Introduction
The European Union has developed in scope from being merely economic in intentions to encompass the political and foreign spheres of government yet, it is constantly assaulted for harbouring a deep-seated democratic deficit. The Lisbon Treaty, following on from the ill-fated European Constitutional Treaty, seeks to remedy this through broad reforms but manages to bring with it as many issues as it sought to repair. Issues such as the conflict between the elected European Parliament and the non-elect, the Commission. These issues, are in some ways too confining also as they do not manage to fully legitimise this vast area of public law enough to overcome such deficiencies as the economic mindset of the court and the unstable validity of the Charter of Fundamental Rights.

The “Changing” Institutions
Two of the most pivotal institutions with the EU are the Commission and Parliament (as the Commission is the primary drafter of all new acts within the EU and Parliament are the directly elected representatives of the community’s citizens), both being inextricably linked to the democratic process of drafting European law (along with the Council of the European Union). As a result, these two are accused more often than any others for containing a perceived democratic deficit with Commissioners existing at the supra-national level and members of parliament only directly elected after 1979 (before this they were nominated by their respective governments).

Under the community pillar (the largest area of expertise for the EU as it has always been a largely economic body) this is most evident, with six different ways in which to draft legislation:
1. The Commission can itself produce directives and make decisions
2. The Council and the Commission both decide, without involving the Parliament, though Council can make reference to the Parliament if it so decides. This concerns matters arising from economic policy, common commercial policy and the free movement of workers and capital
3. The Original Treaty of Rome allowed for a consultation procedure, with which the Commission makes proposals upon which the Parliament are consulted and the Council votes on the measure. The Council has the right to ignore any opinions from the Parliament as it is not bound by them and as such, Parliament has no real power within this process which is still used in such areas as internal taxation and matters arising from citizenship.
4. The Single European Act (SEA) created a procedure for increased co-operation with Parliament in the drafting of legislation. Here, the Council, by use of a qualified majority on a Commission proposal, aim to adopt a common position. This is done by the Council and Commission referring their position to the Parliament and the reasons by

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1 TEC at Art. 86(3)
2 TEC at Art. 252
which they came to this same position, allowing a three month period for Parliament to approve or add amendments to the position (by absolute majority). If after this three month period Parliament has failed to take any action in the approving of the common position, the Council can itself adopt it but if it is rejected within that timeframe by Parliament, the Council requires its own unanimity on the subject with a further second reading (where it can also take any failed amendments and include them through another unanimous decision).

Although this marks a large move forward from mere consultation, the requirement of unanimity so often rather than qualified majorities does again place limitations on the role of Parliament. Requiring universal support for any and all individual amendments to the common position on the part of parliament raises a high standard, especially when one considers that they only have three months within which they can propose amendments, reject or accept the act in question before the Council does so for them and that there are 732 members of Parliament. This timeframe can be extended under the same provision (by a maximum of one month) but this also requires agreement between the Council and Parliament for it to do. It would appear that the greatest limitation within this procedure for proposing legislation is placed upon the largest body and that which is intergovernmental in nature. When one considers this in tandem with Westlake’s statement that the Commission views it’s ability to propose legislation as “a fundamental constitutional prerogative vital to the good functioning of the Community’s institutional balance and its legislative machinery”, meaning that they might use such measures to allow for their own greater standing within the community legislative process. Westlake also seeks to establish that “Parliament’s powers in the legislative process were transformed from the weak and essentially unconstructive power of delat to a stronger and potentially constructive role in the drafting of legislation” but this evidently stretching their role to make it seem more involved when one considers the above points; it is an improvement compared to the mere consultation of Parliament in other provisions but does not go far enough to give them a significant role in this respect, in the drafting of new legislations.

5. A far better article gives Parliament equal role in drafting legislation along with the Council. Using the same three month period, the Commission makes proposals jointly to the Council and Parliament with the Council and Commission again, informing the Parliament as to the reason for which they came to their positions on the act. However, the same universal acquiescence is required of the Parliament and qualified majorities of the Council in order for amendments to be made (although where the Commission

3 As set out in TEC 189-201

4 Supra n.2


6 Ibid at 37-38

7 TEC at Art. 251
has a negative opinion of the amendments, the Council must unanimously agree upon
the amendments for them to be incorporated into the act). The only significant difference
is that if the Council does not agree upon all of the proposed amendments, the
Conciliation committee is convened within six weeks by the President of the Council and
the President of the European Parliament. Formed of an equal number of
representatives from both the Council and Parliament, they must strive to reach a
mutually beneficial agreement through qualified majority and majority voting respectively
(the Commission also effectively plays the role of mediator, tasked with trying to
reconcile both parties opinions). A new joint text must be approved within 6 weeks of the
convening of the Committee and a further six weeks are given to both the the Council
and Parliament with which to approve the acts (by an absolute and qualified majority
respectively), if this does not occur, then the acts are not adopted.
This has become the main body through which legislation is passed, it’s success due to
the nature of it’s longer and more involved process, the Parliament being granted several
more opportunities to block any offending legislation and reconcile all sides in the matter to
a truly common viewpoint. Sadly, the only real difference comes into effect only where the
Council cannot agree on how to organize all the amendments, if they can do so then the
Parliament’s role is in no material way, better off than in the co-operative approach to
drafting legislation.
6. Worryingly, the last remaining power available to legislate is through the assent of the
   Parliament, where the Commission proposes new measures which can only be adopted
   by the Council once Parliament has done so.
This procedure swings too far in the direction of inter-governmental interests, with
Parliament effectively having a veto on new legislation brought through this process,
stifling the interest of the EU in favour of national representatives.

As it can be seen, there is a great deal of ineffectiveness within the legislative process,
three parties each which roles that vary hugely in power and influence over that same
process, allowing for the so called democratic deficit to take place. However, most
alarmingly, the Commission has powers to legislators outside of these six methods and even
has quasi-judicial functions. These are evident in their ability to make decisions
themselves and take an active role in measures taken by the Council and Parliament
(conveyed to them by the Treaties, more specifically, the Treaty of Nice)\(^8\) and in the area of
competition law, record violations and publish decisions which seek to remedy the situation
through actions taken by member states.
Craig and De Burca highlight specific instances of this deficit within the legislative process\(^9\)
as the following:
1. The EU lacks the ability of most democratic governments, for the citizens to alter it’s
government. As the legislative process is divided amongst the Council, Commission and

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\(^8\) TEC at Art. 230

Parliament, even a large scale shift in the make up of the Parliament (the only branch of the legislative directly elected) would not lead to a significant shift in broader EU policy. This is advantageous from a continuity aspect as it means that the general ideology of the community would not shift based on the results of an election and development of this maintained viewpoint could reasonably develop at a more pronounced rate (as the EU is meant to represent a larger common interest) however it also means that the citizens of Europe cannot change it’s composition to reflect their viewpoint to any material degree and as such, any political ideology developing in the community will not be reflected.

2. There exists an ‘executive dominance’. Transferring functions and competencies to the EU as a central body means that the two supranational bodies within the legislative gain more than the elected Parliament.

3. The Commissions ability to bypass the legislative process completely in certain instances and often it is other unelected specialists who are granted influences into this decision making, perhaps at the expense of standardised norms of democratic decision-making.

4. By removing issues from the national sphere and granting this functions to the community, they are often removed further from the citizen.

The Lisbon Treaty, often referred to as the Reform Treaty, sought to alleviate these deficits after the Constitutional Treaty failed to be brought into European law. In fact, Weiler argues that some of these reforms are merely restatements of the Constitutional Treaty\(^\text{10}\) and do not make any material changes beyond altering the status quo slightly. A minor alteration of how functions are given by member states to the EU and more decisive wording of their flexibility\(^\text{11}\) and limits\(^\text{12}\) were proposed in the Constitutional Treaty\(^\text{13}\) and before being brought into the later Lisbon Treaty for example. In many ways, such porting from one form of Treaty to another, simply highlights that perhaps a European Constitution of some sort is needed in order to give greater validity and certainty to community law and principles, especially when one considers that the deficit cannot truly be tackled in great detail as long as EU sovereignty remains in question (discussed later). Overall, it is perhaps a misnomer to call Lisbon a true reform treaty when large parts of it are given over merely to consolidation and as such, Weiler is extremely accurate in his assertions; one of the largest structural changes is in fact the transfer of the remaining Community functions over to the Union along with the removal of the pillars of EU

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\(^{10}\) J.H.H Weiler, Constitutionalism Beyond The Constitution: The Treaty of Lisbon in the Light of Post-National Public Law, Jean Monnet Working Paper 03/09 at 14

\(^{11}\) Ibid citing TEC at Art. 308

\(^{12}\) Ibid citing TFEU at Art. 352

\(^{13}\) Ibid citing CT at Art. 1-18
governance\textsuperscript{14}, yet other bodies remain untouched in their remit with the Community meaning that overall reform has as yet, actually come to fruition. The inclusion of the European Council within the governance of the EU\textsuperscript{15} will somewhat placate the deficit in that the remaining bodies will be more available to accountability and scrutinising but this will also dilute the essential nature of the Union in that there will now be another intergovernmental body, often exerting national interests above those of the Community as a whole.

Several key changes are made under the Lisbon Treaty but again, many of these are resumed sections of the Constitutional Treaty, with weaker amendments in parts. Most importantly when considering the democratic deficit, the Parliament is finally given a fully articulated legitimacy as the elected representatives of the people\textsuperscript{16} and the co-decision method of legislating is now the ordinary method of doing so\textsuperscript{17}, but in the case of the latter, this means that the remaining methods can and more than likely will still be used where prudent to do so, again bypassing the most successful way of creating EU law which Craig and De Burca argue has a very successful rate of having amendments accepted\textsuperscript{18}. However according to Weiler there still exists two specific instances, (ie where the Parliament is consulted and the Council vote by a majority\textsuperscript{19} and where the Parliament are completely removed from the process and the Council vote by a majority\textsuperscript{20}) where “evident and serious is the democratic deficit.....in which the citizens of the member states which have been outnumbered in the majority voting within the Council are simple bypassed: although they are obliged to comply with the norms issued by the EU organs, the citizens... in these cases, have not agreed... by the national parliaments, nor can they rely upon the involvement in the deliberation of a parliamentary assembly that represents and binds them as Union citizens”\textsuperscript{21}.

This serves only to highlight that although from a legislative standpoint, the Parliament is seeing an increase in its sphere of influence, there is still significant potential for limiting this same scope in ways that would be tantamount to that of a still existing deficit. However there is also a significant argument\textsuperscript{22} stating that even without the EU as it currently stands, there would still exist some degree of co-operation between states in what is becoming more and more, a global economy and as such, the need for policies between national governments would need to be in force to maintain competitiveness with

\textsuperscript{14} TEU at Art. 1 and Art. 47
\textsuperscript{15} TEU-Lisbon at Art. 15
\textsuperscript{16} TEU at Art. 14
\textsuperscript{17} TFEU at Art. 294
\textsuperscript{18} Supra n.9 at 135
\textsuperscript{19} TFEU at Art. 95
\textsuperscript{20} TFEU at Art. 7
\textsuperscript{21} Supra n.10 at 26
\textsuperscript{22} Supra n.9 at 135-136
the outside world. Thus, such agreements on removing barriers to trade as one basic example, would always be necessary and as such, a more permanent and stable form would be necessary as the number of parties grows and as a result, these would also be carried out at an executive level above the national parliaments, limiting their control as is the case now. As a result, the EU is essentially running as it should, with executives exerting more control than parliaments and the issue becomes more about certainty of direction rather than deficits because as the nature of these international agreements requires some degree of executive oversight, there will always be at least a minor democratic deficit and long lasting changes to address this, might not be possible without an overall change to the basic structure of the EU as we know it.

In order to create this greater form of certainty beyond economic matters (with which this largely deals with), it is necessary to address the questioning of the strength of EU natural law through the European Court of Justice which are equally as important as the deficits themselves as the Community cannot logically move forward, if it does not have a solid foundation on which to build.

**Does the EU have Fundamental Rights?**

The essential economic nature of the Union has led to a confused and uncertain body of law in the European Court of Justice whenever questions of human rights were brought before it. As human rights are often the essential part of democratic societies, this lack of certainty over whether or not the EU recognizes them at all and in what circumstances, can itself be seen as a democratic deficit as well as an inherent flaw in the development of the Community’s body of law.

Two cases of similar circumstances, Stork and Greitiling argued that the E.C.S.C Treaty meant a loss of trade for them and this violated the provisions within the German Constitution for human rights but the Court found in both instances that the law of the E.C.S.C did not incorporate human rights and as such, they could not be invoked before the court. This position changed dramatically shortly after, with the Court using alternative sources to infer rights provisions into the treaties such as the constitutional ideals inherent to member states and agreements such as the European Convention on Human Rights that member states are signatories for example until being brought into the Treaty articles which allow for “the Union... founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms... which are common to the Member States”. In a way, such a provision is a mere codification of these earlier judgments which sought to identify common rights and obligations within the treaties

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23 C 1/58 Stork v High Authority [1959] ER 17 and Case 40/59

24 Greitiling v High Authority [1960] ECR 423


27 TEU at Art. 6 and 7
through the member states’ own constitutional backgrounds but also prevents the Union from dictating its own position on human rights, remaining neutral in a sense as it only allows for what is a “consensus of rights”.
The Charter of Fundamental Rights was born with the Nice Treaty as one such attempt to further recognize rights but was never incorporated into the body of EU law in any form until the passing of the Lisbon Treaty. It had been addressed in the Constitutional Treaty which intended to insert the Charter directly into EU law with full force\(^{28}\), whereas Lisbon does not do the same, it does give it equal weight as the Treaties themselves\(^{29}\). A significant issue however, is that the Charter itself concludes that these rights can only be invoked when member states are ratifying EU law into their own legal system\(^{30}\).

One would hope that such issues would be addressed before the ECJ through the actions brought before it but some decisions would allude to rights being applied in favour of both the states themselves and in favour of the working, economic class. The latter is more subtle but can be seen when evaluating the *Eunice Sutton* case\(^{31}\) where the Court distinguished between earlier case law as her claim for loss or damage as a result of not receiving interest on an invalid care allowance, which she did not qualify for because the State did not apply Direct 79/7, as it did not fit the earlier criteria of discriminatory dismissal claims\(^{32}\). Despite this not qualifying, a later case involving the loss of interest on tax monies\(^{33}\)\(^{34}\) illustrating a subtle imbalance in favour of those who contribute rather than those who are redistributed to.

As such, the Union must address its policies on human rights in order to make sure that all citizens are covered equally and that there is consistency and certainty in the future, if at all possible, when the Charter is being invoked within the ECJ to avoid such issues of possible imbalance arising again.

**Conclusion**

As already discussed, it is hard to separate the supposed democratic deficit of the Union from the entity as a whole, due to the Community’s basis in international, intergovernmental agreements, which would be done at a largely executive rather than parliamentary level and such, the EU is simply building upon the foundations it was given. The Lisbon Treaty has tried in parts to address certain issues inherent in this problem but without a systematic overhaul of its component parts, it’s unlikely that this will ever fully be

\(^{28}\) CT at Art. II-61

\(^{29}\) TEU-Lisbon at Art 6

\(^{30}\) Charter at Art. 51

\(^{31}\) C-66/95 R v Secretary of State for Social Security ex parte Eunice Sutton [1997] ECR I-2163

\(^{32}\) As in C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority II [1993] ECR I-4367

\(^{33}\) C-410/98 Metallgesellschaft & Hoechst v Inland Revenue [2001] ECR I-1727

\(^{34}\) Applied to TEEC at Art. 52
addressed, such as through a full federal constitution or through another Treaty aimed at actual reform rather than maintenance of the status quo.

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