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PORTRAIT OF THE EU AS A RATIONAL MAN:
COLLECTIVE REASON AND DEMOCRATIC DEFICIT

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Abstract

In the present paper I take a critical view on the well-known discursive dilemma which captures the difference between governance by collective reasoning or governance responsive to majoritarian will. Then I suggest the republican concept of collective reason as a new perspective for study of EU and analyse the European Union as an example of a system which collectivises reason. From such perspective the notorious democratic deficit is explainable as the contradiction between collective reason and popular will. This problem brings home the conclusion that neither collectivising reason nor responsiveness to majority will alone can fully satisfy our normative demands. Thus, I claim that it is necessary to find a way out of the dilemma by a decision-making process that can bring about the two solutions in the same time. I suggest that in polities where people (as individuals) identify with the people (as a group) the gap is closed by a stepwise process of deliberation in the public sphere. Paneuropean deliberation is possible solution for Europe but in practice is obstructed by the competition from the spontaneous deliberation in the existing national public spheres. The latter are more robust, so they close the rationality gaps faster at national level; national public opinions tend to polarise and defend a 'national' interest against further deliberative challenges. I argue that the notion of competition is useful to explain why despite the development of the common democratic institutions at EU level and the emergence of weak European public, the deficit is bound to persist.

Keywords

Discursive dilemma; civic republicanism; deliberative democracy; democratic deficit; depoliticization.

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PORTRAIT OF THE EU AS A RATIONAL MAN: COLLECTIVE REASON AND DEMOCRATIC DEFICIT

Vesco Paskalev¹

Collectivising Reason

In 1986 Lewis Kornhauser and Lawrence Sager² identified a paradox in collective decision-making which haunts political and legal theory ever since. Philip Pettit, followed by a constellation of authors have generalised the original paradox to make it a powerful lens for understanding of political authority and many of the problems it faces.³ The Dilemma is the following: whenever a *reasoned* decision has to be taken by a collective decision-maker (either by a small board or a large population) there are two routes. First, its members can assess the factual premises relevant for the decision independently, reach their own conclusions and then, on the basis of these individual conclusions, determine the common decision on the issue by majority voting. Alternatively, they can decide on the premises together, e.g. vote on each of the relevant premises,⁴ and then, on the basis of the common estimation of the premises, embrace the outcome which is entailed from the premises by virtue of the rules of formal logic, *modus ponens* in particular. The two procedural modes will often yield mutually contradicting outcomes: “socially aggregating the conclusion-judgement gives us a different result from socially aggregating the premise-judgement.”⁵

This can be illustrated by the following example. Let us suppose that a panel of three experts has to recommend the adoption of certain policy to mitigate climate change. Suppose that it is undisputed among them that there are three relevant premises the cumulative availability of which warrants adoption of the policy.⁶ These are: P₁ – whether climate change is a real threat to society, P₂ – whether the proposed policy will actually prevent or at least mitigate climate change, and P₃ – whether the cost of the policy is economically bearable. However member’s beliefs on each of the premises differ as per Matrix 1:

¹ I am happy to acknowledge by indebtedness to Giovanni Sartor for his unrelenting support for this and my other work and to George Vasilev for the helpful feedback on the draft. Certainly all blunders are my own.

² Lewis A Kornhauser and Lawrence G Sager, ‘Unpacking the Court’ (1986) 96 *Yale Law Journal* 82-117.

³ His core argument first appeared in Philip Pettit, ‘Deliberative Democracy and the Discursive Dilemma’ (2001) 35 *Noûs* 268-299. For survey of the recent developments see Christian List and Clemens Puppe, ‘Judgement Aggregation’ in Paul Anand and others (eds), *The Handbook of Rational and Social Choice* (OUP 2009).

⁴ In most of the examples this determination is done by voting, but the result holds for any other judgement aggregation function like unanimity, supermajority, etc. See the original generalisation in Christian List and Philip Pettit, ‘Aggregating Sets of Judgments: An Impossibility Result’ (2002) 18 *Economics and Philosophy* 89-110 or for a recent overview List and Puppe, ‘Judgement Aggregation’ (n 3).

⁵ Pettit, ‘Deliberative Democracy and the Discursive Dilemma’ (n 2), p. 273.

⁶ To keep the things simple throughout this paper I will take the premises and the whole logical framework to be undisputed. Certainly in different actual groups different considerations may be relevant but I will discuss this issue elsewhere.

Members	P ₁ : Climate treat real?	P ₂ : Change preventable?	P ₃ : Cost feasible?	Individual conclusions:
A	No	No	Yes	No
B	Yes	Yes	Yes	Yes
C	Yes	Yes	No	No
Collective beliefs:	Yes	Yes	Yes	?

Apparently there is a majority believing that each of the premises obtains. Therefore, if the panel decides by voting on *each of premises*, the decisions on all three will be positive and therefore the policy should be deemed adopted. However, if the panel does not decide on the premises separately, but each of the members makes up her own mind whether to adopt or reject the measure itself, there is a majority against the policy. Thus, the result in the bottom-right cell will differ depending on whether the decision is taken in *premisewise mode (PWM)* or in *conclusionwise mode (CWM)*. Certainly, the actual occurrence of this contradiction depends on the distribution of members' judgements on the premises, however in the complex policy-making of today there will always be sufficient number of distributions where the contradiction does arise. Even though the original paradox was identified in the cases of jury trial where the premise-conclusion relationship was specified by mandatory legal rules the result can be generalised: "a paradoxical distribution of views can arise in any group of three or more persons faced with a decision that can be broken down into at least two constituent sub-decisions."⁷ Even if the decision-makers are not formally bounded to follow any rule, they are normally expected to exhibit a measure of consistency in the propositions they officially endorse. Their *common* decisions are normally expected to conform to the principle of integrity⁸ so that formal logic, commonsense or recognized scientific laws may bind them just as legal doctrine binds courts. This is more interesting than it may appear, as rule-makers are typically considered free in their choices (within the constitutional limits at least). Nonetheless, they often face the integrity challenge.⁹

Thus, whenever social choices are explicitly made on the basis of reasons it is likely that various majorities support each of the reasons yet a majority opposes the conclusion they logically entail. This will hold also if the decision-making body is extended beyond the three members to the whole population, or more interestingly, to any kind of body which takes into account the relevant premise-beliefs of the population. It is worth noting that sometimes *all* members of the panel may individually oppose the policy yet it is collectively rational to have it adopted (in the example above this will be the case if A judges P₁ is true and B judges P₂ is false). Whenever this is so, the panel will "have" the two

⁷ Lewis A. Kornhauser and Lawrence G. Sager, 'The Many as One: Integrity and Group Choice in Paradoxical Cases' (2004) 32 *Philosophy & Public Affairs* 249-276.

⁸ A system satisfies the principle of integrity if "the different propositions it supports are consistent with each other." See Christian List and Philip Pettit, 'On the Many as One: A Reply to Kornhauser and Sager' (2005) 33 *Philosophy & Public Affairs* 377-390, at 378. Consistency is judged according to logic or some other set of rules external for the decision-making system.

⁹ Note that although in this article for the sake of simplicity I discuss only social aggregation of *beliefs* and not preferences it applies also for aggregation of their preferences if the decision-makers are required to justify their preferences by giving some reasons.

opposite views in the same time – a collective opinion in favour of the policy and “personal” views of all members against it.¹⁰

The uneasy choice between the two modes of decision-making Pettit calls discursive dilemma and notes that:

going the conclusion-driven way means adopting a course that is inconsistent with the premises endorsed by the group and going the premise-driven way means adopting a course that a majority individually reject. Going the first way means sacrificing collective rationality for the sake of responsiveness to individuals, going the second means sacrificing responsiveness to individuals for the sake of collective rationality.¹¹

This dilemma seems akin to the one which Hume decided unequivocally in his famous dictum that “Reason is and ought to be the slave of the passions”¹² yet the debate which one has, or ought to have priority remains unabated. Equally unequivocally Pettit chooses the other way, and forcefully argues for collectivisation of reason throughout his writings.¹³ Yet he acknowledges that in this way responsiveness to individual wills (i.e. to their *aggregation* into a ‘popular will’) will be lost; for him this is a price worth to be paid for the gains in collective rationality. In choosing that way he finds himself in good company – think of the Federalist papers for example – but his reason for doing so is his republican understanding of freedom as independence from arbitrary power.¹⁴ Apparently a CWM decision is arbitrary for it is not premised on any reasons which are collectively supported, therefore PWM should be always preferred.

This is a normative claim which is not uncontroversial, but there is also a pragmatic rationale for preferring PWM to CWM decision-making: the capacity of the group to set its goals and to choose the appropriate means to achieve them (i.e. to act as an agent). Not all groups need to do that. For example the group of all passengers in a coach may need to decide collectively whether the music and the air-conditioning should be turned on or off and there is no reason why their collective decisions even on related issues ought to be consistent. However some groups with regard to some issues need more than this. The inhabitants of a city have good reasons to pursue certain common goals, like the prevention of crime in the city. Such *purposive communities* ought to adopt consistent decisions as a practical matter – otherwise they will undermine their own capacity to achieve the purposes. Note that the commitment to certain goals is a social and not moral fact; the commitment may be a matter of deliberately adopted positive law or of implicit background understanding. Those groups need to act as agents and therefore their decisions need to exhibit certain degree of consistency and rationality. When they face the discursive dilemma, such groups must opt for PWM rather than CWM in order to collectivise reason.¹⁵

Now, in the abstract PWM model it seems that all premise judgements are taken simultaneously but this need not be so. Pettit explicitly notes that the reason can (and needs to be) collectivised also diachronically and suggests that this can be implemented by straw poll and sequential voting for

¹⁰ This distinctive opinion that a collective may form is the ground on which Pettit and Christian List maintain that groups may be agents of their own right. See Philip Pettit, ‘Groups with Minds of Their Own’ in Frederick F. Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers 2003) and Christian List and Philip Pettit, ‘Group Agency. The Possibility, Design and Status of Group Agents’ (Oxford University Press 2011)

¹¹ Pettit, ‘Deliberative Democracy and the Discursive Dilemma’ (n 2), p. 274.

¹² David Hume, ‘A Treatise of Human Nature’, (1739) available on www.gutenberg.org/dirs/etext03/trthn10.txt, at 2.3.3.4.

¹³ Note that collective reason should not be equated to what John Rawls and others call public reason; collective reason can be specified formally as the outcome of the premises procedure. Informally, decisions conform to the collective reasons when they are consistent with the earlier collectively rational decisions.

¹⁴ Philip Pettit, ‘*Republicanism: a theory of freedom and government*’ (Clarendon Press; Oxford University Press 1997).

¹⁵ List and Pettit, ‘Group Agency. The Possibility, Design and Status of Group Agents’ (n 10).

instance.¹⁶ Again neither seems to be implemented verbatim in practice anywhere. Yet any authoritative decision, which takes for granted what has been decided previously is in a sense premised on them. Collective reasoning should be understood in a broader sense – the PWM voting is only the paradigmatic model, but any polity which has some mechanisms ensuring that it would systematically display integrity is collectively rational.

In practice there are various institutional devices to achieve collective rationality in such sense. Pettit discusses the depoliticization of certain issues and areas of decision-making, the proliferation of “contestatory institutions” such as constitutional courts which reduce “hands on power” of majoritarian institutions,¹⁷ *indicative* instead of responsive representation via consultative bodies and arm’s length appointees.¹⁸ To these I would add that many of the traditional constitutional principles, like separation of powers, judicial review, duty to give reasons, etc can be understood as ways to bring about the integrity of collective decisions. In the republican polity citizens have effective opportunity to challenge the decisions of their own representatives. By such contestation the public is to ascertain that the governance is according to democratically persuasive reasons and therefore collectively unreasonable decisions are avoided.

Thus, any contemporary polity is collectivising reason in this broader sense but the exemplary contestatory institutions are nowhere more common than in the European Union. Not surprisingly its *raison d’être* is recognised to be the rationalisation of collective governance. To this I will turn in the second section of this paper.

For all its virtues, collective rationality creates one problem for democratic polities - it frustrates collective will. Certainly, appeals to reason to constrain popular passion have been justified by a constellation of thinkers like Rousseau, Condorcet, Burke, Madison and even Polybius; indeed almost all canons of democracy seek to constrain popular will for the sake of common good, human rights, principles of justice, etc.¹⁹ Yet even while doing so, none of them abandons the notion that the authoritative decisions are in some ways responsive to the will of citizens. They could do that on the implicit assumption that by constraining factionalism or populist passions the “true” will of people will reign; in a sense the collective will was equated to collective reason. But having recognised that there is a dilemma between the two this is no longer plausible.

Thus far, the dilemma has been discussed in the literature as a choice between two alternative decisional procedures, but it bears on the nature of political authority. It is a choice between submitting to acts of collective reason opposed by almost everyone and adopting arbitrary acts, which even if supported by overwhelming majorities are not premised on reasons which are themselves supported by such majorities (i.e. for the majority of people they are not reasons at all).²⁰ As we saw, there are good reasons to prefer the reason to will if we cannot have both, yet if we abandon the

¹⁶ See List and Pettit, ‘On the Many as One: A Reply to Kornhauser and Sager’ (n 8). In sequential priority procedure the propositions on the public agenda are prioritised in certain way, so that the subsequent proposition is voted upon only if it is *not* entailed by those already decided. In straw polls, a vote *pro tempore* is taken on each new proposition and if the result contradicts to what is entailed by a previous decision a vote which of the two should be revised is taken. For a more detailed discussion of the sequential priority decision procedure see Christian List, ‘A Model of Path Dependence in Decisions over Multiple Propositions’ (2004) 98 *American Political Science Review* 495-513. For the straw polls as method to discipline reasoning see Philip Pettit, ‘Rationality, Reasoning and Group Agency’ (2007) 61 *Dialectica* 495-519.

¹⁷ Philip Pettit, ‘Depoliticizing Democracy’ (2004) 17 *Ratio Juris* 52-65, p. 63.

¹⁸ See Philip Pettit, ‘Representation, Responsive and Indicative’ (2010) 17 *Constellations*.

¹⁹ For a subtle account of this contradiction in American context see Joseph M. Bessette, ‘Deliberative Democracy: The Majority Principle in Republican Government’ in Robert A. Goldwin and William A. Schambra (eds), *How Democratic is the Constitution?* (AEI 1980) who is credited for coining the term ‘deliberative democracy.’

²⁰ This may seem to suggest the impossibility of a republican polity, but if the dilemma were for or against a theory that exposes a problem I would embrace it.

pursuit of responsiveness altogether, we are bound to face considerable problem that I shall call rationality gap.

It may be argued that the outcome of collective reasoning *is* the common will (or at least that it is closer to it than the majoritarian aggregation of individual wills can ever be). But such redefinition of our concepts would not help as regardless of our normative theory, the actual divergence of the collective decision from the *individual wills* of the members of that collective would lead to their frustration; when the frustrated individual wills amount to a majority, we have a yawning gap which may threaten the very existence of the collective. Pettit acknowledges that some degree of conformity with popular will is necessary for the collective to exist as an agent at all. In their latest book, List and Pettit make clear that group agents exist only by virtue of the respective intents of their members. Certainly, the will to act collectively as a purposive agent in principle is distinct from the disposition that the agent should act in particular way; nevertheless one may wonder whether the frustration of members with regard to the latter will not gradually erode their support for the former. Indeed, if on one hand the attitudes of the group agent differ from those of the members and on the other, the group agent exists solely by virtue of certain attitudes of the members, it must be quite an unstable entity. In any existing collective agent a varying degree of trust, solidarity and the like can be ascertained amongst members and this can explain their tolerance to the rationality gaps. But if the group agents are dependent on certain stock of trust, which is not an unlimited resource, rationality gaps would deplete it. The republican theory would suggest that the responsible decision-makers should seek to go along this spiral upwards instead. I haste to say that nothing in my argument is intended to deny the priority of collective reason, it is only to assert the importance of the rationality gap and the impending necessity for it to be closed. In my view a republican democracy would need a constant effort to align collective reason with majority will. My suggestions is that the grim choice between frustration and populism might be avoided when we do not have to take member's attitudes to be constant and the theory of deliberative democracy allows for some optimism with its promise that the individual attitudes might be changed in the process.²¹

It should be obvious that the rationality gap cannot be bridged by the design of the institutions because the opposing majorities against many of the collective decisions will spontaneously accrue outside these institutions. In real world decision-making *both* PWM and CWM happen all the time. When we opt for integrity and gear the constitution accordingly, the contravening individual attitudes towards the conclusion will be formed simultaneously even if no conclusionwise *decisions* are taken anywhere at all.

This discussion provides us with a new perspective to the notorious democratic deficit of the EU. It is commonly attributed to the depoliticization of the EU, but if my argument is correct, it is not caused by the depoliticization *per se* but by the rationalization that is deliberately achieved, *inter alia*, by depoliticization. Now, this is a sweeping claim and a little latter I will discuss why in many actual cases the problem may be not so acute. Several factors may mitigate (and ideally close) the rationality gap but when they are absent or inadequate it becomes visible and threatens the legitimacy of the authorities.

The obvious way to close the rationality gap is by appealing to collective identity or to bonds of solidarity.²² It is commonly asserted that some sense of solidarity is necessary for the outvoted

²¹ Dryzek and List had already suggested that by deliberation which precedes the aggregation procedure some of the impossibilities can be avoided and therefore deliberation is a necessary complement to any mechanisms for social choice. John S. Dryzek and Christian List, 'Social Choice Theory and Deliberative Democracy: A Reconciliation' (2003) 33 *British Journal of Political Science* 1-28. Below I will show how ex-post communication closes the gap, and will claim more generally that the gap is closed by a stepwise process of communication in the public sphere.

²² Compare with Pettit, who notes that the "identification [of group members] with one another will support a wish to reach agreement" on a "antecedently agreed set of considerations on the basis of which to justify particular judgements." (Philip Pettit, 'Collective Persons and Powers' (2002) 8 *Legal Theory* 443-470, p. 448).

minority to concede to the decision of the majority, and the same may help a frustrated majority to concede to the contravening collective reason.²³ This sense is a *separate* reason for citizens to endorse the outcome of the PWM decisions of *their* community or *their* government, even when following their own beliefs they would have chosen the opposite.²⁴ More interestingly, the decision reached collectively may persuade the group members to change their minds.²⁵

Consider the example of a family deciding whether to buy a car. The family has three members (e.g. two parents and one sufficiently mature child) and the relevant premises are P₁ – whether the car is needed by the family, P₂ – whether the purchase is economically wise and P₃ – whether the increase of the carbon footprint of the family is tolerable. Let the beliefs be distributed according to the following Matrix 2:

Family members	P ₁ : Car necessary?	P ₂ : Car affordable?	P ₃ : Carbon footprint acceptable?	Individual conclusions:
A:	Yes	Yes	No	No
B:	Yes	No	Yes	No
C:	No	Yes	Yes	No
Collective beliefs:	Yes	Yes	Yes	?

Again there are apparent majorities supporting each relevant premise. A family which is collectivising reason would decide on each premise and then following *modus ponens* would have to buy the car even though the individual will of each member is against the purchase. However, unlike the panel members in the earlier example, here each member of the family is genuinely committed to treat the car purchase as ‘our decision.’ Therefore, he or she may be inclined to revise his or her beliefs on the premises. C may just figure out new usages for the car and change position on P₁. B may still believe it is too expensive, but start to consider it a well-deserved reward. After seeing the happiness the purchase brought to the family, A may also relax his environmentalist zeal.

Similarly, in large groups where citizens identify with *their* group, they will be often prompted by the common opinion shared by their nation to revise their initial individual beliefs about the premises (or at least reconsider the relevance and the weight of some premises as well as the evaluations thresholds). In other words, the identity-induced endorsement of certain conclusion will lead them to practice *modus tollens* and eventually align their beliefs with the conclusions.²⁶ It can be argued that the proper role of the elected representatives is precisely to facilitate such alignment.²⁷ Thus the

²³ Note that albeit collective reasoning may create frustrated majorities this is not always graver problem than the one with the outvoted minorities. As Renaud Dehousse noted a strict majoritarian rule may feed up centrifugal forces, while collective reasoning avoids the divisions between winners and losers. (Renaud Dehousse, ‘Beyond representative democracy: constitutionalism in a polycentric polity’ in J H H Weiler (ed), *European Constitutionalism beyond the State* (Cambridge University Press 2003)).

²⁴ I prefer to speak about identity rather than solidarity as in the case of rationality gap the controversy is not between majority and minority but between individual and collective conclusions. The controversy is relieved when the individual has some sense that he is part of the same (*idem*) collective entity and so the decisions are and ought to be identical.

²⁵ This phenomenon is well discussed, see for example Cass R Sunstein, ‘The Law of Group Polarization’ (2002) 10 *Journal of Political Philosophy* 175-195. He notes that in cases when the group matters for its members “once they hear what others believe, they adjust their positions in the direction of the dominant position” (p. 179).

²⁶ The suggested process should be considered as the social equivalent to restoration of coherence in individual mind in the face of contradictions described by Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).

²⁷ As John Parkinson aptly put it “Representatives are transmitters of information and instructions in two directions, not just one: ideally they convey the views of their principals, and they convey the arguments of the other delegates back to those

individuals are likely to practice *modus tollens*, while the community practices *modus ponens*.²⁸ The most telling example of the latter is Britons' overall opposition to the Iraqi war of 2003, which within a week changed to overall support, once the decision of *their* government became final (i.e. the war started).²⁹ Apparently it is members' willingness to revise their initial beliefs which is crucial for the rationality gap to close so that PWM and CWM decisions *become* identical.

We can distinguish two phases of the alignment process – after the collective decision is reached the members who *internalise* it revise their initial beliefs. But in practice the phases will not be discrete but the collective position will be *formed* and beliefs revised in a continuous and incremental process of communication which goes both ways.³⁰ When this process is successful decisions which are collectively rational *and* supported by the members are reached. This is how the general will of a nation is formulated, as an instrument to attaining what is perceived as national interest. On the suggested account both are co-produced through deliberation in the public sphere. Indeed, it is robustly demonstrated by various social scientist that nations are socially constructed³¹ and also that individual preferences are socially determined.³² The conclusion that national interests are socially determined apparently follows from any of the two. Certainly, none of the authors quoted goes as far as claiming that nations or national interests are created by deliberation in the public sphere. Nevertheless if my argument that only when decisions are reached by public deliberation rationality gap does not open is correct, it would follow that a single entity with the capacity to rationally pursue its 'own' interests which are endorsed as 'own' also by its members can emerge only in the process of deliberation.

In this section we have discussed a dilemma arising in case when collective decisions premised on reasons have to be taken, how it ought to be solved and the problem that the preferred solution creates. It was also suggested that reason is collectivised by depoliticization and contestation, that all contemporary polities collectivise reason and achieve at least some degree of integrity and therefore they all face this problem. Finally it was suggested that the problem may be mitigated by deliberation in the public sphere if citizens sufficiently identify themselves with the polity. In the light of this

(Contd.) _____

principals for further consideration." Speaking about the representatives in the so called micro-publics (John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy*, 2006, p. 32).

²⁸ Pettit should be credited for the most concise definition of both *modus tollens* and *modus ponens*: "In short, it might involve practising *modus ponens* — letting the premises dictate the conclusion — or *modus tollens* — keeping the conclusion and revising one or more of the premises." Pettit, 'Deliberative Democracy and the Discursive Dilemma' (n 2), p. 277

²⁹ On the suggested account democracy may appear as demagoguery, with political leaders manipulating the gullible population. While deliberation may indeed degenerate in this way, in principle it is legitimate for the leaders to identify problems and create respective interest groups. They are responsible *to lead* the public opinion in such a way that the acts endorsed by the group are collectively rational (i.e. to close rationality gap). Those *are lead* by the public opinion are justly scorned – by responding to public opinion and they undermine the capacity of the polity to pursue its goals rationally and consistently. Politicians have a responsibility to seek to close the rationality gap.³⁰ In this paper I deliberately set aside the possibility that the citizens will use arguments to persuade each other, which certainly catalyses the process of aligning.

³⁰ In this paper I deliberately set aside the possibility that the citizens will use arguments to persuade each other, which certainly catalyses the process of aligning.

³¹ See for example Eric J. Hobsbawm, *Nations and nationalism since 1780: programme, myth, reality* (Cambridge University Press 1780), or Benedict Richard O'Gorman Anderson, *Imagined communities: reflections on the origin and spread of nationalism*, vol. 7 (Verso 2006).

³² Citizens do not have 'objective' interests with the possible exceptions of protection of the core of their human rights. Beyond that minimum, interests are only perceived by individuals with reference to different groups to which they belong and as these groups overlap the interests contradict. Thus my interests as Bulgarian are different from my interests as environmentalist, which are yet different from my interests as member of the middle class. With regard to any of my properties I can be associated with different groups and within each of them conflicting interests may be constructed, i.e. deliberatively identified, generalized and defended.

account, in the next section I will turn to the EU as a polity which collectivises reason and faces the associated problem, which in this case is known as democratic deficit.

The EU as Collectively Rational Agent

In this section I shall discuss the EU in light of the republican paradigm. Although Pettit and his followers rarely discuss the EU³³ it appears to be a good test case for the republican theory. Clearly the EU is not a system for expression and aggregation of the will either of its Member States or of its citizens. It is highly rationalised decision-maker and *prima facie* exhibits agential capacities which make it good empirical illustration of a republican polity. Now I will briefly discuss some of its idiosyncratic features to show how they enable collective reasoning (in the broad sense of integrity) and how their existence makes more sense as tools for collectively rational (as opposed to responsive) decision-making. This is necessarily sketchy and will rely mostly on conclusions in the existing academic literature. I also confess to have deliberately cherry-picked the features which work well on the suggested account but I think this is justified by the scope of the claim I make. I do not make claim that the EU is collectivising reason all the time, whether it conforms to the integrity principle is an empirical question; I only claim that its idiosyncratic features make most sense on the republican account.³⁴

The first question is whether the EU is a group which is appropriate to personify? On all accounts it seems that it is. Whatever the citizens stance on integration, even the most severe sceptics seem to expect the Union to act rationally in pursuance of certain purposes and to speak in a single voice; they expect it to act as an agent (ironically they need this also to be able to meaningfully disparage *it*). Still some people deny that the Union has any common purpose³⁵ and is merely a system for facilitation of international cooperation, enabling the member states to achieve *their* goals. Yet such understanding is increasingly loosing its support in the positive law. The Treaty on the European Union (TEU) ascribed to it as a single body certain purposes³⁶ and obliges its members to help to achieve them.³⁷ Apparently it is treated as entity capable of having own goals. More importantly the Treaty on the Functioning of the EU (TFEU) stipulates that “The Union shall ensure consistency between its policies and

³³ The only piece in which Pettit discussed the EU is a short conference comment (Philip Pettit, ‘Comment on Walker: Europe’s constitutional momentum’ (2005) 3 *International Journal of Constitutional Law* 239-242) which does not address this issue. Bellamy systematically applies the republican perspective to the EU with very compelling normative arguments which I share, see Richard Bellamy and Dario Castiglione, ‘Democracy, Sovereignty and the Constitution of the EU: The Republican Alternative to Liberalism’ in Zenon Bankowski and Andrew Scott (eds), *The European Union and its Order* (OUP 2000). However his version is quite different from the one I have adopted following Pettit, most notably he is critical of the depoliticization which is characteristic both of Pettit’s republicanism and the EU constitutionalism, see Richard Bellamy, ‘Democracy without democracy? Can the EU’s democratic ‘outputs’ be separated from the democratic ‘inputs’ provided by competitive parties and majority rule?’ (2010) 17 *Journal of European Public Policy* 2-19.

³⁴ Bellamy and his collaborators have shown that the republican paradigm is the most adequate to the EU as a polity (compared to rivals like liberalism and contractarianism), see Bellamy and Castiglione, ‘Democracy, Sovereignty and the Constitution of the EU: The Republican Alternative to Liberalism’ (n 33) and Richard Bellamy and Claudia Attucci, ‘Normative Theory and the EU: Between Contract and Community’ in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (2nd edn, OUP 2009). My argument here is that its institutions should be analyzed from republican perspective and it is complementary but not dependent on theirs.

³⁵ Eleftheriadis for example vehemently opposes the attempts to ascribe common purpose to the Union though not in the sense of purpose used here (Pavlos Eleftheriadis, ‘The moral distinctiveness of the European Union’ (2011) 9 *International Journal of Constitutional Law* 695-713).

³⁶ TEU, Art. 3 stipulates that the aim of the EU is to promote peace, its values (listed in Art. 2) and “the well-being of its peoples.” It elaborates further that the EU has to establish area of freedom, security and justice; internal market, etc. (SEE OJ C 83/17).

³⁷ See TEU, Art. 4, para 3 which stipulates that “The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

activities, taking all of its objectives into account.”³⁸ This is perhaps the clearest requirement for a system to collectivise reason one can find in a legal instrument. Thus, I suggest that the EU is best conceived as a system for collective reasoning and therefore its institutions are required to exhibit integrity in their reasoning.³⁹

Why the concept of the EU as a (collectively) rational agent is appealing? It is beyond the scope of this paper to compare all of the many ways to understand the nature of the Union which have been proposed by the burgeoning scholarship,⁴⁰ but I can try to seduce the reader by highlighting the explanatory power of the suggested account. First, it is powerful as analytical tool to better understand many of the complexities and idiosyncrasies of the Union which are ill-fitting to the classical majoritarian model of democracy. Second, it provides criteria for legitimacy of authority, which allows the evaluation of any decision of any public authority.

It may appear overly ambitious to suggest yet another new paradigm for the EU for the EU. Yet I think it is warranted in two ways. On one hand, the scholarship of on judgement aggregation and collective reason has developed considerably in the last decade so it is a puzzle why it has not been applied to the EU yet. On the other, the burgeoning constructivist trend in the studies of the EU found overwhelming evidence for cooperative behaviour, deliberation, persuasion, belief-reversals, pro-norm choices, etc. While it is far from certain that the Union is the kingdom of the collective reason,⁴¹ the evidence is sufficient to claim at least that something more than utility-maximisation is necessary to explain how the decisions are actually made.

It is well known that the European Coal and Steel Community (ECSC) was created on the Madisonian rationale to prevent the excesses of the wills of European peoples in certain areas, which had resulted in suicidal trade protectionism and two world wars.⁴² The economic liberals today would claim that the Union is the embodiment of economic rationality which is necessary to constrain the populist excesses of the welfare state⁴³ and many social-democrats will almost agree with that, by decrying the crude market rationality of the EU which constrains the wilful policies of national welfare states.⁴⁴ The latest illustration of its function to discipline unreasonable national governments was in the autumn of 2011 when two national governments were effectively fired by their European peers for failing to act according to the imperatives of the fiscal rationality.

³⁸ TFEU, Art. 7, OJ C 83/53.

³⁹ Note that my notion of purposive community should be understood pragmatically and I haste to distinguish myself from the grand narratives for common European destiny (Joschka Fischer, ‘From Confederacy to Federation: Thoughts on the Finality of European Integration’ [2000] Speech at the Humboldt University in Berlin, 12 May 2000). For a pertinent criticism of such narratives which I share see Justine Lacroix, ‘Does Europe Need Common Values? Habermas vs Habermas’ (2009) 8 *European Journal of Political Theory* 141-156. Lacroix’s notions of constitutional discipline and shared critical reflections are not unlike the suggested public contestations.

⁴⁰ For a exhaustive enumeration and classification see Neo-neofunctionalism, ‘Philippe Schmitter’ in Antje Wiener and Thomas Diez (eds), *European integration theory* (1st edn, Oxford University Press 2004)

⁴¹ Nicole Deitelhoff and Harald Müller, ‘Theoretical paradise – empirically lost? Arguing with Habermas’ (2005) 31 *Review of International Studies* 167-179

⁴² A brief look in any textbook on the EU will inevitably come across a paragraph about the post-war distrust of national governments. See for example Paul P Craig and Gráinne De Búrca, ‘EU law: text, cases, and materials’ (Oxford University Press 2008), p. 2 “discrete economic sectors [to] be managed efficiently and technocratically by supranational institutions away from the fray of politics”. It is ironic that the Community was created because of the distrust of the national governments, the Union delivered on its promise while helping the national government to deliver on theirs and thus regain trust. Now, the EU is increasingly distrusted *because* it is a constraint of the re-credited national governments.

⁴³ Giandomenico Majone observed that by Community regulation “industries want to avoid inconsistent and progressively more stringent regulations” in the Member States (Giandomenico Majone, ‘The EC: An ‘Independent Fourth Branch of Government’?’, EUI Working Paper SPS-1993/09 p.19).

⁴⁴ See for example the discussion in Fritz W Scharpf, ‘Economic integration, democracy and the welfare state’ (1997) 4 *Journal of European Public Policy* 18-36.

The rationalisation was and still is achieved by mechanisms for depoliticization and contestation. Although the framers by no means lacked bold visions for “ever closer union”, what they seemed to care most was to design a depoliticized bureaucracy able to deliver the decisions which are rational means to the stipulated Community ends. The European Coal and Steel Community established a surprisingly powerful supranational institution – the High Authority – to govern the two strategic industries of the member states on the basis of common premises enshrined in an international treaty.⁴⁵ This method goes on until today and all types of contestatory institutions Pettit enlists - constitutional courts, consultative bodies and arms-length appointments - are nowhere more common than in the European Union.⁴⁶ Pettit’s description of a contestatory institution:

a depoliticized forum, at arms length from parliament, which can offer guidelines on what sort of activities amongst those offending against most people’s moral ideals ought to be legalised and how they ought to be regulated. This body could represent different sectors of popular opinion and professional expertise and would be able to take a long-term view, informed by sustained monitoring, of the costs and benefits of different overtures.⁴⁷

could very well refer to the European Commission, with the only difference being that it offers guidelines on any other but moral issues.

Giandomenico Majone is the most renowned proponent of the thesis that the Union is just a regulatory system, i.e. its essential function is to correct market and ‘regulatory failures’ and thus its decisions are by definition Pareto-optimal and therefore there is no need to democratise it.⁴⁸ Just like Pettit called to reduce the hands-on power of elected politicians, Majone asserts that the European governments delegated powers to EU in order “deliberately to isolate [certain] policies from domestic majoritarian government” and to “produce a supranational regulatory regime which not only complements, but is ...more credible than the national systems.”⁴⁹

Today the view that the EU as a whole is *only* a system for rational constraint of the will of the Member States is difficult to sustain in the context of ever-increasing competences of the EU to make apparent political choices.⁵⁰ Yet, the constitutional structure of the Union remains essentially one of contestatory system for collectivising reason.⁵¹ While the particularities of the EU are still well explainable on the classical functionalist terms I believe republicanism takes us further, because

⁴⁵ The Schuman Declaration famously proposed that “Franco-German production of coal and steel as a whole be placed under a common High Authority The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.”

⁴⁶ Bellamy disapprovingly notes that the EU is “among the most systematically counter-majoritarian political systems in the world, second only to the United States” Bellamy, ‘Democracy without democracy? Can the EU’s democratic ‘outputs’ be separated from the democratic ‘inputs’ provided by competitive parties and majority rule?’ (n 33), p. 12, internal reference omitted.

⁴⁷ Pettit, ‘Depoliticizing Democracy’ (n 17), p. 56-7.

⁴⁸ See for example Giandomenico Majone, ‘Regulating Europe’ (Routledge 1996), who maintains that the EU is “at most a ‘regulatory state’ since it exhibits some of the features of statehood only in the important but limited area of economic and social regulation”, p. 287.

⁴⁹ Giandomenico Majone, op cit.

⁵⁰ Majone himself recently argued that political decisions should be taken by political process, although he maintains his distinction between political and regulatory issues. Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2009).

⁵¹ Numerous calls from various quarters have been made for politicization of the EU, see Bellamy, ‘Democracy without democracy? Can the EU’s democratic ‘outputs’ be separated from the democratic ‘inputs’ provided by competitive parties and majority rule?’ (n 33), Andreas Follesdal and Simon Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533-562). Note that politicization is not always inimical to rationalization, Follesdal and Hix claim that “electoral contests provide incentives for the elites to develop rival policy ideas” (ibid) which may be a route to avoid what Pettit calls false negatives.

functionalist explanations suit best to the ‘regulatory’ and ‘technical issues’, and are not well fitting whit apparent political choices, a limitation republicanism overcomes.

The most pertinent example of mechanism geared towards integrity of collective decision is the ‘Community Method’ by which legislation is adopted on proposal of the Commission by the European Parliament and the Council acting in sync. Commission is commonly considered to be the executive of the EU, but this is imprecise; its primary function is to make expert policy proposals furthering the otherwise unrepresented *community* interest. It has been even likened to an independent think-tank.⁵² Of course, the Commission may very well promote certain particular interest, but only inasmuch as it is rationalised, i.e. presented as best way to attain a common good, which is itself acceptable and valuable for all. When such proposal is made, it is subjected to contestations from all sides – member states (in Council), factions (in European Parliament), regional and sectoral interests (in the Committee of the Regions and in the Economic and Social Committee respectively). More importantly, member states in Council tend to accept it (because of the rationality-driven momentum behind the proposal) or must provide rational argumentation in order to publicly reject it. This contestatory mechanism is protected by a prohibition for the Member States to initiate own proposals, thus barring their parochial interests from public space. On the other hand, the Commission must propose only Pareto-optimal decisions, for otherwise the interest-representing institutions will not adopt them. On the republican account suggested here, the Commission as the only repository of knowledge of the *Pan-European* good, is responsible to avoid the false negatives, i.e. ‘failures to perceive options that public valuations would support,’⁵³ while the member states in Council are responsible to avoid false positives, i.e. from one side to prevent Commission from promoting sectional interests as common ones, and on the other hand to prevent disproportional burdening of their own interests. This is actually a mirror image of one of Pettit’s model: he suggests that the elected institutions should be constrained by expert bodies,⁵⁴ while with the Community method the expert proposals are constrained by political actors. Either way, the effect should be similar; the Community method may well go a bit further in the avoidance of false positives by the restriction of the legislative incentive of the political actors. It is worthy to emphasise that the Commission has no other power to force the acceptance of its proposal except the persuasiveness of the reasons given in support of it. Its draft must be so rationalized to make it impossible for (almost) any of the political representatives to reject it publicly. For good or worse, the Community method is the most striking example of collectivised reason displacing (even if not overcoming!) the popular will.⁵⁵

Certainly, not all decisions are taken through the Community method, and in several important domains the political will (formed at national level) dominates. The Union is only partly depoliticized and it is precisely in the areas where there are robust commitments to common purposes, while where they are thin or none, it is merely aggregating the wills of the member states. In the domains of foreign policy even after the Lisbon Treaty there is no commitment to a common purpose and that is why it is not appropriate to treat the EU as agent at all. Accordingly, rationalisation through Community method is not allowed in the area. The Union acts on *ad hoc* basis whenever there is political will among the Member States.

The other major method which drives the Union towards premise-centred decision-making, is the empowering of citizens to contest European legislation in the European Court of Justice (ECJ) which

⁵² John Temple Lang, ‘The Commission: The Key to the Constitutional Treaty for Europe’ (2003) 26 *Fordham International Law Journal*, p. 102.

⁵³ Pettit, ‘Depoliticizing Democracy’ (n 17), p. 60.

⁵⁴ *ibid.*

⁵⁵ It is interesting to note that according to Majone the Commission is a *fiduciary* representative of the Pan-European interest, which corresponds to Pettit’s concept of indicative representation, even though the arguments of both authors seem completely independent from each other. See Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (n 50) and Pettit, ‘Representation, Responsive and Indicative’ (n 18).

made it quite unlike the other international courts. Depoliticization, here in the form of judicialisation, again drives decision-making towards more premise-centred mode. Since the 60's the ECJ constitutionalised the four freedoms and constitutionalisation happens to be the first mechanism that Pettit mentions in his model of contestatory democracy.

It should be noted that giving contestatory power to the citizens in the EU context has an even deeper effect because while they contest the common will as expressed in the EU legislation they also contest the will of their own Member States to vote for that legislation in Council. The latter is breaking the presumed singularity of the will of the Member States themselves. If the Member State has formed, in whatever manner, a single will at national level, which has resulted in certain regulation in EU level, the empowering of citizens to contest the European level decision actually reopens the discussion on the premises on the national level as well. In the shadow of such threat, Member States are pushed toward a more premise-centred decision-making from the very beginning. The framers of the EU certainly had the goal of depoliticizing the decision-making, but ECJ in cooperation with citizens took it much further.

Another contestatory mechanism (which until now fails to deliver upon its promises) can be seen in the coveted involvement of national parliaments in public valuation of Union legislation. Within the member states the national parliaments occupy the central space for collective reasoning.⁵⁶ In EU the European Parliament is such institution, but with the EU public sphere only nascent⁵⁷ despite its growing formal power it fails to provide avenue for the public actors to contest legislative proposals. Vis-à-vis the EU the national parliaments have been traditionally deliberately disempowered, so they have been redundant with regard to contestation of EU policies. Now the Lisbon Treaty introduced the so "yellow card" through which national parliaments are expected to contest draft European legislation, in parallel, and probably before the position of their government is expressed or even formed. While there may be doubts about the actual efficacy of the mechanism⁵⁸ this certainly is yet another contestatory mechanism for further rationalisation of the EU. In the last section I will return to this mechanism again, for now it suffices to say that the involvement of parliament promises to obstruct the single voice of member states in EU matters and this drives the collectivisation of reasoning up from national to European level.

The process known as comitology is perhaps the European champion of deliberative democrats. It allows the Commission to adopt itself delegated legislation which are subject to review by special committees consisting of national experts, like miniature councils. Although the procedures vary greatly, the core principle is that if committee members disapprove the proposal they can refer it to the Council to decide. In practice in the overwhelming majority of the cases they do not and the proposal is effectively approved. Christian Joerges and Jürgen Neyer were perhaps the first to note that the comitology committees represent a novel 'forum for deliberative politics' where the participants are genuinely engaged to establish the common good.⁵⁹ In a case study of the regulation of foodstuffs they found that:

In comitology, however, preferences cannot be simply asserted, but need to be justified by arguments on health risks which are backed by scientific evidence – a feature which seems astonishing to international relations theorists, but which was confirmed by all delegates ... and which is also supported by our own observations of committee sessions. Thus, relative power

⁵⁶ See Jürgen Habermas, *The structural transformation of the public sphere: An inquiry into a category of bourgeois society* (MIT Press 1991). Note that even though in contemporary democracy they are rarely policy-makers they are the central legislative arenas, see Nelson Polsby, p. 129-148 [1975] in Philip Norton (ed), *Legislatures* (OUP 1990).

⁵⁷ Thomas Risse, 'An Emerging European Public Sphere? Theoretical Clarifications and Empirical Indicators', 2003

⁵⁸ See Vesco Paskalev, 'Network for a European democracy: Are the national parliaments up to the job?' (2011) 7 *Croatian Yearbook of International Law and Policy* 43-67.

⁵⁹ Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273-299.

would need to be defined with regard to the ability to present and substantiate convincing arguments.⁶⁰

From the adopted perspective, the comitology committees are *fora* for contestations – national experts can challenge the proposal, but only if they can make the argument that it does not pertain to the agreed common purposes. The successful adoption of the proposal supposes that it did and so comitology appears to be another procedural route integrity. Note that such contestations are carried out by experts supposedly on the reasons justifying the proposal, rather than on the ‘national interest.’⁶¹ Thus it is plausible to assume that the comitology procedure is as close as we can ever get to premise-wise vote. Unfortunately comitology is notoriously untransparent and no study so far could provide any evidence for or against this hypothesis.

The picture is similar if we turn to the internal mode of operation of the Council, COREPER and the related working groups. The constructivist scholarship⁶² finds abundant empirical evidence that members and staffers in all these bodies act in non-confrontational, cooperative, ‘pro-norm’⁶³, consensual and ‘deliberative mode.’⁶⁴ They also claim that the decision-making is driven to a considerable extent by arguing and not by bargaining.⁶⁵

Certainly none of these should be equated with collective reasoning, integrity or contestation, yet they are related in at least two ways which are relevant for this paper. The first way is by the central role of argumentation and reasons in the decision-making of these bodies which seems undisputed. All of these studies support the conclusion that reasons matter, and when they matter systems tend to display integrity even if they do not adopt their decisions by explicit premises-wise voting.⁶⁶ The second way is by the constraints on the choices placed on the decision-makers – they have to appear cooperative and mindful of what is understood as collective purpose. Again although such norm-governed mode is not identical with PWM, it can bring about integrity of the decision-making indirectly (as arguably the contestatory mechanisms do).⁶⁷ There are also other features of the decision-making in Council and

⁶⁰ Christian Joerges and Jurgen Neyer, ‘Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector’ (1997) 4 *Journal of European Public Policy* 609-625.

⁶¹ This assumption has not been tested empirically, but is plausible as the issues subject to comitology by definition are considered technical which precludes choices; also the qualification of the decision-makers as experts supposes they are competent to discuss the scientific foundation of certain measure rather than its overall end.

⁶² See most recent overview in Jeffrey Lewis, ‘Institutions: The Council of Ministers and the European Council’ in Anand Menon and others (eds), *Oxford Handbook of the European Union* (OUP 2012) and also Jeffrey Lewis, ‘How Institutional Environments Facilitate Cooperative Negotiation Styles in EU Decision Making’ (2010) 17 *Journal of European Public Policy* 650-666 and the other articles in the same volume.

⁶³ When acting in pro-norm mode the agents still may promote strategic interests, yet they comply with the established conventions for cooperative behaviour and perceive as their duty to reach an agreement or at least not to appear obstructionist. Thus the agents are often instructed to “oppose as long as not isolated” (Daniel Naurin and Helen Wallace, *Unveiling the Council of the European Union: games governments play in Brussels* (Palgrave Macmillan 2008), p. 116

⁶⁴ While many authors tend to call deliberation any non-confrontational outcome others distinguish technocratic and democratic deliberation and acknowledge that only the latter is normatively attractive (Jurgen Neyer, ‘The Deliberative Turn in Integration Theory’ (2006) 13 *Journal of European Public Policy* 779-791, p. 782). Apparently very little of the latter happens in the Council. To avoid confusion I am using the term only for deliberation in the public sphere through which public opinion is formed.

⁶⁵ ‘Arguing’ is a process focused on the premises which determine certain conclusions while in ‘bargaining’ the whole interest is in the preferred conclusions and the outcome is determined by the power of the negotiators which is usually irrelevant for the issue, while the premises which are relevant are disregarded completely.

⁶⁶ Elsewhere I illustrate by a formal model how this is more than intuitive and semantic link.

⁶⁷ See for example Pigozzi who shows formally how common decisions which are screened for compliance with certain rule or principle are collectively rational. See Gabriella Pigozzi, ‘Belief merging and the discursive dilemma: an argument-based account to paradoxes of judgment aggregation’ (2006) 152 *Synthese* 258-298 or Jesus Zamora Bonilla, ‘Optimal Judgment Aggregation’ (2007) 74 *Philosophy of Science* 813-824.

the like akin to deliberation, most importantly the evidenced frequency of consensus and persuasion, but they are not relevant for the argument of this paper.

Jeffrey Lewis, along to many others, maintains that the observed behaviour in the Council cannot be explained within the strategic bargaining paradigm.⁶⁸ More interestingly, according to him in the Council (and the like):

the negotiators subject claims to group scrutiny for collective legitimation or rejection, with the corollary that individuals remain open to be convinced by good arguments.⁶⁹

In republican terms this means that the Council is a contestatory institution where proposals are subjected to public valuations; those which are exposed as not conforming to the collective reason are presumably defeated. While the claims of the constructivist scholarship are far from being undisputed, few scholars would deny that reasons play an important part in shaping the outcomes of European legislative process.

COREPER is another institution where argumentation and consensual mode of decision-making are abundantly evidenced to warrant the conclusion that it collectivises reason, but it is interesting in another way too. This is a COmmittee of the diplomatic REPresentatives of the member states to the EU, who in theory are agents of their governments. Again they are often able to reach consensus after some negotiation, which means that the position of some of them must have strayed away from the initial instructions received by their principals. Certainly, sometimes they have received new instructions but this is not always the case. Jeffrey Lewis claims that that members of COREPER

have earned some notoriety for being able to find consensus on *anything* given enough time to ‘cut slack’ and sell results back home.⁷⁰

and also

[an] observable pattern of deliberation, used regularly by COREPER to find solutions, is the collective plotting to overcome domestic reserves (‘cut slack’) or force a national capital to rethink instructions.⁷¹

COREPER appears to be not only reaching a collectively rational solution, but also to be a kind of think-thank engaged in advocacy for it. A member revealed that it is one of their ‘standard practices’⁷² to ask the committee to help them persuade their principals and constituencies at home.⁷³ These observations are interesting for the present paper above all because they suggest that *modus tollens* is regularly practiced in EU, when the outcome of collective reasoning is internalised by the members of the deliberative bodies just like in the car purchase decision model discussed above. Here the motives for change of heart may be not only what I called identification; the scholarship has observed that the

⁶⁸ See Jeffrey Lewis, ‘Strategic Bargaining, Norms and Deliberation’ in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union: games governments play in Brussels* (Palgrave Macmillan 2008), p. 170. According to him certain patterns of behaviour or outcomes can be explained only by ‘norm-governed’ and deliberative modes of decision-making. Empirical research from the rationalist scholarship suggest the same: Koning and Junge found that the standard veto player models “predict much less agreement that is actually observed” (T. Konig and D. Junge, ‘Veto Player Theory and Consensus Behaviour,’ in Naurin and Wallace, *Unveiling the Council* (n 62), p. 94).

⁶⁹ See Lewis, ‘Strategic Bargaining, Norms and Deliberation’ (n 68) p. 173. Note that the actual change of heart of the opponent may occur during the process, but it is not necessary, as long as even the unpersuaded agents find themselves unable to maintain unsubstantiated positions: “the group can put very strong pressure to change a position to a reasonable one” (ibid, at p 177, quoting an interviewed participant in the negotiations).

⁷⁰ ibid, p. 170.

⁷¹ ibid, p. 174.

⁷² ibid, p. 174, emphasis added.

⁷³ Similar is the case in many other committees, for another example see A. Niemann, ‘Deliberation and Bargaining in the Article 113 Committee and the 1996/97 IGC Representatives Group’ in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union: games governments play in Brussels*. (Palgrave Macmillan 2008).

such is the effect of social norms, webs of informal relationships, comity and the organisational culture.⁷⁴ Yet again participants internalise certain agreement, and then update their premises to align the outcomes of individual and collective reasoning.

From this brief review of the scholarship on the EU it seems that we can generalise what Joerges and Neyer observed in comitology to all EU bodies: the institutionalisation of interaction [is] a process of internalising new preferences and even identities. Institutionalisation ... is a cognitive process that involves a redefinition of the self and the other.⁷⁵

Joerges and Neyer further note that “delegates, perceiving themselves as part of a transnational problem-solving community, may be able to change their governments’ perceptions of interests or even simply bypass them.”⁷⁶ Apparently there is a huge difference between changing and bypassing formed national positions; although in both ways integrity is promoted, the latter is democratically implausible as it will open rationality gap. However, if members subsequently persuade their principles, the system would be practicing *modus tollens*: representatives collectivise reason in the deliberative body, and take the responsibility to change the beliefs of their governments (and ideally their fellow citizens) on the premises in order to align their individual conclusions with the collective conclusion reached in COREPER and other committees. On the suggested understanding of republicanism collective reasoning should go in two directions and therefore the ‘agents’ are not only allowed but are responsible to be transmitters in both of the directions.⁷⁷

None of this is to say that all or even most of the decisions adopted by the EU are collectively rational. While the political scientists evidenced considerable degree of deliberation on reasons and argument-based contestations in all institutions, the question whether arguing or bargaining is more is bound to remain open.⁷⁸ The empirical students of deliberation should be cautious not to overestimate the evidence.⁷⁹ There are various reasons why collective reasoning may fail even in this most favourable of all institutional environments, and in the next section I will turn to one of them which is often discussed under the somewhat misleading heading ‘politicization.’

Yet the studies discussed in this section suggest that the EU is a system geared to collectivise reasoning by means of depoliticization and contestation and thus at least *some* of the decisions are taken *as if* in premise-wise mode. I do not need to engage in the debate how often this is the case, in any event it suffices to make the republican perspective appropriate one for the analysis of the EU. On the other hand, the Union is a good a test case for civic republicanism – its shortcomings exemplify problems that are generally neglected by the republican theory⁸⁰ like the one I called rationality gap. If

⁷⁴ Note that for the argument developed in this paper it is irrelevant whether committee members were actually persuaded or had other reasons to internalise the collective decision.

⁷⁵ Christian Joerges and Jurgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ 3 *European Law Journal* 273, p. 291

⁷⁶ Joerges and Neyer, ‘Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector’ (n 60), p. 619.

⁷⁷ Compare again with Parkinson: “the ‘better arguments’ that persuade representatives within a micro-deliberative forum will also convince people outside it once they have been exposed to those arguments in their own, separate deliberations.” (Parkinson, *Deliberating in the Real World* (n 27), p. 32).

⁷⁸ Summarising a decade-long research program carried out by constellation of political scientists Deitelhoff and Muller suggest that this is impossible to answer. (Deitelhoff and Müller, ‘Theoretical paradise – empirically lost? Arguing with Habermas’ (n 41)).

⁷⁹ Niemann for example admits that “negotiations within the Council framework (broadly interpreted) are probably not *dominated* by the deliberation. Strategic action ... seem to take the lion’s share under most circumstances. Yet ... if the conditions are right, genuine deliberation may take over as the chief interaction mode.” Niemann, ‘Deliberation and Bargaining in the Article 113 Committee and the 1996/97 IGC Representatives Group’ (n 73), p. 141, emphasis of the original.

⁸⁰ Pettit and List discuss what they call impossibility results, which are more general than what I call rationality gap. See List and Pettit, ‘Aggregating Sets of Judgments: An Impossibility Result’ (n 4). They suggest how the conditions which lead

every decision which abides to the integrity requirement may open a rationality gap, the EU as the most rationalised empirical polity is bound to experience it most acutely. Not surprisingly it is notoriously known for its ‘democratic deficit.’ On the suggested account the deficit must be understood as the difference between what a collectively rational EU decision stipulates and what the majority of the member states (or of citizens) would prefer to have it stipulate.⁸¹ In other words, this is the gap between what counts as ‘our’ decision as a Union and ‘our’ preference as group of members.⁸² The sense of alienation or frustration citizens experience are just the symptoms of this persistent and systematic difference.

The legitimacy concerns raised by the democratic deficit have already been abundantly discussed in the scholarship and in the next section I will turn to another related problem: it seems that in a system of multilevel governance the internalisation of collective reason at one level may abort the deliberation at another level perpetuating a rationality gap there.

Competition for Closure of Deliberating Communities

In the first section of this paper I have suggested that *when* a collectively rational decision is *internalised* by the group members, it prompts them to revise their initial beliefs so that the identity of collectively rational decision and individually preferred option is restored. This alignment happens through practice of *modus ponens* and *modus tollens* which for large groups is mediated by communication to and fro in what is known as the public sphere. Without such robust and continuous communication in the best case we can have decisions responsive to members’ pre-deliberation beliefs which are bound to be mutually inconsistent as the discursive dilemma teaches. At worst we can have decisions which are neither collectively rational, nor responsive.⁸³

I have contrasted collective reason defined in this way, to the ‘popular will’ without specifying the latter. I have taken it to mean aggregation of individual beliefs on the conclusions for the desirability of the proposed policies. This seems appropriate for many cases - for issues which are not salient and do not receive much media attention citizens form their opinions independently from each other. In such cases the popular will will be merely a function of their individual attitudes. However in case of major issues people discuss them informally – with their friends, families, parties or charities or sports clubs. Thus they form what appears as individual opinions in deliberation with others and these opinions are at least partly shared within the respective discussing groups. In every democracy while bills make their way through the respective institutions, they are informally discussed in the public sphere and it is trivial to note that the post-deliberation attitudes will be different; even if entrenched interests and pre-deliberative opinions strongly prejudice the outcome, the latter will be at least partly modified during the process of decision-making. Thus the popular will properly understood is aggregation of the *post-deliberation* attitudes and in any event it is *formed* during the process.⁸⁴

(Contd.) _____

to such impossibilities can be plausibly relaxed to make the normatively attractive social choice procedure possible. Yet these papers are very formal and abstract and they never consider what would the suggested functions look like in the real world.

⁸¹ If we take the member states to stand for the position of their citizens we can interpret the gap as the difference between the Union decision and the will of its citizens. But it is uncertain whether we can do that – as the member states themselves collectivize reason their position is not identical with their public opinion. On the other hand in nation states the two are often be aligned by deliberation in the public sphere as suggested in the preceding section.

⁸² Similar is the understanding of Follesdal and Hix “The bigger problem ... is the lack of a connection between the growing democratic politics inside the European Parliament and EU Council and the views of the public.” (Follesdal and Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (n 51), p. 553.)

⁸³ It may be suggested that we may have rational and consistent decisions which are not responsive if they are taken by the proverbial philosopher king but apparently such decisions are not ‘collective.’

⁸⁴ This informal deliberation is not related (not directly!) with the collective reasoning discussed in the previous section. If the group is collectivising reason, its decisions may be different from either of the two opinions.

More interestingly, the opinion of every individual will be affected differently by the different peoples he deliberates with, and as people can potentially deliberate in several overlapping groups they are likely to be driven in conflicting directions. On the other hand, we cannot expect people's opinions to be malleable infinitely, so it is plausible to assume that the same person may end up with different post-deliberation attitudes depending on the order of deliberations.⁸⁵ This suggests that simultaneous processes of opinion formations in overlapping communities interfere with each other. Here is how political conflicts arise.

Now, the empirical scholarship on the Council of the EU often reaches strikingly different conclusions. For example Jeffrey Lewis provides abundant evidence for cooperation and rational persuasion, Pollack and Shaffer evidence none of these in their study of the regime for GMO regulation in EU even though the conditions seemed appropriate. They conclude that that "the deliberation ... has fallen victim to the widespread politicization of the GM issue"⁸⁶ and more importantly that "public opinion severely limited the ability of Member States representatives to engage in ... deliberative search for the better policy."⁸⁷ Numerous other studies also identify politicization as a negative condition for reaching reasonable solutions. Prompted by the apparent effect of domestic public opinions on the mode of decision-making in the Union institutions, Heather McKibben made the prediction that "the more domestically/electorally salient an issue is to a state, the more likely that state is to adopt hard bargaining strategies when negotiating over that issue."⁸⁸ Although this remains to be tested, there is an air of uneasiness in finding the intergovernmental cooperation and national public opinions at odds with each other.⁸⁹

Pollack and Schaffer do not define 'politicization' but emphasise that in their case there was a strong public opinion in some domestic constituencies, which constrained the agents and prevented them from reaching a reasonable solution. Therefore I will take politicization of an issue to mean that the public opinion is *consolidated* on certain position so that deliberation is unlikely to change it any further. Politicization in that sense should be distinguished from politicization as involvement of the political (as opposed to technocratic) level as the latter does not seem to prevent deliberation; thus I can predict that if the domestic discussion is still open-ended politicization *per se* is not an obstacle.⁹⁰ Only when certain *single* public opinion on the issue is formed *and* this opinion is internalised as a common position of *our* group by its members further deliberation is derailed. This position may be just aggregation of individual preferences (pre- or post-deliberative) of group members or it may result from a more subtle practice for collective reasoning, via deliberative institutions. However formed, this position must be internalised i.e. a significant number of members have revised their initial positions accordingly.⁹¹

⁸⁵ The order will be only one of the possible factors, certainly some groups may have more influence than others for variety of other reasons.

⁸⁶ Mark A Pollack and Gregory Shaffer, 'Risk Regulation, GMOs and the Limits of Deliberation' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union: games governments play in Brussels* (Palgrave Macmillan 2009), p. 149.

⁸⁷ *ibid*, p. 161.

⁸⁸ Heather Elko McKibben, 'Issue characteristics, issue linkage, and states' choice of bargaining strategies in the European Union' (2010) 17 *Journal of European Public Policy* 694 - 707, p. 699.

⁸⁹ Here again I avoid using the term deliberation which those authors use to describe any cooperative or consensual outcome.

⁹⁰ The political debate is open ended in many different cases, one of which is the case of uncertainty. Indeed many empirical studies found that that scientific uncertainty fosters cooperation and deliberation but my hypothesis is this is only one special case and even without uncertainty deliberation would flourish also if the public opinion is still divided or the issue is not salient so no common opinion is formed at all.

⁹¹ Note that internalisation of common will closes the rationality gap as argued before. But in this section I am concerned with common will and what I mean by its consolidation is equally relevant also for groups which do and do not collectivise reason.

Public deliberation is the most democratically plausible cause of internalisation⁹² and the process has been observed empirically in various circumstances.⁹³ On the basis of the available empirical literature Cass Sunstein concludes that the “effect of deliberation is ... to decrease variance among group members, as individual differences diminish.”⁹⁴ Note that the group itself will often exist before and independently of the formation of the common will, but in some cases it may be constituted during the process itself – such is the case of many civic organisations emerging around a single cause. Whatever the method, when a position is formed its understanding as ‘common’ provides incentive for its internalisation by members so that the position consolidates and *closes* for any further challenges, deliberative or other. Sunstein observed that “social ties among deliberating group members tend to suppress dissent”⁹⁵ and that is why group may speak with a single voice for what is perceived to be the interest and will of all. Such a group is a singular agent with interests of its own and naturally its actions are governed by instrumental rationality which uncompromisingly chooses the *one* best alternative. As the agency emerges out of the commitment to certain purpose it is unavoidably parochial; it cannot speak for anything but *this* interest and that is why the issue is effectively *closed* to revision.⁹⁶ There is no further deliberation internally and members of the relevant group join efforts to act in pursuance of the common position and if necessary guard it against external argumentative challenges. If the common position is formed but not internalised, it is unstable - external agents may appeal to the different inner groupings and shape what will eventually appear as collective opinion. This is no longer possible when singular group opinion is formed, such group is an *agent* with a mind of its own.

I suggest that this is what routinely happens in nation states when they define something as ‘national interest’; in principle it may happen also on different levels – on regional level, in minority or professional groups, etc. It can happen also on supranational, indeed at any level. Although it is rare to witness consolidated public opinion at European level, there was at least one example of such in the opposition to the Iraq war which prompted Habermas to announce the birth of European public sphere and European demos.⁹⁷

Here is not the place to take stock of all consequences of this closing⁹⁸ but there is an apparent problem with the consolidated will in multilevel decision-making systems, where the same citizens participate in several nested groups. As the collective opinions ontologically depend on the attitudes of the respective individual members, discourses at each level are effectively in competition with each other to form consolidated collective opinion. This is the case of the EU where the consolidated

⁹² Other means to consolidate common will may be tradition, sense of identity, religion, charisma, ideology, manipulation.

⁹³ Fishkin’s studies are the most well-known. See most recently James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, USA 2011).

⁹⁴ Sunstein, ‘The Law of Group Polarization’ (n 25), p. 178: He also noted that this leads to the group moving to a more extreme position, which is precisely what Pollack and Shaffer observed.

⁹⁵ *ibid.*, p. 181.

⁹⁶ Recall that List and Pettit emphasise that for a group to act as a single agent it must speak with single voice and display integrity, so closure and agency appear to co-originate and constitute each other (List and Pettit, ‘Group Agency. The Possibility, Design and Status of Group Agents’ (n 15). Note that this is what allows us to treat collectives as single agents; otherwise it would make no sense to speak about collectives and states in the singular at all.

⁹⁷ See Jürgen Habermas and Jacques Derrida, ‘February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe’ (2003) 10 *Constellations* 291-297. A decade later and amid the Euro crisis, it is clear that the announcement was quite premature but this does not undermine my point that it is possible to happen.

⁹⁸ For example such apparent group consensus often protect hidden exploitation as the critical legal studies have forcefully demonstrated.

collective will formed at one level precluded further deliberation at the others.⁹⁹ Apparently such competition is inevitable even in ideal speech situation. In such case the competition may continue ad infinitum (if personal opinions change infinitely) or perhaps the most universal discourse may preempt all the others. In the non-ideal case the malleability of individual opinions is finite and at some point of time common will is formed and the discourse stops. Closing allows the nations to speak in single voice, which is necessary for their capacity to achieve goals. However this thwarts any further argumentative challenges as inimical to “national interests.” Closing creates the distinction between the perceived interests of the members of the nation from what may be rival interests of the others.¹⁰⁰ The outcome of opinion formation varies according to the location of the boundaries of the deliberative space; within the boundaries individual opinions tend to homogenize and polarize.

Now, in the EU the interests of *all* European citizens are legitimately to be taken into account, yet the public spaces remain largely national and exclusionary.¹⁰¹ We may assume counterfactually that communication in a Paneuropean public sphere emerging around the Union institutions would decrease variances in individual wills of all of the citizens (as it does in national spheres) and ideally produce European opinion tending interests which are European. However, the existing internal borders create deliberating subgroups tending the respective parochial interests. The latter not only find their opinions thwarted by the EU decisions but also impede the communicative process at the upper level which appears as external challenge to them.¹⁰²

The dialectic of homogenisation and radicalisation of deliberative groups puts the overlapping groups into competition with each other to form ‘their’ will and close themselves in protection thereof. Given that in our post-metaphysical and post-traditional world ‘common interests’ are all socially constructed and the means to construct them is by deliberation in the public sphere. Overlapping groups compete for the souls of their individual members – they compete to construct ‘their’ shared beliefs and preferences and their success depends on the actual communicative practices. To succeed, groups must improve the communicative conditions in their public spheres in order to construct such consensus that is both quick and can be internalised by all or most members. The construction of more robust and more inclusive public spheres is what determines the success of a group to form a consolidated opinion which allows it to formulate and protect an ‘own’ group interest. Only in this way they can sustain their capacity to act in pursuance of their perceived goals¹⁰³ without being constantly undermined by yawning rationality gaps. Closing the rationality gaps appears to be not only a matter of legitimacy but also of sustainability of the group. On the other hand, when public deliberation within the group fails to close it in this way, there is a chance for opinion formation at a different

⁹⁹ Note that despite the alleged commonality of values etc, the opinions reached at each level are bound to be at odds with each other because the inclusion of different deliberators on the upper level leads to introduction of different information and different considerations.

¹⁰⁰ Compare the suggested notion of closing against deliberative challenges with Hannah Arendt’s claim that in Ancient Greece the democratic politics became possible only within the city walls which protected the agora from external challenges (Hannah Arendt, *The promise of politics* (Schocken Books 2007)). For Arendt the distinction internal – external is constitutive for public space. It is fundamental also for republicanism which needs finite number of participants in the collective reasoning and also finite set of relevant considerations. Nowadays the authority of the EU penetrates borders yet public discourses cannot (yet) transcend it.

¹⁰¹ Notwithstanding that there is a nascent EU public space – see Risse, ‘An Emerging European Public Sphere? Theoretical Clarifications and Empirical Indicators’ (n 57). He and several collaborators in series of studies during the first decade of the century found that “same European themes are discussed at the same time at similar level of attention across national public spheres”, however the overall attention paid to these issues remains low.

¹⁰² European integration opens the decision-making institutions to external normative and argumentative interventions and may prevent the adoption of single-minded parochial decisions. However this is not matched by sufficiently robust national public spheres. The yellow card mechanism discussed above promises to contribute to the latter, but its efficacy is still to be seen.

¹⁰³ Recall the argument of List and Pettit for collective reason as enabling condition, List and Pettit, ‘Group Agency. The Possibility, Design and Status of Group Agents’ (n 15).

(higher) level. Although will formation at national level usually is much faster, there are many cases when the issue is too technical, too uncontroversial or not sufficiently salient so no national will is formed. This is the case of ‘uncertainty’ which was identified as condition enabling deliberation by many scholars.¹⁰⁴ However on the suggested account it is not the mere uncertainty but the availability of multiple voices in cases of uncertainty which makes a difference.¹⁰⁵ Even though the constitutional system of the Union generally opens the national public spaces to the pressure of argumentative rationality,¹⁰⁶ the deliberative homogenization of national opinions closes the borders again.

Similarly, many studies blamed publicity for thwarting cooperation. On the suggested account of competition for opinion formation publicity in Council and the related bodies will prevent cooperation only when there is consolidated will already formed at national level. Consolidated positions will prevail because they constrain the agents to uphold them even if they are argumentatively defeated. On the contrary, when positions are not consolidated, argumentative rationality may support the position of internal dissenters and the delegate may side with them to change the initial determination.

To sum up, my claim is that in a multilevel polity rationality gaps occur on each level, each level of rationalization has to deal with its own frustrations. But the popular will whose frustration matters most is the one that is formed deliberatively at another level because it affects the discursive processes on the other levels. General will is formed by public deliberation where intended *or where not intended*. Wherever it is formed it tends to consolidate and close to further deliberative challenges. In modern multilevel systems will formation may close at level different from the one that is actually empowered, and then deficits appear.

Conclusion

One of the purposes of this paper was to expose a problem neglected in the republican theory which I called rationality gap. The other was to suggest that republican theory provides better understanding of the EU, which is a highly rationalised polity and its notorious democratic deficit appears to be a good empirical illustration of the gap. Yet my claim is that all rationalised polities are bound to face gaps, as they arise from the logical distinction between collective and individual rationality, both of which have legitimate claims to prevail. Thus, the democratic deficit of the EU is a logical necessity rather than institutional contingency and the host of institutional reforms which have been proposed to solve it are bound to fail.

I have also suggested that rationality gap sometimes is closed when during the process of decision-making citizens *internalise* the collectively rational decisions. This happens through stepwise process of communication in the public sphere when common opinions which are perceived as national interests are formed; that is why nation states, albeit themselves rationalised, do not experience acute rationality gaps too often. When this process is successful citizens identify with the collective position as their own and revise their initial beliefs. Thus the communicative process is closed to further discursive challenges. This could potentially happen at European level by communication in the nascent Paneuropean public sphere; however the discourse is often pre-empted by the competitive discourses in the more robust public spheres of the member states. As the communication there is

¹⁰⁴ See the contributions in Naurin and Wallace, *Unveiling the Council* (n 63) mention uncertainty as enabling condition.

¹⁰⁵ Note that uncertainty is not an exogenous factor but itself is a matter of perception; in the GMO controversy discussed by Pollock and Shaffer the opponents of the technology believed it the effects of genetic engineering are uncertain, and the proponents – vice versa. That controversy suggests that no degree of scientific uncertainty can enable discourse to overcome the consolidated national positions.

¹⁰⁶ As Risse and Kleine note “speakers could never be sure whether their audiences held national preferences, party preferences, European versus national ones, or simply personal preferences”, see Thomas Risse and Mareike Kleine, ‘Deliberation in Negotiations’ (2010) 17 *Journal of European Public Policy* 708-726, p. 16.

more robust, citizens form their opinion there, and given that deliberating groups tend toward homogenization and polarization, this derails the simultaneous communicative process at EU level.

Although the paper is intended to offer better understanding rather than solutions to the latter problem two possible escape routes seem obvious. The first is to integrate national public spaces by connecting them into a network so that the discourses on policy issues spill from one national public sphere to another. Even if citizens deliberate mainly locally, discourses may be connected so that they transcend the national boundaries and ideally produce genuine Paneuropean opinions. The second is by biting the bullet – whenever the EU institutions identify a problem and reach a decision *before* contrary will is formed at another level, the rationality gap will close at European level. Albeit the first option may seem utopian, neither of the two is radical and in any case neither requires major constitutional changes.

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