

## INSTITUTIONAL BALANCE, CIVIC VIRTUE AND DIALOGUE: A REPUBLICAN BALANCING ACT FOR THE EU CONSTITUTIONAL ORDER

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**Abstract:** Non-domination is a central tenet of republicanism and a foundational principle of the EU constitutional order. Republicanism, however, has often been overlooked as a legitimating principle in the EU. This article explores the EU from a non-dominating paradigm. It shows that the institutional balance, as opposed to the separation of powers, has descriptive and normative force in the EU. Additionally, this analysis provides a systematic reinterpretation of the EU analysing its institutional balance from a dialogical perspective that emphasizes republican values linked with civic virtue. This highlights that intergovernmental, supranational, the peoples, interest group, and technocratic actors are vital players ‘free and equal’ to exert influence that shapes and reshapes the institutional balance to reflect their own vision of the public good. The republican model presented in this article provides for the active participation and limitation of each actor that can – and should – be understood as enhancing the democratic nature and legitimation of the EU.

### A. INTRODUCTION

Since the inception of the European integration process, the framers of the Treaties have envisaged a multilevel governance mechanism to prevent any societal force from dominating the European continent.<sup>1</sup> In this context, it is important to emphasize that ‘the EU was born first and foremost as an anti-hegemonic project’ to *balance* competing societal forces within Europe.<sup>2</sup> The initial Treaties understood that an essential element of the public good in Europe was to guarantee peace and security across the continent.<sup>3</sup> Accordingly, in the aftermath of World War II, the framers envisioned a non-dominating paradigm designed with the aim of preventing any societal force from unilaterally controlling Europe. This aim necessitates constitutional and institutional structures and processes that counterbalance competing societal forces. This central objective of establishing a continuous equilibrium that counterbalances societal forces leads to important debates on the legitimation of the EU

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<sup>1</sup> R Schuman, ‘Declaration of 9 May 1950: The Schuman Plan for European Integration’ in D Karmis and W Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 203-205.

<sup>2</sup> S Bunse and K Aude Nicolaïdis, ‘Large Versus Small States: Anti-hegemony and the Politics of Shared Leadership in the EU’ in A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 249-266.

<sup>3</sup> This aim of peace and security continues to be of fundamental importance in the EU. Consolidated Version of the Treaty on European Union [2012] OJ L 326/13 (TEU), Article 3.

constitutional order. For this reason, the EU is on an ongoing quest to achieve the republican ideal of balanced governance through non-domination. This contribution examines whether the EU constitutional order adheres to fundamental themes of republicanism.

This article contends that a reinterpretation of EU governance from a republican perspective can help address fundamental challenges facing the EU. It provides a systematic reassessment of the EU constitutional order by analysing its institutional balance from a dialogical perspective, which itself emphasizes republican values. A further development of a republican model can address current challenges and in the process, enhance the legitimation of the EU.

This constitutional model aims to promote central tenets of republicanism – non-domination, non-arbitrariness, pluralism, dialogue, and the pursuit of the public good.<sup>4</sup> A constitutional order, which promotes republicanism in the EU, can secure an institutional balance that reconciles a plurality of competing societal interests, legitimacy claims, and constitutional norms.<sup>5</sup> Ultimately, such a framework can promote individual and political self-determination while achieving the public good. Despite the aspiration towards non-domination at the initial stages of European integration, republicanism has too often been overlooked as a legitimating principle within the EU.<sup>6</sup> Consequently, the central question of this article is whether a republican model of EU governance can add value to our understanding of the evolution of the institutional balance in the EU constitutional order.

To explore the central question, the article proceeds with the following structure. First, the analysis shows that non-domination is an essential element of EU governance, highlighting the need to examine the potential of a republican model of the EU. Second, the article explores the relationship between the institutional balance and the separation of powers. It clarifies the distinction between the two constitutional approaches, before elucidating why the institutional balance is better suited for the EU. Third, it explores the concept of civic republicanism, connecting it with the ‘good life’ of the individual and the

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<sup>4</sup> D Johnson, ‘The Institutional Balance as an Agent of Transformation in the EU Constitutional Order: Reconciling the Simultaneous Rise of the European Parliament and European Agencies’ (2017) 6(2) Cambridge International Law Journal 202-31.

<sup>5</sup> D Johnson, ‘Institutional Balance as Constitutional Dialogue. A Republican Paradigm for the EU’ in M Derlen and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, (Bloomsbury Publishing 2018), 115-139, at 121-124.

<sup>6</sup> For detailed analysis that utilizes republicanism to assess the workings of the EU, see P Craig, ‘Democracy and Rule-making Within the EC: An Empirical and Normative Assessment’ (1997) 3(2) European Law Journal 105; G Majone, ‘Delegation of Regulatory Powers in a Mixed Polity’ (2002) 8 European Law Journal 319; R Bellamy, ‘An Ever Closer Union Among the Peoples of Europe: Republican Intergovernmentalism and Democratic Representation within the EU’ (2013) 35 Journal of European Integration 499.

community. This section constructs a constitutional model that links civic republicanism, institutional balance, and constitutional dialogue.<sup>7</sup> Fourth, a republican perspective is utilized to explain how the EU constitutional order has evolved to incorporate different dimensions of governance – intergovernmental, supranational, the peoples of Europe, interest groups, and technocratic. The analysis concludes that the EU has significantly increased the number of formal and informal societal forces that operate in each of the dimensions of EU governance. This is consistent with the non-dominating and pluralistic aims of republicanism. Overall, this study traces the evolution of the institutional balance in the EU to demonstrate how its constitutional order is moving closer towards realizing republican ideals. It shows that a reinterpretation of EU governance through a republican model of institutional balance as constitutional dialogue contributes to debates concerning how to restructure and enhance the legitimation of the EU. Still, more steps must be taken to fully achieve republican aims, demonstrating that an intensification of republicanism in the EU can increase the legitimation of the Union while putting forth a framework to address current challenges.

## **B. NON-DOMINATION AS AN ENDURING TENET OF EU GOVERNANCE**

A central organizing principle within the EU is non-domination. Non-dominating ideals embodied in the original European Framework were vividly illustrated with the purpose of pooling the resources of France and Germany in the area of coal and steel.<sup>8</sup> This non-dominating objective is exemplified in the Schuman Declaration that set out to tie the economies of the two economic powers and ensure the supply of coal and steel to both markets – as well as other member states - so that no single actor could control the distinct processes of war in Europe.<sup>9</sup> Ultimately, to achieve the European public good of securing peace and security, the Schuman Declaration was designed to constrain all societal forces and guarantee balanced Franco-German relations. A comprehensive system of checks and balances operating at different levels of governance was necessary to realize such objectives.

This shift from ‘pure’ power dynamics, which dominated European relations before the two devastating World Wars, to a European system focused on cooperation and guaranteed by the checks and balances established in the Treaties is a great milestone in European integration.<sup>10</sup> The original European framework shows that non-domination is an

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<sup>7</sup> The ‘good life’ is explained in more detail in section C.

<sup>8</sup> For a comprehensive analysis of the early developments in EU integration, see G Bebr, ‘The European Coal and Steel Community; A Political and Legal Innovation’ (1953) 63(1) *The Yale Law Journal* 1.

<sup>9</sup> Schuman (n 1) 203-04.

<sup>10</sup> Bunse and Aude Nicolaidis (n 2) 249-253.

essential founding principle at the heart of the European project, signifying that a republican model was being used to reassess, strengthen, and restructure the European order. Importantly, this enduring aspiration to ensure societal forces are balanced and prevent any element from obtaining a dominant position is as vital today as it was during the initial stages of European integration.<sup>11</sup>

The EU is in a state of crisis.<sup>12</sup> This present state of volatility is exemplified across sectors, from Brexit to security, the euro, and European migration. Significant questions arise concerning whether the EU and its constitutional order have the capacity to handle such challenges simultaneously.<sup>13</sup> Such transformative events have led to increasing demands on government at different levels – the local, national, transnational, and international. Consequently, greater emphasis is placed on the enduring constitutional question within Europe: what type of governmental system is (or should exist in) the EU? These developments trigger renewed interest in the intricate workings of the EU constitutional order.

The EU receives intense criticism for what detractors label a drastically inadequate response to these crises.<sup>14</sup> One of the most fundamental criticisms of the EU's response to current challenges is the widespread perception that a significant 'democratic deficit' and 'accountability deficit' still exist.<sup>15</sup> Essentially, this perspective claims that EU decisions reflect the will of political elites rather than the peoples of Europe. Political elites are then able to shape EU governance at a great distance from EU citizens. Consequently, the EU currently suffers from the perception that technocrats dominate EU governance.<sup>16</sup> Additionally, the complex constitutional structures and processes comprising EU governance make it increasingly difficult to hold the different actors who engage in EU decision-making to account.<sup>17</sup> This perceived unresponsiveness to the desires of the peoples of Europe

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<sup>11</sup> F Snyder, 'The effectiveness of European Community law: Institutions, processes, tools and techniques' (1993) 56(1) *The Modern Law Review* 19, 24.

<sup>12</sup> K Archick, 'The European Union: Current Challenges and Future Prospects' (2016) *Congressional Research Service Report* 44249.

<sup>13</sup> *ibid.*

<sup>14</sup> For further analysis of the different European crisis, see C Kapartziani and K Papathanasiou, 'The Refugee Crisis as a European Democratic Crisis' (2016) 2 *Glocalism: Journal of Culture, Politics and Innovation* 1-4.

<sup>15</sup> *ibid.*; M Avbelj, 'Integral pre-emption of EU Democracy in Economic Crisis under Transnational Law' (2015) 4 *Cambridge Journal of International & Comparative Law* 242-267.

<sup>16</sup> M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76(5) *The Modern Law Review* 817, 821.

<sup>17</sup> For a discussion concerning the complexity of judicial review in the context of EU legislation, see J Öberg, 'The rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13(2) *Constitutional Law Review* 248, 253-59.

highlights the lack of active participation in EU governance.<sup>18</sup> Such challenges present vital questions concerning the legitimation of the EU constitutional order.

The question remains whether the EU can realize republican aims. Can increased emphasis on republicanism enhance the legitimation of the EU's responses to current challenges? This question demands a reassessment of the constitutional and institutional structures, norms, and processes within the EU. Accordingly, the next section examines the relationship between the institutional balance and the separation of powers. Such an examination is necessary to determine which mode of governance the EU utilizes to achieve its non-dominating aspirations.

### **C. COMPETING MODES: INSTITUTIONAL BALANCE AND SEPARATION OF POWERS**

Ongoing contestation over the constitutional disposition of authority has been an enduring theme since the beginning of European integration.<sup>19</sup> Debates over the legal and political nature of the EU highlight competing perspectives concerning how public power is or ought to be balanced in the EU.<sup>20</sup> Such debates often concentrate on two distinct constitutional modes of governance: institutional balance and separation of powers.<sup>21</sup> Despite the attention paid to each concept, as Majone and Chamon have argued, the precise relationship between the two modes of governance is still drastically understudied in EU discourse.<sup>22</sup> This is surprising given that an increased emphasis on the relationship between these concepts can provide valuable insights into 'the elusive constitutional nature' of the EU.<sup>23</sup> Thus, it is necessary to explore how the concepts relate to one another.

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<sup>18</sup> B Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51(4) *Journal of Common Market Studies* 614, 616-19.

<sup>19</sup> For detailed analysis of institutional debates concerning EU integration, see R Bieber, 'Settlement of institutional conflicts on the basis of article 4 of the EEC Treaty' (1984) 21(3) *Common Market Law Review* 505-523; G Garrett and G Tsebelis, 'An institutional critique of intergovernmentalism' (1996) 50(2) *International Organization* 269-299.

<sup>20</sup> G de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 55-81.

<sup>21</sup> For an in depth analysis of the debates concerning the institutional balance and the existence (or lack thereof) of the separation of powers in the EU, see P Craig, 'Institutions, Powers, and Institutional Balance' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 41-84; G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17(3) *European Law Journal* 304-322.

<sup>22</sup> Both Majone and Chamon demonstrate that further research on the relationship between the institutional balance and separation of powers in the EU is necessary. G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4(1) *European Law Journal* 5-28; M Chamon, 'The Institutional Balance, and Ill-Fated Principle of EU Law?' (2015) 21 *European Public Law* 371, 372.

<sup>23</sup> *ibid.*

Some similarities exist between the institutional balance and the separation of powers. Analogous to other modes of governance in constitutionalism, both attempt to limit government, control the exercise of public authority, and prevent the concentration of power in any single societal force. Each mode aims to diminish the potential for the arbitrary interference of individual and political self-determination by dispersing public authority and influence.<sup>24</sup> This ‘objective of power-sharing’, demanding the dispersion of public power among different societal forces to prevent the arbitrary interference of individual and political self-determination, is an essential element of both concepts. Although the two modes of governance share this similar underlying rationale, it is a mistake to conflate them. The methods of dispersing and controlling public power differ as each utilizes different structures, processes, and decision-making arrangements to achieve constitutional objectives.

The two modes of constitutional governance are competing, if not diametrically opposed. Accordingly, a significant question in EU governance is whether the institutional balance or the separation of powers adequately describes the EU.<sup>25</sup> Others seek to ask the more normative question, whether either mode can offer a viable model to structure and articulate the disposition of power in the EU.<sup>26</sup> This article argues that the institutional balance – as opposed to the tripartite separation of powers – should be utilized as a frame of reference and guiding constitutional norm for EU governance. Therefore, it is necessary to distinguish the concepts and explain why institutional balance better reflects the complex realities of the EU and is a normative aim to which the EU should aspire. The next section begins by elucidating the central tenets of the separation of powers theory to distinguish it from the institutional balance.

### ***1. The conventional, function-oriented separation of powers theory***

The traditional tripartite separation of powers theory espoused by the likes of Montesquieu and Madison reflects the constitutional maxim that the legislature legislates, the executive executes, and the judiciary adjudicates.<sup>27</sup> This conventional function-oriented understanding derives from what Vile famously formulated as the ‘pure’ theory of separation of powers.<sup>28</sup>

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<sup>24</sup> Unlike Chamon this work does not argue that institutional balance and the separation of powers have different overall aims, see Chamon (n 22) 373.

<sup>25</sup> JP Jacqué, ‘Principle of Institutional Balance’ (2004) 41 *The Common Market Law Review* 383-391; Majone (n 6) 319-339.

<sup>26</sup> Craig (n 21) 41-42.

<sup>27</sup> For an in depth examination of the separation of powers, see MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998); NW Barber, ‘Prelude to the Separation of powers’ (2001) 60(1) *Cambridge Law Journal* 59-88; E Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009).

<sup>28</sup> Vile (n 27) 14-19.

The pure theory rests on three elements.<sup>29</sup> First, it requires the division of government into three organs to ensure individual liberty: legislative, executive, and judiciary. Secondly, each organ exercises only one corresponding identifiable and distinct function of government. Each of the different organs is limited to exercising its ‘own’ specific function, preventing each from entering the territory of another. Thirdly, an individual may only be a member of one organ at any given time. Thus, the different organs and functions are kept separate and distinct. This pure approach, however, has never been applied in reality for any considerable time.<sup>30</sup> The conventional function-oriented theory, nevertheless, reflects the core premise of the ‘pure’ theory that each of the distinct functions of government is the domain of a particular actor.

## ***2. The applicability of the separation of powers to the EU***

EU scholarship traditionally eschews the separation of powers theory. The institutional balance, as opposed to the separation of powers, is often used as the frame and guiding constitutional principle.<sup>31</sup> This, however, has not stopped a few commentators from using the separation of powers theory to address constitutional questions.<sup>32</sup>

A prominent proponent of applying the separation of powers is Gerald Conway. For Conway, the tripartite separation of powers theory offers unique insights into constitutional challenges facing the EU and serves as a model to accurately describe the EU.<sup>33</sup> Conway also justifies the use of the separation of powers from a normative angle proclaiming that the notion can safeguard democracy and the rule of law in the Union, while diminishing the democratic deficit.<sup>34</sup> Similarly, Lenaerts declares that a functional understanding of the separation of powers theory can be used to describe the Union legal order and decrease the democratic deficit in the EU constitutional order.<sup>35</sup> Thus, Conway and Lenaerts argue that a functional understanding of the separation of powers is applicable for the EU.

However caution must be used when attempting to apply the separation of powers to the complex constitutional realities in the EU. Curtin argues that one of the most significant challenges for scholars and practitioners within the EU is to construct ‘a *new* model of

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<sup>29</sup> *ibid.*

<sup>30</sup> Carolon (n 27) 18-22.

<sup>31</sup> Case 9-56, *Meroni v High Authority* EU:C:1958:7, [1958] ECR 00011; Case C-70/88, *Parliament v Council (Chernobyl)* EU:C:1991:373, [1990] ECR I-04529.

<sup>32</sup> Chamon acknowledges the fallacies with utilizing separation of powers to describe EU governance, but does ponder whether the separation of powers approach has normative appeal for the EU. See Chamon (n 22) 372.

<sup>33</sup> Conway (n 21) 304-322.

<sup>34</sup> *ibid.*

<sup>35</sup> K Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’ (1991) 28(1) *Common Market Law Review* 12-19.

separation of powers in the context of the EU political and legal systems'.<sup>36</sup> Developing a new model of the tripartite theory is an arduous task and one that the author does not propose to undertake. For any constitutional model to have legitimating force, it must reflect the constitutional realities of that system of governance and achieve normative aims linked with the public good.<sup>37</sup> When applied to the EU, the separation of powers does not fit this fundamental constitutional requirement.

The current EU constitutional apparatus is inconsistent with the original vision of the separation of powers theory. Even the modified versions of the separation of powers that permits some blending and some form of checks and balances, including the ability for actors to exercise overlapping functions is inadequate according to the realities of EU governance.<sup>38</sup> Further, any 'new' model of the separation of powers theory must move so far away from the classical tripartite theory to reflect the complex realities of the EU that it would no longer retain the essential characteristics of the theory.<sup>39</sup> In essence, it would only be a nominal separation of powers. For this reason, even with a significant overhaul, the theory of the separation of powers is ill-suited for a pluralistic and multilevel system as complex as EU governance.

### ***3. Distinguishing between separation of powers and institutional balance***

Fundamental differences exist between the separation of powers and the institutional balance theories. The separation of powers places normative force behind an actor obtaining a dominant position in the exercise of a particular power. The conventional understanding of the separation of powers theory rests on a hierarchical model of decision-making where a central organ of the state has the ultimate authority to take a 'final' decision in a particular exercise of power. Thus, only one central organ is vested with the ultimate authority in the different phases of governance – creating, applying, or interpreting.<sup>40</sup> Under this theory, the legislature 'dominates' the lawmaking process; the executive 'dominates' the execution of

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<sup>36</sup> D Curtin, 'EU constitution as architecture: separation of powers in the twenty-first century' in *De Regels en Het Spel: Opstellen Over Recht, Filosofie, Literatuur en Geschiedenis Aangeboden aan Tom Eijsbouts* (T.M.C. Asser Press 2011) 123-133.

<sup>37</sup> *ibid.*

<sup>38</sup> Such modified versions of the separation of powers would still permit one societal force to dominate the exercise of a particular public power. This is clarified in the following section.

<sup>39</sup> For instance, Ziller utilizes the separation of powers terminology but devises a new model in which to understand the distribution of powers within the Union, thus making a significant departure from the conventional tripartite separation of powers model to a new approach. See J Ziller, 'Separation of Powers in the European Union's Intertwined System of Government: A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) 3 *Il Politico* 133-179.

<sup>40</sup> Barber (n 27) 59.



those laws during the implementation process; the court ‘dominates’ the interpretation of those laws in the judicial process.

This conventional understanding of the separation of powers theory demands a fixed structure of institutional interaction between three centralized organs. Each of the structures of government is inherently linked with a particular function (function-oriented). The creation, application, and interpretation of constitutional norms, which shape and influence the meaning and interpretation of the Treaty, is not the exclusive domain of any single societal force. An understanding of EU governance where a single actor unilaterally establishes the constitutional rules of the game belies the complex constitutional realities in the EU. Thus, the separation of powers is overly simplified and vastly ill-equipped to capture the complexities of EU governance.

The institutional balance, on the other hand, is a republican model of governance designed to achieve a balance between each of the competing societal forces within a constitutional order.<sup>41</sup> It demands that multiple actors share authority in the exercise of the different powers of governance,<sup>42</sup> and a plurality of societal forces participate in each of the different processes of constitutional decision-making. Lenaerts exemplifies the dynamic multi-actor processes of EU governance stating that it seems impossible to characterize any Union institutions as the exclusive legislative or executive authority ‘since a close analysis of their prerogatives certainly does not indicate a clear-cut line between the legislative and the executive branches’.<sup>43</sup>

The institutional balance, demands multi-actor and interactive processes of governance with the aim of preventing any single actor from unilaterally establishing, applying, or interpreting the Treaties. Thus, institutional balance is designed to eradicate the possibility of any societal force obtaining a dominant position. This mutual interdependence indicates that the institutional balance, unlike the separation of powers, attempts to prevent any societal force from unilaterally controlling the exercise of a particular power. The republican model of institutional balance as dialogue described in section D moves away from a hierarchical understanding of government towards a broader and more inclusive understanding of the exercise of public power. This not only more accurately reflects EU

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<sup>41</sup> Craig (n 21) 41-42.

<sup>42</sup> R Dehousse, ‘Delegation of powers in the European union: The need for a multi-principals model’ (2008) 31(4) *West European Politics* 789-805.

<sup>43</sup> Lenaerts (n 35) 13.

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governance, but also has normative legitimating force under a republican reading of EU governance.

The overwhelming majority of scholarship agrees with the legitimation nature of the institutional balance. Jacqu  and de B rca contend that the Court of Justice of the European Union (CJEU) utilizes institutional balance as a substitute or replacement for the separation of powers in the EU.<sup>44</sup> Lenaerts and Verhoeven argue that ‘the Union’s institutional balance does not rest on an organic separation of powers but on a balanced interaction between representatives of various interests’.<sup>45</sup> Prechal declares ‘it is no novelty to observe that the classical, often organic – understanding of the separation of powers makes little sense in the Community context’.<sup>46</sup> Robert Schutze contends ‘the European Union – born in 1958 with the genetic code of an international organization – could hardly be viewed to reproduce the *trias politica* of a nation state’.<sup>47</sup> Dashwood exemplifies the tensions with utilizing the separation of powers theory to explain the constitutional disposition of powers in the EU, elucidating that the EU does not have an identifiable legislator or executive but a multi-actor legislative and executive process.<sup>48</sup>

The lawmaking process includes the Commission, Council, European Parliament (EP), national parliaments, and national governments. Executive and regulatory processes include the Commission, Council, EU agencies, comitology committees, ombudspersons, and a network of actors at the national level including national governments, agencies, and regulatory actors responsible for implementing EU policies.<sup>49</sup> The judicial process includes interactions between the CJEU, the Commission, and national courts, which range from openly combative to extremely cooperative.<sup>50</sup> Evidently, applying the separation of powers to clarify the disposition of authority between societal forces does not address the onerous tasks

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<sup>44</sup> Jacqu  (n 25) 383.

<sup>45</sup> K Lenaerts and A Verhoeven, ‘Institutional balance as a guarantee for democracy in EU governance’ in C Joerges and R Dehousse (eds), *Good Governance in Europe’s Integrated Market* (OUP 2002) 35-88; S Smismans, ‘Institutional Balance as Interest Representation: Some Reflections on Lenaerts and Verhoeven’ in C Joerges and R Dehousse (eds) 89-108.

<sup>46</sup> S Prechal, ‘Institutional Balance: A Fragile Principle with Uncertain Contents’ in T Heukels, N Blokker and M Brus (eds), *The European Union After Amsterdam: A Legal Analysis* (Kluwer Law International 1998) 273-294.

<sup>47</sup> R Sch tze, ‘Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty’s regime for Legislative and Executive law-making’ (2005) European Institute of Public Administration Working Paper 2005/W/01, 5-17 <<https://ssrn.com/abstract=996005>> accessed 14 January 2018.

<sup>48</sup> A Dashwood, ‘The Limits of European Community Powers’ (1996) 21 *European Law Review* 113-128.

<sup>49</sup> *ibid.*

<sup>50</sup> M Claes and M De Visser, ‘Are you networked yet? On dialogues in European judicial networks’ (2012) 8 *Utrecht Law Review* 100-114.

of how precisely to delineate who should exercise the distinct legislative, executive, and judicial powers in the EU.<sup>51</sup>

There are currently a number of actors beyond those in the institutional triangle – the Commission, the EP, and the Council – that are essential to EU governance. De Búrca, for instance, recognizes a plethora of actors that exercise real public power in the EU.<sup>52</sup> Curtin also highlights the increasing challenges with establishing a constitutional model that reflects the increasing confusion concerning the roles, powers, and relations between different actors within the EU constitutional apparatus.<sup>53</sup> Importantly, Smismans agrees, arguing for a broader understanding of institutional balance to capture the wide degree of ‘functional’ interests that participate in EU governance.<sup>54</sup>

Since a characteristic feature of the EU’s constitutional order is ‘the impossibility of mapping functions onto specific institutions’, the argument that the traditional separation of powers theory does not reflect EU governance is axiomatic.<sup>55</sup> As Vile explains, the balancing of competing societal forces is no longer limited to balancing different elements within governments, but also counterbalancing societal forces including individuals, political parties, interests groups, businesses, and other actors within civil society.<sup>56</sup> Thus, it is necessary to capture the multitude of different societal elements operating at different levels of governance that exercise public power in the EU.<sup>57</sup>

This interdependency reflects the republican notion of institutional balance where a plurality of societal forces engages in multi-actor and interactive processes to exercise each public power. EU governance demands that multiple actors representing competing societal forces and legitimacy claims participate in each of the phases of decision-making. In the process, societal forces engage and deliberate over the meaning and application of the

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<sup>51</sup> The next section illustrates how the separation of powers terminology has tremendous difficulty in distinguishing between legislative and executive functions.

<sup>52</sup> However, the literature often fails to recognize this ‘confusion’ increasingly occurs at the national level as well.

<sup>53</sup> Curtin explains the decentralization and fragmentation of EU power. See D Curtin, ‘Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 *The Common Market Law Review* 17-69.

<sup>54</sup> Smismans (n 46).

<sup>55</sup> ‘It is hardly necessary to remind the reader that the constitutional architecture of the Community is not based on the principle of separation of powers’: see J Hammitt et al (eds), *The reality of precaution: Comparing Risk Regulation in the United States and Europe* (RFF Press 2011) 415.

<sup>56</sup> Vile (n 27) 317.

<sup>57</sup> M Farrell, ‘EU External Relations: Exporting the EU Model of Governance?’ (2005) 10 *European Foreign Affairs Review* 451-462.

Founding Treaties.<sup>58</sup> In the EU, one is hard pressed to find a definitive answer to the question as to who has the ultimate authority to exercise any of the distinct exercises of public power. Instead of a clear hierarchy, multiple actors are engaging in ongoing contestation concerning who has the authority to exercise public power in each of the distinct processes of EU governance.

This analysis demonstrates that the institutional balance reflects the complex constitutional realities and the non-dominating ideals found in the EU better than the separation of powers. The institutional balance, contrary to the separation of powers, captures the continuous multi-actor, mutual interdependence and interactive processes in the EU. Thus, ongoing interaction between competing societal forces is vital in the constitutional arrangements of the EU, not the complete separation of actors along essentialist or functionalist lines. Under the institutional balance, there is no direct link between a particular actor and the exercise of a particular function. For these reasons, this study concurs with the majority of scholarship that acknowledges the two modes of governance are distinct, and that the institutional balance has more descriptive and normative force to explain the complex realities of EU governance.<sup>59</sup> The next section utilizes the republican model of institutional balance as constitutional dialogue to incorporate the plurality of societal forces that participate in the different dimensions of EU governance.<sup>60</sup>

#### **D. CIVIC REPUBLICANISM, INSTITUTIONAL BALANCE, AND DIALOGUE**

Constitutional thought has focused on two distinct strands of political theory – liberalism and republicanism – to address questions concerning the legitimation of a governmental system. Republicanism demands that those who exercise public power must do so on behalf of the public good, instead of pursuing only their own factional self-interests.<sup>61</sup> Liberalism focuses on the enduring pursuit of individual self-interests to the greatest extent possible.<sup>62</sup> Therefore, the liberal perspective transforms the pursuit of public interests into a quest for obtaining

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<sup>58</sup> L. Friedman, 'The Constitutional Value of Dialogue and the New Judicial Federalism' (2000) 28 *Hastings Constitutional Law Quarterly* 93-144; M. Dawson, 'Constitutional Dialogue Between Courts and Legislatures in the European Union: Prospects and Limits' (2013) 19(2) *European Public Law* 369-396.

<sup>59</sup> Craig captures this prevailing understanding that institutional balance is a more fitting tool than the separation of powers to describe the relationship between legislative and executive power within the EU. Craig (n 21) 41.

<sup>60</sup> For a more detailed analysis of the republican model of institutional balance as constitutional dialogue, see Johnson (n 5) 115-226.

<sup>61</sup> From the Aristotelian perspective, a constitutional order (polity) 'is prior to the individual and essential for the development of human capabilities': F.W. Scharpf, 'Legitimacy in the multilevel European Polity' (2009) Max Planck Institute for the Study of Societies Working Paper 09/1, 5-37.

<sup>62</sup> DC Williams, 'European and U.S. Perspectives on Civic Republicanism' (1994) 2(1) *Indiana Journal of Global Legal Studies* 71-77.

individual preferences.<sup>63</sup> This article focuses on republicanism as opposed to liberalism. During this period of significant turmoil in Europe, republicanism is a constitutional model that can enhance the legitimation of the EU and therefore deserves greater attention.

Republican thought is an essential strand of constitutionalism designed to achieve balance within a constitutional order.<sup>64</sup> Republicanism has had a long and complex history, dating back to antiquity.<sup>65</sup> It can be traced back to ancient Greek and Roman, where thinkers such as Plato, Aristotle, and Polybius included republican concepts, such as civic virtue and mixed government, as essential elements of ‘good’ government. In Republican Rome, it was Cicero who made a lasting imprint, while in the Florentine Renaissance period Machiavelli pioneered a republican movement.<sup>66</sup> More recently, in the British and American context, the likes of Harrington and Madison inspired a wave of innovative developments within republicanism.<sup>67</sup> In contemporary discourse, the work of Skinner, Pocock, and Pettit, has brought renewed interest to republican thought as a model to enhance the legitimation of contemporary constitutional orders.<sup>68</sup>

The central tenets of republicanism include non-domination, non-arbitrariness, pluralism, and the pursuit of the public good.<sup>69</sup> In addition, civic republicanism is one strand of constitutional thought that emphasizes the relations between individual and political self-determination, active civic participation, and civic virtue.<sup>70</sup> Thus, civic republicanism goes beyond the institutions of government and demands all forces within civil society play a role in the political process. Plato and Aristotle are emblematic of the republican ideal that in any ‘good’ polity both the individual and the community are virtuous and just. This necessitates a constitutional order that promotes republican ideals linked to the limited government, self-government, mixed constitutionalism, dialogue, civic virtue, and a system of balancing powers.

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<sup>63</sup> Scharpf (n 61) 5-10.

<sup>64</sup> Pettit emphasizes that republicanism promotes balance within a constitutional order through non-domination. See generally, P Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997); P Pettit, ‘The Globalized Republican Ideal’ (2016) 9 (1) *Global Justice: Theory Practice Rhetoric*.

<sup>65</sup> G Kellow and N Leddy, *On Civic Republicanism: Ancient Lessons for Global Politics* (University of Toronto Press 2016) 3-13.

<sup>66</sup> M Sellers, ‘Republicanism, Liberalism, and the Law’ (1997) 86(1) *Kentucky Law Journal* 120-123.

<sup>67</sup> L Dobuzinskis, ‘Old Wine in New Bottles? Civic Republicanism and the Challenges of the Global Era’ (1993) *Global Instability* (Springer Vol 13 2002) 181-199.

<sup>68</sup> For a comprehensive analysis of republican thought, see J Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (Princeton University Press 1975); Q Skinner, *The Foundations of Modern Political Thought, Vol 1: The Renaissance* (CUP 1978); Pettit (n 64).

<sup>69</sup> Johnson (n 4) 208-10.

<sup>70</sup> A Peterson, *Civic Republicanism and Civic Education: The Education of Citizens* (Palgrave MacMillan 2011) 32-56.

### **1. Concord trust civic republicanism**

Civic republicanism emphasizes that active civic participation in the political process is an essential element of the ‘good life’.<sup>71</sup> It focuses on the interplay between the individual and the community, providing the framework for both to develop the republican ideal of civic virtue.<sup>72</sup> Civic virtue rests on the notion that societal forces work on behalf of the community, instead of factional self-interests, to achieve the public good.<sup>73</sup> Civic republicanism understands that each societal force is responsible for the society they operate in and therefore must promote the good life for both the individual and the community. Consequently, each societal element shall actively engage in the political life to ensure a ‘good’ or virtuous individual and community.<sup>74</sup> Ideally, civic participation facilitates self-government by promoting a deliberative environment that encourages a plurality of societal interests to engage and learn how to *perfect* the ‘art of governing’.<sup>75</sup> Civic engagement ultimately leads to each societal force being ‘free and equal’ to articulate and assess what the public good is – or should be – and how best to achieve it within a constitutional order.

Civic republicanism understands that citizens are constantly at the forefront of shaping and reshaping what the public good is and how constitutional values are modified to achieve republican aims in an ongoing public dialogue.<sup>76</sup> This public dialogue allows a constitutional order to be responsive to the needs of different societal forces within society. This republican understanding links civic republicanism and institutional balance. Both demand that a plurality of societal interests is involved in the distinct processes of governance within a constitutional order. In this way, different societal forces can exchange ideas and learn from one another, improving both the individual and the community. . From this point of view, public decisions reflect ongoing public dialogues with multiple societal forces that aim to reconcile competing perspectives concerning how to achieve the public good.

Civic republicans understand that the public good is ultimately realized through an ongoing public dialogue that is reflected in public decisions. For these reasons, each societal

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<sup>71</sup> SG Gey, ‘The Unfortunate Revival of Civic Republicanism’ (1993) 141(3) University of Pennsylvania Law Review 801, 806-811.

<sup>72</sup> MJ Parlow, ‘Civil Republicanism, Public Choice Theory, and Neighbourhood Councils: A New Model for Civic Engagement’ (2008) 79 University of Columbia Law Review 137-188.

<sup>73</sup> Dobuzinkis (n 67) 181.

<sup>74</sup> M Tushnet, ‘An Essay on Rights’ (1984) 62 Texas Law Review 1363-1384.

<sup>75</sup> HM Babcock, ‘Civic Republicanism provides theoretical support for making individuals more environmentally responsible’ (2009) 23 Notre Dame J.L Ethics & Public Policy 515, 519.

<sup>76</sup> Williams (n 62) 71-77.

force has a shared responsibility toward the community; not only can citizens actively participate in the political life, but they have a constitutional duty to do so.<sup>77</sup>

In any constitutional order, a certain degree of interference with individual and political self-determination is necessary to fulfil the ends of society.<sup>78</sup> Competing perspectives exist over what the public good is, or should be, and how best to achieve it. Such competing perspectives must be balanced in dialogical fora for contestation and reconciliation. Therefore, each societal force has the potential to contribute to various processes of governance, with the aim of achieving the public good.<sup>79</sup>

This section has illustrated that active civic participation is essential to the realization of individual and political self-determination. It shows that the republican model aims to *balance* the exercise of public power with individual and political self-determination, thus ensuring non-domination and non-arbitrariness in the EU.<sup>80</sup> A chief objective of the model is to ensure that any intervention with individual and political self-determination is legitimate insofar as it is consistent with republican values. The following section elucidates how the ideals of civic republican reflect the essential elements of this republican model.

## ***2. A dialogical paradigm for a republican constitutional order***

To secure central tenets of republicanism, the republican model of institutional balance as constitutional dialogue demands public power to be constitutionally constrained, and diffused across different societal forces.<sup>81</sup> This model requires a constitutional and institutional apparatus that ensures non-dominant and non-arbitrary exercise of public power. This is designed to prevent the monopolization of public power within any single actor. Accordingly, republicanism compels a multitude of constitutional constraints so that each societal force exercises public power in a non-dominating fashion.

Dominance, from Pettit's perspective, exists in a relationship where an agent (X) enjoys a degree of external control over another societal force (Y), allowing X to arbitrarily interfere with the individual and political self-determination of Y.<sup>82</sup> Each societal force must be 'free and equal' to articulate and pursue their own view of the public good.<sup>83</sup> To prevent

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<sup>77</sup> M Tushnet, Dialogue and Constitutional Duty (March 20, 2012) Harvard Public Law Working Paper No 12-10 <<https://ssrn.com/abstract=2026555>> accessed 14 January 2018.

<sup>78</sup> Vile (n 27) 1-22.

<sup>79</sup> Smismans (n 45) 10.

<sup>80</sup> Johnson (n 5).

<sup>81</sup> J Martí, 'Republican Freedom, Non-Domination, and Global Constitutionalism' in R Uitz (ed), *Freedom and its Enemies: The Tragedy of Liberty* (1st edn, Eleven International Publishing 2015) 57-78.

<sup>82</sup> Pettit, a widely influential contemporary republican, argues that the central tenant of republicanism is non-domination. See Pettit (n 64).

<sup>83</sup> Johnson (n 4) 208-9.

such domination public power must be balanced by means of constitutional controls to secure non-domination. This demands a constitutional order that incorporates distinct process norms, which promote public deliberation and prevent the arbitrary interference of individual and political self-determination.

A legitimate constitutional order ensures republican values are linked with the ‘good life’, including values that promote human rights, constitutional norms, balanced government and the rule of law.<sup>84</sup> To guarantee non-domination and non-arbitrariness, representatives of pluralistic societal interests must have their voices heard in the political process. Ideally, public deliberation through dialogical processes helps to reconcile competing perspectives of what the public good is and how best to achieve it. Importantly, each societal force must have a diverse range of process norms to engage in an ongoing public dialogue concerning how best to resolve constitutional conflicts.<sup>85</sup> Such an inclusive form of governance includes an array of distinct societal forces in each exercise of power, which provides for distinct veto players and multi-actor processes of governance. Such multi-actor processes of governance aim to allow each societal force to engage in the art of governance while preventing any single force from unilaterally dominating it.

This republican model understands that the nature of a constitutional order is not immutable.<sup>86</sup> Constitutional arrangements, structures and processes will never be permanently fixed. Instead, to promote self-governance, a constitutional order must be dynamic and responsive to an ongoing public dialogue concerning how best to govern.<sup>87</sup> Republicanism has long emphasized dialogical processes of governance that reflect pluralistic interests, reconciling and balancing competing societal forces within a constitutional order.<sup>88</sup> Thus, republican ideals can facilitate dynamism and responsiveness. Similarly, this model applies a dialogical model of republicanism to the EU’s constitutional order.

This model promotes ex-ante and ex-post processes of both a legal and political nature in different dialogical fora of contestation, compromise, and reconciliation.<sup>89</sup> It provides the framework to ensure each societal force can actively participate in political life. The dialogical fora allow for processes of mutual learning and an exchange of ideas among different societal forces to achieve the good life. The shared creation of constitutional norms

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<sup>84</sup> Scharpf (n 61) 7-12.

<sup>85</sup> T Hickey, ‘The Republican Virtues of the ‘New Commonwealth Model of Constitutionalism’ (2016) 14(4) *International Journal of Constitutional Law* 794-816.

<sup>86</sup> Carolan (n 30) 1-15.

<sup>87</sup> Williams (n 62) 73.

<sup>88</sup> Babcock (n 75) 521.

<sup>89</sup> Johnson (n 5) 123-24.



seeking to achieve the public good allows for an ongoing reassessment and re-articulation of the public good.<sup>90</sup>

From this republican viewpoint, dialogical fora that promote competition and reconciliation are necessary to secure a non-arbitrary and constitutionally constrained framework. This constitutional model demands dialogical fora capable of counterbalancing different actors. Accordingly, EU governance consists of ongoing, multi-actor, and interactive processes, where different societal forces engage in negotiation, contestation, and comprise. Such processes ultimately aim to reconcile competing visions of the institutional balance and how best to govern to achieve the public good in the EU. The creation, enforcement, and interpretation of shared constitutional norms through such dialogical processes, is an essential feature of civic republicanism.<sup>91</sup> The shared creation of constitutional norms allows for the ongoing reinterpretation and reassessment of the institutional balance and how best to realize republican ideals linked to the public good. This understanding reflects the intricacies of contemporary governance and the evolution of the institutional balance in the EU constitutional order.

Constitutional dialogue demands that no societal force is absolute.<sup>92</sup> No actor can unilaterally establish what the public good is or how best to achieve it. From this view, neither the legislator nor the judiciary is absolute. Further, this model understands that the will of the people, as vital as it is in a democratic society, is also not absolute. Majoritarian rule alone is not synonymous with a democratic constitutional order. The majority – like any other societal force – can behave tyrannically in pursuit of self-interests if left unchecked. Thus, the majoritarian rule can lead to the democratic oppression of non-majoritarian societal forces where winning election leads to a dominant position over those who lost. For these reasons, majoritarian forces must be checked and controlled. Demanding the participation of a plurality of societal forces in each exercise of public power – creating, applying, and interpreting – allows for each societal force to be counterbalanced.

Representative government in this republican model demands public decisions reflect the will of the people. However, non-majoritarian tools, such as judicial review and technocratic governance, also have a role to play counterbalancing majoritarian forces.<sup>93</sup>

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<sup>90</sup> Babcock (n 75) 519-525.

<sup>91</sup> *ibid.*

<sup>92</sup> L Fisher, *Constitutional dialogues: Interpretation as political process* (Princeton University Press 2014) 3-15; A Meuwese and M Snel, 'Constitutional Dialogue: An Overview' (2013) 9 *Utrecht Law Review* 123-140.

<sup>93</sup> *ibid.*

Under this model, the rule of law is fundamental since it prevents any societal force from exercising power in an arbitrary, oppressive, or tyrannical manner.

This section has elucidated central themes in the republican model of institutional balance as constitutional dialogue. A constitutional order must promote dialogical fora consisting of ex-ante and ex-post legal and political controls, to achieve these republican ideals and ensure each societal force can contribute to political life. The discourse concerning EU governance predominately concentrates on the intergovernmental and supranational paradigm. However, such debates do not paint a complete portrait of the intricate workings of EU governance. In the subsequent section, this republican model is applied to the EU and incorporates broader dimensions of EU governance beyond this traditional paradigm.

#### **E. THE DIFFERENT DIMENSIONS OF EU GOVERNANCE: PURSUING A NON-DOMINATING PARADIGM**

The debates between intergovernmental and supranational governance continue to be a focal point in the discourse concerning European integration and constitutionalization.<sup>94</sup> It is necessary to go beyond this traditional vision to reflect the realities of EU governance. Accordingly, this analysis puts forth an alternative to this intergovernmental versus supranational paradigm. In addition to the main constituencies of the EU – the peoples, the Member States, and the Union – this study includes the interest group and the technocratic dimension.<sup>95</sup> From this viewpoint, the central themes throughout the evolution of the EU constitutional order produce societal forces representing different dimensions of EU governance: intergovernmental, supranational, the peoples of Europe, interest groups, and technocratic. This analysis incorporates a broad array of societal forces representing competing interests that shape and reshape the institutional balance. It is important to note that each of the different dimensions operates in unique societal and political context. Each of the dimensions has multiple actors, with their own formal and informal processes designed to

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<sup>94</sup> For a comprehensive analysis of intergovernmentalism and supranationalism, see G Tsebelis and G Garrett, ‘The institutional foundations of intergovernmentalism and supranationalism in the European Union’ (2001) 55(2) *International Organization* 357-390; J Blom-Hansen and GJ Brandsma, ‘The EU comitology system: intergovernmental bargaining and deliberative supranationalism?’ (2009) 47(4) *JCMS: Journal of Common Market Studies* 719-740.

<sup>95</sup> Vile states that contemporary governance at the national level demands more than balancing governmental institutions. Similarly, contemporary governance in the EU demands going beyond the balancing intergovernmental and supranational dimensions of governance. See Vile (n 27) 346-384.

shape the institutional balance in a manner that conforms to its own version of the public good.

The multi-actor and interactive processes of EU governance are developed to ensure non-domination in each of the processes of governance and the overall EU constitutional order. Multiple societal forces in each dimension are designed to exercise power in a manner that counterbalances each, preventing any actor dominating the distinct processes of EU governance. The following sections explore the different dimensions of EU governance and provide guidance for establishing and maintaining dialogical fora of contestation and reconciliation that achieve non-dominating ideals.

### ***1. The intergovernmental dimension***

The intergovernmental dimension understands the EU is a ‘traditional’ international organization, focusing on the role of Member States in European integration. This dimension initially concentrated on the role of the Council in EU governance. The Council and its working group COREPER remain significant players in the EU, as it continues to play a key role in the processes of EU governance including exercising lawmaking, budgetary, and control functions. With the enactment of the Lisbon Treaty, however, the Council increasingly shares lawmaking authority with the EP. In the aftermath of the introduction of the ordinary legislative procedure, in the Lisbon Treaty, the two organs operate as co-equal legislatures in most policy areas.<sup>96</sup>

A significant development in the intergovernmental dimension is the enhanced role of the European Council in EU governance. The European Council’s scope, power, and role in EU decision-making have steadily increased.<sup>97</sup> The European Council has transformed from an informal body with relatively little ‘real’ coercive power to a formal in the early part of the 1970s, to a formal Union institution that considerably shapes the overall direction of the contemporary EU governance. The European Council consists of the heads of States or Government of its Member States, the Presidents of the Commission and the President of the European Council, and the High Representative is meant to provide strategic guidance for the EU.<sup>98</sup>

The evolution of the European Council’s role in the EU constitutional order is vital from the republican perspective. First, its increasing powers, including becoming a formal

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<sup>96</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L 326/47 (TFEU), Articles 288, 294, 311, 312.

<sup>97</sup> J Tallberg, ‘Bargaining power in the European Council’, (2008) 46(3) *JCMS: Journal of Common Market Studies* 685-708.

<sup>98</sup> Article 289 TFEU.

institution in the Lisbon Treaty, under Article 13 TEU indicates that the Council is no longer the only important intergovernmental actor in EU governance. The increased role of the European Council prevents the Council from dominating the intergovernmental dimension. Second, the increase in the European Council's powers can mitigate gains made by supranational actors, such as the EP or the European Central Bank (ECB). This mitigates the potential risk of the supranational dimension dominating EU governance.

## **2. *The supranational dimension***

The supranational dimension has concentrated on three Union institutions: the EP, the Commission, and the CJEU.<sup>99</sup> Increasingly, studies focusing on EU governance also explore the role of the ECB ECB, especially in the aftermath of the euro-crisis.<sup>100</sup> Over time, these supranational actors tend to acquire greater powers, potentially counterbalancing the rise of the European Council.

One of the most transformative developments in this supranational dimension has been the increasing strength of the EP through European integration.<sup>101</sup> The augmented institutional position of the EP is evident when comparing the EP's increasing formal and informal powers to those of the Council and Commission, whose powers have largely remained unchanged.<sup>102</sup> Similar to the European Council, the EP has transformed from an advisory body, with little coercive power into an extremely valuable player in EU governance.

The EP now exercises significant legislative, budgetary, and control authority.<sup>103</sup> This development is particularly striking in the lawmaking and budgetary spheres, where the EP has utilized an array of different sources – CJEU litigation, inter-institutional agreements, and budgetary tactics – to enhance its institutional position and protect its prerogatives.<sup>104</sup> The EP's enhanced strength is also evident in its supervisory powers of the Commission and ECB, where its committees can act as a key dialogical forum for oversight, control, and

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<sup>99</sup> S Hix and B Høyland, *The Political System of the European Union* (3rd edn, Palgrave MacMillan 2011) 16-19.

<sup>100</sup> M Dawson and F de Witte (n 16) 826-28.

<sup>101</sup> G Tsebelis, 'The power of the European Parliament as a conditional agenda setter' (2008) 88(1) *American Political Science Review* 128-142; S Hix, 'Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam' (2002) 32(2) *British Journal of Political Science* 259-280.

<sup>102</sup> H Farrell and A Héritier, 'Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe' (2003) 16(4) *Governance* 577-600.

<sup>103</sup> Articles 225, 233, 294, 311, 312, 352, 318, 319 TFEU.

<sup>104</sup> Johnson (n 4) 212-14.

accountability.<sup>105</sup> Importantly, such changes have occurred both through formal means via successive Treaty changes and informal processes, such as inter-institutional agreements and budgetary negotiations. However, as the EP strength increases in successive Treaty reforms, voter turnout has consistently dropped from 63 percent to 43 percent over a thirty-year period from 1979 to 2009.<sup>106</sup> This leads to questions concerning whether the enhanced powers of the EP have a meaningful impact on reducing the perception of the democratic deficit. Unlike the EP, the Commission's powers have remained relatively the same.

The Commission remains a significant player in the EU lawmaking process, through its right of initiative for legislative acts.<sup>107</sup> Moreover, the Commission is often considered the 'guardian of the Treaties' and continues to exercise important executive and regulatory powers. A chief aim of the Commission is to act as a unitary executive and exercise its regulatory powers with little to no oversight from the Council or the EP. The Commission has yet to realize this objective, as the Council and EP have opted to establish comitology committees and European agencies to disperse executive and regulatory power within the EU. Furthermore, the co-legislators are ideally able to exercise significant control mechanisms when delegating lawmaking authority to the Commission.<sup>108</sup>

One of the most significant events regarding the power dynamics concerning the Commission and the EP was the downfall of the Santer Commission in 1999. The forced resignation of the Santer Commission prompted by the EP illustrated that significant reforms were needed to enhance the Commission's public reputation. The Santer Commission's downfall exemplifies the EP's control powers over the Commission. A noteworthy development in this regard is the Commission's White Paper on Good Governance, which was published in reaction to the removal of the Santer Commission.<sup>109</sup>

The CJEU is a vital player in the European integration and 'constitutionalization' process.<sup>110</sup> The Court has made a profound impact shaping how public power is balanced in the EU by utilizing its role under Article 19 TEU to ensure the rule of law concerning the

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<sup>105</sup> T Taunton, 'The European Parliament' in A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 371.

<sup>106</sup> *ibid* 366.

<sup>107</sup> It is important to note that the Commission's right of initiative is increasingly influenced by other actors. See Article 225 TFEU; S Princen, 'Agenda-setting in the European Union: A Theoretical exploration and agenda for research (2007) 14(1) *Journal of European Public Policy* 21-38.

<sup>108</sup> Articles 290, 291 TFEU.

<sup>109</sup> A noteworthy development in this regard is the Commission's White Paper on Good Governance that was a reaction to the removal of the Santer Commission. B Kohler-Koch and B Rittberger, 'The "governance turn" in EU studies' (2006) 44 *JCMS: Journal of Common Market Studies* 27-49.

<sup>110</sup> AS Sweet and T Brunell, 'Constructing a Supranational constitution: Dispute Resolution and Governance in the European Community' (1998) 92(1) *American Political Science Review* 63-81.

interpretation and application of the Treaties is observed.<sup>111</sup> In this context, the CJEU has been a vigorous actor in establishing the mutually interdependent and shared creation of constitutional norms. The CJEU has utilized various processes to *constitutionalize* the EU Treaties, notably the teleological interpretation of the Treaty, the doctrines of direct effect supremacy, and institutional balance.<sup>112</sup>

In two pivotal decisions, *Van Gend en Loos* and *Costa*, the CJEU ‘created a new legal order’ and established constitutional norms in direct effect and supremacy that fundamentally transformed the EU constitutional order.<sup>113</sup> In addition, the Court has continuously stressed the *constitutional* nature of the EU in cases like *Les Verts*.<sup>114</sup> The Court has also played an essential role in constitutional conflicts concerning the institutional balance. For instance, establishing the institutional balance in the concept of *Meroni*, and continuously interpreting and reinterpreting the institutional balance in cases such as *Comitology*, *Chernobyl* and *ESMA*, the CJEU has been instrumental in shaping the interactions between Union actors.<sup>115</sup>

Importantly, the competing societal – legal, political, economic, and cultural – forces across Europe and the different Member States provide the Court with the ability to act as problem-solver, potentially reconciling competing legitimacy claims, constitutional values, and societal interests.<sup>116</sup> In this way, the Court engages with judicial and extrajudicial societal elements to provide its own view on how best to resolve constitutional conflicts. This allows the Court to act as a judicial forum that provides a fair and equitable process. For these reasons, the CJEU exercises judicial review and utilizes teleological interpretation to achieve the objectives of the Treaty based on its own vision of the public good within the Union.

The analysis shows that the significant role played by the EP, the Commission and the CJEU in the supranational dimension diminishes the potential for any of these actors to obtain a dominant position in this dimension or EU governance generally. Further, the increasing powers exercised by the EP, CJEU and ECB can counterbalance the rise of the

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<sup>111</sup> De Búrca (n 20) 55-57.

<sup>112</sup> L Azoulay and D Dehousse, ‘The European Court of Justice and the legal dynamics of integration’ in A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 350-365; T Tridimas, ‘The ECJ and the National Courts: Dialogue, Cooperation, and Instability’ in D Chalmers and A Arnall (eds), *The Oxford Handbook of the European Union* (OUP 2015) 403-430.

<sup>113</sup> Case 26/62 *Algemene Transporten Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* EU:C:1963:1, [1963] ECR 00779; Case 6/64 *Costa v ENEL* EU:C:1964:66, [1964] ECR 585.

<sup>114</sup> Case 294/83 *Les Verts v Parliament* EU:C:1986:166, [1986] ECR 01339.

<sup>115</sup> Case 302/87 *European Parliament v Council (Comitology)* EU:C:1988:461, [1988] ECR 05615; Case 70/88 *European Parliament v Council (Chernobyl)* EU:C:1991:373, [1990] ECR I-2041; Case C-65/93 *Parliament v Council* EU:C:1995:91 [1995] ECR-643; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* EU:C:2014:18, [2014].

<sup>116</sup> Dawson (n 58) 369.

European Council in the intergovernmental dimension or actors in other dimensions that have evolved throughout European integration.

### **3. *The peoples of Europe dimension***

The Lisbon Treaty declares that the EU is founded on democracy, among other values.<sup>117</sup> The EU has consistently sought to increase the number of ways to promote inclusive governance. This demand for more inclusive governance has the potential to provide an enhanced role for European citizens.<sup>118</sup>

National parliaments now have the formal powers to influence EU lawmaking.<sup>119</sup> Traditionally, however, national parliaments were an afterthought in the European integration process. The Lisbon Treaty introduces a formal role for national parliaments in EU decision-making.<sup>120</sup> During the ordinary legislative procedure, national parliaments provide subsidiarity checks under Article 5 TEU and Protocol 2 on the application of subsidiarity and proportionality. National parliaments can also monitor the functioning of the Union under Article 12 TEU. The Lisbon Treaty requires that national parliaments have access to information to allow them to perform these constitutional tasks.<sup>121</sup>

The peoples of Europe are also important players in the European integration process. National referenda concerning core issues of European integration have shaped the institutional balance and increasingly highlight the need for Europe to be responsive to the demands of the people,<sup>122</sup> such as the close referenda concerning the ratification of the Maastricht Treaty in 1992.<sup>123</sup> In France, 51% of people voted in favour of ratification, while in Denmark nearly 51% of the people voted against ratification on the first vote, but 56 % voted in favour on the second vote. The ratification of the Nice Treaty<sup>124</sup> in 2001 was also vigorously contested. In Ireland, nearly 54% of the people voted against the Nice Treaty in the first round. In the second round, however, nearly 63% of people voted in favour. The

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<sup>117</sup> Articles 2, 15 TEU.

<sup>118</sup> The 'peoples of Europe' in this context connotes European citizens. This refers to the civil political and societal rights and obligation vested on the European citizens.

<sup>119</sup> Articles 12, 48 TEU.

<sup>120</sup> *ibid.*

<sup>121</sup> Articles 12, 48(2), 49 TEU; Articles 70, 71, 81 TFEU.

<sup>122</sup> From the euro to opt-outs, questions over migration quotas, and the European Constitution, referendums have been essential in shaping European integration. See de G Búrca, 'If at First You Don't Succeed: Vote, Vote Again: Analysing the Second Referendum Phenomenon in EU Treaty Change' (2009) 33 *Fordham International Law Journal* 1472-78.

<sup>123</sup> Treaty on European Union (Maastricht) [1992] OJ C 191/1.

<sup>124</sup> Treaty of Nice amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C 80/1.

2005 referenda for the European Constitution caused even greater contestation with 55% of the French population and 62% of the Dutch population voting against the Treaty.

The vote on the EU Referendum in the United Kingdom (ie Brexit) transformed the EU constitutional landscape. The groundbreaking ‘non-binding’ referendum asked whether the United Kingdom should leave or remain in the EU.<sup>125</sup> Almost 52% of the electorate voted to leave the Union. The question of how the departure of a Member State impacts the constitutional structure and decision-making arrangements in the EU and shapes the institutional balance of the EU, is now an increasingly pressing one. In particular, the Brexit vote has led to ongoing public dialogues between an array of actors operating at different levels of governance, concerning how to reconcile competing visions of the future of the EU.<sup>126</sup>

One of the innovative developments of the Lisbon Treaty is the European Citizens Initiative (ECI). Under Article 11.4 TEU, when at least a million citizens from different Member States agree, a new initiative is proposed to the Commission requesting it to use its right of initiative to start new Union action. Despite the potential to use the ECI to ensure EU governance is responsive to the will of the people, the ECI has rarely been used since its inception in the Lisbon Treaty. However, if the ECI is promoted and applied correctly it can reflect the republican model of institutional balance as constitutional dialogue. The ECI, along with other developments in this people of Europe dimension, could facilitate active participation of a diverse array of citizens within the EU, operating as a dialogical forum that diminishes any perceived democratic deficit and enhances the legitimation of the EU constitutional order. This can in turn alleviate concerns that technocrats are controlling EU governance at the expense of the peoples of Europe.

#### **4. *The interests group dimension***

Public and private interest groups now play a crucial role in EU governance.<sup>127</sup> Through social dialogue, the role of social partners – representatives of management and labor – can contribute to shaping EU social policy exemplifying the role such actors can play in the EU. The role of the social partners in social policy is enshrined in the Treaty.<sup>128</sup> Furthermore, Article 154 TFEU provides that the Commission must consult the social partners before acting in the field of social policy.

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<sup>125</sup> United Kingdom European Union membership referendum, 23 June 2016.

<sup>126</sup> Participants in this dialogue include, among others, the peoples of the UK, UK Parliament, the UK Supreme Court, the EP, the European Council, and various interest groups in the UK and the EU.

<sup>127</sup> Public and private companies are also included in this dimension.

<sup>128</sup> Articles 151-156 TFEU.



The Commission is tasked with promoting the consultation of the social partners at the Union level and fostering dialogue with them to ensure balanced support from both the management and labor representatives.<sup>129</sup> This inclusion engenders a Union-wide debate that includes divergent actors within European civil society. The process allows the social partners to negotiate among themselves and request the Commission to propose their initiative to the Council. Alternatively, social partners may come to their own agreements and utilize their own specific procedures.

Additionally, both management and labor representatives can provide the Commission with an opinion or, where appropriate, a recommendation concerning the type of action necessary for the field of social policy.<sup>130</sup> The Social Dialogue Committee is also a key forum at the EU level for the bipartite social dialogue between management and labor. This dialogical framework established for management and labor representatives is designed to prevent either from dominating how civil society shapes EU governance. This also allows interests groups to respond to decisions made by the central organs of EU governance in the intergovernmental or supranational dimensions, the peoples of Europe dimension, or by decentralized actors in the technocratic dimension.

### **5. *The technocratic dimension***

The subject of delegating powers and secondary rulemaking power is deeply contested.<sup>131</sup> At its core, it presents certain fundamental constitutional questions that have the potential to shape and ultimately distort the balance within a constitutional order.<sup>132</sup> Among the fundamental constitutional issues brought to the fore are the legitimation, efficacy, democratic nature, and accountability of secondary rulemaking in the EU.<sup>133</sup> Such questions include: how and why does the delegation of power occur? Which actors participate in non-legislative secondary rulemaking and how? What criteria govern the delegation? How are actors that exercise delegated powers held to account? What control mechanisms are available and which actors can exercise them and when? Consequently, constitutional debates

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<sup>129</sup> Article 154 TFEU.

<sup>130</sup> *ibid.*

<sup>131</sup> A Héritier, et al, *Changing Rules of Delegation: A contest for power in Comitology* (OUP 2013) 5.

<sup>132</sup> For a detailed analysis of the role of agencies in the US constitutional order, see PL Strauss, 'The place of agencies in government: Separation of powers and the fourth branch' (1984) 84 *Columbia Law Review* 573-669.

<sup>133</sup> CF Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP 2005) 1-33; GJ Brandsma, D Curtin and A Meijer, 'How Transparent are EU 'Comitology' Committees in Practice?' (2008) 14(6) *European Law Journal* 819-838; M Bovens, 'New forms of accountability and EU-governance' (2007) 5(1) *Comparative European Politics* 104-120.

over secondary rulemaking in the EU exemplify profound inter-institutional contestation over the institutional balance.<sup>134</sup>

Thus, a fundamental question in the field of delegation is what amount of autonomy and discretion the Commission has when one of or both Union legislators, ie the Council and the EP, delegate power to the Commission. Furthermore, what methods of control do the Council or the EP have when they delegate powers to the Commission? As a result, much of the debate in delegated decision-making concentrates on how much autonomy the Commission should have in the field and who should control the Commission to ensure its actions are consistent with rules governing the exercise of implementing powers.

The comitology system has proven to be an instrumental aspect of non-legislative secondary lawmaking throughout the history of European integration.<sup>135</sup> Although comitology started in the 1960s as a committee system that established rules of a technical nature in the Common Agricultural Policy (CAP), the adoption of secondary legislation has gained increasing importance in the EU. The role of comitology committees in the making of secondary legislation has now spread across almost every area of EU law and policy. Importantly, non-legislative secondary rulemaking incorporates both technical decisions and substantive decisions of a politically sensitive nature.<sup>136</sup> The complexity of the comitology system, which includes distinct committee procedures, multiple participants exercising constitutional authority in various matters, and different control mechanisms, led to deep contestation and increasing calls for changes in the system. Over the years, many modifications to the comitology system occurred. The Lisbon Treaty is another important step in the constantly evolving delegated decision-making framework in the EU.

The Lisbon Treaty brought innovative changes to delegated decision-making from a formal and practical aspect. These modifications include the introduction of Articles 290 and 291 TFEU, and the post-Lisbon Comitology Regulation, as new measures intended to operationalize the Lisbon Treaty and ensure its objectives are met.<sup>137</sup> The post-Lisbon non-legislative secondary rule-making framework is designed to clarify and augment the legitimation of the making of secondary norms by distinguishing between delegated and

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<sup>134</sup> A Hérietier, 'Institutional Change in Europe: Co-decision and Comitology Transformed' (2012) 50(1) *JCMS: Journal of Common Market Studies* 38-54.

<sup>135</sup> R Dehousse, 'Comitology: who watches the watchmen?' (2003) 10(5) *Journal of European Public Policy* 798-813.

<sup>136</sup> P Craig, *EU Administrative Law: Text, Cases, and Materials* (OUP 2011) 128-130.

<sup>137</sup> *ibid.*

implementing acts.<sup>138</sup> Such changes have modified the role actors play in the delegation, the various functions those actors exercise, and introduced new terminology and operations for the procedures and variants used in delegated decision-making, while also creating new legal bases for the delegation of powers to the Commission by the Council and EP. Consequently, intense inter-institutional battles concerning institutional balance in delegated decision-making remain in the wake of the Lisbon Treaty.

The creation of EU agencies has fundamentally altered the EU constitutional order. The question of the precise nature and scope of EU agencies has caused major inter-institutional debates between the EP, the Council, and the Commission.<sup>139</sup> This question is difficult to answer because different actors have various perspectives on the nature, powers, resources, and function of EU agencies.<sup>140</sup> Agencies are a result of different political compromises between the EP, Council, and Commission.<sup>141</sup>

The different dimensions of EU governance show the fundamental importance of the non-dominating paradigm within the EU constitutional order. The pluralistic, multi-actor and interactive processes in each of these dimensions highlight the dynamic nature of EU governance. The analysis shows that the constitutional and institutional apparatus within the EU with the increasing rise and proliferation of a plurality of societal force is designed not only to prevent dominance within any dimension but across dimensions, and prevents any actor from dominating the distinct processes of EU governance.

This section highlights that actors in each of these five dimensions are vital players ‘free and equal’ to exert influence that shapes and reshapes the institutional balance in a manner that reflects their own vision of the public good. Each is subject to ex-ante and ex-post controls that prevent it from dominating its dimension and EU governance generally. For these reasons, this republican model of institutional balance as constitutional dialogue provides the frame for the active participation and limitation of actors and can be understood as enhancing and legitimating the democratic nature of the EU.

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<sup>138</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L 55.

<sup>139</sup> M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016) 118-131.

<sup>140</sup> DR Kelemen, ‘European Union Agencies’ in in A Menon and S Weatherill (eds), *Oxford Handbook of the European Union* (OUP 2013) 392-406.

<sup>141</sup> DR Kelemen, ‘The politics of ‘eurocratic’ structure and the new European agencies’ (2002) 25 *West European Politics* 93-118.

## **F. CONCLUSION**

This article assesses how a republican model of institutional balance as constitutional dialogue can be used to better understand the EU. This contribution further shows that non-domination is a foundational organizing principle at the heart of European integration. The framers of the European ‘project’ set out to create a non-dominating paradigm that prevents any single societal force from unilaterally imposing its own version of the public good. This non-dominating vision remains a paramount objective in contemporary EU governance.

However, the challenges identified in this article have increasingly led to questions as to how to restructure and enhance the legitimation of the EU constitutional order. Despite the enduring ideal of non-domination that seeks to achieve a balance between competing societal forces, republicanism remains an underutilized model for enhancing the legitimation of the EU. The ongoing quest to legitimate the exercise of public power in contemporary EU governance and ensure a non-dominating and non-arbitrary constitutional order leads to the central question of this article: whether increased emphasis on a republican model of institutional balance as constitutional dialogue can contribute to our understanding of the evolution of the institutional balance in the EU constitutional order. In dealing with this question, it reassesses the EU constitutional order from a republican perspective, shedding light on the benefits of republicanism for EU constitutionalism.

This study contends that a republican model of institutional balance as constitutional dialogue can and should be used as a legitimating principle in the EU. The reinterpretation of the institutional balance, with civic republicanism and dialogue as central elements, adds value to ongoing debates concerning how to legitimate the EU. The article illustrates that institutional balance, as opposed to the separation of powers, is the constitutional model that best captures the complex realities of EU governance. Moreover, the pluralistic, multilevel and dialogical processes within EU decision-making are designed to achieve the enduring aim of securing a non-dominating and non-arbitrary constitutional order.

This constitutional model understands that the arbitrary interference with individual and political self-determination is less likely to occur when a plurality of societal forces participates in each of the different exercises of public power. To achieve essential elements of republicanism – non-domination, non-arbitrariness, pluralism, and the pursuit of public good – the model demands the existence of constitutional structures and processes that guarantee each societal force is ‘free and equal’. Thus, each can pursue its own version of the

public good. Ultimately, this republican model is based on shared constitutional authority, mutually interdependent and interactive societal elements.

Furthermore, this republican model ensures an institutional balance designed to reconcile a plurality of competing societal interests, legitimacy claims, and constitutional perspectives on the public good. For these reasons, normative aims linked with the republican vision are particularly appealing in the multilevel system of EU governance. Thus, the active participation of the citizenry in the ‘art of governance’ is a central element of the republican ideal. Dialogical fora must be utilized not only to diminish the potential for societal conflict over how best to govern to achieve the public good, but also as a deliberative venue for competition and reconciliation.

This dynamic understanding of institutional balance envisions that the Union oscillates between competing poles, not only the peoples of Europe, the Member States, and the Union, but also technocratic and interests group dimensions. The role such dimensions play in the EU demands that a delicate balancing act occur, diminishing the potential for any single dimension from unilaterally dominating the distinct processes of EU governance. Such societal forces fundamentally shape the institutional balance and its role in the EU constitutional order. The republican model and the different dimensions show that EU governance is of a heterarchical rather than hierarchical nature.

The republican model and understanding of different dimensions provide a new frame to understand the institutional balance and its role in the EU constitutional order. As the analysis demonstrates, republicanism has been an essential feature of EU governance but EU discourse has yet to explicitly recognize this feature and continues to overlook the potential of a republican framework. The argument here, however, is not that the EU has fully realized the republican values associated with the model, but that the EU is continuously moving toward such objectives. In conclusion, this article contends that greater emphasis should be placed on republicanism and its application in the EU to enhance its democratic legitimacy.