Laws 526 – Comparative Constitutionalism

Constituent power, citizenship, and the European Union

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I. I*NTRODUCTION* - Democracy and the rule of law in the European Union

The European Union (EU) has undergone constant political and economic integration since its inception in 1952. It has developed from a community in the aftermath of World War Two, into a Union of diverse states with its own political and legal system. It is the best example of international integration and co-operation in the world.

A number of treaties represent the primary law of the EU. The treaties represent the EU's commitment to promote human rights, freedom, democracy, equality, and the rule of law. The Treaty of Lisbon[2] was introduced and adopted by the Member States to increase participatory democracy within the EU. Originally called the Reform Treaty, it amended the existing EU and EC treaties, providing the EU with the legal framework to meet the future challenges and to respond to the increasing demands of the citizens' for a more transparent and open institution.

The European Parliament is the only directly elected institution of the EU, and traditionally had the least amount of power of the EU institutions. The Lisbon Treaty attempted to address the so-called democratic deficit through a range of institutional reforms that recognised the importance of European citizen involvement in the EU. Citizen involvement in the EU has also been increased through the implementation of the European Citizens' Initiative (ECI). The ECI represents a further step towards the EU becoming a true participatory democracy.

This purpose of this paper is to critically assess the democratic involvement of European citizens in the operation of the EU, and how the constitutional foundation of the EU provides for this involvement. The paper will seek to answer to what extent European Citizens' have the ability to affect real and meaningful change upon the EU, a power that currently sits with the governments of Member States.

Democracy is often associated with the power of the citizens to affect change in the institutions that govern them. The theory of constituent power goes one step further and argues that it gives citizens the ability to alter not only the governing institutions,

[2] Official Journal of the European Union 2007 No C 306/1 (herein after referred to as the Treaty of Lisbon). Adopted 2008, entered into force 1 December 2009.

but the also the power that those institutions exercise. This begins with an introduction of the main institutions of the EU, before moving to discuss the theory of constituent power, before assessing what factors would be necessary for constitutent power to be successful in the EU.

II. *INSTIUTIONS OF THE EUROPEAN UNION*

Article 13 TEU provides that the EU has seven institutions. It states that the EU

> "shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."[3]

The Institutions of the EU are; the European Parliament, the European Council, the Council, The European Commission (the Commission), the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. Each institution exercises functions that are vital to the effective functioning of the EU. However, for the purposes of this discussion, I will focus on those institutions that exercise primary legislative functions for the EU. These legislative institutions are, the European Parliament, the European Commission, the Council. An examination of the Court of Justice of the European Union (ECJ) is important, as it is the institution responsible for upholding the rule of European Law throughout the EU.

A. The European Parliament

One of the effects of the Treaty of Lisbon was that it gave "greater emphasis to the EU's values and the rights of its citizens."[4] The European Parliament represents over 500 million citizens of the EU. As the only directly elected EU institution, the European Parliament exercises a vital role in ensuring the views of European citizens are considered when decisions are made at the EU level. The European Parliament is elected by "direct universal suffrage in a free and secret ballot"[5] and it is composed "of representatives of the Union's citizens."[6] To ensure that as equal as possible representation of Union citizens is maintained, the Treaty on European Union (TEU)

[3] Treaty on European Union (TEU), art 13.
[4] C H. Church & D Phinnemore 'Understanding the Treaty of Lisbon' Romanian Journal of European Affiars, Vol. 10, No. 2, 2010, at 15.
[5] TEU, Art 14(3).
[6] TEU, Art 14(2).

requires that "[r]epresentation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State, [and] no Member State shall be allocated more than ninety-six seats."[7]

The participation of Union citizens, through the European Parliament, is supposed to enhance the democratic legitimacy of the EU. "Participation is … conceived as an opportunity for citizens … to argue in public deliberation[.]"[8] This principle of participation was recognised as one of the general principles of good governance in the European Commission's White Paper on European Governance (2001).[9] The recognition of the necessity for increased participation is crucial for ensuring that Union citizens remain engaged with the EU and through the European Parliament, can have their interests represented at the transnational level. In the White Paper, the Commission acknowledged that "[t]he quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain."[10]

The European Parliament, as a transnational democratic representative body, is vital for ensuring an "effective and accountable political, administrative and regulative capacity at global and regional levels"[11] is maintained over the other institutions of the EU. The European Parliament maintains the unique position of legitimising the democratic status of the EU. While it is arguably far from the most powerful institution, for the purposes of constituent power, its involvement will prove to be of vital importance.

B. Powers and functions of the European Parliament

A significant downfall of the European Parliament is that it has no right of legislative initiative. However, the Treaty of Lisbon introduced what is known as the co-decision procedure, or 'the ordinary legislative procedure'.[12] Through the ordinary legislative procedure the "European Parliament shall, jointly with the Council, exercise legislative

[7] Ibid.
[8] Prof. Dr V C Lopez 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy', *European Public Law* 16, no 1 (2010): 123-138 at 124.
[9] 'European Governance: A White Paper' COM (2001) 428 final, 25 July 2001.
[10] Ibid at 7.
[11] D Held, 'Democracy, the Nation-Sate and the Global System' in *Models of Democracy* (3rd ed, Stanford University Press, Stanford, 2006) at 305.
[12] TEU, Art 14(1).

and budgetary functions."[13] The European Parliament has also had its role in consenting to EU decisions increased. For example, its consent is required to be given "to the Multi-annual Financial Framework through which the EU is funded, the establishment of a European External Action Service, and certain treaty amendments."[14] The ordinary legislative procedure also works to ensure compliance and accountability between the EU's institutions. The European Parliament also has the power to "request the commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaty."[15]

Despite significant advancements in the role of the European Parliament in the general affairs of the EU, Horspool & Humphrey succinctly summarise the so-called progress made by the European Parliament under the Treaty of Lisbon. They state that "the EP is still far short of being a Parliament in the proper sense of word. It has practically no legislative initiative and a right to reject legislation."[16] They continue to state that despite "being the only directly elected body in the Union, it still has difficulty in presenting itself as an effective representative of the peoples of Europe and this is reflected in the extremely low voter turnout at European Parliament elections."[17] The results of low voter turnout problem highlights the difficulty of the European Parliament presenting itself as representative of the peoples of Europe. This affirms the need for the existence, and the ability of the 'peoples of Europe' to exercise constituent power over those governing institutions.

C. The European Commission

The Commission is given legal personality under Article 17 TEU. The Treaty of Lisbon establishes that the Commission is responsible for the co-ordination, execution and administrative functions of the EU. Specifically, the Commission "shall promote the general interest of the Union and take appropriate initiatives to that end."[18] While a common criticism of the Commission is that it is "[p]ower-hungry and … single-

[13] Ibid.
[14] 'Understanding the Treaty of Lisbon' Above, n 26 at 17.
[15] Treaty on the Functioning of the European Union, Article 225(2).
[16] M Horspool & M Humphreys *European Union Law* (7th ed, Oxford University Press, Oxford, 2012) at 60.
[17] Ibid.
[18] TEU, Art 17(1).

mindedly pursues the integration of Europe along 'supranational' or federalist lines."[19] The Treaty of Lisbon works to ensure a Commission exists that works more co-operatively with Member States and other instituions of the EU.

There are currently 28 Commissioners, one from each EU Member State. Traditionally, Commissioners are likely to have been members of their national parliaments and are selected by the head of their State's government. Despite Commissioners being politicians, rather than civil servants, the Commissioners must exercise their duties, and the duty of the Commission generally, completely impartially from the influence of any Member State and its members "shall be chosen on the grounds of their general competence and European commitment from persons whose independence is beyond doubt."[20] Article 17(3) further requires that members of the Commission "shall neither seek nor take instructions from any government or other institution[.]"[21]

D. Powers and Functions of the European Commission

The primary function of the Commission is to ensure the general interest of the Union, and application of the Treaties is adhered to. Article 258 TFEU provides that where the Commission considers that a Member State has failed to fulfil its obligations under the Treaties, the Commission as the power to effectively require the Member State to explain why this situation has occurred. This supervisory power is supported by extensive enforcement powers. Where a Member State fails to comply with an obligation under the Treaties, the Commission "may bring the matter before the Court of Justice of the European Union."[22]

The second function of the Commission, is to act as the executive branch of the EU. This sentiment is widely accepted, but is "misleading outside some quite narrow areas, mainly connected to the expenditure of the EU's budget, which is small in relation to the budgets of the [M]ember [S]tates, [but] has to operate within strict parameters set by

[19] D G. Dimitrakopoulos and H Kassim, 'Inside the European Commission: Preference Formation and the Convention on the Future of Europe', Comparative European Politics, 2005, 3 at 182.
[20] TEU, Art 17(3).
[21] Ibid.
[22] TFEU, Art 258.

the Council of Ministers and the Parliament."[23] The Commission is also responsible for representing the EU at the international level in the EU's relations with other states.

The Commission, together with the Council and the European Parliament, plays a vital role in the law-making process at the EU level. The Commission has the important power of initiating legilsation. Article 289 TFEU states that the "ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission[.]"[24] While the legislative process of the EU requires a consultative process, the Commission is responsible for "drawing up a proposal on what they want to legislate, [consistent with] three constant objectives: to identify the European interest, to seek advice on what is necessary and to respect the principle of subsidia[rity]."[25] After a proposal has been initiated the Commission will continue to have significant input as the proposal works its way through the legislative process.

The ordinary legislative process increases the involvement and co-operation that must take place between the Commission and the European Parliament, as required by Article 294 of the TFEU. It retains significant powers to initiate legislation, but as a result of the reforms of the Treaty of Lisbon, it must work with greater co-operation with the other institutions of the EU.

E. The Council of the European Union

The Council is the primary legislative arm of the EU. Originally known as the Council of Ministers, it is now 'the Council of the European Union'. Article 31 TEU gives the Council the power of "taking the final decision on, and of carrying out, the proposals submitted by the Commission under the TEU and the TFEU."[26] While one body, the Council's configration and membership depends on the matter that is the subject of discussion, whether it be agriculture, finance, environment, and so on.

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[23] Author Unknown, 'EU Constitution and institutions', EIU ViewsWire, <search.proquest.com/docview/466518114?accountid=14782>.
[24] TFEU, Art 289.
[25] D Vataman, 'Decision Making Process in the European Union after entry into force of the Treaty of Lisbon,' *Institutional law of the European Union*, Bucharest, Universul Jurdic Publishing House, 2010, p. 179 at 182.
[26] Above, n 15 at 38.

The Council consists of representatives of Member States at ministerial level, who have the authority to "commit the government of the Member State in question and cast its vote."[27] Traditionally, meetings of the Council of the European Union were traditionally not public, "and the secrecy of the deliberations has been the subject of much criticism, viewing this as a contributing factor to the democratic deficit in the Union."[28]

As the primary legislative body of the EU, the voting procedures the Council of the European Union are important to understand how decisions are made at the EU level. The Treaty of Lisbon states that decisions of the Council of the European Union shall be made "by a qualified majority."[29] From November 2014, the qualified majority vote is defined as "at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the popoulation of the Union." In addition, Article 16(8) TEU requires that at Council meetings when the Council deliberates and votes on a daft legislative act, these meetings are made public.

III. *THE CONSTITUIONAL BASIS OF THE EUROPEAN UNION*

As it will have become apparent, a number of treaties represent the constitutional basis of the EU. In the aftermath of World War Two, The Treaty of Paris established the European Coal and Steal Community (ECSC). The ECSC brought together France, Germany, Italy and the Benelux countries (Belgium, Netherlands, and Luxembourg) together to ensure the free movement of coal and steel, and to prevent the possibility of war occurring. The aim of this Treaty through the ECSC was to "contribute to economic expansion, the development of employment and the improvement of the standard of living[.]"[30] The founders of the ECSC recognised that only through increased economic co-operation and integration, there would be less desire, and possibility for the Member States to go to war with each other.

To ensure compliance with the Treaty, a number of supranational institutions were established. These institutions were the High Authority, a Common Assembly, a Special

[27] TEU, Art 16(2).
[28] Above, n 15 at 39.
[29] TEU, Art 16(3).
[30] Treaty of Paris, Art 2, adopted 1951, entered into force 1952.

Council of Ministers and a Court of Justice.[31] Principally, the High Authority was designated with the power and responsibility "for assuring the fulfilment of the purposes stated in the … Treaty[.]"[32] The High Authority had supranational powers, which were to be exercised independently of any influence or persuasion by the Member States.

The success of the ECSC demonstrated that wider European integration was possible. Therefore, further economic co-operation was decided necessary. In response to the desire for greater integration, the Treaty of Rome, signed in 1957, established the European Economic Community (EEC). The EEC provided the institutional framework for what would later become the EU. Integration and development continued throughout the 20th century with a number of Treaties designed to increase the powers of the European Community in order to achieve the original goals of the Treaty of Rome, of greater European economic co-operation.

While the history of the EU provides valuable insight into the EU's existing constitutional arrangements, for the purposes of this discussion, the primary focus is upon the current governing treaty, the Treaty of Lisbon.[33] It is also necessary to examine why the Treaty of Lisbon was necessary, particulary the failure of the European Union to institute a Constitution for Europe.

The Treaty establishing a Constitution for Europe proposed in 2003, and agreed to by the Heads of State or Government of the Member States in October 2004[34] was driven by the desire of closer integration, and a need to simplify the governing structure of the EU. This need was clearly evident when considering that the "texts of the various EU's agreed treaties and the laws derived from them, the acquis communautair, [ran] to a total of 20,000 pages."[35] In response to this arguably excessive volume of laws and regulations, the Constitution for Europe was to be "a clear statement of what the EU is and what it does, as well as fixing some glaring institutional problems."[36]

[31] TEU, Art 7.
[32] TEU, Art 8.
[33] Above, n 1.
[34] Official Journal of the European Union 2004 No L 310.
[35] R Tiersky, "The EU Constitution: How Significant?" Headline Series 326 (2004) at 46.
[36] Ibid.

The foundation of the Draft Constitutional Treaty followed the principle need to reform the very institutional basis of the EU. It would put on paper "a simplified, more or less decision-making structure for the EU, finally clarifying the division of powers between the national governments and the EU institutions."[37] However, despite its aspirational nature and straightforward purpose, citizens in France and the Netherlands rejected the Draft Constitutional Treaty's adoption in referendas conducted by those countries governments in 2005. Following these rejections, in conjunction with the unratified status of the Treaty in a number of other Member States, it became clear that a unique constitutional crisis was occurring in the EU. The rejection by the French and Dutch citizens sent a clear message that European citizens did not share the same desire as EU governments and leaders that the desire to adopt a 'European Constitution'. It is suggested that one of the primary reasons for the 'no' votes by the Dutch and French citizens resulted out of a fear that "by a Constitution of Europe their national constitutions would be overruled, [and] the European Union would become a super-state."[38]

In response to the constitutional crisis EU leaders returned to the traditional reform approach of amending the existing treaties. The outcome of the re-negotiations was the "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community."[39]

Initially referred to as the Reform Treaty, the Treaty of Lisbon "largely reproduces the Constitutional Treaty, but has done away with all the elements which gave [the] draft treaty the character of a constitution."[40] Importantly, this decision to do away with all elements of the Draft Constitutional Treaty represents a clear rejection by the Member States to take the symbolic step towards integration, by agreeing to be bound to a 'European Constitution'.

[37] Tiersky, above n 25 at 48.
[38] R Streinz, München, 'The European Constitution after the Failure of the Constitutional Treaty' ZÖR 63 (2008), 159-187 at 170.
[39] Official Journal of the European Union 2007 No C 306/1 (herein after referred to as the Treaty of Lisbon).
[40] Above, n 16 at 18.

The Treaty of Lisbon's purpose is to make the EU "more democratic, more efficient and better able to address global problems … with one voice."[41] It also clarifies the division of powers between the EU, Member States, and what powers are shared. The Treaty of Lisbon is divided into the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). All references to the former three-pillar structure of the European Community were abolished, and references to the term 'law' were removed when referring to decisions of the European Law.

The TEU and TFEU sets out the legal powers and competencies of the European Union. Similar to a constitution that sets out the legal structure of a domestic legal system, the TEU codifies the institutions of the EU, while the TFEU provides the legal basis for these institutions to act. The TEU "marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."[42] Article 1 reinforces the EU's commitment to increased participation of European citizens in the governing of the EU. To complement the legal basis of the EU, Article 1 TFEU "determines the areas of, delimitation of, and arrangements for exercising [the EU's] competences." Together, the TFEU "and the Treaty on European Union constitute the Treaties on which the Union is founded."[43] The Treaty of Lisbon reformed and reordered these two treaties, providing the constitutional and institutional basis of the EU.

F. The Origins of Constituent Power

Constituent power, and specifically constituent power in the EU, is central to this discussion. Joel Colón-Ríos helpfully provides a succinct definition of what constituent power is. Principally, "[c]onstituent power means constitution-making power, the source of production of fundamental juridical norms."[44] Constituent power is crucial in order to establish legitimate constituted powers, which are the "legal and political institutions created by the constituent subject."[45] For the EU where the principles of

[41] EU Law, Treaties, < www.europa.eu/eu-law/decision-making/treaties/index_en.htm>.
[42] TEU, Art 1.
[43] TFEU, Art 1.
[44] J L. Colón-Ríos 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia' Constellations 18:3, 2011 at 366.
[45] Ibid.

democracy and the rule of law are fundamental and are enshrined as fundamental in its legal framework, the idea of constituent power is conspicuously absent.

There is significant discussion and debate about the impact and influence of constituent power on constitutions and democracy generally. However, what is clear is that despite any attempt to enshrine and codify a constitution as being unable to be altered or replaced, there is always the possibility for this to occur, as constituent power sits above any constitution or sovereign authority.

Furthermore, constituent power "is the political will, whose power or authority is cable of making the concrete, comprehensive decision of the type and form of its own political existence."[46] Furthermore, "constituent power is seen as a legally unlimited power, a power that assumes the constitutional regime as radically open."[47] The theory of constituent power argues that citizens of a sovereign state have the power to create and adopt the fundamental rules that govern them. It further argues that the constituent power of the people can never be limited or derogated from.

Dependent on two important conditions, constituent power requires "recognition that the ultimate source of political authority derives from an entity known as 'the people' and acceptance of the idea of a constitution as something that is created."[48] To a significant extent the theory of constituent power arguably sits well within the EU's fundamental principles of respect for democracy and the rule of law. However, the applicability of constituent power, and the possibility for it to be exercised, depends upon the existence of a single unified constituent base of citizens. Crucially, it also requires a single constitutional basis that applies universally to those who have agreed to be bound by it.

Carl Schmitt, arguably one of the leading theorists on constituent power, attempted to describe the relationship between constituent power and constitutions. Schmitt stated

[46] C Schmitt *Constitutional Theory* (Duke University Press, Durham and London, 2008) at 125.
[47] J L. Colón-Ríos *Weak Constitutionalism Democratic legitimacy and the question of constituent power* (ed, Routledge, Abingdon, 2012) at 7.
[48] Martin Loughlin 'The concept of constituent power' European Journal of Political Theory 2014, Vol. 13(2) 218-237 at 219.

that constituent power is an expression of political will "capable of making the concrete, comprehensive decision over the type and form of its own political existence."[49] Schmitt argued that this constituent power is inherently different from any changes that could be made by a government or legislature.

Any constitution that exists is "an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed."[50] This expression of constituent power, can also be expressed to mean that the 'constituted power' is the power vested in an authority to rule, or govern, while the 'constituent power' is "the power through which the prince's power to rule was authorized."[51] By dividing constituent power in this way, it is clear that constituent power is a fundamental principle that is arguably greater than any constitution and has the power to amend or replace constitutions that are often described as entrenched and beyond normal legislative amendment.

Most formulations of constituent power are considered only in the context of a domestic legal order. The question remains, if the ability to fundamentally alter and replace a constitution is held by 'the people' at the domestic level, in what form does constituent power exist at the EU level, and who holds that power.

As has been discussed, the EU is founded on treaty law. If the EU wishes to undertake any action, that action must be provided for in its governing treaties. Anything that is not within the scope of the EU remains with Member States. To initiate constituent power, Schmitt details a number of scenarios whereby 'the people' have the ability to reorganise the constitutional make-up of the institutions that govern them. Importantly, Schmitt states that '[t]here cannot be a regulated procedure, through which the activity of the constitution-making power would be bound'[52]. Such a statement sits in conflict with the fundamental structure of the EU, where no action is capable of being undertaken unless it is expressly provided for in the treaties.

[49] Carl Schmitt *Constitutional Theory* (Duke University Press, Durham, 2008) at 125.
[50] Above, n 39 at 219.
[51] Above, n 39 at 220.
[52] Above n 39.

Constituent power, as the exercise of constitution-making power by the constituent body, is crucial to the fundamental democratic make-up of a sovereign democratic state. However, constituent power is arguably more difficult to apply at the EU level. The exercise of power is strictly defined in the Treaty of Lisbon, through the institutions of the EU. It is necessary to examine the explicit exercise of power in the EU by its institutions before questions of whether constituent power in the EU exists.

G. The Court of Justice of the European Union

After outlining the constitutional structure of the EU, it is necessary to discuss the primary institution that is responsible for for ensuring the uniform interpretation and application of EU law.

While not involved in the legislative procedure of the Union like the Parliament, Commission and Council, it is necessary to discuss the the most important court of the European Union. The Court of Justice of the European Union (ECJ) consists of the Court of Justice, the General Court and specialised courts. These courts "shall ensure that in the interpretation and application of the Treaties the law is observed."[53] Article 19 gives to the ECJ the power to rule on actions brought by a Member State, an institution or a natural or legal person. The ECJ is composed in a manner following the example of other institutions, such as the Commission. Each Member State provides one judge to sit on the Bench.

The ECJ has arguably made some of the most important contributions to the development of EU law. Through its case law, the ECJ has ruled that national adminstrations and courts must apply EU law in full in order to protect the rights of EU law conferred upon citizens. This is known as the principle of direct effect, and has significant influence on how the constitutional structure of the EU operates in its relationship with citizens of the Member States.

In Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Belastingad-ministratie* (1963) (van Gend en Loos). The case itself concerned a reclassification of a product for purposes of customs duties imported into

[53] TEU, Art 19(1).

the Netherlands. The result of this reclassficiation was that a higher customs duty was imposed by the Netherlands. At that time, Article 12 of the European Economic Community (EEC) Treaty stated that any existing customs duties that existed must be removed. In refering the case to the ECJ, the national court asked "did Article 12 [of the existing EEC Treaty] have direct application within the territory of a Member State … meaning … could nationals of such a Member State on the basis of the Article lay claim to individual rights which the court must protect."[54] In the case, the Netherlands Government disputed whether an alleged infringement of the Treaty by a Member State could be submitted for judgment by someone other than the European Commission or another Member State. In reply, the ECJ held that "Article 12 is applicable without any preliminary incorporation in the national legislation of Member States [and] it has direct effect without any further measures of implementation under Community legislation[.][55] The Court continued to state that

> "[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights … and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is intended to confer upon them rights which become part of their legal heritage[.]"[56]

This statement, and the decision in *Van Gend en Loos* generally, clarified the legal situation for the Member States of the EEC. Importantly, it set out the crtieria for the direct effect of Treaty articles to be implemented on Member States. The ECJ required that Treaty articles had to be "clear, uncondititonal and not subject to further implementation."[57] This principle of direct effect plays a vital role in ensuring that EU law is applied uniformly throughout the Member States.

The ECJ also has a vital role to play in the uniform application of EU law throughout Member States. The principle of direct effect is summarised to mean that "[l]egally, direct effect construes mutual obligations among memberr states as rights owed by states to individuals which national courts must protect."[58] Here Weiler highlights the

[54] *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie Der Belastingen* Case 26/62 at 3.
[55] Ibid at 7.
[56] Above, n 53 at 12.
[57] Above, n 15 at 163.
[58] J.H.H Weiler, 'Van Gend en Loos; *The individual as subject and object and the dilemma of European legitimacy,* I CON 12 (2014), 94–103 at 96.

role that individuals play in the EU, and the disparity of power and influence that exists between individuals and the institutions.

With greater analysis, it becomes clear that the EU is a large entity with many actors seeking to exercise the greatest amount of influence in the decision-making process. Now that the key institutions of the EU have been described, as well as outlining the constitutional structure of the EU, it is necessary to discuss the EU's legal system.

H. The Union Legal System

For the purposes of this discussion, focus of the EU's legal system will largely remain with the legislative procedures, as these procedures arguably have the most direct impact upon the citizens of the EU.

As it should be clear, the EU does not have a single source of law, and no single constitutional base. Despite the various institutions having significantly large scope to carry out the functions of the EU, everything the institutions can do do is limited by the governing treaties. However, thanks to reforms made under the Treaty of Lisbon "[t]he EU is defined by the treaties and what it does."[59] Furthermore, the "treaties show the EU to be a legalistic affair, subject to rules and guidelines about operation, principles and relationships, not an untrammelled super-state."[60] The EU may only act where power has been attributed to it through the legal texts. This is the principle of conferral and it is codified under Articles 4 and 5 of the TEU.

Article 4 specifies that "competences not conferred upon the Union in the Treaties remain with the Member States."[61] EU powers are further limited by the Member States under Article 5(2) which states "[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therin. Competences not conferred upon the Union in the Treaties remain with the Member States."

[59] Above, n 3 at 23.
[60] Ibid.
[61] TEU, Art 4(1).

EU legislation, as I have described, is primarily passed by the Council and the European Parliament acting on a proposal by the Commission. This is done through the ordinary legislative procedure. The implementation of EU law varies and depends on what type of legislative act is chosen by an institution to achieve a legislative goal. EU law, like domestic law can be made through primary or secondary legislation. Primary law making power comes from the EU's constitutive treaties, the TEU and TFEU. A key aspect of the TFEU is that it governs how legislation is adopted by the institutions of the EU. When exercising the competences of the EU, Article 288 provides for three binding, and two non-binding legislative acts. These legislative acts are "regulations, directives, decisions, recommendations and opinions."[62] Through these acts, the EU is able to institute its policy and achieve its objectives under the TEU and TFEU.

I. Democracy – Participatory Democracy or a Democratic Deficit

So far, this paper has focused primarily on providing an outline of key EU institutions and its constitutional and legal framework. While these are important, notably absent has been any discussion on the involvement and participation of European citizens. The EU boldly affirms its commitment to democracy and the rights of European citizens in the first three Articles of the TEU. Under Article 1, TEU that "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe." This every closer union is "founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." Article 3 provides that the Union's aim "is to promote peace, its values and the well-being of its peoples." On reading these opening Articles, it could be assumed that citizens are at the heart of the EU in every respect. However, citizen involvement in the functioning of the EU remains extremely limited.

The following section will discuss what has been termed the democratic deficit of the EU and in what form 'democracy' can be held to exist in the EU. Primarily that citizen's lack the ability to influence change over the instutions that govern them. In response to this perception, the EU has taken various steps through its development and transition into a more participatory democracy including the reforms brought in through the Treaty of Lisbon, and the principle of subsidiarity. I will seek to identify to what extent

[62] Treaty on the Functioning of the European Union, Art 288.

the EU represents a modern liberal democracy, and whether it has succeeded in fully engaging with the citizens of the EU.

J. The Democratic Deficit

Democratic states and regimes "are more likely to endure and flourish where a balanced equilibrium exists between citizens' aspirations for democracy … and its perceieved supply."[63] Critically for the EU, this gap between citizens' aspirations for democracy and the supply of that democracy originated as a result of the EU's constitutional and institutional framework placing more power in unelected and appointed instutitons instead of those elected by citizens. Furthermore, "the core decision-making instututions in the EU have been regarded … as falling well short of the standards of democratic accountability and transparency that exists at the national level within each of the member states."[64] This idea of the democratic deficit matters because where there is a perceived lack of involvement by the citizens in their governing institutions it can indicate "pervasive doubts about the role and powers of government."[65] When viewed in consideration of the fact that the EU's principle treaties, the TEU and TFEU place such value on the importance of the individual citizen, it is difficult to understand why there is such a disparity of influence between the citizens and the institutions. However, it is easy to determine that if this is the situation, why disengagement between citizens and the EU institutions exists.

Despite lacking significant aspects of participatory democracy, the EU arguably undergoes a constant progression towards becoming a more democratic organisation that is "inspired by traditional institutions from national constitutionalism."[66] However, as it has been established, the only directly representative body of the EU, the European Parliament is relatively weak and "has been considered as the main cause of the EU's democratic deficit."[67] While treaty reforms have aimed at reducing this deficit and increasing the powers of the European Parliament in the law-making process, the participation of citizens remains extremely weak. Participation as a democratic value is

[63] P Norris 'Democratic Deficit *Critical Citizens* Revisited' (ed, Cambridge University Press, New York, 2011) at 4-5.
[64] Ibid at 5.
[65] Above, n 62 at 8.
[66] Above, n 7 at 123.
[67] Ibid.

important because it "enables individuals to rise about their private existence and become emancipated citizens … more attentive to the interests of others, and more probing of their own interests."[68] Furthermore, [p]articipatory democracy implies information, communication and engagement within the relationship between adminstration and citizens."[69] This type of democracy is considered to be one "which allows citizens to actively play a part within a decision-making process."[70] Participatory democracy is essential in order to ensure the legitimacy of the EU's institutions are maintained.

K. The Subsidiarity Principle – Checks and Balances upon the EU's power

An important way in which the EU has attempted to address the issue of the democratic deficit is through the principles of subsidiatiry and proportionality. The principle of subsidiarity creates the limits that the Member States have placed upon EU institutions exercise of power. Subsidiarity was first included in EU treaty law in the Treaty of Maastricht, which was signed in 1992. The purpose and role of subsidiarity was introduced "as a mechanism for alleviating disputes concerning the division of competence between the [European Community] and the Member States."[71] Through the subsidiarity principle, Member States concerns about the expansion of the European Community into areas where the Member States had not ceded authority to the Community's institutions to act. Importantly, "it was felt that subsidiarity would help prevent excessive use of power by Brussels."[72] This sentiment, expressed by the Member States at Maastricht, provides a strong indication of the reluctance by the Member States to accept excessive overreaching of the European Community into areas not explicitly within the Community's competencies.

Subsidiarity, as introduced under the Maastricht Treaty was the Member States key method for "allaying fears about the 'F' word (federalism)."[73] The fear of federalism and

[68] B.Kohler-Koch & B.Rittberger, 'Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007) at 16.
[69] C Gilia and C Mares, 'Participatory Democracy in Europe' European Conference on e-Government, 2012, at 279
[70] Ibid.
[71] P Craig "Subsidiarity: A Political and Legal Analysis" JCMS 2012 Vol 12, no S1 at 72.
[72] Ibid at 73.
[73] Ibid.

the EU becoming a federal state has led to the continuation of subsidiarity under the Treaty of Lisbon. The subsidiarity principle is of central importance and is given prominence in the TEU under Article 5(3). It states:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of scale or effects of the proposed action, be better achieved at the Union level.

Article 5(3) emphasises that the EU will only act when it is can be reasonably argued that action at the EU level would achieve the most effective and beneficial outcome. Protocol (No 2) sets out the specific application of the principles of subsidiarity and proportionality.

The Protocol's preamble sets out the objectives of subsidiarity and proportionality, which is "to ensure that decisions are taken as closely as possible to the citizens of the Union."[74] When deciding whether to take action, article 5 of Protocol 2 requires that '[a]ny draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality." This means that any legislative action taken by the EU must be first justified as necessary and compliant with the subsidiarity and proportionality requirements of the TEU.

Subsidiarity and proportionality are effective means of providing checks and balances on the EU institutions. They ensure that where a decision for a proposed action is put forward by an EU institution, the elected representative bodies of Member States have the opportunity to provide feedback on the proposed legislative action. Protocol 2 helps to increase the democratic legitimacy of proposed EU action by requiring that "the Commission shall consult widely."[75] The Protocol gives to national parliaments the opportunity to submit to the legislative institutions of the EU (the European Parliament, Council, and the Commission) that Parliament's "reasoned opinion stating why it considers that the draft … does not comply with the principle of subsidiarity."[76] While

[74] TFEU, Protocol (No 2), Preamble.
[75] Ibid, Article 2.
[76] Above, n 73 Article 6.

not perfect, subsidiarity provides a further, although indirect, way of achieving greater participation of European citizens in the EU's legislative process.

L. Committee of the Regions

The Committee of the Regions (the Committee) was another innovation under the Maastricht Treaty with the intent of creating an EU that was built on representative democracy and accountability of its institutions. The Commission was a strong advocate for the establishment of the Committee as it "tried to find a way to increase the legitmacy of the policy-making process in the EU."[77] By establishing a regional representative body, "[g]iving the subnational level of government direct access to EU policy making seemed to be a feasible solution for regaining the trust and interest of the citizens."[78] Articles 305 – 307 of the TFEU sets out the role of the Committee, and states that the Committee be consulted by the European Parliament, the Council, or the Commission "where the Treaties so provide"[79] and in any case "which one of these institutions considers it appropriate."[80] The Committee acts primarily as an advisory body to the EU institutions representing the the opinions of local and regional bodies.

The Committee's Mission Statement provides a useful insight into the overall objectives that it identifies as important, and areas where its input is required. It's mission is "to involve regional and local authorities in the European decision-making process and thus to encourage greater participation from [its] fellow citizens."[81] This statement reinforces the role of the Committee as set out under the TFEU. The Committee further affirms its goals by stating that its members "are ambassadors of Europe in the regions, cities and municipalities and speak for them in the European debate."[82] The Mission Statement continues to affirm the Committee's role as the best placed institution to effectively represent European citizens. It concludes by acknowleding the members position as locally elected politicians and that it has "a direct dialouge with … fellow

[77] E Domorenok "The Committee of the Regions: in Search of Identity" Regional and Federal Studies, Vol. 19, no 1, (2009) at 145.
[78] Ibid.
[79] TFEU, Art 307.
[80] Ibid.
[81] Committee of the Regions, European Union, "Mission Statement" (Brussels, 21 April 2009) at 1.
[82] Ibid at 2.

citizens on Europe's achievements and challenges."[83] Throughout the Mission Statement, the Committee recognises its role as a facilitator of communication between the main EU institutions and the citizens. This suggests that it sees itself as the best institution for this role.

However, despite the various EU institutions best efforts, and those of the members of the Committee, it has "neither become a regional representative chamber with full rights nor has it followed the institutional model based on the example [of other committees]."[84] Despite criticisms of the Committees' ability to influence the policy-making process of the EU, when assessing the effectiveness of the Committee, there are three questions that are relevant. Firstly, how effectively does the Committee perform its representative functions? Secondly, how effectively does the Committee perform its advisory functions? Thirdly, how effectively does the Committee perform its symbolic functions?

M. Committee of the Regions - Representation

Membership of the Committee is allocated proportionally to each Member State based roughly on size. Its composition "relates directly to the representative function of the [Committee]."[85] Under the Treaty of Nice, the EU agreed that members of the committee must be "representative of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly."[86] (This provision was translated into Article 300 of the TFEU). The Committee has 353 members who are regional presidents, mayors or elected representatives of regions and cities throughout the EU's Member States. The Committee initially was granted very limited scope to exercise its functions but has gradually seen its role in the EU, and ability to fulfill its objectives expanded.

In this way, the Committee provides an institutional representation of the principle of subsidiarity. Through representing the regions, and local authorities, the Committee is

[83] Ibid.
[84] Above, n 76 at 146.
[85] W E Carroll "The Committee of the Regions: A Functional Analysis of the CoR's Institutional Capacity" (2011) Regional and Federal Studies, Vol 21, No. 3 at 343.
[86] Treaty of Nice, (opened for signature 26 February 2001, entered into force 1 February 2003), art 263.

arguably the best placed organisation to provide advice to the other EU institutions on the matters that affect European citizens the most. However, Member States prove to be reluctant to give the Committee greater autonomy and the ability to act on its own initiative except in very limited circumstances.

N. Committee of the Regions – an Advisory Body

The Committees advisory functions relate closely to its role as 'guardian' of the principle of subsidiarity. In order to provide advice to the main EU instituions on legislative matters, the Committee has created six commissions "for the purpose of writing opinions."[87] The commissions cover all aspects of policy area that the Committee considers it should have input in. These commissions "examine documents issued by the Council, the Commission or the Parliament."[88] The opinions produced by the commissions "enable the European Union to benefit from the experience of COR members at local or regional level."[89] However, for the Committee to function as an effective advisory body, it relies significantly on the co-operation of the other EU institutions to consider its opnions.

The Committee's advisory function is strengthened by its ability to bring actions to the ECJ where it believes the principle of subisidiarity has been infringed. Protocol 2 provides grants jursidiction to the ECJ in actions "on grounds of infringment of the principle of subsidiarity by a legislative act."[90] Article 8 further states that in areas where the TFEU provides that the Committee is consulted, "the Committee of the Regions may also bring such actions[.]"[91] This ability to bring an action helps to ensure that its opinions are given appropriate consideration by the other EU institutions.

O. Committee of the Regions – Symbolic Functions

A final way in order to measure the effectiveness of the Committee is to assess how well it fulfills its symbolic functions. As noted, the Committee was created to the idea that the EU was built on the principle of representative democracy and there was a direct way to

[87] Above, n 84 at 345.
[88] The Committee of the Regions "The Committee of the Regions: Five Questions, Five Answers" (2005) <cor.europa.eu>.
[89] Ibid.
[90] Above, n 73 art 8.
[91] Ibid.

ensure accountability of its institutions. In order to combat the overreach of Brussels into the sovereignty of Member States, subsidiarity is seen as "an assertion of the sovereignty of national governments against the supranational powers of Brussels."[92] Increasingly, "[d]ecisions fundamentally affecting the people's lives … were made … by their national governments without consulting them, while the powers to take these decisions were transferred … to European Commissioners … who were not democratically accountable."[93] The EU's response to create the Committee was its attempt to address this perceived democratic deficit that existed in the EU. The Treaty of Lisbon's reforms that have expanded the Committee's power to provide advice and monitor other institutions' compliance with the principles of subsidiarity function provide a significant way to help the EU maintain its democratic legitimacy.

For the Committee to effectively represent the local and regional interests of citizens at the EU level, it must be perceived by the other institutions, the Commission, European Parliament, and Council of Ministers, as a significant body in its own right. If the institutions do include Committee opinions into the legislative process, it is possible "to conclude that the local and regional dimension is included … in EU policy making and implementation."[94] The Committee has the ability to play a central role in policy making process and to make the connection between European citizens and the EU institutions, often perceived to be extremely tenuous.

The focus of the Committee is on involving European citizens in the decision-making process of the EU. This desire to involve citizens is seen throughout the EU's institutions objectives and in the governing treaties. It is clear that despite several measures to involve citizens in the governing process, the primary actors within the EU are the member states. As a result of the Committee's membership being made up of directly-elected representatives, the Committee "prefers a normative discourse on subsidiarity, proximity, partnership and closeness to the people[,]"[95] as opposed to talking about participatory democracy in a strictly theoretical sense. Resulting from the

[92] Above n 84, at 348.
[93] Ibid.
[94] Above n 84 at 353.
[95] A A. Luksic and M Bahor, "Participatory Democracy within the EU: A Solution For Democratic Gap" Journal of Comparative Politics, (Vol 3, No 2, July 2010) at 92.

Committee's membership, it arguably gives it as an institution with an electoral mandate and has the ability to "claim the importance of representative democracy"[96] while in contrast "non-elected political actors like the Commission … may search for alternative or complementary sources of legitimacy in civil society involvement."[97] The Commission continues to emphasise the importance of citizen involvement in the decision and policy-making process, by attempting to institutionalise political participation. Despite this, any form of instituionalised participation, other than direct participatory democracy will arguably be unable to address the criticisms relating to the democractic deficit.

However, for the EU as a whole, trying to establish itself as a supranational organisation with all the appearances of a national federal organisation, it crucially lacks one important factor. The EU fails to create one united group of EU citizens. In order for the theory of constituent power to apply at the EU level, it is necessary for a single constituent group to exist in order to exercise the constituent power over the EU. I will now discuss the ways in which the EU has attempted to create this concept of the European citizen, and how processes are in place that could help European citizens exercise constituent power over the EU.

IV. CREATING A EUROPEAN CITIZEN

While the EU has undergone significant reforms in strengthening its democratic cedibility, this has arguably only extended it in the area of representative democracy. The EU lacked significant aspects of representative democracy. In an attempt to solve this issue, the Treaty of Lisbon introduced one of its more important reforms (in terms of citizen participation), the European Citizens' Initiative (ECI). In order to fully explain the ECI, I will first look at the ECI's legal basis, before explaining the processes and how the ECI works. I will then look at what it means for democracy in the EU and how it represents a step towards creating a 'European citizenary'. I will then assess whether the ECI could lead to constituent power being exercised by European citizens.

[96] Ibid.
[97] Ibid.

The concept of individual European citizens must be established and recognised, before any attempt for the citizens to exercise constituent power over the EU can be made. European citizens, as the constituent subject of the EU, could arguably possess greater power to amend the framework of the Member States. This is because in a democracy "the legitimacy of the constitutent depends on it being the expression of a sovereign decision of the people, because a democracy only recogni[s]es the entire citzenry as the proper bearer of constituent power."[98] The EU has established various methods for engaging citizen participation in order to increase its democratic legitimacy, and includes the concept of 'European citizenship'. The Treaty of Maastricht[99] introduced European citizenship and held that "[e]very person holding the nationality of a Member State shall be a citizen of the Union."[100] The Treaty of Maastricht clearly sets out the rights and duties that are imposed upon Union citizens. Rights and duties imposed include "the right to more and reside freely within the territory of Member States"[101], and the "right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State."[102] Furthermore, the Treaty of Maastricht extended to Union citizens the entitlement of "protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State."[103] The Treaty also provides that every citizen of the Union "shall have the right to petition the European Parliament [and] may aply to the Ombudsman[.]"[104] These rights afforded by the Treaty of Maastricht provide an important basis for the development of a Union citizen, by having common and indivisible rights afforded to all citizens whose countries are Member States of the EU.

The concept of citizenship, whether in the EU context or generally, is a source of debate and contention. While citizenship "remains a contested concept, … one understanding of citizenship emerged from [W]estern Europe[:] a homogeneous poltiical status within the context of a state."[105] Using this understanding of citizenship, there are two

[98] C Schmitt *Constitutional Theory* (Duke University Press, Durham and London, 2008) at 138.
[99] Treaty of Maastricht, (signed 7 February 1992, entered into force 1993).
[100] Ibid, art 8(1).
[101] Above n 99, art 8 a(1).
[102] Above n 99, art 8 b(1).
[103] Above n 99, art 8 c(1).r
[104] Above n 99, art 8 d.
[105] W Mass *Creating European Citizens* (ed, Rowman & Littlefield Publishers, Inc, United States of America, 2007) at 2.

important aspects that create the concept of citizenship. Firstly, a homogeneous political status, and secondly, in the context of a state. A homogeneous political status would be single citizenship resulting from being a member "of a legally uniform (usually naitonal) group of people, with attendant rights and duties."[106] This concept is challenged when attempting to apply it into the EU's context because "the notion of an overarching EU citizenship is jarring as long as EU member states continue to exist as states and the EU itself is not a state."[107] In an attempt to limit the impact of growing EU influence, under the Treaty of Maastricht Member States sought to limit the importance attached to Union citizenship. The Member States did this by ensuring that "nationality remain[ed] dependent on member state citizenship[.]"[108]

For the EU to be a truly successful transnational democratic organisation with citizens interests at the heart of its actions, it needed to ensure that it had a system of universally applicable rights for all citizens of EU Member States. Maastricht was the constitutional moment that created the concept of the 'EU citizen' but further work was needed to further solidify and codify the rights of the EU citizen. The changes that the Maastricht Treaty introduced "unleashed a further flurry of debates and decisions in the ongoing process of creating European citizens."[109] Following further consolidation of the citizen concept by the Treaty of Nice, the European Parliament accurately described the exisiting state of European citizenship as "a dynamic institution, a key to the process of European integration [with the goal of] "gradually … supplement and extend the rights"[110] of European's national citizenship. The gradual extension of citizenship is crucial for the development of the creation of a unified constituent body.

Extending the social rights of Europeans was identified as necessary for further fostering of a shared European identity. As a result of the limited EU budget allocated to it through Member States' contributions, the EU supports European citizens' rights through regulation of the implementation of these rights at the national level. EU regulation in this field has been so effective and exceed the most advanced national

[106] Ibid.
[107] Ibid.
[108] Above, n 105 at 46.
[109] Above, n 105 at 61.
[110] European Parliament, 1998 in W Mass, above n 105 at 62.

measures in the level of protection they afford, causing social rights activists to pursue a European rather than national strategy"[111] because they expect European citizenship to provide a more effective resolution. EU social rights provide one of the most tangible examples of the benefits of European citizenship, and this has been supported by decisions in the Court of Justice of the European Union (then the European Court of Justice).

The first decision, case C-85/96[112], referred to the Court from the State of Bavaria asked whether a national of another Member State was entitled to a child-raising allowance. Originally, Maria Sala's application was refused because she did not have German citizenship, a residence entitlement, or a residence permit. In response, the ECJ ruled that benefits granted to "persons fulfilling certain objective criteria … fall within the scope *ratione materiae* of Community Law as a family benefit within the meaning [of Community law.]"[113] Furthermore, the ECJ ruled that "Community law precludes a Member State from requiring nationals of other Member States … to produce a formal residence permit … in order to receive a child-raising allowance."[114] This ruling is significant because it provided that regardless of national citizenship identity, the rights of the EU were applicable regardless of that citizen's place of residence by virtue of their Union citizenship.

The second case brought before the ECJ concerned a French citizen, Grzelcyk, who had moved to Belgium to study.[115] Initially granted a student financial allowance, this was later refused "on the ground that the legal requirements for the grant of the [payment] … in particular the nationality requirement, had not been satisfied [because Grzelczyk] is an EEC national enrolled as a student."[116] As a result of the potential wide-reaching consequences the ECJ's decision would have on Member States obligations, several Member States submitted to the Court different Government's interpretation of Union law. The Belgian and Danish governments argued that despite the entry into force of the TEU and the Treaty of Amsterdam, "[c]itizenship of the Union does not mean that Union

[111] Above, n 105 at 64.
[112] Case C-85/96, *Maria Martine Sala v Freistaat Bayern*.
[113] Ibid at I – 2727.
[114] Above, n 112 at I – 2728.
[115] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve*.
[116] Ibid at I – 6236.

citizens obtain rights that are new and more extensive than those already deriving from the EC Treaty … [and the] principle of citizenship of the Union has no autonomous content[.][117] Whereas the Portuguese Government stated that the rights introduced by the TEU, "nationals of the Member States acquired the status of citizens of the Union … [and the benefits provided to workers] ought also to be extended to all citizens of the Union, whether or not they are workers within the meaning of [Regulation No 1612/68]."[118] In response, the ECJ ruled that "Union citizenship is destined to be the fundamental status of nationals of the Member States [entitling them[to enjoy the same treatment in law irrespective of their nationality[.]"[119] The ECJ held that payment was required because if it was referred, would be contrary to the provisions of the freedom of movement for workers within the EU. Both the Sala and Grzelczyk decisions upheld the right to equal access to social benefits to anyone by virtue of their holding EU citizenship. As the experience of the ECSC demonstrated, closer economic relationships provided the basis for deeper political integration. So too through increased social rights of European citizens the EU's institution provide a pathway for greater integration of citizens at the transnational level.

P. Towards Greater Citizenship Rights and Powers

Significant progress had been made in recognising Union citizens' rights. The ways in which the EU has gradually increased the recognition of citizens within the overall EU policy and law-making framework has been highlighted. This paper will now look at how citizens of the EU could arguably begin to exercise greater influence over EU institions and the legal process. In his book, Bohman suggests ways in which the EU could undergo further reforms to make its transnational authority truly democratic. As a result of the rights and powers established in the Treaty of Maastricht, the "normative powers of EU citizens are constitutionally independent of their powers as citizens of member states."[120] Bohman argues that for the EU to gain greater democratic legitimacy, it would have to "reform itself in such a way as to create conditions for

[117] Above, n 115 at I - 6239, 6240.
[118] Above, n 115 at I - 6240.
[119] Above, n 115 at I - 6242.
[120] J Bohman *Democracy across Borders From Demos to Demoi* (ed, The MIT Press, Massachusetts, 2007) at 136.

deliberative and popular legitimacy [and would] cease to be merely a potentially innovative structural model and become an actual democratic political community."[121]

At the time of Bohman's writing, the EU was in the middle of its constitutional discussions in response to the failed Draft Constitutional Treaty. He argues that in constitutional democracies there are three different aspects of democratic legitimacy that form part of the constitution-making or constitutional change process. These three types of legitimacy work The three types of legitmacy, suggested by Bohman are; formal legitimacy, popular legitimacy and deliberative legitimacy. The formal legitimacy process of reform "is found in the institutional authority to initiate it, where this authority can be specifically delegated to some particular office or constitutionally specified in some expliciit amendment procedure."[122] Popular legitimacy is "the extent that the people have genuine opportunities to shape or assent to … reform."[123] Finally, democratic reform that maintains deliverative legitimacy offers citizens the opportunity to exert "an influence over the process of drafting the constitution or parts of a constitution."[124] These three forms of legitimacy represent various processes highlighting how constitutional change may take place, using democratic pre-existing concepts. They are important as they seek to explain how democratic change may take place.

Bohman examined the Draft Constitutional Treaty and found that the "proposed EU constitution codifies rather than improves the status quo and thus does not respond to the popular dissatisfaction with the current EU structure."[125] Despite being written before the reforms brought in under the Treaty of Lisbon, Bohman recognises the key difficulty of democratic constitutional reform in the EU "since there is not 'People" that [the EU] is supposed to organize into a subject."[126] The lack of a unified subject, and effective representation for the subjects further compounds the difficulty of bringing about effective democratic reform. In response to this it was sugested that "the processes that form the popular will [should] be distributed across the various parts of

[121] Ibid at 138.
[122] Above, n 120 at 139.
[123] Ibid.
[124] Ibid.
[125] Above, n 120 at 140.
[126] Ibid.

the constitutional structure."[127] The reforms of the Treaty of Lisbon went some way to reorganising the EU's legislative structure, however the "challenge of democratic reform is that citizens have to appeal to normative powers that are not already constituted in some institutional structure."[128] In order for citizens to utilise the democratic authority and constituent power, "they must first appeal to their intrinsic democratic authority to recreate those institutions that constitute their normative powers in the first place."[129] Bohman argues that only by doing this can citizens overcome institutional forms of domination. The institutional structure of the EU requires Member States input in any Treaty reforms, but Boham proposed various ways in which EU citizens could become intrinsic in the legislative and constitutional process. It is clear the any form of democratic and institutional reform of EU law is a protracted process requiring many different steps, but by involving citizens can add a greater level of legitmacy to the EU's institutions' democratic claims.

The EU in its current form provides a constitutional framework for accountability and its "explicit recognition of political rights as human rights invests all those affected by authoritative decisions with the normative powers and opportunities to exercise voice, including rights of participation."[130] As should be clear, the extent of participation is arguably quite limited but persistent reforms have sought to develop the level of European citizen participation. It is further suggested that "the main criterion for successful constitutionalization of the EU is whether or not it can democratize the transnational polity just as representative institutions previously democratized the constitutional state, by making its political agents more accountable and diverse."[131] The EU requires a fundamental change from its current arrangement of delgated legislative authority and executive decision-making power.

Q. Democratic Participation in the EU

Throughout its establishment and constant reforms, the EU's institutions have worked to create and solidify the notion of the European citizen. Significant work has been done

[127] H Richardson, *Democratic Autonomy: Public Reasoning and the Ends of Policy* (Oxford University Press, Oxford, 2002) at
[128] Above n 120 at 141.
[129] Ibid.
[130] Above n 120 at 148.
[131] Above n 120 at 154.

in the areas of social and human rights that complement the EU's free market principles. However, citizen's political standing at the EU remains weak. In response to this and the continuing problem of the alleged democratic deficit, each new treaty attempted to address this democratic deficit problem "by further empowering the European Parliament, first through direct elections and then gradually through increasing its legislative role until the Treaty of Lisbon 2009 made it a co-legislature[.]"[132] As the only directly-elected Union institution, the European Parliament has a significant interest in ensuring that the views and opinions of citizens are as effective as possible in the governing of the EU. While the addition of the co-legislative procedure was a seen as a significant achievement for advancing the authority and power of the European Parliament, the Treaty of Lisbon provided for another form of participation that would allow European citizens to contribute and participate in the EU's democratic life in an even more direct way than had previously been possible.

R. Direct European Citizen Participation

The execution of constituent power, as argued by Carl Schmitt, is "the transformation of the will of the constituent subject into law."[133] In order for the constituent subject to initiate the transformation of will into law, and the exercise of constituent power to take place, "something, some sort of political act(s), must occur that results in the initiation of constituent activity."[134] It is my argument that the inclusion of the ECI in the Treaty of Lisbon reforms represents the institutional and political act that provides the precursor for European citizens to engage and give effect to their constitutent power as citizens of the EU.

Article 11 TEU provides for citizens involvement in, and participation, in the EU's activities. Specifically, Article 11(4) gives European citizens the opportunity to invite the Commission to submit a legislative proposal for EU action. Article 11(4) allows for a set number of European citizens from Member States to "submit any appropriate proposal"[135] for "the purpose of implementing the Treaties."[136] The TEU provides for

[132] Bleddyn Davies "Giving EU Citizens a voice: Regulation 211/2011 on the EU Citizen's Initiative" Journal of Social Welfare & Family Law Vol. 33, No 3, September 2011 at 289.
[133] Above, n 47 at 175.
[134] Ibid.
[135] TEU, Art 11(4).
[136] Ibid.

the legal basis of the citizens initiative, commonly known as the European Citizens' Initiative (ECI). In conjunction with Article 11(4), Article 24 of the TFEU provides the legal basis for how the ECI must be implemented, specifically by requiring the "European Parliament and the Council [to] adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 [TEU.]"[137] The following section of this paper will describe and outline the technical and legal requirements of the ECI, and the value and potential impact the ECI could have on the EU's democratic system as it currently exists. I will then argue that the ECI provides a starting point for EU citizens to utilise their constituent power with the potential of altering the EU's constitutional and Treaty foundations.

S. The Legal Basis of the European Citizens Initiative

Article 11 TEU provides the legal basis for the ECI. Article 11 seeks to reinforce the concept of the EU as an organisation that maintains open and democratic processes. The EU seeks to foster participatory democracy by ensuring that the "institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action."[138] As we have seen, this opportunity to make known, and exchange views exists in theory, but is quite limited in practice. Article 11 requires that the ECI is supported by a minimum of one million European citizens. However, there are a number of formal legal requirements that must be met before an ECI can be submitted to the Commission for consideration.

To give effect to the requirements for the ECI under the TEU, the Council and the European Parliament adopted Regulation 211/2011 which set out the specific requirements for citizens who want to organise and submit an ECI. The ECI is defined under Article 2(1) in similar wording from Article 11 TEU. It states that an ECI proposal may be submitted where it "has received the support of at least one million eligible signatories coming from at least one quarter of all Member States."[139] An important part of the initiative is the definition of who is eligible to support an ECI proposal.

[137] TFEU, Art 24.
[138] TEU, art 11(1).
[139] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, Art 2(1).

Regulation 211/2011 defines signatories as "citizens of the Union".[140] Citizens of the Union refers to anyone who holds the citizenship of an EU Member State. This represents a clear example of a unique political power that is only afforded to Union citizens and provides another way the EU has worked to enhance the concept of the European citizen to one that includes greater political power and the opportunity to "exercise their rights across borders."[141]

For citizens rights to be exercised using the ECI, a number of strict criteria set out under Regulation 211/2011 must be met. The requirements are contained under Article 3 of Regulation 211/2011, and I will summarise these requirements. The organisers of an ECI "shall be citizens of the Union"[142] who are also entitled to vote in European Parliament elections. The organisers of an ECI are then required to form a citizens' committee of "at least seven persons who are residents of at least seven different Member States."[143] This requirement helps to provide legitimacy to the argument that if the organising committee represents a number of different Member States, this suggests that the proposal that an ECI is suggesting is representative of a shared view throughout the EU.

Once the requirements of Article 3 have been fulfilled, and before signatures are collected, the organising committee must register the ECI with the Commission. The Commission is required to register a proposed ECI provided the organisers have fulfilled a further set of specific requirements about the proposed ECI. Organisers must ensure that; a citizens' committee has been formed and contact persons designated,[144] the proposed ECI does not "manifestly fall outside of the Commission's powers to submit a proposal for a legal act,"[145] the proposed ECI "is not manifestly abusive, frivolous or vexatious,"[146] and the proposed ECI is not manifestly contrary to the values

[140] Ibid, Art 2(2).
[141] Maximilian Conrad, "The European Citizens' Initiative. Transnational Democracy in the EU at last?" Stjórnmál & Stjórnsýsla 1. tbl.,7. árg. 2011 (5-22) Fræðigreinar at 6.
[142] Regulation 211/2011, Art 3(1).
[143] Ibid, Art 3(2).
[144] Regulation 211/2011, Art 4(2)(a).
[145] Regulation 211/2011, Art 4(2)(b).
[146] Regulation 211/2011, Art 4(2)(c).

of the Union."[147] If the Commission considers that a proposal does not fulfil any of these requirements, it is required to refuse the registration of that proposal.

After assessing the regulatory requirements established under Regulation 211/2011, it is clear that the EU is working to broaden the ability of European citizens to enter into the political decision-making process. The ECI provides a straightforward process to enable European citizen's to express their views in a way that was previously not possible. However, because of the need to strictly adhere to the procedural requirements of the Regulation it suggests a degree of reluctance on the part of the existing institutions to cede too greater power to citizens to initiate legislative proposals.

T. Who Cannot offer Support in an ECI

Article 11(4) TEU requires that in order to agree to a proposed initiative, a person must be a citizen of a Member State. Regulation 211/2011 clearly sets out the exact participatory requirements for citizens. It is important to note that Regulation 211/2011 excludes a large group of people who live within the EU. Article 3(4) sets the eligibility requirements to support an ECI by specifying that "signatories shall be citizens of the Union and be of the age to be entitled to vote in elections to the European Parliament."[148] While this is a very broad inclusion, it totally excludes the ability of third country nationals from supporting a proposed ECI. It is suggested that this total exclusion of third country nationals to support an ECI "might seem difficult to square with the Union's own longstanding aspiration of treating at least long-term resident TCNs on an equal footing"[149] as European citizens. This exclusion could reflect "a deliberate constitutional choice about the underlying role of the new CI"[150] as an institutional mechanism in the political decision-making process of the EU. Dougan argues that the ECI's purpose is "not only to offer fresh channels for public participation … but also to foster a greater sense of European identity."[151] This attempt to foster greater "European-ness" is extremly important as it represents another way in which

[147] Regulation 211/2011, Art 4(2)(d).
[148] Regulation 211/2011, Art 3(4).
[149] Michael Dougan "What are we to make of the Citizens' Initiative?" *Common Market Law Review*, 48: 1807–1848, 2011 at 1821.
[150] Ibid.
[151] Ibid.

the EU is attempting to develop greater importance and develop the benefits related to the possession of EU citizenship in addition to national citizenship. This development in EU law reflects the EU's mission "to promote a stronger "European political identity""[152] which I suggest, in time, could lead to the effective development of a coherent constituent body that has the ability to alter the constitutional framework of the EU.

U. What is the ECI's purpose

Now that the regulatory requirements for the establishment and organisation of an ECI have been described, it is necessary to determine the exact scope of what an ECI can achieve. This includes determinig what an ECI cannot do. Article 11(4) TEU explicitly sets out that any proposed ECI can only invite the Commission to act "within the framework of its powers."[153] In otherwords, proposed legislative acts have to be "required for the purpose of implementing the Treaties."[154]

What is the purpose of the ECI? "The ECI basically has a normative purpose."[155] Its purpose is to propose a suggestion for legislative action by the competent EU institutions. This action has the ability to be be either positive or negative in its effect. It can "promot[e] a new legal act, amend[] an existing one, or abolish[] another."[156] The ECI is the result of a legislative action by the EU and its current form, does not form part of the EU's constitutional arrangements. Furthermore, according to Andreas Auer, it "does not give citizens the right to launch the process of amending the constitution."[157] This statement is based on the interpretation of the wording of the Article 11. The TEU clearly states that ECI's may only be proposed for changes in areas where that are within the framework of the Commission's powers to act. If, at this stage, an ECI is not capable of bringing about constitutional amendments it is necessary to establish what type of reforms an ECI proposal can bring about.

V. What can an ECI proposal do

[152] Above, n 149 at 1822.
[153] TEU, Art 11(4).
[154] Ibid.
[155] Andreas Auer "Representation – European Citizens' Initiative" *EuConst 1 (2005)* at 81.
[156] Ibid at 82.
[157] Ibid.

The ECI may therefore "be related to any area in which the Union, according to the Constitution, has competencies."[158] While Auer refers to the Draft Constitutional Treaty, this can be interpreted to mean the reforms to the TEU under the Treaty of Lisbon as part of the constitutional treaties. An ECI may ask the Commission to submit a proposal for a legal act using any of the legislative options available to the Commission.

The specific legislative acts are provided for under the TFEU. Article 288 provides for three binding, and two non-binding legislative acts. These legislative acts are "regulations, directives, decisions, recommendations and opinions."[159] Regulations "shall have general application [and] shall be binding in its entirety and directly applicable in all Member States."[160] This power of direct effect, similar to legislation based by a national parliament, can be compared to a decision of an EU institution. In contrast to the universal application of regulations, a decision is binding in its entirety. A decision "specifies those to whom it is addressed [and] shall be binding only on them."[161] Article 289 provides that "[t]he ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission." When deciding which would be the most appropriate form of legislative act for an ECI to take there must be consideration of what a proposal is seeking to achieve, but is it for the organising committee, or the Commission to decide? Auer suggests that "one would expect that the decision as to the appropriate form … could only be taken by the organ which has the sole power to initiate legal acts"[162], the Commission.

This reflects a strict interpretation of the extent of an ECI. In contrast, the wording of Article 11 (4) it is suggested, was drafted "without much opportunity … for public scrutiny and reflection"[163] which means that "the potential scope of the [E]CI is … both broad and yet constricted."[164] This scope is wide because an ECI is "an invitation to the

[158] Ibid.
[159] Treaty on the Functioning of the European Union, Art 288.
[160] M Horspool & M Humphreys *European Union Law* (6th ed, Oxford University Press, Melbourne, 2010) at 13.
[161] Ibid.
[162] Above, n 156.
[163] Above, n 149 at 1834.
[164] Ibid.

European Commission to propose a law in a field where it has the power to do so[.]"[165] As a result, this means that an ECI proposal could ask the Commission to exercise its power of initating both a legislative procedure as well as the adoption "of non-legilslative measures or indeed any other form of Union legal act (such as non-binding recommendations)."[166] The question of what type of proposal can be submitted to the Commission for a suggested legal act depends on the interpertation of Article 11(4) which requires that the Commission must "submit" a proposal for Union action. The requirement of the Commission to submit a proposal suggests that an ECI is restricted to decision-making procedures that the Commission initiates, but requires other institutions to pass. On this interpretation, it would exclude acts of which the Commission may act autonomously. Dougan suggests that the difficulty exists in determining to what extent the ECI may request a proposal of any nature is limited because of the wording of Article 11(4) TEU. Specifically, that an ECI is "required for the purpose of implementing the Treaties." He continues by arguing the choice of wording in the drafting of Article 11(4) means that it is debatable whether it "was intended to rule out calls for actually changing, rather than merely implementing, the current Treaties[.]"[167]

Supporting the idea that that an ECI proposal could ultimately work to alter the Treaty provisions relies on a joint interpretation of Article 11(4) TEU in conjunction with Articles 2 and 3 TEU which set out the EU's values and objectives. If an ECI had the ability to do this, it could "well necessitate the amendment of existing Treaty provisions or the introduction of new ones[.]"[168] This would be a significant step in the development of participatory democracy in the EU and would work to move power away from the Member States and place it in the hands of European citizens.

W. The ECI – Developing the European Citizen and Participatory Democracy

The importance of the ECI cannot be understatated. It is working to enhance the powers of European citizens through active participation in the democratic life of the

[165] European Commission "Guide to the European Citizens' Initiative", (European Commission, Secretariat-General, European Union, 2011) at 4.
[166] Above, n 163.
[167] Above, n 149 at 1835.
[168] Above, n 149 at 1836.

Union. This paper has already discussed the ways in which EU institutions have sought to provide effective representative democracy for EU citizens. However, only through participation and involvement can European citizens become truly involved in the democratic process which would further work to develop the concept of a 'European citizen' capabable of exercising constitutent power.

This paper has focused so far on the legal requirements of an ECI and the theoretical discussion of potential changes an ECI could have on the Treaty system. I will now briefly highlight the existing methods of participatory democracy in the EU, and how the ECI adds a significant opportunity for civil society participation. One existing form of participatory democracy in the EU is the Commission's exisiting practice of consultation during the agenda-setting phase of new legislation. This consultation "takes place prior to the formal legislative process and is testimony to the role of civil society in the agenda-setting phases of the legislative process."[169] In addition to the Commission's consultation process, two further rights exist for participation. These are, a citizen's right to petition the European Parliament directly, and the right to complain to the European Ombudsman.

The Right to petition the European Parliament allows EU citizens to suggest "improvements or changes that might address existing problems."[170] Petitions can be submitted to highlight that a new law or action is needed. This is a useful tool for individual citizens to draw attention to particular issues but lacks features of the ECI which makes the ECI a much more valuable and effective method of engaging with European decision makers. The ECI is arguably a more effective form of participatory democracy because after receiving a petition, "the European Parliament is not obliged to act on any given petition".[171] Article 20(d) of the TFEU provides for this right to petition the European Parliament. Another restriction on the individual petition is that citizen's may petition only "on a matter which comes within the Union's fields of activity and which affects him, her or it directly."[172] The right to petition presents a more indirect form of citizen participation, in can only be used to call on the European

[169] Above, n 141 at 13.
[170] Ibid.
[171] Ibid.
[172] TFEU, Art 227.

Parliament "to request a proposal from the Commission, while a successful [ECI] directly obliges the Commission to act."[173] Additionally, the European Ombudsman allows for European citizens to lodge official complaints about perceived cases of mal-administration in the EU institutions. However, the powers of the Ombudsman are even more limited in how they can influence EU legislation. The ultimate power the Ombudsman has is submit a report to the European Parliament, and this measure is only taken as a final option. All three of these elements of participatory democracy show a willingness of the EU to engage with European citizens. However, "none of them gives citizens the opportunity to play a direct role in initiating EU legislation."[174] The ECI presents a new method of citizen participation at the EU level.

X. What Impact does the ECI have on the Demoratic Life of the EU

Despite debate as to the extent to which an ECI proposal may influence or change the EU political system, it is undisputed that it will contribute to the development of policy and legislation. Analysis of Regulation 211/2011 makes it clear that the Commission retains significant control throughout the ECI process. This is because "it is the institution which will be affected to a great extent by this new instrument of participatory democracy."[175] For example, at the beginning of the process, during the registration of an ECI proposal, the Commission might be required to "judge politically sensitive issues [and whether] these [proposals] might not even stand a chance of reaching the one-million threshold."[176] In addition to having to provide administrative support for ECI proposal organisers, the Commission will be under scrutiny from interest groups and will "will have to find a balanced position for itself on the scale going from total submission towards total control."[177]

Total control over an ECI proposal would mean that "the Commission would be refraining from putting ECIs through, even if they met all the formal requirements

[173] Above, n 141 at 13.
[174] Above, n 141 at 14.
[175] Dorota Szeligowska & Elitsa Mincheva "the European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis" (5 October 2012) <http://dx.doi.org/10.1080/15705854.2012.702572> at 280.
[176] Ibid.
[177] Above, n 155 at 83.

purely at its own discretion."[178] This would create a situation where the Commission became a "mere connecting link"[179] between European citizens and the legislative institutions of the EU. The opposite total control position would "mean that the Commission would be refraining from putting ECIs through, even if they met all the formal requirements, purely at its own discretion."[180] As Szeligowska and Mincheva recognise, it is important for the Commission to find an appropriate balance between these two positions because if the Commission was to totally submit, the Commission's position would arguably deteriorate, while the opposite could "degrade the newly implemented procedure [and could] reinforce the perception of [the Commission] as a technocratic, distant, institution."[181] An appropriate balance between these two is important because of the influential role that the Commission has throughout the entire ECI process. Mehr Demokratie's response to the Commission on the ECI effectively summarises this position.

> "[The] ECI offers significant possibilities for the development of European civil society and of European public space and thus for democracy itself at the EU level – as long as the Commission, as the intended recipient of such intiatives, makes active use of the opportunity the ECI presents for engaging intensively with the citizens."[182]

If the Commission does work to actively engage with citizens throughout the ECI process and recognises the ECI process as a significant tool for participatory democracy in the EU.

Furthermore, a useful consequence of the ECI as an institutional tool would be if a proposal is made that is similar to something on the Commission's own agenda. With the Commission working towards a policy objective, combined with "one million citizens signing such an initiative could be a strong argument for the Commission in its negotiation with the Parliament and the Council."[183] With an ECI supporting a Commission proposal, the ECI could become a powerful tool for the Commission to use to its advantage in the "case of opposition with the Council [as] representatives of

[178] Above, n 175 at 281.
[179] Above, n 155 at 83.
[180] Above, n 175 at 281.
[181] Ibid.
[182] Mehr Demokratie "Response by Mehr Demokratie e.V. on the EU Commission's Green Book on the European Citizens' Initiative" (19 January 2010) <http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/mehr_demokratie_en.pdf>.
[183] Above, n 175 at 282.

national governments … might not find it easy … to go against the voice of civil society."[184] Pressure such as this provides another strong example of how the ECI is slowly changing the constitutional structure of the EU. Whereas previously the legislative process was mainly between the Commission, the Council, and the European Parliament, by adding the ECI as an effective fourth institution with input, the existing institutions and the Member States would be extremely unwise to ignore a proposal that has gathered significant support throughout the EU.

Y. How the ECI process creates the European Citizen

Several specific elements work to further contribute to the creation of the European citizen as a separate and combined group of citizens from throughout the Member States. The 'emotional element' gives European citizens "the feeling that they are part of a normal society and they participate effectively in the decisions-making process[.]"[185] This is done by making European co-initators of legislative proposals, a very powerful and influential tool. Furthermore, the 'cognitive element' helps citizens to realise that their voice and opinion is being heard "through the medium of initiatives and is taken into consideration"[186] by the EU institutions. Finally, the 'political element' is the political reality for the EU institutions that the "citizens represent the new political "actor" who joined the European institutions in drafting and adopting … the legislation of the EU."[187] If European citizens possess the knowledge and certainty of being able to amend or implement European legislation, this lends support to continuning the development of the Euoprean citizen identity, as more than just something that is associated with the economic aims of the EU.

By utilising the ECI, it is hoped that citizens will understand and recognise that their European citizen identity is unique and important, capable of influencing real and meaningful change at the EU level.

[184] Ibid.
[185] Oana – Mariuca Petrescu "Strengthening the Idea of "By Citizens, for Citizens" in the Context of the European Citizens' Initative – Brief Analysis of Initiatives –." Romanian Journal of European Affiars Vol 14, No. 2, June 2014, at 9.
[186] Ibid.
[187] Ibid.

Z. Citizens influencing the agenda – an analysis of European Citizen Initiatives to date

To gain a practical understanding of how the ECI process may impact and possibly change the EU's constitutional system, I will now discuss and analyse some of the ECI proposals that have been submitted to the Commission. By doing this it will provide an understanding of the issues that European citizens consider important, and to what extent the change on the EU's laws and policies these ECI's have had.

As of 27 May 2014, there have been 8 ECI's "registered on the offical website of the European Commission."[188] Reflecting the desire for ECI's to help create European citizens, certain ECI proposals registered since April 2012 until May 2014 "have been translated into almost or into all langauges"[189] of the EU. Depending on the nature of the ECI and the intended goal, the availability of the ECI in different languages highlights how effective organising committees may be at gaining support, or attempting to gain support, throughout the EU. While individual ECI's may not on the first analysis appear to have significant constitutional aspirations or seek to alter the fundamental structure of the EU, by looking at ECI proposals objectives, the desire for further integration by European citizens becomes clear.

For example, the first ECI registered on the Commission's website is called "Fraternité 2020 – Mobility. Progress. Europe (F2020)".[190] Despite being unable to gain the required number of signatures to support the initiative, the proposal reflected the belief that the EU needed "to re-focus its integration efforts on the level of individaul European citizens to build a genuine European Union of people, not states."[191]

Another initiative that is aimed at promoting fundamental citizens rights is the "Let me vote!"[192] initiative. The 'Let me vote!' initative's main objective is "to strengthen the rights listed in Article 20 (2) TFEU by granting EU citizens residing in another Member

[188] Above, n 185 at 17.
[189] Ibid.
[190] Fraternité 2020 (9 May 2012) <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000001>.
[191] Fraternité 2020 <http://en.fraternite2020.eu/summary.html>.
[192] Let me vote (28 January 2014) <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2013/000003>.

State the right to vote in all political elections in their country of residence, in the same conditions as the nationals of the State." The organising group, Europeens Sans Frontieres, states that the main reason for this particular initiative was the need "to reduce the existing democratic deficit by ensuring a better political mobility to all the European citizens to exercise freely their right to vote in the local and European elections … on a permanent basis."[193]Similarly, Europeens Sans Frontieres argues that if Europeans were given the right to vote in all elections of the country in which they are resident, this would "give each European the feeling of a common destinty, of being at home where he or she is within the European Union."[194] The group states that it was its desire to "promote fuller European citizenship" that led to its decision to launch the 'Let me vote!' ECI.

This initiative was was registered on the Commission's website on 28 January 2013, and the period for the collection of signatures has closed. According to the official register of ECI's it is unknown whether this initiative has been submitted to the Commission and "whether the organisers managed or failed to collect the required number of signatures."[195]

The two previous example while both were ultimately unsuccessful to achieve the stated objectives, they highlight the existence of awareness of citizens who desire greater rights as European citizens, with the goal of "strengthening their participation in the European political life."[196]Petrescu strongly advocates that the ECI is an appropriate tool to strengthen European participatory democracy and believes that "the proper implementation of this instrument will bring only benefits for the European Union … and for almost 500 million citizens … acting as "co-authors" in the European legislative process[.]"[197]Furthermore, it is believed that the ECI has the chance "to become a policy-creating instrument that will impove citizens' influence in the EU political context by

[193] Philippe Cayla & Catherine Colonna, "Europeans without borders" (3 April 2012) Le Monde < http://www.letmevote.eu/elements/LeMonde3avril2012eng.pdf>.
[194] Ibid.
[195] Above, n 185 at 20.
[196] Above, n 185 at 22.
[197] Ibid.

reinforcing the exchange of civic competence and fostering civic inclusion at the supranational level."[198]

AA. Opposition to the European Citizens' Initiative

Throughout this paper, the extent to which citizens of EU Member States has been analysed and discussed. The ECI has been identified as a significant way for increasing democratic participation of European citizens throughout the EU. However, there was not universal support for the idealistic democratic goals many held for the ECI. Before the ECI process was implemented, it was identified that the possibility exists "that if too many initiatives have to be rejected for formal reasons, the ECI may lead to increased frutration with, rather than to an enlightened understanding of, the EU as a political system."[199]

During the ECI policy development stages concerns about the ECI were raised. These included the fear "that this approach would raise expectations that would be difficult to meet."[200]As well as "the eternal question of the tension between representative and direct democracy"[201]Finally, "it was feared that the [ECI] could be used by well-organised interest groups to promote solutions to their benefit."[202] These points were later addressed by the Commission, in the form of Regulation 211/2011, but they highlighted the difficulties faced by the EU institutions during the implementation stages of the ECI. Furthermore, with the implementation of the ECI, fears existed that it could work to reduce the importance of other institutions, primarily, the European Parliament. Additionally, it is the responsibility of the European Commission "to defend the legal order of the EU."[203] This includes the Commission recognising areas that are outside of the EU's competencies to act, so initiatives concerning "Abortion, euthanasia or legislation of 'soft' drugs will be considered inadmissible[.]"[204] Another possible problem was identified as potentially arising if an ECI was proposed on a subject that

[198] K Hristova-Valtcheva "European Citizens' Initiative: Is a Bottom-Up Process Possible?" in R Kolarova and K Hristova-Valtcheva (eds) *Citizens' Europe? Reflections on the Implications of the Lisbon Treaty* (Bulgarian European Community Studies Association, 2008) at 116.
[199] Above, n 141 at 14.
[200] Rafal Trzaskowski "The European Citizens' Initiative: a victory for democracy or a marketing trick?" (2010) European View 9:263-266 at 264.
[201] Ibid.
[202] Above, n 200.
[203] Above, n 200 at 265.
[204] Ibid.

had been recently proposed by the Member States and the European Parliament. The problem arises if the Member States and the European Parliament thad found a solution to an issue which is also the subject of an ECI, although the solution adopted was different to that proposed by the ECI. If this were to occur, it would be necessary to determine "[w]hose claim should be more important to the European Commission[?]"[205] If an ECI option was preferred, the quesiton that remains is "[w]ould it not weaken the legimiacy of EU institutions?"[206] Now that the ECI process has been in effect for two years, I argue that these concerns while legitimate, have not eventuated in a situation where institutions such as the European Parliament, have been relegated in importance or influence.

V. *CONCLUSION* – The European Citizens' Initiative – Creating the European Citizen

This paper has sought to provide a critical reflection on an important aspect of the EU's democratic constitutional framework, the citizens of the EU who are affected by the decisions of the EU institutions and Member States. It has described the development of the EU towards creating greater rights and privileges for citizens in an attempt to foster a stronger sense of unity in Europe, of not simply Member States, but that of European citizens.

History has demonstrated that despite repeated efforts by the institutions and the Member States, citizens have rejected integration that appears to create European citizenship to the detriment of national citizenship. In a new attempt to help the integration process, the EU introduced the ECI as a tool to increase participatory democracy in the EU and provide citizen engagement in a way that has not been possible at the EU level. This article has argued that the ECI is a useful tool for addressing some of the short comings of EU democracy by allowing citizens to provide direct input in the crucial development of legislation stages.

While the constitutional structure of the EU as it currently exists can only be changed by the Member States through the existing treaty revision process, the ECI may serve as a

[205] Ibid.
[206] Ibid.

springboard for citizens to enhance their involvement in the constitutional process, through the exericse of their constituent power. The article suggests that only by developing a cohesive and united European citizen body, is constituent power possible.

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