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A European res publica

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Abstract

The article analyses the fundamental constitutional enigma of the European Union (EU), namely whether the EU can be considered as a (from its Member States) *separate* and *independent* constitutional legal order. The EU is often referred to as a legal order *sui generis*, i.e. of a unique character that defies traditional definitions. More specifically, the notion of an independent and separate EU is at odds with the idea of the sovereign state. The notion of the EU as a legal order *sui generis* is too much influenced by the models of the sovereign state and sovereignty (in the vein of Thomas Hobbes). The key component in the Hobbesian idea of sovereignty is freedom as *non-interference.* A sovereign state is consequently a state that is free from, i.e. not interfered with by, external actors like, for example, the EU. Put differently, either the EU is sovereign or the Member States are sovereign.

By shifting the perspective to a neo-Roman republican understanding of freedom as *non-domination* the constitutional picture of the EU will become more nuanced. *Res publica* is best understood as what citizens hold in common and above their narrow self-interest. According to a republican notion of the constitution the purpose of the law is to eliminate the possibility of arbitrary domination. For that reason, not all interference is to be considered as a restriction of freedom but only those restrictions that cannot be justified according to the *res publica*. Viewed through the republican prism it can be argued that the EU represents an important advancement in securing freedom as non-domination without implying that the EU must become a state. The fundamental enigma can thus be rephrased as a clash between two diverging concepts of freedom. Whereas the EU will always be at odds with the idea of sovereignty (however framed) it will be much easier to reconcile with the republican ideal.

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Keywords

Constitutional theory, EU-constitution, sovereignty, republican theory, res publica.

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1. The notion of res publica and aim of the article

The notion of *res publica* is often translated as "the common good" but more properly it is what citizens hold in common and above their own narrow self-interest. *Res publica* departs from an idea of the legal order as a species of moral dialogue based on reason thereby appealing to the rational assent of its members. Viewed as an ongoing moral dialogue striving for coherence and rationality in the law, *res publica* is better understood as a dynamic concept than as a fixed and unalterable set of values. It may sound like an ancient term today, more appropriate for discourses on classical Roman law than for European Union law. Such summary dismissal may, however, deprive us of a useful tool for assessing the constitutional enigma of the European Union – is the EU a *separate* and *independent* legal order comprising not only states but also citizens as direct subjects? The fundamental enigma challenges our traditional notions of the relationship between law, state and democracy where the two former have often been held to be necessarily dependent on the latter. Hence it is that the EU, which undoubtedly is not a state, has given rise to insoluble constitutional problems prompting many scholars and lawyers to hold that the EU is an organisation *sui generis*, i.e. one that defies traditional constitutional models.

Our current constitutional models, not least the parliamentary democracy that is prevalent in many of the Member States (Sweden among these), are very much based on and framed by the idea of the (sovereign) state as it has emerged since the 17:th century primarily according to the philosophy of Thomas Hobbes. The basis for the idea of sovereignty is the notion of freedom as non-interference, i.e. a sovereign state is one that does not take orders from any other state (or other wielder of power) and a sovereign people is, in the same vein, one that is not restricted from taking its own course of action.

My claim is that the conclusion of the EU as a *sui generis* entity is overly simplistic and too influenced by the sovereign state. The incompatibility between traditional constitutional models and the EU is a conflict mainly on the surface level of constitutional law and one that is mainly conditioned by the normative ideals underpinning the idea of sovereignty. This conflict is particularly clear concerning the Swedish constitutional provision (Instrument of Government chapter 10 article 6) on the relation between Sweden and the EU, which is deeply influenced by the notion of sovereignty. If the perspective is changed to a deeper level another picture will emerge where the EU accords well with republican constitutional values and models whereas it is much more difficult to reconcile with the idea of sovereignty (however framed).

The classical notion of *res publica* could confer constitutional legitimacy on the EU in those places where the traditional model of democracy, defined as majority decision-making, obviously fails without having to resort to the notion of the EU as a totally unique creation in the history of legal theory. Put differently, the return to the Roman assessment of the moral quality of the constitution and viewing law as an instrument for achieving non-domination, rather than non-interference, will provide a plausible solution to the constitutional enigma that does not necessarily imply the creation of a European state. There are, however, some obstacles before the EU can be said to accord with the republican ideal of the legal order as a species of moral dialogue endowed with a *res publica* of its own. These obstacles are mainly the result of the current position of the states as intermediary subjects between the EU and her citizens.

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2. Rule of law and res publica

The origin of the notion of *res publica* and republican constitutionalism lies mainly with the Roman statesman and philosopher Marcus Tullius Cicero (106 - 43 B.C.) who held that *legal agreement* and *community of interest* formed the core of the concept.[1] In the Roman constitution *res publica* was incompatible with arbitrary power and the constitution accordingly rested on the principle of separation of powers.[2] Cicero also formulated another classic of modern Western legal theory in his famous account of law to be viewed as "…right reason [*recta ratio*] in harmony with nature"[3] and that law must be universalistic (and not limited to a certain community) in its character. [4] Put in different words, there was a difference between (morally) "good" and "bad" law in the republican constitution[5] and sharing law also meant sharing justice.[6] The law has ever since been held to be instrumental in relation to some over-arching social good. This social good has typically been either religious or moral in kind, i.e. the law as a social force cannot be studied without connection with other social factors that make up the moral deep structure of society. More specifically this link between public power, law and public morality has ever since the days of the Roman republic been known as the *res publica* or the *common good* of the society from which the constitutional notion of the *commonwealth* derives. The notion meant to the Romans not as much a "republic" as "the activities of the Roman people".[7] This dynamic concept of the *res publica* is underlined by the fact that the Roman republic did not possess a constitution in the modern sense of a clear set of written rules that defined state institutions and their powers.[8]

The understanding of the social good constituting the *res publica* is of importance for understanding the deep structure of constitutional law since it is according to the *res publica* that the constitutional law is justified (or critisised). Constitutional institutions are likewise designed in order to give effect to the ideals of the *res publica* thus pointing to the issue of purposeful design. The social good represents the reason (*raison d'etre*) for which the members of the society in question submit to the authority of the norms and institutions set up by the legal order. The legal and political orders are in this sense the property (*res*) of the people (*publica*).

Historically the *res publica* has seldom been specified beyond the core values of limited government under law with the aim to secure non-domination. The lasting appeal of the notion has rather been found in the fact that it appeals to a universalistic idea of a common good, morally superior to the self interest of the single individual (or group of individuals). Rousseau famously stated that there was a significant difference between the "will of all" and the "general will", the proper *res publica*:

[1] Cicero, "The Republic", in *The Republic and The Laws* (Oxford University Press, 1998), p 19. In this passage Cicero can be seen as an early precursor of the core ideas of constitutionalism, the modern heir of the republican ideal cf P Pettit, *Republicanism – A Theory of Freedom and Government* (Oxford University Press, 1997) p 177ff. Some modern republicans will dispute this point: Richard Bellamy and Adam Tomkins for instance believe that a constitution designed on checks and balances with a strong judicial power (legal constitutionalism) will fail to secure freedom as non-domination. In their view republicanism is best secured through a parliamentary democracy with little or no judicial review, see further R. Bellamy, *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*, (Cambridge University Press, Cambridge, 2007) and A. Tomkins, *Our Republican Constitution* (Hart Publishing, Oxford, 2005). I would contend that this view is not in accordance with the Roman notion of the republic, as formulated by Cicero, and more closely related to the Athenian model of democracy.
[2] Cf. Cicero, The Republic, p 71ff.
[3] Cicero, The Republic, p 68.
[4] Cicero, "The Laws" in *The Republic and The Laws* (Oxford University Press, 1998), p 111.
[5] Cicero, The Laws, p 112.
[6] Cicero, The Laws, p 105.
[7] The World of Rome, eds. Peter Jones & Keith Sidwell, Cambridge University Press, 1997, p 84
[8] Still today there are constitutions that develop in the Roman way. The British common law constitution is the most important contemporary example.

> "The [general will] looks only to the common interest, the [will of all] looks to private interest, and is nothing but a sum of particular wills."[9]

Even though Rousseau in the end concludes that there is no other viable way of ascertaining the general will than by majority rule, his idea of a distinction between the general will and a cumulated will of all has been quite influential for a modern interpretation of the *res publica*. Much like the idea of a social contract, *res publica* aspires to the assent of rationally thinking individuals by appealing to principles of justice that are shared by most (if not all) individuals. Put in other words one could say that the *res publica* concerns the essence of the moral dialogue that constitutes the core of the moral legitimacy of the legal and political order.

3. Res publica and democracy

Historically there has been a tension between the notions of *res publica* on the one hand and the democratic form of government, understood as the unrestricted rule of the majority, on the other. The Athenian democracy, in perfect formal order sentenced Socrates to death, though he had broken no law of the *polis*. Athens also decided to raze the neutral city of Melos to the ground for the simple reason that it had not deferred to Athenian rule. These two events stained the name of democracy for more than two thousand years to come when democracy was generally equated with mob-rule.[10]

A later and telling example of the historically uneasy tension between democracy and *res publica* is to be found in the constitutional debate preceding the American constitution of 1787, one of the first modern constitutions and the oldest written one still in force. The framers of the American constitution were decidedly against the idea of setting up a government based on the principles of Greek democracy holding that:

> "In all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."11

The framers were thus disinclined to believe that the classical democratic form of government could secure *res publica* understood as public reason. The authors of the American constitution therefore deliberately omitted any reference to democracy (which, conspicuously, is not even mentioned once in the entire document) and instead opted for the label "republic". Still to this day it is argued

[9] J. J. Rousseau, "The Social Contract" in The Social *Contract and other later political writings*, (Cambridge University Press, 1997) p 60.

[10] Cicero for example rejected Athenian style democracy as a form of government consistent with *res publica*: "…there is no state to which I should be quicker to refuse the name of republic than the one which is totally in the power of the masses… there is no public except when it is held together by a legal agreement… That rabble is just as tyrannical as one man, and all the more repellent in that there is nothing more monstrous than a creature which masquerades as a public and usurps its name.", Cicero, "The Republic", in The Republic and The Laws, Oxford University Press, 1998, III:45, p 73. This argument, presumably on the same grounds, is echoed by John Locke: "By *Common-wealth*, I must be understood al along to mean not a Democracy, or any Form of Government, but *any Independent Community* which the *Latines* signified by the word *Civitas*…", Two Treatises of Government, Cambridge University Press, 1988, II, p 355, § 133.

[11] J Madison, "The Federalist no 48", in A Hamilton, J Madison & J Jay, *The Federalist* (Everyman's Library [1787] 1992), p 285

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that the American constitution is primarily based not on democratic but on republican values. This is what makes its non-democratic features, such as a system of checks and balances guarded by non elected judges, acceptable even for the current generation.

4. Leviathan - the challenge to the republican model

The republican model of freedom as non-domination and government characterised by checks and balances should be contrasted with its powerful challenger of the 17:th century, namely Thomas Hobbes and his tremendously influential theory of the sovereign state set out in his masterpiece *Leviathan* (1651). This is not the place to give a full account of Hobbes theory but attention will be drawn to the most important contrasts with the republican model.

Freedom, according to Hobbes, is to be understood as the "absence of Opposition" understood as external impediments of motion.[12] Such a concept entails that freedom is not viewed as a balance of freedoms one against the other as in the case of non-domination where total freedom could not be conceived without this implying domination on some part's behalf. It is clear that freedom on Hobbes' account cannot be equally possessed by all individuals without signifying the much dreaded state of nature, i.e. anarchy. The crucial point in Hobbes' theory is that it is only the sovereign (state) that possesses total freedom otherwise characteristic of the state of nature:

> "*The Liberty, which writers praise, is the Liberty of Sovereigns; not of Private men*… in States and Common-wealths not dependent on one another, every Common-wealth (not every man) has an absolute Libertie, to doe what it shall judge (that is to say, what that Man, or Assemblie that representeth it, shall judge) most conducing to their benefit."[13]

Personal autonomy should thus, according to Hobbes, not be confused with the autonomy of the state. According to Hobbes there is thus a vast difference between a free state and a free people.[14] In accordance with his idea of liberty as non-interference and ultimate liberty as the prerogative of the sovereign Hobbes also argued that law is, by necessity, a limitation of the original (total) liberty of the state of nature:

> "For Right is a Liberty, namely that Liberty which the Civil Law leaves us: But Civill Law is an Obligation; and takes from us the Liberty which the Law of Nature gave us."[15]

The Hobbesian notion of the law proceeds from the assumption that before the law (and the state), everything was liberty in the sense of freedom to choose whatever

[12] Hobbes, Leviathan (Cambridge University Press [1651] 1991), p 145
[13] Hobbes, Leviathan, p 149.
[14] An example of contemporary history could be that of the Soviet Union. The Soviet Union was certainly a free state in the sense that no one could tell the Soviet Union what to do and not to do without this meaning that the citizens of the Soviet Union were free in any sense comparable to their counterparts in the Western world.
[15] Hobbes above, p 200.

action that would be considered most appropriate or beneficial for its agent. The introduction of the law into this total liberty introduces something new that cannot possibly be liberty since liberty was there already. Consequently the law takes away the liberty that the state of nature gave. What is not taken away by the law remains free and hence it is not strange that Hobbes idea forms the essence of our modern notion of legality – what is not prohibited by law is permitted.

The civil law furthermore serves the paramount function of distinguishing good from evil:

> "…the measure of Good and Evill actions is the Civill Law; and the Judge the Legislator, who is alwayes the Representative of the Common-wealth."[16]

According to Hobbes the confusion (of the republicans) of trying to distinguish between "good" and "bad" forms of power was indeed to blame for the civil strife and bloodshed that was (and to some degree still is) commonplace in human society.[17] Hobbes strived to eliminate the possibility of assessing law against some (independent) moral criteria and thereby augured the thesis, central to all brands of legal positivism, that there should be a clear distinction as to what the law *is* and what it *ought* to be.

5. Counterchallenges to Leviathan

Hobbes' straightforward view of the concept of liberty and its relation to the law was challenged by several contemporaries of a more republican vein. James Harrington, for one, responded to the Hobbesian challenge by stating:

> "…to say that a Lucchese [Lucca was an Italian republic, authors remark] hath no more liberty or immunity from the laws of Lucca, than a Turk hath from those of Constantinople, and to say that a Lucchese hath no more liberty or immunity by the laws of Lucca than a Turk hath by those of Constantinople, are pretty different speeches. The first may be said of all governments alike, the second scarce of any two."[18]

John Locke also rejected the Hobbesian notion of freedom and law by affirming that freedom must be understood, in the Roman fashion, as non-domination (i.e. absence of arbitrariness) rather than as simple non-interference. The law, as an expression of public reason, was instrumental in securing the objective of non-arbitrariness.

[16] Hobbes above, p 223.
[17] "And by reading of these Greek, and Latine Authors, men from their childhood have gotten a habit (under the falseshew of Liberty), of favouring tumults, and of licentious controlling of the actions of their Soveraigns; and again of controlling those controllers, with the effusion of so much Blood; as I think I may truly say, there was never any thing so deerly bought, as these Western parts have bought the learning of the Greek and Latine tounges.", Hobbes, p 150
[18] J Harrington, "The Commonwealth of Oceana" in *The Commonwealth of Oceana and a System of Politics* (Cambridge University Press [1656] 1992), p 20.

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> "…*Freedom of Men under Government*, is to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it: A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man."[19] Furthermore "…*the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*."[20]

Locke in this passage reconnects to Cicero's distinction between just and unjust forms of law by pointing out that there is a qualitative difference between law that "preserves and enlarges" freedom and law that merely "restrains".[21] Democracy and freedom are more complex concepts in the republican tradition than a process of decision-making. A decision that has been endorsed by the majority is not necessarily in accordance with the *res publica* if it is not in the interest of the whole of the community but rather a way of the majority dominating the minority.

On the other hand, the advantages of the democratic process for the *res publica* should not be overlooked. It is certainly the easiest and most efficient way to ensure that decisions are taken with a view to the interest of the whole to place the legislative power in the hands of elected representatives rather than in the hands of a few non-elected (often self-proclaimed) experts. The republican ideal of government rejects a Westminster style model of parliamentary sovereignty since such a system does not provide for any safeguard against the possible domination of the majority. It may be very true that a democratically elected assembly does not generally go about enslaving or dominating minorities but the absence of such safeguards means that there will always be a possibility of this happening. As one of the advocates of the American cause had it in 18:th century England:

> "For by the same power, by which the people of England can compel them to pay *one penny*, they may compel them to pay the *last penny* they have. There will be nothing but arbitrary imposition on the one side, and humble petition on the other."[22]

Even though the latter possibility seems remote in ordinary political life, it is the mere possibility of arbitrary power that is the target of the republican ideal. The other side of the coin is that political, collective, action will be more difficult, even when there is wide support among the general public for such action. Action will thus only be taken when several powers, representing a more qualified support than a single majority, agree on it.[23]

[19] J Locke, p 284, § 22.
[20] J Locke, p 306, § 57.
[21] In the same paragraph Locke makes an implicit reference to the Hobbesian concept of law and freedom: "for *Law*, in its true notion, is not so much the limitation as *the direction of a free and intelligent Agent* to his proper interest, and prescribes no farther than is for the general good of those under that law: could they be happier without it, the *Law*, as an useless thing, would of itself vanish; and that ill deserves the name of confinement which hedges us in only from bogs and precipices."
[22] J Priestly, *Political Writings* (Cambridge University Press [1769] 1993), p 140, quoted from Pettit above, p 34.
[23] Even though such a system could indicate a state of paralysis, systems that are based on checks and balances are seldom characterised by inaction and impotence .The paradox was formulated by Montesquieu in his classical analysis of the British constitution: "The form of these three powers should be rest or inaction. But as they are constrained to move by the necessary motion of things, they will be forced to move in concert." (Montesquieu, p 164)

6. Interpretation of the res publica

Res publica concerns the interpretation of fundamental (moral) values underpinning the legal order – the reason *why* there is a legal order in the first place. According to the republican theorists of the 17:th and 18:th century the concept was, along the lines of the Roman understanding of the constitution, more a question of a continuous process rather than fixed and static rules. The connection between the law and the *res publica* is particularly prominent in theories that stress law as a reflection of public reason rather than as command and will. The difference is once again, as Harrington pointed out, between freedom *from* law and freedom *by* law. The republican understanding of law accordingly accepts some interference in personal autonomy without holding that such interference necessarily restricts personal autonomy. Only when such interference is *arbitrary*, i.e. not in conformity with the *res publica*, is it to be considered as inconsistent with liberty.[24]

Law is on such a view not necessarily "a fetter" (as Hobbes formulated it[25]) or simply an expression of command but rather a public reason reflecting a civic bond between the individuals belonging to the legal order. In the same vein that Cicero considered that those who share law also share justice Locke argued that law expressed civic morality among the citizens (in their horizontal relation):

> "…'tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This *is the Soul that gives Form, Life and Unity* to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy and Connexion."[26]

Locke argued famously (in the *Essay Concerning Human Understanding*) that we are born without any intrinsic knowledge and that all knowledge is acquired through experience. The same principle applies in the legal domain; even if we know that the *res publica* entails the liberty and welfare of the individual members of the commonwealth we do not know beforehand the exact content of these concepts. They can only be identified by the collective use of reasoning and the legislative is one of the most important arenas for this activity.[27] Just as the use of reason sets the individual free in the personal sphere[28], reason in the law is crucial for securing political and legal freedom.

Along the lines of the Lockean argument it is often assumed that the task of public reasoning, ultimately resulting in legal norms, belongs primarily to political assemblies in general and parliaments in particular. The reason for this assumption is that political assemblies reflect all of, or at least most of, the diverse opinions and views found in society. It is from their interaction that a shared notion of social justice can be elaborated. As Burke formulated the idea in his speech to the electors of Bristol on 3 November 1774

> "Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices,

[24] This concept is developed by Pettit (above), p 51ff.
[25] Hobbes, "The Citizen", in *Man and Citizen* (Hacket Publishing [1642] 1991) p 274.
[26] Locke, Two treatises of Government, Cambridge University Press, 1988 [1689], p 407, II § 212 (italics in the original)
[27] Cf. Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) p 68ff.
[28] "Reason must be our last judge and guide in everything". Locke, *An Essay Concerning Human Understanding* (Oxford University Press [1690] 1975) p 704

> ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of parliament."29

Parliaments are the places where citizens' opinions meet in a free debate and where the end-result is likely to improve from the preceding deliberations and to be consistent with a notion of common good rather than as political horse-trading where each group seeks maximum benefit at the others expense.

There are on the other hand limits to what the elected assembly can decide. Firstly, as already Cicero pointed out, the power held by a democratic assembly can never be thought to be arbitrary in kind, a view later echoed by Locke.[30] Secondly, the legislative cannot give their powers away to someone who is not answerable to the people since this would be tantamount to renouncing one's own reason. Locke formulated this position by stating that the grant conveyed by the people to the legislative can only be "…to make *Laws*, and not to make *Legislators*".[31]

A republican understanding of the nature of power and law as the instrument for securing freedom obviously calls for a check even on the democratically elected legislative.[32] Checks on the legislative power are in modern constitutional law most often entrusted to the judicial power, i.e. to a court of one kind or another. On the other hand a court will not often, apart from rather extreme cases, be in a position to represent a morally superior position in relation to the elected legislative. A moral dialogue that is conducted exclusively in the courts would disregard the same activity in the legislative assembly and a court that bluntly insists on imposing its own values over those of the democratically elected bodies will in the end most likely be either wing-clipped or outright abolished.

Still a judicial remedy remains essential for the attainment of non-domination in respect to the public power. The approach taken in the US and Canadian supreme courts is instructive regarding the striking of balance between judicial review and majority decision-making in political bodies. According to this view it corresponds to the political bodies to identify the material values and policies to be pursued by the public authorities while the courts are charged with the duty to ensure that these values are universalistic and applied equally to all without any (conscious or unconscious) bias regarding impact in respect to minorities.[33] The underlying idea is to secure coherence in the law as an analogy to individual reasoning on moral issues where a person is supposed to act on a consistent set of values even if the factual conditions change. Holding that the courts primary objective is to ensure equal and unbiased application of the law can be seen as a transformation from moral philosophy to law of the thesis of *universalisability* which is associated with the philosophy of Richard Hare. Hare formulates this thesis, which also concerns the bridge between *is* and *ought*, in terms of universalising value judgements thereby providing consistency and reason to moral actions.[34] Hare's argument prescribes that the person who states a given value judgement is obliged, as a logical consequence, to apply that judgement to all similar cases even if (or especially when) it would affect himself.

[29] The speech is available at http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html
[30] Locke, *Two Treatises of Government*, p 357.
[31] Locke, *Two Treatises of Government*, p 363.
[32] With the words of the American founding fathers: "An *elective despotism* was not the government we fought for.", Madison, "The Federalist no 48", in A Hamilton, J Madison & J Jay, *The Federalist* (Everyman's Library [1787] 1992) p 256.
[33] This theory is developed in J Hart Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press, 1980).
[34] R Hare, *Freedom and Reason* (Oxford University Press 1963) p. 30ff.

If Hare's argument is translated to the legal domain the ideal result would be that only legislation based on coherent and unbiased principle, i.e. that meets the requirement of universalisability, will survive judicial review. The courts participation in the identification of the *Res publica* is thus not primarily a question of the judges imposing "their view" of the morally good on the other branches of government. The ideal of equal protection and rational argumentation amounts to, with the terminology of Dworkin, the concept of *integrity* in the law, meaning that the courts should enforce the law as a coherent and principled whole rather than as isolated *ad hoc* pieces.[35] The courts have an important task of interpreting the *res publica* in their day to day business when adjudicating in matters concerning individual rights and freedoms according to the coherent set of principles that make up the *res publica*.

7. Res publica in the Treaty on the Functioning of the European Union and the reasoning of the ECJ

The ECJ started it all! The ECJ has consistently, since the 1960-ies, claimed that the EU already has a constitutional legal order that is independent from the legal orders of the Member States and that it embraces individuals as well as states. By the same token it is from the status as an independent legal order that the problems associated with the "democratic deficit" of the EU seek their provenance. The claims of the ECJ correspond fairly well with the republican tradition and a European *res publica* can be advanced on the basis of the Treaty on the European Union (TEU) and the case law of the ECJ even if there are, as will be seen, some problematic aspects to this argument.

The starting point of the constitutional argument is found in the by now classical statement in the preamble of the TEU (found also in the original Treaty of the European Community from 1958) that the EU strives to create "an ever closer Union among the peoples of Europe". This statement has been said to form the "genetic code" of the EU.[36] Further guidance could be found in article 6.1 TEU which states that the EU is founded on certain fundamental values (liberty, democracy, respect for human rights and fundamental freedoms and the rule of law) and that these principles are common to the Member States. These constitute the moral foundations of the EU or, put in other terms, its *res publica* – its claim for moral authority.

The ECJ set out its famous arguments for the "new legal order" of the EU in the seminal van Gend en Loos case.[37] One could summarise the argument of the Court as follows: The Treaty provisions could not be understood without an inquiry into its "spirit, the general scheme and the wording of [its] provisions". The objective of the Treaty implied that the Treaty did not limit itself to creating mutual obligations between the states but also created rights and obligations for *individuals* that became part of their legal heritage. The Treaties were adopted in legal form and created institutions with state powers. The treaties furthermore made reference to individuals in the preamble and the nationals of the Member States were called upon to collaborate in the functioning of the Community through the European Parliament and the Economic and Social Committee.[38] As a consequence, the Court held that, provided some other conditions are met, rights laid down in the Treaty might have *direct effect* in the Member States. The important constitutional point is that the effect of EU-law follows directly from the Treaty and not from the Member

[35] R Dworkin, *Law's Empire*, (Harvard University Press, 1986) p 166f and 254-258.
[36] F Mancini & D Keeling, *Democracy and the European Court of Justice*, The Modern Law Review [1994] p 175-190 at p 186.
[37] 26/62, van Gend en Loos, ECR [1963] 1
[38] p 12 of the judgment.

State's internal provisions. Direct effect is in this sense incompatible with the traditional view of the relationship between domestic law and international law since the traditional position is that it is the state's constitutional provisions ultimately determine the internal effects of international law.[39]

In the likewise seminal case Costa v ENEL[40], the ECJ held that the terms and spirit of the Treaty were accepted by the states on a basis of reciprocity. The executive force of the treaties could not vary between the Member States without giving rise to discrimination between the European individuals. The Treaty, as an independent source of law, could not be overridden without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[41] The conclusion from this reasoning was that EU-law had supremacy over Member State law within the jurisdiction of the ECJ, even in the case where the Member State law concerned was of constitutional character, something which runs counter to the traditional view on the relationship between international and domestic law.

A further paramount step in the development of the constitutional character of the EU was the introduction of protection of fundamental rights of the individual as a part of the general principles of European Union law.[42] Reading a bill of rights into EU law was a significant step in the constitutionalisation process of the Treaties since it placed a hitherto unprecedented emphasis on the position of the individual in the EU legal order.[43] The Court found that fundamental rights were protected as rights under EU law, rather than as rights of a certain *Member State* legal order. Such protection can be seen as a necessary counterbalance to the principle of supremacy of EU law in relation to national law. If violations, by EU institutions, of fundamental rights of the individual could no longer be checked by national constitutional provisions an alternative protection under EU-law would have to be found for the EU to enjoy constitutional legitimacy. To paraphrase Voltaire's famous remark on the Deity, one could say that if constitutional rights protection did not exist in EU law before, one would have to invent it.

It is clear from this cursory glance that the ECJ has given an unprecedented importance to the position of the individual in international law and the rule of law in its reasoning on why EU-law constitutes a new legal order. The treaties are concluded in legal form and create rights for individuals (although the treaties themselves were concluded by states). This is said to be because of the "spirit and general scheme" and the objective of the treaty, i.e. because of its moral *purpose* or *res publica*. Considering the emphasis placed on the rights of the European individual conferred by their common law (the Treaties), the equality of these individuals in regard to these rights and the fact that the ECJ is charged with upholding these rights, the reasoning of the ECJ is rhymes well with republican fundamentals.

[39] Cf, *inter alia*, E. Denza, The Relationship between international and national law, in ed. M.D. Evans, *International Law*, Oxford University Press, 2006, p 428. This very argument was also put forward in the van Gend en Loos case by the Dutch, German and Belgian governments (p 6-8 of the judgment) and was supported by the Advocate General but not by the Court.
[40] 6/64, "Costa v ENEL", ECR [1964] 585
[41] p 593f of the judgment.
42 The ECJ embarked on this path in a string of cases in the 1960-ies and 1970-ies starting with the case 29/69, Stauder, ECR [1969] 419. The idea was further clarified in the seminal case Internationale Handelsgesellschaft where the Court held that "… respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community", 11/70, ECR [1970] 1125 at 1134, § 4. A fuller account of the issue is given in T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p 202-243.
[43] Cf. F. Mancini, *The Making of a Constitution for Europe*, p 595-614 at p 608ff

The EU functions as an important source of legal rights for European individuals, rights that could not be achieved by the Member States on their own. No state can on its own grant their citizens the right to freely move and reside within other Member States. Even an agreement between two (or more) states on these matters would leave the rights of the individual as, at best, accessory to those of the state in question. What is more; these rights do not only function as a constitutional parameter against one's own state (thereby strengthening judicial protection considerably in states that, like Sweden, previously had a comparatively weak tradition of judicial review), they are also operative against other states as a matter of right and not as concession.

Through the EU, the rights now held by European citizens have furthermore been set on an independent legal footing which also requires that any claim based on EU-law must be arguable in a court of law, ultimately before the ECJ itself.[44] The institutions of the EU can therefore be said to be endowed with a moral authority, a *res publica*, based on these rights. Even though the interest in fundamental rights was to some extent forced on the ECJ by national courts (notably the German constitutional court) the challenge has been readily accepted and the view expressed by one of the Advocate Generals is very much to the point:

> "[The fundamental principles of national legal systems] contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual."[45]

Conferring rights on individuals also means that conflicts between different rights under EU-law will occur. The ECJ has on several occasions held that a right under EU-law can only be assessed in the light of the EU legal order itself (and not that of a particular Member State) if the unity of EU law and the cohesion of the EU are not to be jeopardized.[46] A right protected under EU law can, just like most rights in the legal orders of the Member States, be restricted in "the general interest". This concept in effect translates into the rights and interests of other individuals articulated through the institutions and legal norms of the public power. The general interest is in this context closely linked to the *res publica* in the sense that a restriction that "does not infringe the substance of the right"[47] represents a fair balance between the interests of all parties concerned. The point is that the general interest at issue here is one that embraces the entire EU and not only a part of it. It is thus possible that the general interest in the EU might call for a restriction that would not have been permitted in one part (typically a Member State) or vice versa. By taking the entire EU into consideration the balance between competing claims will ideally be based on more universalistic principles than if they were to be decided within a single Member State thereby connecting to Cicero's ideal that the law ought to be universal for all mankind rather than divided by different states.

It is certainly true that the institutional framework for the EU has not caught up with its judge-made development with its *exodus* from the origins in public international law to a constitutional supra-national legal order. The institutions still reflect a Union where the states have a powerful position between the individuals and the institutions of the EU. On balance, however, the interplay between national courts and the ECJ has developed in such a way as to qualify as a constitutional

[44] As stated in, e.g., in the case 222/84, Johnston ECR [1986] 1651.
[45] 11/70, Internationale Handelsgesellschaft", ECR [1970] 1125, at p 1146
[46] 44/79, Hauer, ECR [1979] 3727, § 14.
[47] 44/79, Hauer, ECR [1979] 3727, § 30.

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legal order with individuals as well as states (and it should be recalled that according to the republican ideal the state has no moral standing besides that of its individuals). The EU seems to accord well with the republican ideal as far as the judicial empowerment and rule of law is concerned. Freedom understood as non-domination can reasonably be said to be considerably strengthened by introducing a constitutional bond, ultimately subject to one common judge, between the European individuals.

8. Identification of the res publica and the legislative deficit

The moral dialogue of EU-law through courts, as required by the republican ideal, to some degree fulfils Cicero's idea of law as *recta ratio*. However, the other part of the moral dialogue, the one conducted in legislative assemblies, is underdeveloped at the European level. This condition is aggravated by the fact that the members of the European Parliament are elected on national lists with the concomitant effect that there is rarely any European party politics of the kind that we are used to in the Member States.[48] The democratic deficit of the EU is well known and this is not the place to give a full account of the problem. It is sufficient to point out that the legislative has a pivotal role in conducting public reasoning thereby interpreting the *res publica* and that this is a problematic process within the EU.

There are two dimensions to the problem of the legislative deficit. The first is that the European Parliament does not always have a prominent role in the legislation taking place at the EU level. The second is that the current emphasis on a system of mutual recognition, rather than legislation at the EU level, risks weakening the degree of public reasoning at the EU level and, as a result, undermining its *res publica*.

Concerning the role of the European Parliament (EP) it is well known that it is the only legislative assembly that remotely meets the republican and democratic requirements of an elected assembly and that it wields, at most, a veto power over the actions of the Commission and the Council. Even though this state of affairs could be, and often is, viewed as problematic in itself it is not incompatible with a republican ideal (which does not require that the legislative can act on its own initiative) as long as legislative measures of significance are subject to the deliberations of the elected assembly that reflects the diverse opinions held in contemporary society.

A closer examination of legislation passed at the EU-level reveals that the amount of legislation in the EU adopted by the Commission alone, without the involvement of the Council (which may or may not include the European Parliament), constitutes the majority of current legislation and it is even in the ascendant.[49] This means that more and more issues which call for public reasoning are in fact decided by the non-elected Commission and its experts. To some degree delegation is inescapable in modern legislation but there is a limit where such delegation becomes incompatible with the Lockean principle that the grant conveyed by the people is to make laws and not legislators. The fact that delegated legislation is steadily increasing in the EU is therefore a point of concern from the point of view of *res publica*.

48 In 1994 I was myself amused to see Spanish election propaganda for the European Parliament elections where one of the mainstream parties urged the voters to vote for their candidates since these would "defend the interests of Spain" in the European Parliament. Indicative, one might suspect, of the fact that there was little sense of a European *res publica* present at the party headquarters.

49 For a fuller account see Carl Fredrik Bergström in SIEPS report 2006:6, Vad hände(r) med den konstitutionella krisen i EU, p 8-11.

The second problem related to the legislative deficit concerns the tendency towards increasing reliance on mutual recognition rather than legislative measures at the European level. The position was expressed in the conclusions of the Presidency at the summit of the European Council in Tampere (Finland) on 15-16 October 1999 where paragraph 33 of the conclusions contains the following statement;

> "The European Council [therefore] endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union."[50]

The principle of mutual recognition is related to the general principle of loyalty, one of the cornerstones of the EU. The principle of loyalty applies not only in the relationship between the Member States and the institutions of the EU but also between the Member States themselves.[51]

The basis of the mutual confidence and the horizontal duty of loyalty is a common view concerning the fundamental values on which the different legal orders of the Member States and the EU itself rest (article 2 TEU). An economic and political union presupposes a community of values.

The question of fundamental values concerns the moral foundations of the legal order. The arguments from moral philosophy constitute the contact surface between law and philosophy and are important for the understanding of legal norms since they are expressed in legal argumentation among legal actors. The fundamental values thereby influence the reasoning of both lawyers and politicians and, accordingly, individual judgments, legal norms and legal opinion (the surface level of law). These are both justified and criticized in accordance with the fundamental values. This part of the law can, with the words of the Finnish professor Kaarlo Tuori, be termed the *deep-structure* of the law.[52] The deep structure is separate from single legal norms and judgments but can change over time as the activities at the surface level sediment downwards and over time the deep-structure may change accordingly.

There is *prima facie* considerable concurrence between the different legal orders that comprise the European Union as regards the fundamental values. This concurrence is, as mentioned earlier, expressed in the Treaties but also in numerous instruments of international law where all Member States are signatories. Most prominent among these is perhaps the European Convention on Human Rights but, among others, the UN Rights of the Child convention should be mentioned in this category. There is by now a rich stock of case law from the two European Courts, the ECJ and the European Court of Human Rights, which has generated an important interaction between national courts and their European counterparts.[53] This interaction has resulted in a largely common European administrative and procedural law as well as considerable agreement in the field of human rights.[54]

[50] The conclusions are available at: http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm
[51] J Temple Lang, *Constitutional Law: Article 5 EEC Treaty*, Common Market Law Review [1990] p 645-681 at p 671.
[52] K Tuori, "Towards a Multi-layered View of Modern Law", in *Justice, Morality and Society – A Tribute to Aleksander Peczenik*, eds. Aulis Aarnio, Robert Alexy & Gunnar Bergholtz (Juristförlaget i Lund, 1997) p 432ff.
[53] cf. David Edward, National Courts – The Powerhouse of Community Law, in *The Cambridge Yearbook of European Legal Studies* [2004], p 1ff.
[54] cf. J Schwarze, *Tendencies towards a Common Administrative Law in Europe*, European Law Review [1991] p 3-19 at p 4ff.

The problem concerning mutual recognition is that common values may be interpreted differently and it is well known that the values referred to in article 2 TEU have historically often been in conflict with each other. The final interpretation of different values has traditionally been performed in the national legal order and thus, directly or indirectly, in the (political) democratic decision making process that ultimately governs the legal order of the state in question.

At the international level the classical principle of sovereignty has meant that states are considered as equals[55] and, consequently, that different legislators' (states) interpretations of the same fundamental value may in fact diverge considerably. To give an example, the more precise interpretation of the common value "freedom of expression" (to take an issue that is particularly important in Swedish constitutional law) will most likely be different in state A than in state B. In such a situation, where all states concerned are based on democracy and the rule of law, it will not be possible (if recourse is not to be had to a model of natural law) to explain one solution as "better" than the other by other means than referring to the moral values underpinning the legal order in question.[56]

The principle of mutual recognition reflects a position where the (sovereign) Member States retain more power to decide themselves on the proper interpretation of the fundamental values than they would have had in the case of a proper unification at the European level. At the same time the principle of mutual recognition means that a diverging interpretation of a fundamental value may be parachuted into the legal order of another Member State. However, and for this very reason, the principle of mutual recognition is not without exceptions. A mutual recognition may be refused when it would be in conflict with the "foundations of the legal order" (*ordre public*). Such foundations may well be certain fundamental rights that are expressed in the constitution of the Member State or that are otherwise recognized as fundamental by the legal actors. No Member State seems prepared to give up the right of invoking *ordre public* understood as the ultimate power to decide on fundamental values, not even in relation to other Member States that are all democracies based on the rule of law.

The possibility to be the ultimate judge on the interpretation of fundamental values entails an important aspect of sovereignty.[57] Even if the scope for resorting to *ordre public* in relation to the areas covered by EU-law may be limited, it is most likely the question of ultimate authority, rather than differences of culture or history, that impedes an unconditional acceptance of the principle of mutual recognition. Resorting to the concept of *ordre public* against another Member State therefore also entails, explicitly or implicitly, a rejection of that state's interpretation of the common fundamental value.[58]

The current alternative to mutual recognition is unification at the European level – a standard (whether of rights protection or product requirements) simply has to be decided at either Member State or European level. As was pointed out before, however, the decision making at the European level does not involve the European Parliament as the legislative assembly to an extent comparable to what is required within the Member States. This weakness is aggravated by the fact that there is a

[55] This principle is expressed in the charter of the United Nations chapter 1 article 2: The Organization is based on the principle of the sovereign equality of all its Members

[56] With Tuoris terminology one can say that a shared deep-structure can still result in different results at the surface level.

[57] cf. E Schmidt-Assman, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, Europarecht [1996] p 270-301 at p 297f.

[58] The problem of sharing the same ideal but still disagreeing on its precise content is classical and was formulated by Hobbes in the following terms: "[Men] may agree indeed in certain general things, as that *theft*, *adultery*, and the like are *sins*; as if they should say that all men account those things *evil*, to which they have given names which are usually taken in an *evil* sense. But we demand not whether theft be a sin, but what is to be termed theft", Thomas Hobbes, *De Cive*, Hacket Publishing, 1991 [1642], p 283, § 17

lack of pan-European debate or civil society.[59] On the contrary, political debate is still predominantly conducted within the Member States separately and there currently seems to be no significant development towards a European "market-square". The European political process therefore seems to have a slimmer chance of conducting public reasoning on the interpretation of the fundamental values when compared to the process in the Member State.

The problem in Europe is that a common and precise interpretation of the shared fundamental value can hardly be given by the political institutions until there is a functioning representative *European* democracy. Until then it seems inescapable that conflicts will occur between diverging interpretations of the fundamental values in the different Member States. These will collide in situations that may involve considerations of *ordre public*. In such a case it will, in the absence of interpretation by the political bodies, fall to the courts (in theory ultimately to the ECJ), to decide which interpretation should be given legal effect.

The principle of mutual recognition seeks its origins in the famous decision by the ECJ in the case *Cassis de Dijon*. [60] The principle of mutual recognition was according to Federico Mancini, a former judge on the ECJ, to a large degree motivated by the fact that the political institutions were unable to agree on harmonization of rules related to the internal market. [61] In the same manner it can be assumed that the ECJ, within the field of its jurisdiction, may once again deem it necessary to intervene if the process of mutual recognition runs into trouble in ways that may endanger the achievement of the objectives of the TEU laid down in article 3. In other words, if the political institutions grind to a halt, the ECJ may find itself forced to go on the offensive.

It should be observed, however, that not even Mancini considers the judges of the ECJ as particularly suited to resolve what at heart is the striking of balance of fundamental moral values.[62] When fundamental values are resolved primarily in the courts, the political institutions are deprived their possibility to contribute *ex ante* to the reasoning on the proper interpretation of fundamental values, the only possibility remaining being an intervention *ex post*. The result of such a state of affairs may not only be a lower degree of legitimacy but also perhaps a sub-optimal quality of the answers.[63] Transparency in the sense of public comprehensibility and accessibility may also suffer if the discussion on the fundamental values is conducted in terms of general principles of law, case law and procedural terminology.

The emphasis on the principle of mutual recognition therefore reduces the possibility of a genuine European legislative reasoning on the more precise content of the fundamental values and accordingly means that the definition of the European *res publica* might actually be conducted in the Member States rather than at the European level. The current stress on the principle of mutual recognition means that the interpretation of fundamental values at the European level will move from the political bodies to a more or less unwilling ECJ while at the same time the risk increases that national courts may let the fundamental values of their own legal order prevail in case of conflict. As the scope of EU-law is expanding and now encompasses areas (e.g. criminal law and social security) that were previously closely linked to Member State sovereignty it can not be ruled out that clashes

[59] J Weiler, *Europe: The Case Against the Case for Statehood*, European Law Journal [1998] p 43-62 at p 57This view was also expressed in the famous Maastricht judgment by the German Constitutional Court: 2BvR 2134/92 & 2159/92 "Brunner v. European Union Treaty", [1994] 1 Common Market Law Reports p.87, § 41 (English translation)
[60] 120/78, ECR [1979] 649. The principle of mutual recognition is found in § 14 of the judgment.
[61] F Mancini, *The Making of a Constitution for Europe*, Common Market Law Review [1989] p 595-614 at p 613f.
[62] F Mancini, *The Making of a Constitution for Europe*, Common Market Law Review [1989] p 595-614 at p 612
[63] Amy Gutmann & Dennis Thompson, Democracy and disagreement, s 347.

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between Member State constitutional law and EU-law may jeopardize what the ECJ has accomplished with 40 years of case law developing a constitutional legal order for the EU.[64]

9. The clash of freedoms – The Swedish vs the European constitution

The difference between the deep structures of the various legal orders of the Member States may also shed light on some fundamental issues concerning the relationship between national law and the EU itself. The republican ideal accords fairly well with the European constitution as developed by the ECJ based on the notion of freedom as non-domination and the EU is instrumental in furthering this ideal. Even though the ideals that the ECJ has built its constitutional case law on are *prima facie* shared among all Member States it is obvious that the notion of the EU as a constitutional entity has gone down better in some Member States than in others. Sweden is among the club's most reluctant members and is indeed distinguished in the sense that the very membership itself is constantly under debate.

The ambiguous attitude towards the membership of the EU is reflected in the Swedish constitution. The first part of the sixth article of the tenth chapter deals with the European Union in the following manner:

> The Riksdag may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The transfer of rights to the European Union is (apart from a further requirement that a transfer must have the support of three fourths of those voting or be adopted in the same manner as a constitutional amendment) made subject to two material conditions; the first is that the transfer may not affect the principles of the form of government, the second is that the rights protection in those areas may not fall below the level proscribed by (the second chapter) of the IG and the European Convention of Human Rights.[65]

The principles of the form of government are not defined in the sixth article but seem to relate to the first chapter of the IG which has the heading "basic principles of the form of government". In the first chapter it is, among other things, stated that "all public power in Sweden proceeds from the people" (article 1), expressing the idea of popular sovereignty, and that the Riksdag is the foremost representative of the people (article 4). These two provisions were central in the debate that preceded the Swedish membership when the constitutional committee stated that transfer of rights could not be made to an extent that jeopardized the position of the Riksdag as the foremost organ of the Swedish state.[66]

[64] F Mancini, *Europe: The Case for Statehood*, European Law Journal [1998] p 29-42 at p 41.
[65] The second requirement is probably a theft from the German constitutional courts reasoning in the famous "Solange" judgments where the German court said that it would accept the ECJ:s doctrine of supremacy only as long as (German: *solange*) the EC provided a rights protection of the same quality as that provided by the German *Grundgesetz*.
[66] Cf. the statement made by the Committee on the Constitution, bet. 1993/94:KU p 27f.

The position of the Riksdag as the principal organ of the Swedish state permeates the Swedish constitution and the constitution is primarily designed to protect its status at the top of the Swedish organs of state. The Swedish constitution is thus characterized by the ideal of (popular) sovereignty with the Riksdag representing the sovereign people.

The Swedish constitution is not designed to institute a system of checks and balances of the sort associated with the republican model of non-domination. On the contrary, the Swedish constitution seems to operate more on the Hobbesian principle of freedom as non-interference. The Swedish bill of rights laid down in the second chapter of the IG is directed primarily to the Riksdag itself rather than to the Swedish courts. This conclusion is supported by the fact that there is a significant shortage of case law on the second chapter of the IG. The Swedish bill of rights is furthermore according to the provisions thought to be operative only in the relationship between the individual and the public institutions (vertically) and not between individuals (horizontally) which further indicates that the rights laid down in it are more of a non-interference than a non-domination character. The underlying ethos of the IG is thus to preserve the liberty of the Riksdag rather than the individual citizens. This is not to say that Swedish government in its day to day activities is characterized by despotical features, only that the institutional design seems to be less preoccupied with the possibility of power concentration than the danger that courts and other organs may impede the smooth will formulation and execution of the decisions of the Riksdag.

The fundamental features of the IG condition the Swedish membership in the EU and the activities of the European institutions. Some of theses fundamental aspects were dealt with by legal council (lagrådet) in its opinion on Treaty Establishing a Constitution for Europe. There can be no question that from the Swedish point of view the exercise of power of the European institutions is seen as "borrowed" from the Riksdag, a subordination further underlined by the fact that it can, according to the Legal Council (lagrådet) revoke the transfer of rights to the EU with simple majority.67 The Legal Council also cautioned that the transfer laid down in the Treaty Establishing a Constitution for Europe impinged seriously on the core of state sovereignty[68] and that the overall effect of the Treaty entailed a serious weakening of the position of the Riksdag.[69] Surprisingly, however, the Legal Council concluded that the Treaty was compatible with the IG. The opinion can be seen as a "shot over the bow" in the sense that further transfer of rights to the EU would be incompatible with the basic principles of the IG and thus with the democratic principle as it is laid down in the Swedish constitution.

The second requirement (of IG 10:6) concerns the standard of rights protection and judicial remedies offered by the EU. This requirement, which is at the heart of the republican model, seems to preoccupy the legal council to a significantly smaller degree. The legal council found that the level of rights protection was consistent with both the Swedish IG and with the European Convention of Human Rights and indeed that rights protection would be stronger with the new Treaty.[70]

The reality though is that the requirement concerning rights protection has never been as significant as the requirement concerning the central role of the Riksdag. The EU has, as mentioned earlier, signified something of a rights revolution for European citizens providing them with a new constitutional parameter for judicial review of state action. In Sweden this introduction has truly been of a revolutionary kind and has constituted, at least in theory, a break with the past tradition of judicial deference to the Riksdag. It can thus reasonably be said that the EU has strengthened the judicial protection of the individual by providing mechanisms for

[67] Opinion of the Legal Council on the Treaty Establishing a Constitution for Europe, 28 June 2005, p 2
[68] Opinion of the Legal Council on the Treaty Establishing a Constitution for Europe, 28 June 2005, p 7
[69] Opinion of the Legal Council on the Treaty Establishing a Constitution for Europe, 28 June 2005, p 7
[70] Opinion of the Legal Council on the Treaty Establishing a Constitution for Europe, 28 June 2005, p 9

non-domination that were practically unavailable before the accession to the EU. On the issue of rights protection therefore, Sweden sings out of tune.

The apparent difficulties of compatibility between Swedish constitutional law and EU-law are no co-incidence. They are the result of a conflict in the deep-structure between the republican notion of constitutional law on one hand and the sovereignty oriented model on the other. The membership in the EU has meant that these two diverging constitutions now co-habitat in the same Member State. It cannot be ruled out that the Swedish constitution, under the influence of European law, may over time change towards a more republican one where judicial review and a strengthened position of the rights conferred by the IG may come to be less controversial than they are today. The first steps in this direction have indeed already been taken. The IG has been reformed notably by strengthening the possibilities of judicial review by abrogating the rquirement that constitutional conflict should be manifest before a court could set aside a law or government regulation. This change was indeed justified by reference to the judicial review required by both the European Convention on Human Rights and EU-law. Nevertheless, it still remains to be seen whether this change will result in a situtation where judicial review is seen as less controversial than it has been in the past.

10. The missing link: A European republic?

From a republican point of view it is clear that the EU has advanced the ideal of freedom as non-domination and strengthened the rule of law in important areas. Enough to merit the consideration of a European *res publica* separate from those in the Member States and one that is not simply the result of cumulating the *res publica* of the various Member States (an analogy to Rousseau's distinction of the general will and the will of all). The EU does not, on a republican view, "take away" the political freedom of national parliaments as much as it provides freedom to challenge arbitrary action both by states and other individuals. To reconnect to Harrington's distinction; it is one thing to be free *from* the jurisdiction of the EU and quite another to be free *by* it. If law is assessed against the republican measure of non-domination it is no exaggeration to state that the EU has indeed provided justiciable freedom that individuals previously could only hope for as concession.

There are, on the other hand, significant shortcomings when it comes to the political institutions involvement in the interpretation of the European *res publica*. The Member States still operate as a powerful obstacle to a "politicisation" (much more than they have been an obstacle to "legalisation") of the EU. This means that the republican ideal of law as reason is largely forced to operate with only one of the two wings of reasoning institutions, namely the courts. Put in Cicero's spirit: *recta ratio* in the law is better achieved through interaction between both political and judicial bodies than through only one of them.

The call for "politicising" the EU should not be confounded with the call for a European state. The republican idea would be outright hostile to the idea of creating a sovereign European Parliament since this would represent a potential dominator of continental proportions. The creation of a European state would fit very well with the Hobbesian notion of sovereignty (if such a European democracy was the objective) but has no such implications for a republican theory of government. The question to be asked then is not if the EU is fully democratic according to a Hobbesian understanding of sovereign power but whether it is *adequately* democratic from a republican point of view.[71] To this it could be added that, according to a republican model based on the principle of subsidiarity and

[71] As argued by N MacCormick, *Questioning Sovereignty – Law, State and Practical Reason* (Oxford University Press, 1999), p 145ff.

embracing several different levels of government, a holistic view where consideration is given to democratic elements both at the European level and at Member State (conceivably also at local) level there is a plurality of public fora for European citizens to exercise their civic rights without holding that one particular of these must be the foremost one.

The EU has signified an important challenge to our constitutional conceptions of state, law and democracy. However, much of the debate has focused on the constitutional models rather than on the moral values that underpin these models. Therefore this article has focused on the reasons, i.e. the moral values, for the existence of law and political society according to the republican constitution rather than on the models themselves since such an approach runs the risk of confusing the model with the underlying values that the model was supposed to safeguard.

The EU is not a state but it is a form of government that secures important values that have been the focus of state power ever since the Roman republic. If a republican view is taken where law and government are designed to secure freedom as non domination and law as a coherent *recta ratio* we could move beyond the monolithic Swedish conception of democracy and welcome the fact that we have become members of a European republic, with a European *res publica*.

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