Articles

Article 13(2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination During Lawmaking?

By David Yuratich[*]

Abstract

This Article assesses the extent to which Article 13(2) TEU supports a republican reading of the EU's institutional structure. This question has arisen in light of the move towards more intergovernmental forms of economic governance following the Eurozone Crisis. Dawson and de Witte and Bellamy have critiqued this mutation through theory-driven readings the institutional balance clause of Article 13(2) TEU, arguing that it establishes a norm of non-domination between EU institutions that has been undermined by increased intergovernmentalism. This Article considers whether the institutional balance case law supports their reading. It finds that institutional balance's dominant role is not normative: It protects pre-existing institutional competences. It does carry a normative side when used as a general principle of EU law to support arguments about increasing the European Parliament's legislative contributions, but this is not an independent head of claim. A better legal support for the presence of a non-domination in Article 13(2) lies within its second clause, the principle of sincere co-operation. Ultimately, the case law around both clauses of Article 13(2) TEU means that the provision is best understood as having a tripartite structure providing a constitutional basis for non-domination during lawmaking.

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A. Introduction

The Eurozone crisis's impact on EU constitutional law has been subject to searching examination. Tuori and Tuori frame it within the historical processes of EU constitutionalization, reminding us that the EU's development has not solely been driven by economic imperatives. At different times, led by Treaty change and jurisprudence, the EU has pursued economic, juridical, political, security, and social goals.[1] Tuori and Tuori's view is that the economic constitution has generally been a pacemaker, not a dictator; it "defined the space"[2] within which other constitutional objects were and are pursued. To conceive of EU constitutionalization solely in terms of economic integration obscures the broader goals within various legal and political instruments governing the EU's legal order.[3] Their contribution is timely because, as they point out, the Eurozone crisis has led a constitutional mutation—economics has become more than a pacemaker. Anxieties have emerged that, instead of defining the space within which EU law operates, responses to the Eurozone crisis overruled and re-configured the democratic and political norms necessary for the legitimacy of the EU's constitutional order.[4]

This reconfiguration is manifest in criticism of increased intergovernmentalism. It is frequently charged that key decisions are now taken by Member State and EU executives with very limited, or no, input from the European and national parliaments, and this goes against the democratic principles within the EU Treaties.[5] The lack of European Parliament (EP) power in the economic realm is particularly problematic because the EU's democratic development has broadly, although not exclusively, centered on its empowerment; the EP has transformed from an advisory body into a directly-elected one with significant powers.[6] The EP's diminishing role within Eurozone governance has, according to these views, undermined the developing democratic constitution.

These criticisms are often premised on the notion that the proper division and maintenance of institutional power, and the balance between competing constitutional

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[1] KAARLO TUORI & KLAUS TUORI, THE EUROZONE CRISIS: A CONSTITUTIONAL ANALYSIS 4–5 (2014).

[2] *Id.* at 9.

[3] *Id.* at 16.

[4] *Id.* at 205. See generally Eduardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Debt Crisis*, 50 COMMON MKT. L. REV. 683 (2013); Ben Crum, *Saving the Eurozone at the Cost of Democracy?,* 51 J. COMMON MAR. STUD. 614 (2013).

[5] *See generally* Chiti and Teixeira, *supra* note 4.

[6] *See generally* Manfred Kohler, *European Governance and the European Parliament: From Talking Shop to Legislative Powerhouse*, 52 J. COMMON MKT. STUD. 600, 601–02 (2014); Andreas Føllesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533 (2006).

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objectives, has been usurped. Article 13(2) TEU, which states that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them," is often cited in support of these arguments. This has renewed studies of whether the institutional balance carries a normative potential. In addition to protecting existing institutional competences, can it found arguments about what those competences ought to be? Investigations of this question primarily adopt a theoretical approach providing a normative reading that is broadly in line with a key tenet of republican political theory. These readings suggest that institutional balance can prescribe a more equal relationship among the EU's legislative institutions—the Commission, Council, and EP—that is premised upon non-domination.[7]

This Article contributes to these debates by engaging in a juridical analysis of how far institutional balance assists in conceptualizing this aspect of EU democracy. Investigating the case law allows an assessment of these theoretical positions against the legal meaning of institutional balance. This methodology also serves as a reminder that the CJEU has developed significant constitutional and democratic principles that have enriched the EU's legal legitimacy.[8] Since the onset of the Eurozone crisis, as Scicluna notes, its constitutionalising role has been overshadowed by political integration.[9] The court has gone "from vanguard of European integration to laggard"[10] in the Eurozone context; its role as an integrator and a developer of constitutional values has been reduced to rubber-stamping political agreements. Studying the case law on institutional balance helps kick against this tendency by articulating an underpinning part of the court's ongoing attempts to develop EU democracy. Although this question has arisen in the context of the Eurozone crisis, it is not this author's purpose to analyze in depth the implications that our understanding of institutional balance has for the Eurozone crisis response because it is well-established that the balance has been undermined. Rather, the aim is more limited. This Article builds on those critiques by considering how far institutional balance, viewed through its case law, can help normatively theorize EU democracy.

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[7] *See infra*, Section C.

[8] *See generally* Koen Lenaerts, *The Principle of Democracy in the Case Law of the European Court of Justice,* 62 INT'L & COMP. L. Q. 271 (2013); Daniel Halberstam, The Bride of Messina: Constitutionalism and Democracy in Europe, 30 EUR. L. REV. 775, 784 (2005); G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD L. REV. 175 (1994). This process is not uncontroversial—see generally Thomas Horsley, *Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking*, 50 COMMON MKT. L. REV. 931 (2013).

[9] Nicole Scicluna, *Politicization Without Democratization: How the Eurozone Crisis is Transforming EU Law and Politics*, 12 INT'L. J. CONSTIT. L. 545, 562–56 (2014).

[10] *Id*. at 563.

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It is submitted that institutional balance only supports republican-type conceptualizations of EU democracy to a limited extent. Its dominant juridical role is to protect pre-existing institutional competences. That said, when executed as a general principle of EU law to support other arguments, it carries an expectation that the EP has a fuller legislative contribution, in line with the need to involve EU citizens alongside Member States and the Commission in a non-dominating legislative process. While enlightening, this is probably not justiciable. Instead, it is more fruitful to use the principle of sincere co-operation—also found in Article 13(2) TEU—as a legal support for these normative political readings of institutional balance. In contrast to institutional balance, sincere co-operation has clearly been used to protect a constructive legislative dialogue between EU institutions.[11] This is of greater use to EU democracy analysis, and, in particular, to republican readings of its institutional architecture. Article 13(2) TEU is therefore best understood as having a tripartite structure providing a constitutional basis for non-domination during lawmaking. The institutional balance clause protects competences and helps support decisions that improve legislative participation, and sincere co-operation enforces a constructive dialogue.

The Article is structured as follows: Section B explains in brief why intergovernmental critiques of the Eurozone crisis response have arisen. Section C builds upon this by exploring how institutional balance and republican ideas of non-domination have been used in such critiques, and how they relate to one another to provide a normative understanding of EU lawmaking. Sections D–F respectively examine the case law on institutional balance and sincere co-operation, presenting the tripartite reading of Article 13(2) TEU and institutional balance. Section G concludes.

B. The Eurozone Crisis and Intergovernmentalism

Interest in institutional balance and in its relationship to non-domination has reawakened because intergovernmentalism has characterized the EU's various responses to the Eurozone crisis. [12] Economic decision-making has slipped away from the Community Method, diminishing the EP's input and prioritizing the role of Member State governments and supranational EU institutions, particularly the Commission and European Council.[13] This change has been referred to as a mutation; economic constitutionalism has pushed

[11] See *infra,* Section F.

[12] Tuori & Tuori, *supra* note 1, at 216–21; Chiti & Teixeira, *supra* note 4, at 688. For earlier discussions, see generally Thomas Christiansen, *The European Union After the Lisbon Treaty: An Elusive 'Institutional Balance'?*, *in* EU LAW AFTER LISBON (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012); Jean-Paul Jacqué, *The Principle of Institutional Balance*, 41 COMMON MKT. L. REV. 383 (2004).

[13] Chiti & Teixeira, *supra* note 4, at 686.

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out competing constitutional objectives and legitimating factors, undermining, in particular, Article 10 TEU's commitment to representative democracy and the institutional roles protected by Article 13(2) TEU.[14] Questions arise around whether the correct balance of power between EU institutions has been maintained, and, as explained below, these are typically answered in the negative.

The intergovernmental mutation is clearest under the European Stability Mechanism 2012 (ESM). Designed to provide financial assistance to Eurozone states, it operates within public international law, not EU law. The EP is not involved in its operation and played no part in its negotiation.[15] Although *Pringle*[16] held that its creation was permitted by the TFEU, the ESM is not subject to the Treaty provisions about accountability and transparency.[17] The absence of direct EP input is particularly problematic because it could have been avoided. The European Central Bank and the Commission were conscripted to the ESM's cause, given roles in assessing, negotiating, and monitoring financial assistance. One argument in *Pringle* challenged this conscription on the grounds that Article 13(2) TEU forbade EU organs from taking on new tasks. This argument was unsuccessful; it was held that these roles were continuations of their existing tasks under the EU Treaties. [18] This reasoning would allow the Parliament to be involved, so long as it was performing tasks to which it was entitled, which would include representing EU citizens. Indeed, Scicluna notes that Parliament unsuccessfully proposed that, because the ESM requires that Member State financial assistance is subject to strict conditionality, the rules on conditionality should be adopted as a normal EU Regulation using co-decision.[19] This would allow the EP, and EU citizens, to have a direct say over bailouts. This did not happen. Instead, the ESM excluded the EU's only directly-representative institution from the financial assistance

[14] Tuori & Tuori, *supra* note 1, at 205; Agustín José Menéndez, *Editorial: A European Union in Constitutional Mutation?*, 20 EUR. L. J. 127 (2014).

[15] Koen Lenaerts, *EMU and the EU's Constitutional Framework*, 39 EUR. L. REV. 753, 763 (2014).

[16] Case C-370/12, Thomas Pringle v. Government of Ireland, (Nov. 27, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=130381&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=164236 [hereinafter Pringle].

[17] Lenaerts, *supra* note 14, at 757.

[18] Pringle, *supra* note 15, at 158–59. *See generally* Vestert Borger, The ESM and the European Court's Predicament in Pringle, 14 GERMAN L. J. 113 (2013); Pieter-Augustijn Van Mallegham, Pringle: A Paradigm Shift in the European Union's Monetary Constitution, 14 GERMAN L. J. 141 (2013); Jonathan Tomkin, Contradiction, Circumvention, and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy, 14 GERMAN L. J. 169 (2013).

[19] Scicluna, *supra* note 9, at 561.

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process and thus undermined the balance of voices and interests that had previously characterized EU governance.[20]

Similar problems arose with the 2012 Treaty on Economic Stability, Coordination, and Governance (the Fiscal Compact) and the two sets of regulations and directives referred to as the "Six-pack" and the "Two-pack."[21] Unlike the ESM, these are explicitly linked to the other EU Treaties; the packs are primary EU law, and the Fiscal Compact, through its Article 2, must be interpreted according to EU Treaty norms.[22] Subsequently, the intergovernmental critiques are quieter because each instrument must take effect subject to the EU Treaties and its norms on representative democracy. The EP participates under an economic dialogue.[23] Under the Six-pack, the EP may the ask the President of the Council, Commission, European Council, or Eurogroup to discuss relevant measures they have taken, for example, those concerning violations of budgetary objectives by Member States.[24] Under the Two-pack, the Council and Commission must also keep the Parliament informed on the implementation of its powers. The Fiscal Compact provides that the EP's President may be invited to Euro Summit meetings and requires a report of such meetings to be sent to the Parliament for discussion.[25] The Two-pack also allows for the Parliament to veto delegated Commission acts concerning Member State budgetary surveillance.[26] Nonetheless, both Crum and Fasone raise significant questions about the democratic utility of the economic dialogue and maintain an intergovernmental critique. They argue that the Parliament lacks decision-taking powers, that its right to be informed comes too late to be influential, and that, even if coordinated with national parliaments, there is no significant Parliamentary control, review, or amendment of proposed executive actions.[27] Economic dialogue provisions instead speak generally about a discussion—often after the event—rather than granting the Parliament any real influence.

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[20] Chiti & Teixeira, *supra* note 4, at 689.

[21] For details of these instruments, see EUR. COMM., THE EU'S ECONOMIC GOVERNANCE EXPLAINED (2014), http://europa.eu/rapid/press-release_MEMO-13-979_en.htm.

[22] Lenaerts, *supra* note 14, at 757.

[23] Cristina Fasone, *European Economic Governance and Parliamentary Representation: What Place for the European Parliament?*, 20 EUR. L.J. 164, 175–76 (2013).

[24] *Id.* at 176

[25] *Id.* at 176–81.

[26] *Id.* at 181.

[27] *Id.* at 184; Crum, *supra* note 4, at 622.

C. Institutional Balance, the Eurozone Crisis, and Republicanism

The reduced levels of EP involvement in Eurozone governance connect the critiques of intergovernmentalism with the institutional balance. Dawson and de Witte demonstrate this in their argument that the EU is properly characterized by a constitutional balance of interests that seeks to legitimize and stabilize the polity by embedding pluralism and dialogue within it.[28] This framework should create conditions for democratic legitimacy because it allows the EU's constituencies—the Member States, the EU's interest as a supranational body, and EU citizens—to seek self-determination.[29] Constitutional balance is divided into three distinct types of balance: (1) substantive, where the division of competences balances national sovereignty with EU matters; (2) spatial, where similar levels of representation are granted to small and large states; and (3) institutional, relating to how institutions interact with one another and voice the interests they represent.[30] For this Article's purposes, the key point is that their model uses institutional balance to visualise EU lawmaking and thus an aspect of its democracy. The requirement that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties" ensures that the legislative institutions can play their mandated legislative and representative roles. The Community Method has, since the Treaty of Lisbon, been dominated by the ordinary legislative procedure. This method requires the Parliament and Council to agree on a Commission proposal before it becomes law, generally striking a balance between the voices represented in each institution. Article 13(2) TEU grants legal protection to this process and helps embed a constructive dialogue among these three institutions and their constituencies. Dawson and de Witte argue that consequently the Community Method ought to enable a form of pluralism:

> By incorporating a wide range of diverse interests within the legislative process, by making these interests mutually interdependent in the generation of norms and by creating multiple forums through which the citizen's interests can be articulated . . . the Union ensures that citizens have authorship over the norms that bind them.[31]

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[28] Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. 817, 817–18 (2013).

[29] *Id.* at 819–20.

[30] *Id.* at 822.

[31] *Id.* at 829.

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Lenaerts and Verhoeven make similar comments about the institutional balance. They argue that it dictates a co-operative legislative process: "[It] shape[s] institutions and the interactions between them in such a manner that each interest and constituency present in the Union is duly represented and co-operates with others in the frame of an institutionalized debate geared towards the formulation of the common good."[32] Once institutional balance is understood in this way, concerns about the increased intergovernmentalism bypassing the traditional Community Method become more than constitutional complaints about the division of powers; they are democratic worries. Embedded in those worries is a suggestion that institutional balance is not just about protecting institutional competences; it also guards or prescribes a system in which different legitimating constituencies may engage in a pluralistic and co-operative dialogue about the content of legislation.[33] Intergovernmentalism, especially in light of the EP's reduced role, thus undermines the EU's democratic constitution in the name of economic constitutionalism.

The relationship between pluralistic dialogue and the institutional balance has, before and after the Eurozone crisis, been subject to examination from a republican or republican-type perspective.[34] Republicanism, in contrast to liberal theories which emphasize freedom as non-interference and seek to constrain government via individual rights protection, places more normative emphasis on democratic representation and debate. Republican theorists typically judge the democratic nature of a polity on how effectively those in power are regulated and restricted by transparent and accountable processes of political contestation.[35] It is not that liberalism does not support representative decision-making—most conceptions of democracy do[36]—but that the republican prioritization of representative politics is motivated by a distinct conception of freedom defined as non-domination. Pettit analogizes this conception to the relationship between a slave and a benevolent master. If the master never interferes with the slave's life, there is non-interference. Nevertheless, domination remains because the master still has the capacity to arbitrarily interfere with the slave's choices and interests regardless of the slave's opinions.[37] Hence, republican freedom supposes that citizens are free insofar as they do

[32] Koen Lenaerts & Amaryllis Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 47 (Christian Joerges & Renaud Dehousse eds., 2002).

[33] Dawson & de Witte, *supra* note 28, at 842–43.

[34] *See generally* Dmitris N. Chryssochoou, *The European Synarchy: New Discourses on Sovereignty*, 1 GÖTTINGEN J. INT'L. L. 115 (2009).

[35] Richard Bellamy, *"An Ever Closer Union Between the Peoples of Europe": Republican Intergovernmentalism and Democratic Representation Within the EU*, 35 J. EUR. INTEGRATION 499, 500 (2013).

[36] *See generally* David Held, Models of Democracy (2008).

[37] Phillip Pettit, Republicanism: A Theory of Freedom and Government 22 (1997).

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not experience arbitrary and non-deliberative interference.[38] Although there are other features and controversies within republican thought, this point broadly unites all conceptions.[39] If a party can arbitrarily interfere in people's lives, this removes individual freedom, and, when replicated on the state or polity level, this interference becomes undemocratic; it suppresses the ability of citizens to achieve self-determination and negotiate common goods. One solution to the problem of domination is through constitutional design. Lawmaking institutions ought to be made representative of the constituency and provide an apparatus for effective and inclusive public reasoning and contestation, treating citizens with equal concern and respect.[40] Through a process of representative deliberation that includes public and reason-based argument and counter-argument, common premises will arise that gain the preference of a majority without arbitrarily imposing it on the dissenting minority.[41]

Because institutional balance delineates lawmaking roles and competences to institutions tasked with representing legitimating interests, its potential to regulate their interactions has been identified as a source of republican contestation between the EU's constituencies. Craig was among the first to suggest that institutional balance provides the basis for a dialogue aimed at achieving the common good.[42] He argued that "the resulting schema serves both to satisfy the demands for participation in the legislative process by these differing interests, and also that this allocation of power can help to foster the passage of legislation which is designed to achieve the general good of the Community."[43] As read by Bellamy and Castiglione, the implication is that a republican approach to governance based on a "politics of compromise"[44] can provide a form of EU democracy

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[38] Phillip Pettit, *Legitimate International Institutions: A Neo-Republican Perspective*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 140 (Samantha Besson & John Tasioulas eds., 2010).

[39] These encompass issues such as whether non-domination requires or demands a highly participatory citizenry and the extent to which it can or should be secured through judicial review. *See generally* Samantha Besson & José Luis Martí, *Law and Republicanism: Mapping The Issues*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES (Samantha Besson & José Luis Martí eds., 2010).

[40] *Id.* at 21–22; Pettit, *supra* note 37, at 145–50.

[41] Pettit, *supra* note 37, at 150.

[42] Paul Craig, *Democracy and Rule-Making Within the EC: An Empirical and Normative Assessment*, 3 EUR. L. J. 105, 114–16 (1997).

[43] *Id.* at 118.

[44] Richard Bellamy & Dario Castiglione, *Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism*, *in* THE EUROPEAN UNION AND ITS ORDER: THE LEGAL THEORY OF EUROPEAN INTEGRATION 187 (Andrew Scott & Zenon Bankowski eds., 2000).

that is not reliant on the existence of a *demos*. Bellamy has since developed a normative republican model for the EU that envisages it as "an international association of democratic states."[45] Bellamy's starting point is that just as there must be non-domination within states, it is also necessary that there is non-domination between them.[46] Inter-state interactions, such as those required from EU membership, may limit the ability of a state to secure non-domination among its citizens because the range of domestic policy choices may be constrained by, or subjected to the dominant influence of, other states and legal obligations.[47] The Eurozone crisis provides an example: The Fiscal Compact, Six-Pack and Two-Pack boil down to constitutionalizing a creditor-debtor relationship where the creditor states dominate the debtor, as seen particularly with the crisis in Greece.[48] To ward off this problem, Bellamy argues that interactions between states should be subject to the same non-domination a republican would expect national citizens to enjoy.[49] This way, republican ideals may be pursued between states as well as within them, with attendant benefits for the democratic legitimacy of the global, or here European, order.[50] Part of his model prescribes that international organizations must be under the shared control of their Member States, each accountable to its citizens. For Bellamy, the Council and the EP are the key EU institutions here. In the Council, the elected ministers, therefore the governments, of Member States bargain together and are each accountable to their national parliaments. Consequently, national executives exercise direct contestation over the decisions that affect their states, and they are themselves contested by their national electorates.[51] The representation of national citizens is buttressed by their direct representation through the EP, particularly within the EU's processes of lawmaking and scrutiny.[52] Institutional balance may be of assistance here in two ways. First, it can protect the competences of each institution; and second, it may promote non-domination and dialogue between them. If this is borne out by the case law, Bellamy's republican model of the EU will gain stronger legal-constitutional support. The potential for institutional balance to secure a form of republican intergovernmentalism can be further seen in Dawson and de Witte's constitutional balance; their observations that there is an

[45] Bellamy, *supra* note 35, at 507.

[46] *See also* Federico Fabbrini, *States' Equality vs States' Power: the Euro-Crisis, Inter-State Relations and the Paradox of Domination,* 17 CAMBRIDGE Y.B. EUR. L. STUD. 3 (2015).

[47] Bellamy, *supra* note 35, at 505.

[48] *Id.* at 513.

[49] *Id.* at 507.

[50] *Id*. at 507.

[51] *Id.* at 508.

[52] *Id.* at 509–10.

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internalized pluralism is conceptually similar to arguments that the EU's constitutional system is properly based upon non-domination. Institutional balance can regulate the design of the legislative process and its representation of affected interests.

The theoretical perspective in the above accounts does not establish why as, a matter of law, Article 13(2) TEU's statement that each institution "shall act within the limits of the powers conferred on it in the Treaties" can have the effect of promoting republican intergovernmentalism. On its face, Article 13(2) TEU reads as simply protecting the powers each institution has already been granted. If an institution has not been given a particular power, institutional balance may be of limited use when there is a perceived or actual need to expand its competence. Indeed, this has contributed to the intergovernmental Eurozone crisis response—the institutional balance did not provide any constitutional obligation as to how new competences should be divided.[53] *Pringle* highlights this problem. The litigated question in *Pringle* was whether the Commission and Central Bank *could* have roles under the ESM; it did not engage with whether they *should*. The constitutional legitimacy of the EP's exclusion from the ESM could not be considered. This seems inconsistent with approaches to the institutional balance that state it can require representative institutions to engage in the mutual generation of law. Perhaps as a result, the accounts that identify a normative democratic side to institutional balance are articulated from an explicitly or implicitly republican-type position, emphasizing dialogue and non-domination. They use a normative theoretical approach, rather than a legal analysis of Article 13(2) TEU, to strengthen their arguments that institutional balance does or should constitutionalize legislative dialogue. The extent to which institutional balance can support these positions would be enhanced if the case law indicates that it has the capacity to suggest what each institution's powers ought to be.

It will be argued that the *Pringle* approach is only representative of one side of the institutional balance case law. There is evidence that, as a general principle of law, one can identify non-domination within institutional balance. This aspect is, however, rarely justiciable; it informs the court's reasoning but is not an independent head of claim. Stronger legal support for the republican position arises when Article 13(2) TEU is read in its totality to include its sincere co-operation clause as well as institutional balance. Sincere co-operation is a justiciable provision closely related to institutional balance, and it can more effectively enforce a republican conversation.

[53] *Id.* at 835.

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D. Interest Representation

Before examining the case law on Article 13(2) TEU, it is necessary to show that the CJEU's approach to institutional balance conceptually aligns with the premise that it can facilitate non-domination between constituencies. Underpinning the theoretical arguments is the notion that three constituencies need to be represented within the EU's lawmaking process for it to be democratically legitimate—the supranational EU interest, Member States, and EU citizens. They are primarily identified with the Commission, Council, and EP, with national parliaments providing secondary representation. Articles 10 and 17 TEU enshrine a similar position. The former claims that the EU is based on representative democracy, stating that EU citizens are represented in the EP and Member States in the Council, whereas the latter notes that the Commission promotes the EU's general interest.[54] Notably, these provisions are silent on how to create pluralism between these interests. To assess the accuracy of the claims that Article 13(2) can provoke dialogue and non-domination between those interests, the case law must be considered.

This starting point—three constituencies must be represented in EU decision-making—is indeed shared by case law, seminally *Van Gend en Loos*.[55] As is well known, it held that: "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals."[56] This did more than pave the way for the creation of direct effect. Chalmers and Barroso recognize that it was a statement about the nature of the EU project. It made clear that the EU was a "community beyond the state"[57]—more than a mere international organization. The judgment describes a political space whose "subjects come together to realize and contribute to common purposes tied to the legal and administrative order of the Union."[58] Those subjects are the legitimating constituencies of the EU, those for whom the project exists. As the quotation from the case makes clear, they are those in charge of seeking the EU's overall community interest (this is the 'benefit' for which sovereign rights have been restricted), the elected Member States, and the nationals of those states who would later become EU citizens.[59] This basic position enables, on a conceptual level, the court's case

[54] Consolidated Version of the Treaty on European Union of May 9, 2008, arts. 10, 17, 2008 O.J. (C. 115) 13.

[55] Case 26/62, NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, 1963 E.C.R. 1.

[56] *Id*. at 12.

[57] Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands For*, 12 INT'L J. CONSTIT. L. 105, 108 (2014).

[58] *Id*. at 121.

[59] *Id*. at 120.

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law on institutional balance to sit alongside the theories maintaining that Article 13(2) TEU can establish a dialogue between those affecting and affected by EU activity.

This argument would be limited if it was only supported by *Van Gend en Loos*. At the time of that decision there was no elected EP, and so the Court's statement only covers EU citizens insofar as they are indirectly represented by their national governments in the Council. Importantly, introducing direct elections to the EP 1979 enabled the CJEU to expand its depiction of how citizens ought to be represented. In *Isoglucose*,[60] the court made clear that the EP represented a vital part of EU democracy and its future: "[The EP] reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."[61] The case itself was simple, concerning a clear breach of the Treaties where the Council failed to consult the EP on a legislative proposal. Therefore, it is striking that the CJEU articulated a wider and non-dispositive democratic principle in its decision. The statement identifies the EP's input as necessary for the EU's democratic legitimacy, making explicit what was implicit in *Van Gend en Loos*: the EP, as well as national parliaments, could act as the peoples' interlocutor. This is underscored by the CFI judgment in *Martinez*,[62] later upheld by the CJEU in *Front National*.[63] At issue in both cases was the EP's decision, pursuant to its rules of procedure, to dissolve a political grouping because its members had no political affinities. In *Martinez*, the CFI stated that political groupings in the Parliament must genuinely share common political objectives so that they may better reflect and advocate for the diverse interests of the EU citizenry and promote "the joint expression of political wills and the emergence of compromises."[64] There are two levels to this decision, underscoring that the CJEU understands the EP's democratic role within the institutional balance to be representing EU citizens: First, it foregrounds future objectives of pan-European representation. The EP is seen as a forum in which truly "European" political sentiments should be identified and built upon through the formation of like-minded political groupings. Considering the second-order nature of EP elections, the second level is far more immediate. Put simply, it is that the EP must, daily, represent EU citizens, and it is undesirable for MEPs to act in a way that frustrates this objective. Even if representation comes from second-order elections, Bellamy points out that that the EP does represent a range of national political opinions. This range of representation creates

[60] Case 179/80, Roquette Frères v. Council, 1982 E.C.R. 3623.

[61] *Id.* at para. 33.

[62] Case T-222/99, Martinez v European Parliament, 2001 E.C.R. II-2823.

[63] Case C-486/01 P, Front National v. European Parliament, 2004 E.C.R. I-6289.

[64] *Id.* at para. 146.

the space for contestation and non-domination in the EU decision-making process.[65] Protecting the EP's legislative input through institutional balance can allow for immediate contestation and facilitate long-term political integration among EU citizens.

This judicial assessment of the interests represented by the EP, and by the Commission and Council, is conceptually aligned with the republican arguments that institutional balance can be used to promote self-determining communities based on non-domination and contestatory politics.[66] It is worth mentioning that national parliaments are increasingly involved in EU governance, for example through the subsidiarity early warning system. Their increasing role may provide further sources of contestation beyond providing agent-principal accountability for national executives in the Council. This is not the focus of this piece, which is to uncover how far non-domination inhabits the case law in Article 13(2) TEU, which only refers to a balance between EU institutions. Any assessment of whether institutional balance, or an alternative route, can provoke ties between national parliaments and European institutions that in turn promote non-domination, requires more attention that this article is able to provide.[67] For current purposes, having shown that the CJEU understands EU lawmaking to be based on the effective interaction of bodies representing key constituencies, an examination of the case law surrounding Article 13(2) TEU will commence.

E. The Case Law of Institutional Balance

I. Protecting Competences

On one level, the case law on institutional balance does not bear deep similarities to republicanism. The concept is typically used to delineate the boundaries within which each EU institution may act.[68] Advocate General Maduro summarizes the common position thus: "Legislative procedures laid down by the Treaties establish the extent to which each institution is to be associated with the taking of decisions and thus establishes an institutional balance."[69] On this view, EU bodies cannot trespass onto another's powers or

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[65] Bellamy, *supra* note 35, at 509.

[66] *See generally* Besson & Martí, *supra* note 38.

[67] For present links, see generally Richard Bellamy & Sandra Kröger, *Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance*, 67 PARLIAMENTARY AFF. 37 (2014); ADAM CYGAN, ACCOUNTABILITY, PARLIAMENTARISM, AND TRANSPARENCY IN THE EU (2013).

[68] Gerard Conway, *Recovering a Separation of Powers in the European Union*, 17 EUR. L. J. 304, 320–21 (2011).

[69] Opinion of Advocate General Maduro at para. 31, Case C-133/06, Parliament v Council (Sept. 27, 2007), http://curia.europa.eu/juris/document/document.jsf?text=&docid=63513&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=331243.

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exceed their own.[70] This only shapes the democratic contribution of the institutions to the extent that this is a by-product of ensuring that their competences are respected.[71]

As noted earlier, *Pringle* is an example of this *ultra vires* approach. It used Article 13(2) TEU to determine whether the Commission and European Central Bank's roles under the ESM were within their legal remit. This was also evident in *Council v. Commission (MFA)*.[72] That case concerned whether the Commission could withdraw a proposal for a framework regulation on granting micro-financial assistance to third countries. The proposal was withdrawn because the Council and EP wanted to approve each grant of assistance via the ordinary legislative procedure, replacing the Commission's proposed mechanism of using delegated legislation. The Commission argued that the use of the ordinary legislative procedure would have distorted the original proposal and was not desirable. It was not disputed that under Article 17(1) TEU, the Commission had the right of legislative initiative and may withdraw its proposals in certain circumstances. The issue was instead whether this right still applied when a proposal had been passed onto the EP and the Council, thus beginning its passage through the EU legislature. The CJEU confirmed the meaning of institutional balance:

> Under Article 13(2) TEU, each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union . . . each of the institutions must exercise its powers with due regard for the powers of the other institutions.[73]

This quotation recognizes that the EU's institutional structure is based on a division of powers and roles. The Court held that the Commission's withdrawal of the proposal was in keeping with its powers. Because the Commission is tasked with seeking the general interest of the EU, legislative proposals can be withdrawn if it believes they are no longer pursuant to this objective. This interpretation of institutional balance as a competence divider is widespread. It is even evident in cases where Article 13(2) TEU is not explicitly

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[70] Case 149/85, Roger Wybot v Edgar Faure, 1986 E.C.R. 2391, para. 23.

[71] Bart Driessen, *Interinstitutional Conventions and Institutional Balance*, 33 EUR. L. REV. 550, 560 (2008).

[72] Case C-409/13, Council v Commission (Apr. 14, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=163659&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=331361 [hereinafter MFA].

[73] *Id.* at para. 64.

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cited, using institutional balance as shorthand for a division of powers. For example, the Council did this in *Council v. Parliament (EU Budget)*.[74] Here, it argued that an institutional balance within Article 314(9) TFEU was breached because the EU budget was authorized not through a joint legislative act but through the signature of the EP's President. This argument failed; it was clear that the EP had followed the correct procedures and acted *intra vires*. The budget is jointly agreed, but it is not jointly authorized.

The republican-type approaches to institutional balance require more than this, because they contain expectations about how institutional roles ought to be exercised. On these approaches, institutional balance suggests non-dominating dialogue between the EU institutions and their constituencies. The competence-based approach only supports this by ensuring that one institution does not take powers away from another and by protecting competences that are already aligned to republican ideals. The *EU Budget* case is an example of this. Had the Council's argument been successful, it would have been because the Parliament unlawfully abridged the Council's mandated input and created a state of domination in the budget approval procedure. Although this speaks to the republican view that there should not be arbitrary interference in decision-making, it passes no comment on what influence each institution ought to have beyond the letter of the Treaties. The case supports the idea that institutional balance protects a dialogue if one is already required, but it cannot necessarily maneuver one into place. Importantly, the *EU Budget* case saw the Council found a separate argument on the sincere cooperation clause of Article 13(2) TEU. It argued that that the EP had not properly cooperated with it by refusing to agree that the President of the Council should also sign the budget into law. This argument was rejected because the budget had in fact been mutually agreed upon, and, because the law was clear that the President of the Council did not need to formally authorize the budget, the EP's President had executed his duties under the Treaties in good faith. Despite failing, this ground of argument highlights a significant difference between Article 13(2) TEU's two clauses of institutional balance and sincere co-operation. Institutional balance is predominantly about competences, whereas sincere co-operation is about interactions between institutions. It is therefore better-suited to securing non-domination. This difference is discussed further in Section F.

II. Institutional Balance's Potential as a General Principle of Law

Nonetheless, one element of the case law on institutional balance does suggest a normative republican side. *MFA*, despite predominantly being an example of the *ultra vires* approach, is illustrative. After holding that the Commission remained within its

[74] Case C-77/11, Council v Parliament (Sept. 17, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=141561&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=331613.

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competences to withdraw its proposal, the court discussed the boundaries of the power to withdraw. It concluded that the power must not be used like a veto, because the Commission has not been granted that right. Exercising legislative withdrawal is only compatible with Article 13(2) TEU if accompanied by reasons contestable by the other legislative institutions and amenable to judicial review. This is because institutional balance imperatively attaches conditions to the exercise of legislative prerogatives. A veto would breach the institutional balance upon which the lawmaking process is based because it excludes other constituencies, especially the Council and EP, from exercising influence and ownership over EU law.[75] This suggests that the way in which interests are represented during lawmaking can be partially regulated by the institutional balance, and this might help promote non-domination. The concept can provide some sort of normative statement about the operation of the lawmaking process and EU democracy.

The relationship between the institutional balance and the shape of EU democracy mainly operates at the level of general principles of EU law. In this context, institutional balance generally helps support judicial reasoning on the proper scope of institutional powers rather than acting as an independent head of claim. As Chamon explains, this is because often there will be specific Treaty provisions setting out the limits of a disputed power; resolving such conflicts does not necessarily require reference to the broader principle of institutional balance.[76] It is when the Treaties do not provide clear guidance that institutional balance may influence the Court's reasoning as to the proper scope of institutional powers.[77] In such situations, the case law suggests that, as a general principle of EU law, institutional balance carries a normative edge beyond its usual role as a delineator of competences. This invites a broadly republican reading. This position is supported by the complementary assessments of De Witte and Tridimas. De Witte refers to institutional balance as an "institutional principle"[78] that reinforces, but cannot redraw, inter-institutional relations. Tridimas classifies it as a general principle that "underlie[s] the constitutional structure of the Community and define[s] the Community legal edifice."[79] The CJEU agrees, reiterating in *MFA* that it is "characteristic of the institutional structure of the European Union."[80] This gap-filling role in informing legal arguments is not

[75] MFA, *supra* note 72, at paras. 75–76.

[76] Merijn Chamon, *The Institutional Balance, an Ill-Fated Principle of EU Law?,* 21 EUR. P. L. 371, 386 (2015).

[77] *Id*.

[78] Bruno de Witte, *Institutional Principles: A Special Category of General Principles of EU Law*, *in* GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW 158 (Ulf Bernitz & Joakim Nergelius eds., 2000).

[79] Takis Tridimas, THE GENERAL PRINCIPLES OF EU LAW 4 (3d ed. 2006).

[80] MFA*, supra* note 72, at para. 64.

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unimportant; it does influence the EU's constitutional order. Adopting Tridimas' analysis of general principles of EU law, this occurs in two ways: First, it provides an underpinning grammar of EU democracy by mapping the "constitutional standards underlying the Community legal order."[81] Second, and closely related, it helps the Court interpret the Treaties, either by filling gaps in the text or by forming part of "judicial policy . . . what the court perceives to be its function, what it considers to be the underpinnings of the legal system, how it prioritizes its rules"[82] that colors its interpretative technique.[83] In this sense institutional balance is a valuable constitutional idea underlying the Treaties, capable of articulation and enforcement by the EU's constitutional court.

The next section shows that in some circumstances institutional balance is used to support the reasoning in cases that maximise the legislative role of the EP and thereby encourage non-domination. Overall though, this aspect of institutional balance is limited because it is not independently justiciable. It does, however, indicate that there is more to Article 13(2) TEU in its totality than competence delineation. The normative promise of institutional balance is, as argued in Section F, executable through the sincere co-operation clause of Article 13(2) TEU. Ultimately it is this combined reading which best supports the republican-type interpretations of the EU's constitutional structure put forward by Bellamy and Dawson and de Witte.

III. Institutional Balance Shaping Competences

The interface between institutional balance and the normative functioning of EU democracy is most famously evident in *Chernobyl*.[84] The CJEU held that the EP could sue to defend its legislative prerogatives under Article 173 EC, even though this was on a literal reading not allowed because Article 173 EC did not grant the EP *locus standi*.[85] The Commission would ordinarily bring such a case on the Parliament's behalf, but here this would be contradictory because the Parliament wished to challenge the Commission's choice of legal basis for a regulation. The chosen legal base excluded the EP from the legislative process. The Court reasoned that if the Parliament could not protect its prerogatives in these circumstances, it would be at odds with "maintenance and observance of the institutional balance"[86] because it was unable to fulfil or defend its

[81] Tridimas, *supra* note 79, at 19.

[82] *Id.* at 52.

[83] *Id.* at 53.

[84] Case C-70/88, Parliament v Council, 1990 E.C.R. I-2041.

[85] *Id.* at para. 12.

[86] *Id.* at para. 26.

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institutional role. Institutional balance demanded that Parliament be able to effectively protect its prerogatives, which included representing EU citizens within the legislative process. This informed the decision to grant standing on a teleological reading of Article 173 EC. The court held that, because the Parliament had an indirect way to protect its prerogatives in court, it would be unconstitutional to prevent it doing so directly when the usual route was not viable. This captures the utility of institutional balance as a general principle of law that can help rationalize decisions promoting non-domination. De Witte suggests that *Chernobyl* is an outlier: Institutional balance was particularly influential in a rare and unrepeated situation where it was necessary to vindicate the EP's procedural rights in the face of a clear *lacuna*.[87] Other decisions, which are discussed below, further show that institutional balance can support the promotion of dialogue between institutions and the interests they represent.[88] Because the EP's legislative input has historically been weaker than the Council and Commission, these cases primarily see the Parliament's input maximized within the constraints of the Treaty provisions. Institutional balance informs their reasoning. The cases suggest that it is inhabited by a republican principle, albeit one that is not an independent head of claim.

The relevant cases concern the consultation legislative procedure. Consultation, whereby the Council must ask the Parliament's opinion before promulgating law, was, for many years, the main lawmaking method in the EU. Although it has mostly been surpassed by other legislative procedures, its case law remains relevant for two reasons: First, consultation remains a special legislative procedure, particularly used in external relations law. The cases to be discussed are directly relevant to these situations. Second, these cases articulate the way that non-domination can underpin the general principle of institutional balance. Given that institutional balance is a general principle of EU law, this point is not confined to a particular procedural context; it should have a wider constitutional significance and be applicable in any context where there is an arguable breach of institutional competences. The reason this arises in the consultation context and not elsewhere is because dialogue does not generally need to feature in case law concerning other legislative processes. For example, the ordinary legislative procedure requires conciliation if the Parliament and Council cannot agree on a legislative draft. It therefore requires non-dominating dialogue. Similarly, the consent procedure, often used during the conclusion of international agreements, gives the EP a veto. Although this does not necessarily influence the content of what it assents to or rejects, it provides for political

[87] De Witte, *supra* note 78, at 151–52.

[88] Case 817/79, Roger Buyl v Commission, 1982 E.C.R. 245 [hereinafter Buyl]; Case C-65/90, Parliament v Council, 1992 E.C.R. I-4593 [hereinafter Cabotage I]; Case C-388/92, Parliament v Council, 1994 E.C.R. I-2067 [hereinafter Cabotage II]; Case C-392/95, Parliament v Council, 1997 E.C.R. I-3213 [hereinafter Visas].

contestation because there must be an agreed course of action.[89] When these processes are discussed in litigation, it is usually in the context of legal base case law, where it is argued that the Commission has chosen to base legislation upon the incorrect legal basis and subsequently that the wrong legislative procedure has been used.[90]

Buyl v Commission[91] was one of the first cases connecting institutional balance, consultation, and republican ideas. Commission officials challenged the legality of a regulation that reduced their remuneration. One of their arguments was that the Parliament was improperly consulted because the final draft of the regulation was so different to the one on which it originally opined that its views ought to be re-canvassed. In response, the CJEU explained that consultation and democracy were connected to institutional balance. Consultation "enables the Parliament effectively to participate in the Community's legislative process, [and] is an essential feature of the institutional balance which the Treaties seek to achieve."[92] Buyl's complaint was ultimately dismissed because the post-consultation changes were small and methodological, rather than substantive, alterations about how remuneration was to be calculated.[93] Nonetheless, the case seeded an expectation that the EP's views should be properly considered, and adopted if appropriate, during consultation.

This expectation germinated in *Cabotage I*,[94] which articulated a principle of re-consultation. If a proposal has substantially changed following the initial Parliamentary consultation, and those changes were not confined to those requested, the Council must ask for a second opinion.[95] In *Cabotage I* and *Cabotage II*[96] the Council had not done this, so subsequently the relevant Regulations were annulled. The implication is that if the EP's opinion must be heard on a legislative proposal, this is more than a box-ticking exercise. There is an expectation of Parliamentary influence on consecutive drafts. Although this

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[89] *See generally* Cristina Eckes, How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures, 12 INT'L J. CONSTIT. L. 904 (2014).

[90] These processes have typically been litigated upon. *See generally* Kieran St. Clair Bradley, *Powers and Procedures in the EU Constitution: Legal Bases and the Court*, *in* THE EVOLUTION OF EU LAW 85 (Paul Craig & Gráinne de Búrca eds., 2011).

[91] Buyl, *supra* note 88.

[92] *Id*. at para. 16.

[93] *Id.* at paras. 23–24.

[94] Cabotage I, *supra* note 88.

[95] *Id*. at para. 16.

[96] Cabotage II, *supra* note 88.

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expectation is ultimately based on the definition of consultation, that definition is itself informed by the institutional balance. Re-consultation reflects a need to protect the democratic spirit of the Parliament's legislative prerogatives. It is not just about protecting existing institutional powers. Advocate General Darmon's Opinion in *Cabotage II* made clear that *Cabotage I* adopted re-consultation even though it was "not provided for by the Treaty."[97] Although neither *Cabotage* judgment explicitly referred to institutional balance, Darmon identifies that the institutional balance was at stake in both cases. He argued that: "The Court [has] stressed the importance of the parliamentary consultation procedure for the institutional balance of the community . . . restriction on the re-consultation requirement would result in excluding the Parliament from the legislative procedure."[98] In his view the CJEU had been and should be motivated by *Isoglucose*'s recognition that the EP's representation of EU citizens was an essential part of the EU's institutional balance. This moved the court beyond a need to protect the EP's bare competences and into upholding the democratic reasoning behind them.[99] In the specific circumstances of *Cabotage II*, he was at one with the final judgment in his assessment that the changes to the legislation were so substantial that they demanded re-consultation of the EP.[100] The general principle of institutional balance thus informed a purposive reading of the Treaties that emphasised the need to improve the EP's legislative position and protect non-domination between key constituencies.

The link between Parliamentary participation and re-consultation was more clearly evident in *Parliament v Council (Visas)*,[101] which explicitly referred to institutional balance. Here the EP successfully argued that it was not properly consulted when the Council made significant changes to a legislative draft after its initial consultation without remanding it to re-consultation. Advocate General Fennelly's Opinion summarized the relevant law:

> Where the Treaty provides for consultation, the Parliament is entitled to express its views both on the original proposal and again in the event of substantial amendment . . . . As the Court has put it, "consultation . . . [of the Parliament] is likely to affect the substance of the measure adopted." To

[97]Opinion of Advocate General Darmon, at para. 17 in Cabotage II (Mar. 16, 1994), http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98665&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=334142.

[98] *Id.* at paras. 17–19.

[99] *Id*.

[100] *Id.* at para. 59; Cabotage II, *supra* note 88, at para. 15.

[101] Visas, *supra* note 88.

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> dispense with consultation because of an a priori view that the attitude of the Parliament was known and was unacceptable to the Council presupposes closed minds and rigid postures on the part of both institutions and denies the usefulness of the process of consultation.[102]

This interpretation sees consultation as designed to create an engaged and constructive—that is, non-dominating—dialogue that bears resemblance to republican thought. This encourages effective legislative input from each representative organ and their constituencies. Both sides receive fuller consideration and can influence the content of the promulgated law rather than being treated to a box-ticking exercise. The Court's judgment in *Visas* concurred and explicitly related this to institutional balance, making apparent that the concept provides a framework for how EU democracy should operate. In response to the Council's unsuccessful defense that, because it was aware of Parliament's wishes, re-consultation was unnecessary, the CJEU confirmed the re-consultation law and noted:

> Proper consultation . . . constitutes one of the means enabling it [the EP] to play an effective role in the legislative process of the Community; to accept the Council's argument would result in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question.[103]

Letting the Council avoid re-consultation because it felt it was sufficiently aware of the EP's wishes would prevent dialogue between the two institutions and the interests they represent. EU citizens would be unable to influence the content of legislation, and Member State executives would dominate. Although this reasoning took place in the context of the consultation procedure, it has a wider significance. It suggests that the institutional balance, as a general principle of EU law, can be understood as more than a division of powers. It supported the argument that the EP has to be involved in a non-dominating method of dialogic lawmaking. This lends some legal weight to the republican approaches to institutional balance, shining light on how the concept can motivate, explicitly or implicitly, the promotion of inter-institutional dialogue.

There are limitations to this analysis, however. Most obviously, Section E.I showed that when institutional balance is directly relied upon as a head of claim, it is usually as part of an argument that there has been *ultra vires* action. The 'general principles of law' reading

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[102] Opinion of Advocate General Fennelly, at para. 23 in Visas (Mar. 20, 1997), http://curia.europa.eu/juris/showPdf.jsf?text=&docid=100707&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=334514.

[103] Visas, *supra* note 88, at para. 22.

outlined in Sections E.II and D.III suggests that it can carry a normative edge, but this is usually limited to informing or filling in gaps of other arguments. It also seems only to have arisen in the context of consultation, making it difficult to test the hypothesis that as a general principle of law it ought to operate beyond that specific situation. This also makes it difficult to argue that the case law interpreting and utilizing the statement that each institution "shall act within the limits of the powers conferred on it in the Treaties" supports the models that see it as a potential wellspring of non-domination. If one seeks juridical support for those positions, one must look elsewhere. It was earlier noted that sincere co-operation between institutions is the second clause of Article 13(2) TEU and is sometimes cited, for example in *EU Budget*, alongside the institutional balance in an attempt to dictate how institutions should behave. It is now submitted that instead of focusing on institutional balance as a progenitor of non-domination, the case law suggests that Article 13(2) TEU in its totality, or sincere co-operation alone, provides a firmer support for the argument that republican norms inhabit the EU's institutional architecture.

F. Sincere Co-Operation

Sincere cooperation under Article 13(2) TEU requires that "the institutions shall practice mutual sincere co-operation." As will be shown, this has been decisive in arguments concerning the proper interaction of legislative institutions. It gives effect to the non-dominating principles identified within the institutional balance case law. Consequently, Article 13(2) TEU as a whole, rather than just the institutional balance clause, should be drawn upon to support republican readings of the law governing the EU's legislative process.

Interestingly, Bellamy's republican intergovernmentalism does not refer to sincere co-operation within Article 13(2) TEU but instead uses its presence in Article 4(3) TEU as an example of the EU's commitment to non-domination. This provision relates to co-operation between Member States. It states that "pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." According to Bellamy, this is part of Article 4's broader commitment to respect the competences of Member States and their internal democratic preferences alongside the pursuit of common EU goals. This analysis is in line with Dawson and de Witte's argument that the EU has a constitutional balance of interests.[104] Given that a central pillar of both models stresses the need for representative EU institutions to interact as equals, it is interesting that neither mentions Article 13(2) TEU, which adapts this inter-state obligation into an inter-institutional one. In the context

[104] Dawson & de Witte, *supra* note 28, at 508.

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of Article 4(3) TEU (then Article 10 EC), *Commission v Sweden*[105] held that sincere cooperation requires "Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty."[106] Here, the relevant objectives were the effectiveness of external action and the unity of the EU's international representation. In this way, the general principle of sincere cooperation supports the pursuit of wider Treaty objectives.[107] The same goes for Article 13(2) TEU.[108] The CJEU's interpretation of inter-institutional cooperation seems to provide for effective participation of representative institutions during lawmaking, so long as the principles of non-domination between legitimating constituencies, identified in Sections D and E above, and now enshrined in Article 10 TEU, are followed.

The ECJ connected democracy, the institutional balance, and sincere co-operation in *Parliament v Council (UNCTAD).*[109] It held that "inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions."[110] Here, the court first makes an explicit reference to the need for dialogue during consulation. As noted in *Visas*, this is dormant within institutional balance.[111] The CJEU extended this point in *MFA*, holding that "sincere cooperation . . . . pursuant to Article 13(2) TEU, must govern relations between EU institutions in the context of the ordinary legislative procedure."[112] The CJEU has stressed that this duty applies to the execution of any institutional role.[113] Sincere co-operation is a more direct vehicle for shaping a constructive dialogue between legislative institutions than the institutional

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[105] Case C-246/07, Commission v Sweden, 2010 E.C.R. I-3317.

[106] *Id*. at para. 69.

[107] *See generally* Daniele Davison-Vecchione, Beyond The Forms of Faith: Pacta Sunt Servanda and Loyalty, 16 GERMAN L. J. 1163 (2015); Andres Delgado Casteleiro & Joris Larik, *The Duty To Remain Silent: Limitless Loyalty in EU External Relations?*, 36 EUR. L. REV. 524 (2011).

[108] Christophe Hillion, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES 68 (Marise Cremona & Anne Thies eds., 2014).

[109] Case C-65/93, Parliament v Council, 1995 ECR I-643 [hereinafter UNCTAD].

[110] *Id*. at para. 23.

[111] Visas, *supra* note 88, at para. 22.

[112] MFA, *supra* note 72, at para. 83.

[113] Case C-48/14, Parliament v Council, at para. 57–58 (Feb. 12, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=162261&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=335377.

balance. Whereas institutional balance primarily safeguards the granted powers of representative institutions, sincere co-operation dictates how those powers should be utilized. Taken together, Article 13(2) TEU in its totality can both promote and protect non-domination.

MFA and *UNCTAD* provide good examples of how sincere co-operation protects one institution and its constituencies from dominating another during the lawmaking process. In *MFA*, the CJEU held that the Commission had fulfilled the requirement of sincere cooperation. Prior to its contested legislative withdrawal, the Commission had attempted to reconcile the dispute among it, the Council, and Parliament, and only acted when it was apparent that they would not accept the model of confirming micro-financial assistance through delegated legislation.[114] There had not been any domination; attempts were made to come to a mutually acceptable decision. *UNCTAD* is a less straightforward case. That case concerned the legality of a regulation modifying the EU's generalized tariff preferences. The EP unsuccessfully argued that the Council had not correctly followed the consultation procedure, and failed because it had breached the duty of sincere cooperation. It failed to respond in time to the Council's request for an opinion, which was made on 22 October 1992 with a view to adopting the Regulation by 1 January 1993. Failure to adopt by that date would apparently harm exports to non-EU states.[115] Parliament twice delayed its plenary debate and postponed it to January 1993. Because of the need to adopt the proposal before 1993, however, the Council passed the Regulation in December 1992 without waiting for the delayed opinion. The Council's apparent failure to consult the Parliament was due to the Parliament's lack of co-operation. The Council was not culpable:

> Parliament failed to discharge its obligation to cooperate sincerely with the Council . . . [accordingly the EP] is not entitled to complain of the Council's failure to await its opinion . . . consultation was not complied with because of the Parliament's failure to discharge its obligation to cooperate sincerely with the Council.[116]

It may be argued that if the Court truly prized the Parliament's contribution, it would have required consultation. Advocate General Tesauro took this view. He noted that consultation and re-consultation are prominent constitutional concepts because

[114] MFA, *supra* note 72, at paras. 101–05.

[115] UNCTAD, *supra* note 109, at para. 14.

[116] *Id*. at paras. 27–28.

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institutional balance demands the Parliament has effective legislative participation; letting the Council proceed alone would undermine this.[117] This argument is broadly in line with the reading of institutional balance offered in Section 3 above; the EP's legislative competences must be protected. The CJEU's different approach to the case suggests that sincere co-operation is the dominant provision in Article 13(2)'s wider non-dominating paradigm. Institutional balance has a republican aspect as a general principle of law that informs judicial reasoning, but its overall role is to safeguard existing powers that may or may not keep with non-domination. In contrast, it seems that sincere cooperation requires a non-dominating dialogue, or an attempt at one, between institutions. *UNCTAD* held that the EP's prevarication meant it was not committed to a constructive debate. It could not justifiably argue that it had been arbitrarily excluded from the legislative dialogue, because it had several opportunities to contribute; rather, it had forfeited its rights. This suggests that democratic legitimacy is not based on Parliamentary contribution per se; it flows from non-domination during lawmaking between various representative institutions. This is aligned with the theoretical analyses of the institutional balance and suggests that they can be strengthened by an additional focus on sincere co-operation.

G. Conclusion

As a general principle of law underpinning inter-institutional relationships, the institutional balance is significant for understanding the EU's democratic constitution. The reading presented in this article took its cue from the fact that intergovernmental critiques of the Eurozone crisis have renewed study of the idea that institutional balance should require a non-dominating dialogue between key EU constituencies. The main analyses of this argument, offered by Dawson and de Witte and Bellamy, come from a normative theoretical perspective. The case law on Article 13(2) TEU does not entirely support their positions. Institutional balance is primarily used to protect existing institutional competences that may or may not be aligned with democratic principles of non-domination. It has been used as a general principle of law to support arguments that seek to maximize existing institutional competences, but this serves a gap-filling function at best. If Article 13(2) TEU is read in its totality to encompass both institutional balance and sincere co-operation, however, the law provides a stronger support for the republican conceptualizations of EU democracy. Sincere co-operation requires institutions to interact in a way that reduces their ability to exert dominance over one another. A tripartite view of Article 13(2) TEU can both protect and further a normative republican reading of the EU's institutional structure; institutional balance protects existing competences and suggests that it should pursue non-domination, while sincere co-operation can ensure that

[117] Opinion of Advocate General Tesauro, at paras. 18–20 in UNCTAD (Dec. 13, 1994), http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98895&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=336647.

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non-domination takes place. In uncovering this, it has also been shown that the CJEU has developed an understanding of democracy based upon the need to involve three constituencies as fully as possible within lawmaking. It is indeed unfortunate that this democratic constitutional architecture has been undermined by the Eurozone crisis response.

One wider implication of this Article may be noted. It has been argued that non-domination is an appropriate lens through which to understand inter-institutional lawmaking relationships. This first raises questions about how far non-domination, and republicanism more widely, has permeated the EU's democratic constitution beyond Article 13(2) TEU. Further assessments of constitutional principles of EU law from a republican perspective would help determine the extent to which republicanism is a useful tool through which to analyze EU democracy.

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