzlaff 2009: 396; t’Hart et al 1997: 10-11) and run counter to an exhaustive pondering of reasons and solutions. During deliberative interaction, particularly when the social dynamic of acceptance loops has started, voicing counter-arguments quickly becomes virtually impossible. This can be traced back to a general human rejection of conflict or a prevalent ‘desire for harmony’ (Karpowitz/Mansbridge 2005: 355; cf. also t’Hart et al. 1997: 11), and also a widespread tendency to side with the winning team or to join the majority when one is defeated (Novak 2013: 1100). These social mechanisms and the transaction costs of deliberated decision-making can lead to ignorance of crucial information concerning risks of certain policies (t’Hart et al. 1997).

Summary

The study argued that the absence of open dissent and the avoidance of voting constitute the core mechanism of a decision-making rule in its own right: the rule of tacit consent. It was shown that this aggregation mechanism distinguishes tacit consent decisions decisively from unanimous decisions due to the unclear preference order that follows from it. In fact, the ‘consensual’ outcome of a tacit consent procedure can cover various degrees of actual group consent. Collective belief formation and mutual bindingness in these settings is produced via accumulative acceptance acts and rounded up by a

²³ This is not specific to informal procedures that decide without voting but to consensus-oriented procedures in general, including (unanimous) voting procedures.

confirmation act usually performed by the head of the group who can interpret and shape the decision content disproportionately.

Empirical application of this mode of decision-making is mainly informal, i.e. not codified. Yet, if the mode of decision-making is the usual way of making decisions within a certain arena (or concerning *particular* questions within arenas that otherwise tend to vote), it is established as a social norm and enforced by social sanctions; it can thus be considered a rule or an institution of collective decision-making. Its institutionalised nature affects the process of decision-making because participants will expect this way of decision-making and usually play by the rules during the process. Only on rare occasions will a member of the decision-making entity call for a vote despite ongoing debate. This makes cooperative orientations much more likely and stimulates deliberation. In many cases, the informal rule of tacit consent replaces a formal voting rule that often casts a shadow over the decision-making process and thus helps to enforce the informal rule of tacit consent. The often presupposed veto right under tacit consent rule is in fact limited in so many ways, that it is very often de facto deactivated, generally unequally distributed and virtually non-existent when majority voting constitutes the fall-back option.

Recapitulating the normative implications that follow from the aggregation mechanism and the rule-like nature for the democratic quality of the procedure, the findings are mixed: While the tacit consent procedure protects the sovereignty of participants much better than the majority rule, it also has the potential to cover a distinctive amount of inequality. Since the ambiguity of the group's preferences is a striking feature of the tacit consent rule, it does not promote norms of transparency and accountability. Decisions taken by tacit consent may be slightly less binding for the group than unanimous votes whereby every participant commits her/himself explicitly to the option in question; yet, enforcement by social norms can be very powerful in stable, closely-knit face-to-face groups that typically apply the tacit consent rule. In terms of its costs of decision-making, the tacit consent procedures strikes a balance between the opposing logics of majority and unanimity rule: its decision-making costs exceed those of the majority rule while its external costs tend to be lower. Finally, while intensive debate may bring about more adequate decisions, built on a multitude of experiences and knowledge, these processes also tend to suffer from the silencing effect of growing group coherence, for instance.

References

- Azari, Julia R., and Smith, Jennifer K. 2012. 'Unwritten Rules: Informal Institutions in Established Democracies.' *Perspectives on Politics* 10(1): 37-55.
- Beatty, John and O'Moore, Alfred. 2010. 'Should we Aim for Consensus?' *Episteme* 7(3): 198-214.
- Berg-Schlosser, Dirk, de Meur, Gisèle, Rihoux, Benoit and Ragin, Charles. 2009. 'Qualitative Comparative Analysis as an Approach'. In: Benoit Rihoux and Charles Ragin (eds) *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques*. London: Sage.
- Brown, Mark. 2008. 'Fairly Balanced: The Politics of Representation on Government Advisory Committees.' *Political Research Quarterly* 61(4): 547-560.
- Buchanan, James M. and Tullock, Gordon. 1962. *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan Press.
- Buzan, Barry. 1981. 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea.' *American Journal of International Law* 75(2): 324-348.
- Council of Ministers of the Environment (CME). 2008. *Rules of Procedure*. Available at: <https://www.umweltministerkonferenz.de/documents/Geschaeftsordnung_der_UMK_in_der_Fassung_vom_25_Januar_2008.pdf>. Accessed 4 August 2015.
- Cohen, Joshua. 1989. 'Deliberation and Democratic Legitimacy.' In: Alan Hamlin and Philip Pettit (eds) *The Good Polity*. Oxford: Blackwell.
- Coleman, James S. 1990. *Foundations of Social Theory*. Cambridge, MA: Belknap Press.
- Corbett, Richard. 2014. 'MEP Richard Corbett: "Cameron doesn't have a veto" on next EU Commission chief.' Interview at EurActiv.com. Available at: <<http://www.euractiv.com/sections/eu-elections-2014/richard-corbett-mep-cameron-doesnt-have-veto-next-eu-commission-chief>>. Accessed 4 August 2015.
- Council of the European Union. 2012. *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012, p. 47-390.

- Crawford, Sue and Ostrom, Elinor. 1995. 'A Grammar of Institutions.' *American Political Science Review* 89(3): 582-600.
- Dahl, Robert A. 1994. 'A Democratic Dilemma: System Effectiveness versus Citizen Participation.' *Political Science Quarterly* 109(1): 23-34.
- Della Porta, Donatella. 2009. 'Consensus in Movements.' In: Donatella della Porta (ed.) *Democracy in Social Movements*. Houndsmills: Palgrave Macmillan.
- Dorff, Robert and Steiner, Jürg. 1981. 'Political Decision-Making in Face-to-Face Groups: Theory, Methods, and an Empirical Application in Switzerland.' *The American Political Science Review* 75(2): 368-380.
- Dryzek, John S. and Simon Niemeyer. 2006. 'Reconciling Pluralism and Consensus as Political Ideals.' *American Journal of Political Science* 50(3): 634-49.
- El-Hakim, Sherif. 1978. 'The Structure and Dynamics of Consensus Decision-Making.' *Man: New Series* 13(1): 55-71.
- European Commission. 2015. 'European Commission at Work: Weekly Meetings of the Commissioners.' Available at: http://ec.europa.eu/atwork/decision-making/weekly-meetings/index_en.htm. Accessed 4 August 2015.
- Fiorino, Daniel F. 1997. 'Regulatory Policy and the Consensus Trap: An Agency Perspective.' *Analyse & Kritik* 19: 64-76.
- Graeber, David. 2013. 'Some Remarks on Consensus.' OccupyWallStreet.net. Available at: <http://occupywallstreet.net/story/some-remarks-consensus>. Accessed 4 August 2015.
- Hall Peter A. and Taylor, Rosemary C. 1996. 'Political Science and the Three New Institutionalisms.' *Political Studies* 44(5): 936-957.
- Haug, Christoph. 2012. 'Assembly Publics and the Problem of Hegemony in Consensus Decision-Making.' OpenDemocracy.net, 1 October 2012. Available at: <https://www.opendemocracy.net/christoph-haug/assembly-publics-and-problem-of-hegemony-in-consensus-decision-making>. Accessed 4 August 2015.
- Farrell, Henry and Héritier, Adrienne. 2004. 'Inter-Organizational Negotiation and Intra-Organizational Power in Shared Decision-Making: Early Agreements under Codecision and their Impact on the European Parliament and the Council of Ministers.' *IHS Political Science Series* 95. Vienna: Institute for Advanced Studies.

- Helmke, Gretchen and Levitzki, Steven. 2004. 'Informal Institutions and Comparative Politics: A Research Agenda.' *Perspectives on Politics* 2(4): 725-740.
- Hopmann, Terrence P. 1996. *The Negotiation Process and the Resolution of International Conflicts*. Columbia: University of South Carolina Press.
- International Monetary Fund (2009) I.11; By-laws, Rules and Regulations of the International Monetary Fund.
- Ismayr, Wolfgang. 2012. *Der Deutsche Bundestag*. Wiesbaden: VS.
- Kacprzyk, Janusz and Fedrizzi, Mario. 1988. 'A "Soft" Measure of Consensus in the Setting of Partially (Fuzzy) Preferences.' *European Journal of Operational Research* 34(3): 316-325.
- Karpowitz, Christopher F. and Mansbridge, Jane. 2005. 'Disagreement and Consensus: The Need for Dynamic Updating in Public Deliberation.' *Journal of Public Deliberation* 1(1): 347-364.
- Krick, Eva. 2013. *Verhandlungen im Konsensverfahren. Varianten kollektiver Entscheidung in Expertengremien*. Wiesbaden: VS.
- Kuran, Timur and Sunstein, Cass. 1999. 'Availability Cascades and Risk Regulation.' *Stanford Law Review* 51: 683-768.
- Lijphart Arend. 1981. 'Consociational Theory: Problems and Prospects: A Reply.' *Comparative Politics* 13(3): 355-360.
- Lewis, Jeffrey. 2010. 'How Institutional Environments Facilitate Co-operative Negotiation Styles in EU Decision-Making.' *Journal of European Public Policy* 17(5): 648-664.
- Lewis, Jeffrey. 2003. 'The Council of the European Union.' In: Michelle Cini (ed.) *European Union Politics*, Oxford/New York: Oxford University Press.
- Lockwood Payton, Autumn. 2010. 'Consensus Procedures in International Organizations.' *EUI Working Paper MWP 2010/22*. Florence: European University Institute.
- Manin, Bernard. 1987. 'On Legitimacy and Political Deliberation.' *Political Theory* 15(3): 338-368.
- Moore, Alfred and O'Doherty, Kieran. 2014. 'Deliberative Voting: Clarifying Consent in a Consensus Procedure.' *Journal of Political Philosophy* 22(3): 302-319.

- Mouffe, Chantal. 1999. 'Deliberative Democracy or Agonistic Pluralism?' *Social Research* 66(3): 745-758.
- . 2000 'Deliberative Democracy or Agonistic Pluralism.' *IHS Political Science Series* 72. Vienna: Institute for Advanced Studies.
- Nail, Thomas. 2013. 'Zapatismo and the Global Origins of Occupy.' *Journal for Cultural and Religious Theory* 12(3): 21-38.
- Novak, Stéphanie. 2013. 'The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union.' *Journal of Common Market Studies* 51: 1091-1107.
- Nugent, Neill. 2003. *The Government and Politics of the European Union*. Durham: Duke University Press.
- Nullmeier, Frank and Pritzlaff, Tanja. 2009. 'The Implicit Normativity of Political Practices: Analyzing the Dynamics and Power Relations of Committee Decision-Making.' *Critical Policy Studies* 3(3-4): 357-374.
- Pasquino, Pasquale. 2007. 'Voter et délibérer.' *Revue Européenne des Sciences Sociales* 45: 35-45.
- Petersen, Sönke. 2000. *Manager des Parlaments: Parlamentarische Geschäftsführer im Deutschen Bundestag: Status, Funktion, Arbeitsweise*. Opladen: Leske und Budrich.
- Pettit, Philip. 2007. 'Rationality, Reasoning and Group Agency.' *Dialectica* 61(4): 495-519.
- Polletta, Francesca. 2002. *Freedom is an Endless Meeting: Democracy in American Social Movements*. Chicago, IL: University of Chicago Press
- Raiffa, Howard, Richardson, John and Metcalfe, David. 2007. *Negotiation Analysis: The Science and Art of Collaborative Decision Making*. Cambridge, MA: Belknap Press.
- Saalfeld, Thomas. 1995. 'On Dogs and Whips: Recorded Votes.' In: Herbert Döring (ed.) *Parliaments and Majority Rule in Western Europe*. Mannheim: Martin's Press.
- Scharpf, Fritz W. 1997. *Games Real Actors Play. Actor-Centred Institutionalism in Policy Research*. Boulder, CO: Westview.
- Schmidt, Susanne K. and Werle, Raymund. 1993. 'Technical Controversy in International Standardization.' *MPIfG Discussion Paper* 93/5. Cologne: Max Planck Institute for the Study of Societies.

- Seeds for Change. 2009. 'Consensus Decision-Making.' The Anarchist Library, 17 December 2007. Available at: <<http://theanarchistlibrary.org/library/seeds-for-change-consensus-decision-making>>. Accessed 4 August 2015.
- Steiner, Jürg. 2001. Decision-making. In: Paul B. Clarke and Joe Foweraker (eds) *Encyclopedia of Democratic Thought*. London: Routledge.
- Steiner, Jürg and Dorff, Robert. 1980. 'Decision by Interpretation: A New Concept for an Often Overlooked Decision Mode.' *British Journal of Political Science* 10(1): 1-13.
- T'Hart, Paul, Stern, Eric K. and Sundelius, Bengt. 1997. 'Foreign Policy-Making at the Top: Political Group Dynamics.' In: Paul t'Hart, Eric K. Stern and Bengt Sundelius (eds) *Beyond Group Think: Political Group Dynamics and Foreign Policy-Making*. Ann Arbor, MI: University of Michigan Press.
- Thiele, Carmen. 2008. *Regeln und Verfahren der Entscheidungsfindung innerhalb von Staaten und Staatenverbindungen: Staats- und kommunalrechtliche sowie europa- und völkerrechtliche Untersuchungen*. Berlin: Springer.
- United Nations. 1995. Marrakesh Agreement establishing the World Trade Organization. Available at: <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf>. Accessed 4 August 2015.
- Urfalino, Philippe. 2014. 'The Rule on Non-Opposition: Opening Up Decision-Making by Consensus.' *Journal of Political Philosophy* 22(3): 320-341.
- . 2012. 'Reasons and Preferences in Medicine Evaluation Committees.' In: Hélène Landemore and Jon Elster (eds) *Collective Wisdom: Principles and Mechanisms*. Cambridge, MA: Cambridge University Press.
- Vignes, Daniel. 1975. 'Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?' *American Journal of International Law* 69(1): 119-129.
- Wiredu, Kwasi. 1998. 'Demokratie und Konsensus in traditioneller afrikanischer Politik.' *Polylog* 2: 1-13.
- Yngvesson, Barbara. 1978. 'Leadership and Consensus: Decision-Making in an Egalitarian Community.' *Ethnos* 43(1-2): 73-90.
- Young, Iris M. (2000) *Inclusion and Democracy*. Oxford: Oxford University Press.
- Zartman, William I. 2008. *Negotiation and Conflict Management: Essays on Theory and Practice*. London: Routledge.