

The European Union as a Republic

Stefan Collignon

Abstract

The Euro-crisis has shown that the project of European integration is in need of reconstruction and renewed justification. This paper argues that European integration is no longer sustainable without a proper and democratically legitimate government at the European level. However, this does not necessarily mean going down the federalist route. Instead, it proposes a republican paradigm that offers a different perspective on European integration. First, the issue of governing European public goods in the European context is examined, followed by an analysis of the concept of the Republic and its historic roots. This concept is then connected with modern theories of public goods. Finally, the issue of democracy is re-examined as a principal-agent relationship between citizens and governments in a republican sense, which transcends the fallacies of federalist statism. I should point out that this paper does not propose detailed institutional changes in Europe's governance; its objective is to reconsider the basic principles on which governance is built.

Paris, 23.3.2013

www.stefancollignon.eu

The European Union as a Republic

Stefan Collignon*

1. Introduction

From the beginning, the European integration process combined high hopes and pragmatism. Europe's Founding Fathers dreamt of the distant goal of creating a European federal state, but actual integration was based on practical steps of trans-national cooperation between economic and political agents. The dream motivated European federalists, but the realism of what was known as the 'Monnet Method' and also 'the community method' transformed Europe. It had the advantage of avoiding political obstacles by allowing governments to remain the ultimate decision makers (intergovernmentalism), while agreeing to delegate some limited competences to Community institutions. Nevertheless, both visions shared the idea that the "process of creating an ever closer union among the peoples of Europe" (Lisbon Treaty, Preamble) would create peace and greater prosperity in Europe. However, this process is now in crisis. While peace still prevails, prosperity seems endangered and social tensions generate renewed resentment among nations. Eurosceptics call for the re-nationalisation of a growing list of policy responsibilities. The possibility of a collapse of the euro, and thereby of the European Union, can no longer be ignored. Hence, the project of European integration is in need of reconstruction and renewed justification. In this paper, I will show that European integration is no longer sustainable without a proper and democratically legitimate government at the European level, but this does not necessarily mean going down the federalist route proposed by the early founding fathers. Instead, I propose a republican paradigm that offers a different perspective on European integration.¹ First, the issue of governing European public goods in the European context will be examined (I), followed by an analysis of the concept of the Republic and its historic roots (II). This concept will then be connected with modern theories of public goods (III). Finally, the issue of democracy will be re-examined as a principal-agent relationship between

* Stefan Collignon is Professor of Economic Policy at Sant'Anna School for Advanced Studies in Pisa, www.stefancollignon.eu. An earlier version of this paper was written in German.

¹ For my previous work see: *S. Collignon*, *The European Republic. Reflections on the Political Economy of a Future Constitution*, London 2003, available for download under <http://www.stefancollignon.de/PDF/The%20European%20Republic-text1.pdf>; *Is Europe Going Far Enough? Reflections on the Stability and Growth Pact, the Lisbon Strategy and the EU's Economic Governance*, *European Political Economy Review* 1 (2003), pp. 222–247; *Vive la République européenne*, Paris 2004; *Fiscal Policy and Democracy in Europe*, ÖNB, Wien 2004; *Bundesrepublik Europa? Die demokratische Herausforderung und Europas Krise*, Berlin 2007; *Three Sources of Legitimacy for European Fiscal Policy*, *International Political Science Review* 28(2) 2007, pp. 155–184; *Viva la Repubblica Europea!*, Venezia 2008; *S. Collignon/Ch. Paul*, *Pour la République européenne*, Paris 2008. See also: *A. von Bogdandy*: *Die europäische Republik*, *ApuZ* 36/2005, pp. 21–27; *Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik*, *JZ* 2005, pp. 529 (534); *Europäische Verfassung und europäische Identität*, *JZ* 2004, p. 53 (56).

citizens and governments in a republican sense, which transcends the fallacies of federalist statism (IV). I should point out that this paper does not propose detailed institutional changes in Europe's governance; its objective is to reconsider the basic principles on which governance is built.

I. Governing public goods in the European context

The Monnet Method has been the dominant driver of the European integration process for the last 50 years. It was founded on the neo-functional premise that integration of partial sectors in the economy would create strong incentives for further economic and political integration in order to fully capture and preserve the benefits of unification. The method has been successful in creating an ever larger differentiated supply of European public goods: from the Coal and Steel Union to the internal market and single currency; from the Common Agricultural Policy to regional policy and structural funds; from competition policy to market regulation; from the four economic freedoms in the domestic market and the creation of Schengen to the legal framework of Europol and Eurojust; from common foreign trade policies to the nucleus of a common security and defence policy. These policies can be seen as providing public goods, which are used by all Europeans. They define a joint interest for those who use them and are affected by them. Yet, there is no European government; citizens cannot determine collectively the administration of these public goods. In this contradiction lies the core of the much-bemoaned 'democratic deficit' problem, which has significantly contributed to the European crisis and growing Euroskepticism².

Intergovernmental cooperation has created new problems. As the German foreign minister *Joschka Fischer* remarked in 2000, it has caused a "loss of European identity, of internal coherence, as well as the danger of an internal erosion of the EU. ... [T]oday a crisis of the Monnet method can no longer be overlooked, a crisis that cannot be solved according to the method's own logic."³ The "transition from a Union of States to full parliamentarisation as a European Federation" that *Fischer* desired has not taken place. The re-foundation through the Constitutional Treaty has been unsuccessful, even though a large substance of the draft was saved into the Treaty of Lisbon. Yet, this treaty has also failed to provide a solution to the governance of Europe's public goods, as the Euro-crisis has clearly demonstrated.

² According to Eurobarometer 73 (August 2010), 23 % of European citizens consider the EU to be a waste of money, 21 % associate the EU with bureaucracy, and only 19 % associate the EU with democracy, see http://ec.europa.eu/public_opinion/archives/eb/eb73/eb73_first_en.pdf (22.10.2011).

³ *J. Fischer, From Confederacy to Federation: Thoughts on the Finality of European Integration*. Speech on May 12th 2000 in the Humboldt-Universität Berlin, http://www.maclester.edu/courses/intl372/docs/joschka_fischer_en.pdf (6.10.2012)

The legal challenges against the Treaty of Lisbon brought before the German Federal Constitutional Court⁴ in 2009 and the more recent attempts to stop the financial bail-out funds EFSF and ESM⁵ highlight the conflict between a European democracy and democratic nation states. Even if one does not agree with the plaintiffs in these cases, their arguments draw attention to the problem of democratically legitimising the administration of public goods when the range of these goods and their related problems do not correspond with the action level for dealing with them and with the legitimacy basis on which these actions must rest.

Governing externalities

The problem is the internalisation of political externalities: when the decisions of an agent impact upon others, such as when the democratically legitimised preferences of one political actor are superimposed on others, this will inevitably lead to deadweight losses of welfare, where welfare is understood as the efficient satisfaction of collective preferences. Yet, by their very nature public preferences may diverge from individual preferences. They reflect a transformation of individual desires after collective deliberation. Hence, collective welfare must not just be measured by whether the allocation of resources satisfies the preferences of individual users of public goods, but also by the fact that *users have a right to determine their collective preferences*. This democratic right generates the solidarity whereby minorities accept the preferences of the majority. However, if political actors take decisions regarding issues which concern the full set of European citizens, but for which they have only been authorised by a small subset of voters in local jurisdictions, some voters are inevitably excluded from the democratic decision-making process. This “democratic deficit” does not only open the door to welfare deadweight losses, it also generates a sense of social injustice which undermines the legitimacy for the European integration project.

In nation states governments impose binding solutions to problems of distributive justice. In fact, ideas of social justice and the purpose of democratic government are inseparable. However, in the European Union policies are negotiated between national governments which can only reflect the partial interests of their constituencies. Bargaining compromises between national governments cannot resolve problems of social justice.⁶ Negotiations on how the winners of European integration should compensate potential losers can only shift these gains and losses from one Member State to another, but they cannot reach the affected citizens directly because the trickle-down effects

⁴ *Bundesverfassungsgericht* (BVerfG), 2 BvR 2/08 from 30.6.2009.

⁵ BVerfG, 2 BvR 987/10 from 7.9.2011; BVerfG, 2 BvE 4/11 vom 19.6.2012, Absatz-Nr. (1 - 172), http://www.bverfg.de/entscheidungen/es20120619_2bve000411.html

⁶ *Ch. Joerges*, What is left of the European Economic Constitution? A melancholic eulogy; *European Law Review*, 2005, No 30 (August).

depend on national social systems. This has two consequences: on the one hand, European integration generates unintended problems of social justice; on the other hand, the perception of these problems is holistic-communitarian and not liberal-individualistic, so that it opposes nations as policy units rather than individual winners and losers for which distributive solutions should be found. These injustices result not just from behavioural transgressions by self-seeking politicians, nor are they the imposition of ideological principles, but rather they are caused by institutional shortcomings. It is the basic structure of the European Union that deprives citizens from clarifying how different realisations of justice might be compared and evaluated before final policy decisions are made.⁷ This has important consequences for policy output: given that the intergovernmental system has few if any tools to deal with concerns of social justice, political priority is given to reducing welfare losses by blocking more integration rather than maximising welfare. Instead of considering how the largest possible gains from integration can be achieved, governments are refusing to “pay for others”. Thus, the democratic deficit creates a second deficit of social justice and both undermine the acceptability and efficiency of the European Union.

Some have drawn the conclusion that the nation state is and remains the primary locus of political legitimacy and therefore the appropriate tool to pursue social justice.⁸ The traditional nation state had solved the problem of internalising externalities mentioned earlier by assuming that all public goods were national goods and all state authority emanated from its citizens. Thus, the political decisions of the state are naturally legitimised by those who are affected by these decisions. However, the increasing range of European public goods has blurred the congruence between the *power* of governments and the *authority* of citizens, because policy compromises do not necessarily represent citizens’ preferences. Eurosceptics are, therefore, hoping to restore coherence by reversing integration, leaving the Union and returning to national currencies, but they can do this only at the price of lower welfare. Alternatively, Eurofederalists seek to solve the conflict through the creation of a European federal state. However, this view is met with communitarian opposition who fear that a federal European state will destroy national characteristics and identities by imposed assimilation from the centre.

While the democratic deficit has been widely discussed, the issue of social justice has remained in the shadow, although it is probably the main driver behind populist-Eurosceptic movements. In fact,

⁷ I owe the distinction between behavioural transgressions and the basic institutional system in theories of justice to A. Sen, *The Idea of Justice*; Penguin Books, London 2009 and J. Rawls, *A Theory of Justice*, Harvard University Press, 1999.

⁸ See Th. Nagel, *The Problem of Global*; *Philosophy & Public Affairs*, Vol. 33, No. 2 (Spring, 2005), pp. 113-147. For a critique: J. Cohen and Ch. Sabel, *Extra Republicam Nulla Justitia?* *Philosophy & Public Affairs*, Vol. 34, No. 2 (Spring, 2006), pp. 147-175

the problems of social justice have sharpened with the creation of the single currency, because the introduction of a single hard budget constraint for all Member States has shifted political incentives. Many policy areas now work like zero-sum games, where the gain of one is the loss of another. The Euro-crisis is an example of this. In the context of monetary union, certain policy areas need to be centralised, but this can only be done legitimately if the citizens concerned have voice and choice over policy decisions.

Intergovernmentalism cannot offer a solution to this dilemma, as it relies on (diminishing) output legitimacy, because net benefits from integration no longer satisfy the standards of social justice, and ignores input legitimacy by denying democratic participation in decision making.⁹ Federalism, at least the German decentralising form of it, also offers no way out, because it leads to political gridlock that can constrict democratic participation rights.¹⁰ On the other hand, centralizing Eurofederalists are blocked by communitarian concerns of national identity. This untenable stalemate requires a new perspective and this is where the republican paradigm offers a new solution.

II. The Concept of the Republic

Historic roots

The Republic is one of the oldest of all European political traditions. Its roots lie in *Plato's* and *Aristotle's* *Politeia* and in the Roman Republic, which served as a model for the Renaissance city states in Italy and the German Hanseatic states. From there, republican ideas travelled west. *Pocock* described how the concept of republican liberty went from *Machiavelli* in Florence to *Harrington* and the English Commonwealth, finally reaching the Founding Fathers of the United States. On the other hand, *J. Israel* investigated how the republican ideal of equality in the Dutch Republic travelled to France where it shaped the egalitarian ideas of the French Republic.¹¹ In Germany, the term is rather underdeveloped and is mainly used as a contrast to the idea of a monarchy.

Republicans have always sought to unite the people against domination and subjection under the autocratic rule (*sub potestate*) of kings and despots¹². This, too, has a long tradition: during the

⁹ This distinction was made by *F. W. Scharpf*, *Governing in Europe: Effective and Democratic?*, Oxford 1999

¹⁰ *F. W. Scharpf*, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus im Vergleich*, PVS 26 (1985), pp. 323–356.

¹¹ *J. G. A. Pocock*, *The Machiavellian Moment*, Princeton, N.J. 1975; *J. Israel*, *The Intellectual Origins of Modern Democratic Republicanism (1660–1720)*, *European Journal of Political Theory* 3(1) 2004, pp. 7–36.

¹² See *J. Isensee*, *Republik – Sinnpotential eines Begriffs*, JZ 1981, S. 1–8. Alternatively *W. Henke*, *Zum Verfassungsprinzip der Republik*, JZ 1981, S. 249 ff. Recently *M. Anderheiden*, *Gemeinwohl in Republik und Union*, 2006.

Renaissance, the Republic of free and equal citizens became the counter-concept of “*regnum*” of the Emperor, claiming that the community of citizens retained final sovereignty and the ruling parties were no more than agents charged with the administration of public goods.¹³ Thus, freedom and equality of citizens is the common core of all concepts of the Republic.

On the other hand, the republican tradition has also shaped modern ideas of community. Conservative-holistic¹⁴ interpretations of the Republic emphasise common culture and habits to which individuals have to subject themselves. By contrast in the Latin tradition of the Republic, the people are the set of all citizens who share common interests rather than feelings. Even today the concept of the Republic¹⁵ still invokes *Cicero’s* definition: “*res publica res populi*”, which one may translate as “public goods are the goods of the people”.¹⁶ Cicero explained that “a people is not any collection of human beings brought together in any sort of way, but an assemblage of many, associated in an agreement with respect to law and the utility of a mutual partnership.”¹⁷ Thus, people’s interests derive from public goods and, from the outset, the Republic was conceived as a community based on law, i.e. legal rights and obligations by individuals seeking joint welfare. *Cicero’s* “*res publica res populi*” therefore translates into a modern community of free and equal

¹³ Q. Skinner, *From the State of Princes to the Person of the State*, in: ders., *Visions of Politics*, Vol. II., Cambridge 2002, p. 380: “The community must retain ultimate sovereignty, assigning its rulers and magistrates a status no higher than that of elected functionaries. These officials must in turn recognize that they are mere agents or *ministeri* of justice, charged with the duty of ensuring that the laws established by the community for the promotion of its own good are equitably enforced.”

¹⁴ I use the concept of *holism* in the sense of *Karl Popper*, *The Open Society and its Enemies*; Routledge, London, 1995

¹⁵ R. Gröschner, *Die Republik*, in: Isensee/Kirchhof (Hrsg.), *Handbuch des Staatsrechts*, Bd. II, 3. Edition 2004, § 23, endeavours to show a continuity of republicanism from Aristotle to Cicero. However, U. Wesel (*Geschichte des Rechts in Europa*, 2010, p. 99) stresses that the similarity between Athens and Rome is purely extrinsic: “[T]he Greeks gave us the scientific philosophers that established the basis for European humanities and natural sciences. The Romans gave us the lawyers that developed their legal system in a way that the Greeks could never do due to the collective decision-making of their citizens in their courts.” The difference between Aristotle and Cicero is important for another reason related to B. Constant’s distinction between ancient and modern forms of freedom in his famous discourse of 1819 (published in B. Constant, *Political Writings*, Cambridge University Press, 1988). Modern freedom based on individual rights is a renaissance development, invoked by Cicero but not by Aristotle; see R. Tuck, *Philosophy and Government*, 2003. A. von Bogdandy (*Die europäische Republik*, FN 1, p. 26) refers to the modern conception of the republic when he writes that “a republican understanding of the European Union cannot be built on republican theories that follow the conception of a ‘stronger’ and ‘narrower’ community. The European Republic can form a liberal democratic community, but certainly not a communitarian community”.

¹⁶ For reasons which will become clear soon, my translation varies from the conventional “a commonwealth is the property of a people”. The Latin *res* stands first of all for items, things, goods, affairs.

¹⁷ „Est igitur, ..., *res publica res populi*, *populus autem non omnis hominum coetus quomodo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*“, *Cicero*, *De re publica*, Harvard 1928, translated by Keyes (reprint 2006, p. 64); my translation is slightly at variance with Keyes. I translate *utilitatis communione sociatus* as Welfare.

citizens who jointly determine the laws by which they manage the public goods that affect their common welfare.¹⁸ The modern Republic is a democracy.

The Republic and the State

The concept of legal rights also introduces a difference between modern republicanism and democratic liberalism. *Pettit* has called the republican rights-based liberty “non-domination” and distinguished it from the liberal concept of “non-interference”.¹⁹ A slave may be free from interference of a benevolent owner, but he is not free by law; he has no rights. Liberals seek to protect individuals from arbitrary interference; republicans see the need of a legal framework that citizens jointly establish and voluntarily accept.

Yet, with freedom comes conflict. The Republics of the Italian Renaissance were characterised by tough factional conflicts, which carried the risk of civil war. The liberty of the Republic therefore had to be supported by “*civitas*”, i.e. active citizenship, and republican virtues. This orientation towards public morality was the reason for welfare gains, and not only in the eyes of *Macchiavelli*. For example, *Isensee* argued that in a Republic, it does not matter “who is governing, but rather which objective is guiding the government”²⁰. Thus, the Republic generates its own civic morality inspired by principles of social justice when citizens collectively agree on which policies support collective welfare. The concept of the Republic is therefore founded on the voluntary agreement among citizens living in a just society.

A Republic is not the same as a state. The notion of a state “relates to the impersonal rule of men over men. It emerged in opposition to the idea of an association founded on ties of personal loyalty”²¹. Traditionally, absolute sovereigns could do as they pleased,²² and their subjects owed them obedience and fidelity. By contrast, the modern state is an instrument for objectified and value-neutral rule. It can be liberal-democratic, social-democratic, fascist or communist. It exercises power in the name of an authority without questioning who the authority is. Max Weber defined the

¹⁸ Already *Macchiavelli* stressed that “cities have never managed to increase their acquired rights or prosperity unless they were in a state of liberty” (perché si vede per esperienza le cittadi non avere mai ampliato né di dominio né di ricchezza, se non mentre sono state in libertà), N. Macchiavelli, *Discorsi sopra la prima deca di Tito Livio*, Torino 2000, p. 139

¹⁹ *Ph. Pettit*, *Republicanism. A Theory of Freedom and Government*, Oxford 1997

²⁰ *Isensee* (FN 12), p. 3.

²¹ *I. v. Münch/U. Mager*, *Staatsrecht I*, 7. Edition 2009, Rn. 3.

²² As Hobbes (*Leviathan*, Chap. XX, Cambridge 1996, p. 139) so elegantly put it: “He cannot be Accused by any of his subjects, of Injury: He cannot be punished by them: He is Judge of what is necessary for Peace; and Judge of Doctrines: He is Sole Legislator; and Supreme Judge of Controversies; and of the times and Occasions of Warre and Peace: to Him belongeth to choose Magistrates, Councillors, Commanders, and all other officers, and Ministers; and to determine of Rewards, and Punishments, Honour and Order.” Hobbes would have felt at home in the European Council!

state as an “apparatus of power whose existence is unaffected by whoever is controlling it at any given time”²³, or as an “institutional operation” (*Anstaltsbetrieb*), in which “administrative staff successfully make use of the monopoly of legitimate physical coercion for enforcing order”.²⁴ Thus, even in democratic constitutional states, the concept of the state emphasises the power and holistic-hierarchical²⁵ authority of the sovereign over his subjects.²⁶

The early concept of *Res publica* has never had these connotations. It referred to the liberty and equality of citizens. Hence, republican theory proclaims citizens, rather than the state, to be the bearers of sovereignty.²⁷ It is only when the concepts of state and Republic merge, as they did after the French Revolution, that the Republic is simply reduced to a particular form of state.

This reduced concept causes a dual impoverishment. Firstly, the sense that the Republic is a way of collectively owning and managing public goods disappears, and therewith the awareness that public goods are the object of collective intentionality by which institutions are formed.²⁸ Secondly, the concept of the state is focused on the *possession* of power and the control of resources²⁹, whereas the republican concept highlights the idea that public goods are the *property* of the citizens from which citizens derive the *claim-right* to control communal resources.³⁰ To use the concept of the Republic effectively for the governance of the European Union, it is necessary to restore and enrich its normative content without violating republican traditions. This can be done by incorporating *res*

²³ Skinner (FN 13), p. 378.

²⁴ M. Weber, *Wirtschaft und Gesellschaft*, 1972, p. 29

²⁵ For a discussion of holism, hierarchies and individualism, see K. Popper, *The Open Society and Its Enemies*, London 1995; L. Dumont, *Essays on Individualism*, Chicago 1986.

²⁶ Concerning state authority, J. Isensee (Staat und Verfassung, in: Isensee/Kirchhof (Hrsg.), *Handbuch des Staatsrechts*, Bd. II, 3. Edition 2004, § 15), says they have “two faces: inwardly facing – effective and organised sovereign authority, internal sovereignty; outwardly facing – legal independence, external sovereignty”.

According to this interpretation, states are sovereign rather than their citizens. See also D. Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin 2009. I will discuss the inconsistency of the principle of state sovereignty with the Republic later.

²⁷ Republican writers “make no ... distinction between the powers of states and the powers of communities over which they rule. On the contrary, the whole thrust of republican theory is towards an ultimate equation between the two. This undoubtedly yields a recognizable concept of the state, one that many Marxists and exponents of direct democracy continue to espouse. But it involves a repudiation of the most distinctive element in the mainstream theory of the modern state: the claim that it is the state itself, rather than the community over which it holds sway, that constitutes the seat of sovereignty.” Skinner (FN 13), p. 386.

²⁸ For the term *collective intentionality* see J. Searle, *The Construction of Social Reality*, London 1995.

²⁹ Q. Skinner shows that the concept of “state” derived from the concept of vested rights in the Renaissance. See: *A Genealogy of the Modern State* (2009), download from: <http://www.princeton.edu/politics/events/repository/public/faculty/SkinnerPaper10.21.09.pdf>.

³⁰ Hobbes makes this clear in his distinction between ‘right’ and ‘law’: „RIGHT consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindeth to one of them: to that Law, and Right, differ as much, as Obligation and Liberty; which in one and the same matter are inconsistent” (*Leviathan*, Chap. 14, Cambridge 1996, p. 91).

publica into modern theories of public goods and by articulating authority and power within the framework of the *Principal-Agent* theory.

III. The Logic of Public Goods

Public goods, Republics and Citizenship

Public goods have served from the beginning to define the *res publica*. *Plato* has derived public goods from the idea of the common good: goods are things that serve what is commonly considered as good and just.³¹ This led to the idea of the Republic as a “unity of sameness”, which became the leitmotiv for the French Jacobins.³² The other tradition had its origin in the Republic of Rome. Roman law was less concerned with ethics than by formal considerations of the law. It established the principle of property as a *claim* for control over resources (*dominium*) rather than the *possession* of the resources themselves.³³ Of course, the possession of goods and land implied enjoyment of utilities, but property was the right of the *dominus*. Rome’s aristocrats were the owners of land, although they granted user rights to the *plebs* and the provinces. *Chiusi* therefore concludes that there was no property without sovereignty.³⁴ This concept of property allowed the distinction between *res publica*, which was ruled by user rights (*ususfructus*) for the many, and *res privata*, which was defined by the freedom of *dominium*. It continues to be influential in modern economic theory which distinguishes private from public goods.

Yet, roman property laws were ignorant of the concept of externalities, which only emerged with modern economics. *Samuelson*³⁵ defined a public good as something that can be used by everyone, so that “each individual’s consumption of such a good leads to no subtraction from any other individual’s consumption of that good”. For example, if two people cross a street during the night, the streetlight provides light for both of them; the light will not become weaker because it is providing utility to more than one person. New economic theories discuss the collective benefits and costs under the name of *externalities* which, as I will discuss below, structure the incentives for their provision. The “consumption” of public goods is collective in the sense that each individual in a given user group is able to draw utility from its existence. We may also say that the collective of users is defined by being potentially affected by the good’s existence. By contrast, the consumption of private goods is exclusive and competitive in the sense that usage by one makes usage by another

³¹ See *Plato*, Republic, 6.505.

³² *N. Urbinati*, Mill on Democracy. From the Athenian Polis to Representative Government; The University of Chicago Press, 2003

³³ *A. Eckl* und *B. Ludwig* (Hrg), Was ist Eigentum? Philosophische Positionen von Platon bis Habermas; 2005

³⁴ *T. Chiusi*, Strukturen des römischen Eigentums im Spiegel rhetorisch-philosophischer Texte Ciceros; in FN 33.

³⁵ *P. A. Samuelson*, The Pure Theory of Public Expenditure, Review of Economics and Statistics 36 (1954), p. 387

impossible: if one person eats an apple, nobody else can eat it. Thus, private goods are called rivalrous, public goods non-rivalrous. It follows that how exclusive or how public a good is depends on who is potentially affected by the good. While it is possible to establish exclusive property rights for some goods that exclude consumers who are unwilling to pay the price, *John Stuart Mills* has shown in his famous example where one cannot exclude ships from the benefit of a lighthouse that for pure public goods exclusion is not possible.³⁶

By linking public goods to property rights we may redefine the status of citizens. If property is the *right* to utilise goods, then private property is the exclusive *entitlement* to usage of a good, and common property is the entitlement to use public goods for which users assume collective responsibility. The republican concept of *civitas* derives from the idea that citizens are the collective owners of public goods. In other words, a citizen is defined as a responsible member of a user group of public goods. From the republican point of view, all affected individuals must therefore have equal rights to determine the common usage. In reference to *Cicero*, we may say, it is the *utilitas* of the *res publica* that determines what the *populus* is. Thus, the legal community of republican citizens emerges from their status as common property owners rather than from the “shared cultural, historical or linguistic understanding” of a people, as is implied in the concept of nation-state citizens.³⁷

This also allows addressing European democracy in new terms. Critics have often claimed that there can be no democracy because there is no European *demos*. In the holistic-communitarian tradition, which goes back to ancient Greek democracy, the *demos*, or *Volk* or pre-political nation reflect the “unity of sameness”. By contrast in the Roman tradition of the Republic, it is the common ownership of public goods that defines what is a *people*. Because *European* public goods are goods that affect all citizens of the European Union and they are the property of these citizens, the property rights in European public goods define European citizens as the European *demos*. The Treaty of Lisbon recognises this indirectly by stating that the citizenship in the European Union results in a catalogue of “rights and duties”³⁸. It therefore places citizens of the Union into the “consensus of the law” (*Cicero*), so that the *populus* of the European Republic is the collective of citizens of the Union.

Incentive Structures for the provision of public goods

³⁶ *J. S. Mill*, *Principles of Political Economy*, Book 5, Chap. 11, para. 15, 1848. (<http://www.econlib.org/library/Mill/mIP.html>)

³⁷ See *R. Grawert*, *Staatsvolk und Staatsangehörigkeit*, in: *Isensee/Kirchhof* (Hrsg.), *Handbuch des Staatsrechts*, Bd. II, 3. Edition 2004, § 16

³⁸ Art. 20 TFEU; see also *A. Haratsch/C. Koenig/M. Pechstein*, *Europarecht*, 7. Edition 2010, Rn. 725.

The founders of the European Union focused on market integration, because larger markets were supposed to generate economies of scale and therefore net benefits for the Union. The First Fundamental Theorem of Welfare Economics states that competitive markets for private goods generate a Pareto optimal allocation of resources, which implies the potentially unanimous acceptance of the market outcome. Market integration could therefore support the integration project. Yet, as markets became more integrated, private decisions by market participants generated also increasingly more externalities and therefore European public goods became more prominent.

This poses the question of their governance, i.e. how to deal with externalities. A notorious problem for the efficient provision of public goods is *free-riding*. If a good is not rivalrous and it is not possible to exclude others from its usage,³⁹ its supply depends on how much a group of consumers is willing to pay for its provision. The sum of all individual contributions must cover the marginal cost of the production of a public good. However, because group members who are unwilling to pay cannot be excluded, the provision of public goods will remain *suboptimal*⁴⁰ unless there is a mechanism that forces them to reveal their preferences sincerely and to contribute to their provision fairly. If individual consumers believe that the contributions of others are adequate to guarantee the supply of the good and that their own contribution is not needed, they may attempt to “free-ride” at the cost of others. The dilemma between public welfare and self-interest is referred to as the *collective action problem*.⁴¹

In principle, collective action problems can be solved by voluntary cooperation or by centralised decision making, i.e. by a government.⁴² However, which of the two methods yields efficient solutions depends on the incentives which public goods provide for individuals to cooperate. Two groups of goods can be distinguished; *inclusive club goods* and *common resource goods*. The former are public goods whose usage can be restricted to a particular group of individuals that is willing to contribute towards the production of these goods. By contrast, common resources are limited and

³⁹ In microeconomical theory, this means that in a two-dimensional world of price and quantity, the demand curve for private goods will horizontally intersect the quantity axis, whereas public goods will vertically intersect the price axis. See *Samuelson* (FN 35).

⁴⁰ *R. Musgrave*, *The Role of the State in Fiscal Theory*, *International Tax and Public Finance* 3 (1996), pp. 247–258.

⁴¹ *M. Olson*, *The Logic of Collective Action. Public Goods and the Theory of Groups*, Cambridge (Mass.) 1971; *R. Cooper/A. John*, *Coordinating Coordination Failures in a Keynesian Model*, *Quarterly Journal of Economics* 103 (1988), pp. 441–463; *Collignon*, *The European Republic*, 2003 (FN 1).

⁴² See *Th. Hobbes* (FN 30) and also *D. Hume* (*A Treatise of Human Nature*, 1740: Section vii. Of the Origin of Government) who derives government from externalities: “Two neighbours may agree to drain a meadow, which they possess in common; because it is easy for them to know each other’s mind; and each must perceive, that the immediate consequence of his failing in his part, is, the abandoning the whole project. But it is very difficult, and indeed impossible, that a thousand persons should agree in any such action; it being difficult for them to concert so complicated a design, and still more difficult for them to execute it.”

individual consumers seek to get larger shares at the expense of others. In the first case, members of a group have clear incentives to cooperate as they would otherwise be unable to benefit from these public goods. It is, however, possible that informational asymmetries may hinder or prevent cooperation if actors cannot be sure that their partners will stick to their agreements. In that case, a common institution committed to the overall maximisation of societal wellbeing, such as the European Commission, can overcome the asymmetries by ensuring that all actors recognise their own vested interest. Such an institution is therefore welfare augmenting, but it is not a government.

In the second group of public goods, the incentive structure is different. Here, it is not possible to exclude individuals from accessing the benefits from these goods, even though the goods themselves are limited resources. Consequently, it is in the interest of each individual to acquire as much of these resources as possible before the supply is exhausted, and to exclude others from access. Each individual actor is therefore tempted to act in a way that is directly opposed to the overall collective interests. Voluntary cooperation between individual actors is therefore doomed to fail. To overcome coordination failure, citizens as the “owners” of the public good must set up a government with the intent to preserve their common interests. The property title gives them the right and the authority to use, if necessary, legitimate violence (the power of government) in order to prevent individuals from increasing their personal benefit at the cost of the common interest.

Hence, the two different classes of public goods reflect diametrically opposed incentives for collective action and require different mechanisms for their efficient provision. For inclusive club goods voluntary cooperation between individuals is possible, so that a decentralised form of governance would be sufficient to manage these goods. Hence, intergovernmentalism and subsidiarity are methods for successfully governing inclusive European public goods. But these methods no longer work in the European internal market with a single currency, because money is a common resource good. The administration of *common resource goods* then has to be centralised in a government in order to solve collective action problems.⁴³ It follows that the Eurozone must be governed by a proper government.

⁴³ E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action*, Cambridge University Press 1990, has claimed that “an external actor”, i.e. a government is not the only solution governing the commons, provided insiders can make binding commitments. However, the point of what I call common resource goods is precisely that such commitments cannot be made because of strategic substitutabilities as described by Cooper and John, see footnote 41.

The Euro and the European Republic

With the creation of the euro, the dynamics of European integration have changed. A new logic is governing European public goods. In its early stages, the EU was characterised by the creation of inclusive European community goods. The Commission, as a custodian of common interests, had the task of reducing informational asymmetries and ensuring that the governments of the Member States clearly recognised their shared interest in collective action and cooperated with one another. This integration strategy was successful as the gains achieved through cooperation outweighed coordination costs considerably. However, whilst intergovernmental *deal making* and cooperation expanded the range and number of public goods⁴⁴, the decisions of single Member States in an increasingly tighter system of economic and political interdependence were causing externalities in other Member States. This necessitated new institutions and new policies.

The introduction of the single currency was an inevitable consequence following the creation of the European internal market.⁴⁵ It has transformed the incentives for policy makers in profound and unintended ways by generating a new class of exclusive public goods. In fact, money is the most important *common resource good* of a market economy: it is by definition limited in supply (a consequence of the mandate to maintain price stability), but access to the money market must be open to all banks (a consequence of the lender of last resort function of central banks).⁴⁶ Hence, as an exclusive public good, money generates the distributional gains and losses in a zero-sum game. An example may clarify this logic. Interest rates serve as an indicator for the scarcity of capital, and therefore reflect the aggregated demand for credit and money. Now, if a government becomes an important net borrower, it pushes up interest rates for all others. This makes borrowing for other governments in the Euro Area more expensive and crowds out private demand for credit. The consequence is slower economic growth for all. As private investment is the main driving force for economic growth, it is in the collective interest to constrain public borrowing and the Stability and Growth Pact was created for this purpose. However, for individual borrowers the incentives are different: each government can borrow cheaply as long as the partners adhere to the Stability and Growth Pact. In this case, a government can borrow and spend rather than having to tax its constituency. National governments have, therefore, reasons for constraining their partners while at the same time trying to free-ride at the expense of their partners. Hence, the interests of each

⁴⁴ This was envisaged and even desired by neofunctionalists from the very beginning, see *E. Haas*, *The Uniting of Europe. Political, Social and Economic Forces 1950–1957*, Indiana 2004

⁴⁵ See *S. Collignon/D. Schwarzer*, *Private Sector Involvement in the Euro. The Power of Ideas*, London 2002 for further details.

⁴⁶ See *S. Collignon*, *Macroeconomic imbalances and comparative advantages in the Euro Area*; European Trade Union Institute (ETUI); Brussels, 2012.

individual Member State are directly opposed to the collective welfare, and this will generate cooperation failure.⁴⁷ As Thomas Hobbes and David Hume have pointed out long ago, such cooperation failure requires a government to improve welfare. This argument now applies also to the European Union. Our example of a European budgetary policy is striking, but its logic can be applied to many other political fields such as structural reforms, competition policy, the completion of full market integration, uniform financial supervision, etc. For the administration of these public goods, a genuine European government with law-enforcing powers is required in order to overcome the cooperation failure.

Exclusive public goods also generate new problems of social justice. While the exclusion principle is at the very core of private property rights and market efficiency, it can conflict with ideas of distributive justice and fairness. Only those with money can consume private goods. When market dynamics cause distributional outcomes, which are considered as unfair, losers make moral claims to be compensated. Because inclusive club goods generate positive sum games, compensation is easily justified as no one is made worse off. But for exclusive resource goods, the game is zero-sum and compensation of loser reduces the gains of winners. This redistribution must therefore command the legitimacy and acceptance by all group members concerned. This does not mean that every distributional solution is without objection, but that those whose preferences are overruled will still accept the solution at least on procedural grounds. This is the fundamental principle of democracy, but considerations of fairness and social justice touch the core of the republican principle. Democratic nation-states have developed the modern welfare state as a redistributive instrument, but this poses a problem for European integration, which does not have the legitimacy-generating process of a genuine democracy to justify the imposition of specific solutions of fairness and social justice.⁴⁸ The deeper integration becomes, the larger will be the issues of social justice. Of course, one may stop the integration process itself, but this requires abandoning all the benefits derived from public goods. To deal with the issues of social justice would require democracy at the European level. This raises the question of how such interest is determined and how such power can be legitimized.

⁴⁷ See Cooper/John, FN 41 for a formal model explaining this logic.

⁴⁸ Rawls has argued that principles of justice should be universally acceptable, but this requires still some form of deliberation for their practical implementation. The European Union is institutionally deprived of such deliberation process.

IV. Democracy and the Principal-Agent Relationship

State and Republic

For some readers our republican paradigm may sound like a call for a European super-state. This is wrong and not our intention. The European Union is not a state. Even if it has acquired some traits of statehood and even if more and more areas of life are being touched upon by European decisions, it lacks the “monopoly of legitimate physical coercion for enforcing order”⁴⁹. But even if the EU is not a state, it is governed by a statist ideology that positions the Member States as the “masters of the treaties” and “puts European conciliation on the basis of a contractual union of sovereign states”.⁵⁰ Hence, it is the concept of a state rather than the concept of a Republic that has become the normative anchor for European law. But if states lay claim to being “masters” that make sovereign decisions in Europe, European citizens are not the authority which legitimates power. European policies are imposed, accepted or rejected, but not “owned” by citizens. Such a weak normative foundation of the EU can only lead the European unification project into an impasse. The republican paradigm offers an alternative.

Modern theories of the state explain how sovereign rule can be legitimate, i.e. under which “circumstances an order of particular content will be obeyed by specific persons”.⁵¹ By contrast, the concept of the Republic is related to freedom rather than sovereign rule. It is not value-neutral. The Republic protects its citizens against the *domination* of lords and masters by assigning individual *rights* to all citizens.⁵² Republican *self-government* is the freedom of citizens to determine the administration of the common public goods that they own. This freedom renders all citizens equal. Republican theory must, therefore, explain how to safeguard the civil rights and liberties of equal citizens.⁵³ The Republic is not the objectified exercise of power, but rather the control of common affairs.⁵⁴

⁴⁹ See FN 24

⁵⁰ BVerfG, FN 4, Para. 249

⁵¹ According to *Weber's* (FN 18), p.28 definition of sovereign rule.

⁵² For a discussion of Republicanism as non-domination (contrary to liberalism as non-interference): *Ph. Pettit*, FN 19; see also *I. Kant*, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in: *Werke in zwölf Bänden*, Bd. 11, Frankfurt 1977, pp. 143–165, for a contrast of the republican constitutional state with the arbitrariness of despotic rule.

⁵³ For further information about the revival of this republican principle in the American constitutional debate, see *F. I. Michelman*, *Foreword: Traces of Self-Government*, *Harvard Law Review* 100 (1986–1987), p. 4; *F. I. Michelman*, *Law's Republic*, *The Yale Law Journal* 97(8) 1988, *Symposium: The Republican Civic Tradition*, pp. 1493–1537; *C. Sunstein*, *Beyond the Republican Revival*, *Yale Law Journal* 97 (1988), pp. 1539–1590.

⁵⁴ This focus gives republicanism a weak voice in international relations, see: *N. G. Onuf*, *The Republican Legacy in International Thought*; Cambridge University Press, 1998

Within the republican tradition different approaches for this control can be identified. The first approach extends from Florence and Venice, through *Montesquieu* and *Rousseau* up to modern-day Switzerland and calls for “small Republics” where direct democracy by all citizens is easily-manageable. The second tradition began with David Hume and James Madison’s *Federalist Paper No. 10* and sees the advantage of a “large Republic” in the fact that common interest cannot easily be blocked by particular interests so that minorities are less likely to be tyrannised by the majority.⁵⁵ In a large Republic, the common good can, however, only be managed through *representative democracy*.⁵⁶ The citizens, as the owners of public goods, appoint a government as their agent and custodian for the benefit of their common interests. Because the agent is controlled by the principal, the *principal-agent* relationship is the key issue in a Republic.⁵⁷

Since *John Locke*’s Two Treatises on Government and the Glorious Revolution in 1688, the theories of republicanism and democracy have converged to the core principles that governments are appointed as the agent of the citizens *for a limited time* only, and remain accountable to the principal.⁵⁸ *Citizens have the authority* to elect a government as well as the right to withdraw their confidence from an administration and name a new one.⁵⁹ Measured by these standards, the EU is still far from being a democratic Republic. The intergovernmental principle of statehood, which declares that states are sovereign rather than citizens, has deprived Union citizens from exercising their rights as owners of the European *res publica*.⁶⁰ How one should set up a constitution for European citizens to appoint an agent for the administration of their European public goods is beyond the scope of this paper.⁶¹ However, the republican paradigm can re-articulate the principal-

⁵⁵ *D. Hume*, FN 42; *A. Hamilton/J. Madison/J. Jay*, *The Federalist Papers*, 1788. See also *G. S. Wood*, *The American Revolution. A History*, New York 2003. In modern political economic theory, the problem of small Republics is referred to as *agency capture*.

⁵⁶ “A true Republic ... is, and cannot be anything else but, a *representative system* of the people whereby the people’s rights are looked after on their behalf by deputies who represent the united will of the citizens.” *I. Kant*, *Metaphysik der Sitten*, 1785, § 52, III (English in H.S. Reiss (ed): *Kant, Political Writings*, Cambridge University Press 1991). *N. Urbinati* (*Competing for Liberty: The Republican Critique of Democracy*. *American Political Science Review*, 2012, No.106, pp 607-621) has shown that for early republicans representation was a tool to prevent the populist corruption of democracy and allowed correcting policy mistakes.

⁵⁷ As *R. Price* (*Political Writings*, Cambridge 1991), a radical English Republican and supporter of American independence wrote: If governments “are subject to no control from their constituents, the very idea of liberty will be lost and the power of choosing representatives becomes nothing but a power, lodged in a few, to choose at certain periods a body of masters for themselves and for the rest of the community”.

⁵⁸ This convergence became possible, because accountability for a limited mandate reduced the danger of populist corruption.

⁵⁹ *J. Locke* (*Two Treatises of Government*, Cambridge 1988, p. 367): “yet, the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supreme Power to remove or alter the Legislative, when they find the Legislative to act contrary to the trust reposed in them.”

⁶⁰ According to justifications of judgements made regarding the Treaties of Maastricht and Lisbon is the German Federal Constitutional Court, see FN 4.

⁶¹ For a discussion of how the European Republic could be better structured, see *Collignon/Paul* (FN 1).

agent relationship in ways that are different from federalist statism, which often serves as [the](#) benchmark for European integration.

The Sovereignty of the Citizens against the Power of the State?

In contrast to statism, the republican paradigm differentiates between authority and power. We have argued that the efficient administration of European (exclusive) public goods requires a government with centralised power in order to overcome collective action problems. If it is properly authorised by the principal, a government has the power to act in the name and mandate of citizens. Authorised power is right; unauthorised power is tyranny. Since *Bodin*, authority as the ultimate source of legislative power has been recognised as the *sovereign*.⁶² This implies that sovereignty can never lie with those *who exercise power*. Neither governments, who are merely authorised agents, nor states, which are instruments for the exertion of power, can possess ultimate authority. Since the American and French Revolution, the people are the collective sovereign. The differentiation between authority and power, between citizens as principals and governments as agents, explains the key contribution that the republican tradition can offer towards the institutional reform of the European Union's governance.

Almost all debates concerning the European Union's powers and rights, or its responsibilities and competences, are limited to the question who controls whom, and how and why this can be done. European Treaties, just as state constitutions, are essentially a set of rules articulating the distribution of power. However, at the European level, the authority of the principal that legitimates the exercise of power is weaker than in nation states, because the power of European institutions is derived from the fact that "Member States confer competences to attain objectives they have in common"⁶³ and not by an authoritative act of citizens. European citizens are unable to exercise their sovereignty, because the states consider themselves the "masters of the treaties" and perceive EU citizens merely as "belonging" to nation-states. The division of citizens into nations, which alone have democratically legitimising authority, is the *divide et impera* strategy by which nation-states maintain their monopoly of power. In other words, governments claim an authority, which the

S. Besson/J. L. Martí (Legal Republicanism. National and International Perspectives, Oxford 2009, p. 28) distinguish between Republican legal theory and jurisprudence and Republican law, which they continue to divide into substantive and procedural Legal Republicanism. In this paper, I focus on the normative basis of a substantive form of Legal Republicanism although I agree with the authors when they write: "Constitutional provisions are crucial from a republican point of view. ... A republican lawyer is expected to endorse a strongly democratic theory of legal authority" (pp. 29–31).

⁶² J. Bodin, *Les six livres de la République*, Paris 1993; Collignon, 2003 (FN 1). See also Grimm (FN 26), p. 18.

⁶³ Art. 1 Para. 1 TEU

republican paradigm would only recognise as coming from all citizens collectively as the unified sovereign.

For this reason, European debates concerning competences, subsidiarity, and loss of sovereignty are rather arbitrary; without a higher authority the amount of power, which states can confer to the European level, remains normatively undetermined. In the 18th century, this arbitrariness would have been called “tyranny”; nowadays we speak politely of a “democratic deficit”. The German Federal Constitutional Court has recognised this problem, but its solution remains within the context of state power. By referring power back to the authority of *Staatsvolk (demos)*, i.e. to the fusion of the state and people in their “unity of sameness”, the German court has adopted the communitarian-holistic interpretation of pre-political nationhood as the source of democratic legitimacy. Curiously, in this interpretation, the German Court re-joined a reasoning, which goes back to French Jacobinism and still prevails among French sovereignists today.⁶⁴ However, this interpretation intensifies the legitimacy problems caused by the externalities and collective action failures described above, because, by definition, one nation must seclude another, while the citizens of all nations are affected by the utilities of European public goods. The violations of the Stability and Growth Pact, the difficulties of setting up a European bailout fund or concluding the fiscal compact show how nation-states can generate negative externalities for the Euro Area. These negative effects are created by nation state governments, which rightly claim to act on behalf of their constituency. The problem is that these governments represent partial interests, whereas in principle the only constituency that could authorize policies for European public goods would have to cover all European citizens affected.

The European Republic paradigm avoids this dilemma for three reasons. Firstly, all European citizens are defined as the owners of those and only those public goods by which they are all (potentially) affected. This definition establishes a clear norm for delineating competences. The European Republic stops short of being a superstate, which assimilates different cultures and communities into a hierarchically structured whole. Freedom means diversity. A person can be an owner of private, local, national and European public goods and is, therefore, simultaneously a member of multiple communities. For each class of public goods, the owners can appoint different agents to take care of their specific common properties. The government of the European Republic can therefore

⁶⁴ E.-J. Sieyès (Qu'est-ce que le Tiers Etat ; 1789) proclaimed: « *La nation existe avant tout, elle est l'origine de tout.* » and J.-P. Chevènement (La faute de M. Monnet; Paris, 2006, p. 65) explained: “*Avec la Révolution naissent ensemble le ‘Peuple français’ et la République ‘une et indivisible’*”. The paradigm of the European Republic proposed here would require German communitarians to understand that the *Bundesrepublik* is first of all a republic, and the French souverainists to understand that the Republic can be « *une et divisible* ». See also T. Chopin, *La République une et divisible: Les Fondements de la Fédération américaine*, Paris 2002.

concentrate on the efficient administration of public goods instead of being gridlocked by communitarian-holistic claims from other policy constituencies.

Secondly, as the owners of public goods, citizens are the principal with the authority to bestow power to a government. For this reason, citizens must have the right to choose and control their agents through general elections. This right constitutes their *republican freedom*. Presently, Europe's governance does not give citizens this right, because national governments control the European agent (Commission, Council, etc.). No doubt, the EU is formally legitimate, because democratic states have conferred competences to the European level,⁶⁵ but this fact does not satisfy the radicalism of the republican paradigm, because the recourse to citizens' authority, by which that transfer of power is authorised, is fragmented and incomplete.

To avoid misunderstandings: the authority of the owners of public goods is not only manifested in a one-off constitutional act, i.e. in their *pouvoir constituant*; it reappears every time the republican government is up for election. It allows citizens to choose policies consistent with their preferences for social justice and European public goods. National elections cannot fulfil this task, because they are only offering choices between national policy bundles which contain, at best, a few low-salience European components but no coherent European policy designs. The Europe of nation-states prevents citizens systematically from participating in the important collective deliberation and will formation, through which all citizens constitute themselves as free and equal individuals. Only this broad deliberation will gradually generate the epistemic transformation which, in turn, will widen the boundaries of trust and solidarity.⁶⁶

Thirdly, as the sovereign who owns European public goods, all citizens are equally affected by the externalities of public goods and this fact constitutes their *civic equality*, which gives them a right to participate in the political process and public deliberation of collective choice. This participation requires, of course, fair procedures for decision-making, such as "one man, one vote" in general elections; but, in addition, the republican paradigm asserts that participation in public deliberation allows finding solutions and forming opinions about how to administer public goods.⁶⁷ The procedural infrastructure for public deliberation is provided by political campaigns focussed on choosing a government. The indirect choice through national governments is not democracy, but only its derivative. If in the EU, the Council is considered the second, although decisive,

⁶⁵ See A. v. Bogdandy/J. Bast, *The Federal Order of Competences*, in: *Principles of European Constitutional Law*, 2. Edition. Oxford 2009, pp. 275–307

⁶⁶ E. O. Eriksen, *The unfinished democratization of Europe*, OUP, 2009, especially chapter 3.

⁶⁷ J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Verfassungsstaates*, Frankfurt a.M., 1992; J. Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt a.M. 1996; Collignon, 2003 (FN 1); Eriksen, 2008 (FN 66)

parliamentary chamber, then it is an eternal parliament, which renews itself only through by-elections. Such a system can hardly be described as democratic. From a republican perspective, political decisions about the orientations of the administration of European public goods can only be authorised by *all* European citizens *together*, as they are all collective owners of these goods.

The Federal Order of the Republic

The republican *principal-agent* approach allows deriving the competences of a European government normatively from public goods and defines sovereignty as ownership rights in these public goods. By contrast, intergovernmentalism and federalism are statist theories based on power relations.⁶⁸ Intergovernmentalism identifies sovereignty with states. Thus, in its ruling on the Lisbon Treaty, the German Constitutional Court has viewed the European Union as “an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.”⁶⁹ Hence, citizens are *subjects*, not sovereign.

In contrast, European federalists interpret the European Union as a state in-the-making. Citizens are the sovereign, but they are assimilated by a European state, to which local interests are subordinated. They assume the federation to be founded on an identity of interests (say because everyone wants peace), and this justifies conferring power to a federal government. This approach remains indifferent to the diversity and heterogeneity of cultures, values, preferences that characterises the European Union.

Neither of these principles is helpful in *defining* competences for a European government. By contrast, the republican approach calls for a government at the European level that is *solely* responsible for the administration of European public goods and is legitimised through pan-European elections. National governments are responsible for the administration of national public goods, which affect citizens exclusively in their respective states and for this reason they are appointed national elections.

Such a European government should logically arise from the current European Commission, as it already possesses the requisite administrative and technical infrastructure necessary for a

⁶⁸ See Ch. Schönberger, Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas, AöR 129 (2004), pp. 81–120.

⁶⁹ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. 1.

government. Admittedly, there is an important difference between the Commission and a government in that governments have political responsibility for and accountability to their citizens as a sovereign, while the Commission is in essence responsible to Member States. On the other hand, the European Parliament is already the elected body representing European citizens, but its legislative competences are severely constrained. The republican approach to Europe's governance would therefore establish stronger institutional links between the Commission and the Parliament; it would also broaden its competences to cover the full range of European public goods.

An important step towards a European Republic would be to politicise the Commission through the Parliament. If the President of the Commission (functioning as the government of the European Republic) was elected by the Parliament, political parties would have to present alternative candidates prior to EP elections. In order to win a majority, candidates would present alternative programmes, which seek cross-border support and would thereby become integrative. Given their right to choose, citizens would start to deliberate about policies that serve their interests as with respect to European public goods (and only such goods). The interests of the citizens would then be articulated on a left-right political spectrum rather than according to national identities and reflect ideas of social justice for the EU rather than nation states.⁷⁰ This politization would generate the public sphere for European-wide debates, deliberation and policy consensus, which are today often deplored as being absent. Hence, republican participation is dependent on institutions, which encourage it and not on pre-existing demos-identities.

This analysis implies that a republican government must have clear competences for which it is responsible. The republican criterion applies primarily to exclusive public goods (*common resource goods*), because this is where voluntary cooperation between Member States will not produce optimal results. In the case of inclusive goods, national governments have an incentive to cooperate with each other, so that the European government would mainly fulfil a supportive role by overcoming information asymmetries. However, this means that the federal order of the European Republic would be complex. The Treaty of Lisbon has already divided the Union's competences into *exclusive*, *shared*, *coordinated*, and *supporting* competences.⁷¹ From a republican perspective, exclusive goods should be administered through exclusive or, at the very least, through shared competences using appropriate legislative procedures. Competitive and coordinated competences are sufficient for inclusive goods.⁷²

⁷⁰ See *Simon Hix*, 2008. *What's Wrong With the European Union and How to Fix It*; Polity Press, Cambridge UK

⁷¹ Art. 3–6 TFEU.

⁷² For a classification, see also *Haratsch* (among others) (FN 31), Rn. 149–155

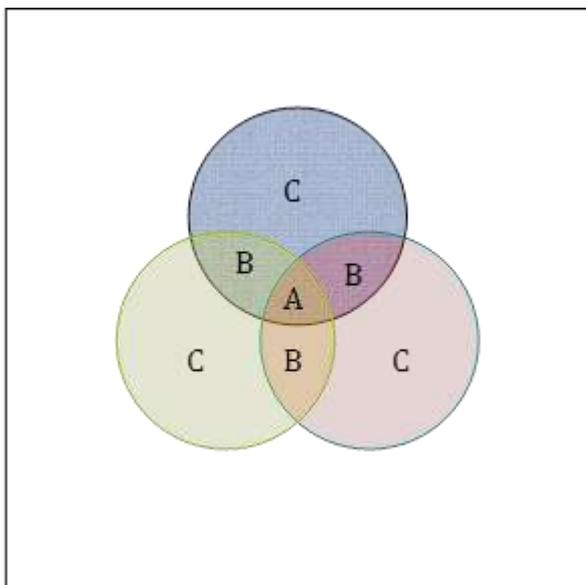
In practice, the allocation of individual competences, as presently enshrined in the Treaty of Lisbon, must be reconsidered. As an example let us look at fiscal and related tax policies. It was argued above that a large number of exclusive common goods have come into existence because the scarcity of money makes the euro a *common resource good*. The debt crisis has shown that the stability of the Euro is a European common good which is threatened by the actions of single Member States. Consequently, it should be the task of the European government to enforce that national budget deficits conform to Eurozone stability requirements. This does not mean that national governments should not have the freedom to decide the extent of their national public goods. The high consumption of national public goods will require high national taxes. However, financing national deficits is a matter of common European concern. This fact justifies finance decisions to be taken at the Euro-level. Yet, from a republican perspective, such high-level interference must be democratically justified. This means that the European Parliament, as the assembly of citizens' representatives, must be given the competences for macroeconomic stability policies in the Euro Area rather than national governments in the European Council. Similar reasoning applies to the administration of other exclusive public goods such as technology policy, internal and external security, foreign policy, energy security, and climate protection.⁷³

The European *governance* becomes even more complicated if we take into consideration that there are public goods that only affect the citizens of a subset of Member States. For example, common monetary and financial policies currently affect only 65.8% of the population of the EU, although all Member States, with the exception of Denmark and the UK, are obliged to adopt the Euro. It is, therefore, difficult to decide who is affected by the euro or not. Similarly, there are public goods that only exhibit mild external effects in other Member States. For example, the Mediterranean Cooperation and Baltic Sea Cooperation affect neighbouring states far more than those on the other side of Europe. It is then arguable that not every public good should be administered by a single government; but it would also defeat the principles of representative democracy, where a parliament is in charge of preserving the coherence over different policy areas, if every configuration of public goods had its own government and parliament. In a Republic, public goods are bundled to serve the common interest of all concerned and in the European Republic European public goods would have to be bundled together in order to administer them efficiently. The key to deciding how this is done lies with the principle of *minimisation* of negative externalities (rather than their elimination).

⁷³ See Collignon/Paul (FN 1), und G. Verhofstadt, *The United States of Europe*, London 2006.

This allocation of competences is demonstrated in a simplified way in the Venn diagram in Figure 1. Each circle represents the set of citizens of a Member State that are affected by a certain policy decision. In section A where all circles overlap, we find European public goods that affect all citizens; these goods must be administered exclusively by a European government. In section B, there is overlap of the requirements of some subgroups of European citizens; there is a large potential for intergovernmental policy in this section. In section C, Member States are largely autonomous and national parliaments must be able to represent the sovereign rights of their citizens. This shows how the republican paradigm can provide clear criteria for structuring the competences of a European government.

Figure 1



IV. Conclusion

In the wake of the 2008 financial crisis and the tsunami-like devastation of public finances that followed and nearly caused the collapse of the euro, the limits of the traditional European model of integration have been clearly exposed. Sovereign Member States are incapable of administering the common goods of European citizens efficiently. After some hesitation, the Euro Area Member States have finally agreed in the Euro crisis to increase cooperation and control mechanisms through the Commission and the Council. Yet, the policies imposed on some Member States have widened the democratic deficit and deepened concerns with social (in)justice because they were not chosen by citizens after European-wide deliberation. These reforms are inconsistent with republican principles of freedom, equality, democracy and the self-determination of citizens.

The republican paradigm allows a new perspective, not only in relation to politics, but perhaps more importantly in relation to European law. It focuses on social justice and European public welfare as the property rights of free citizens who also have the right to appoint and control a government that administrates their public goods. With the large range of European public goods already in existence, the European Republic is not a utopia but rather a daily reality for all citizens. Citizens, as the owners of European goods, must have an effective control right that they could regularly exercise during elections. The precise details of how a republican practice could be put into place must still be decided upon. Working this out is the challenge of our time.

23.3.2013