



UvA-DARE (Digital Academic Repository)

Communication rights, democracy & legitimacy : the European Union

Hoffmann, J.

Publication date
2009

[Link to publication](#)

Citation for published version (APA):

Hoffmann, J. (2009). *Communication rights, democracy & legitimacy : the European Union*. Academic Publishing AG & Co. KG.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

TRANSITION I

As has been argued in the previous section, communication rights may be best understood as moral claims on the nurturing of an enabling environment for a certain quality of communication. To bring about such an environment public authority has a role to play when it comes to ensuring requirements such as pluralism of media, access to information and the proactive inclusion of all in public debate and dialogue. It has also been pointed out that despite many decades of political and scholarly discussion, the debate around communication rights is still marked by a lack of empirical research. Here, the impact of European integration on the environment within which communication within and among European Member States is taking place will be the subject of closer analysis.

Europe: an idea

European integration over the last decades is an expression of the wish for sustainable peace on the continent. Removing strategic resources such as coal and steel from the control of single nation-states (by means of establishing the European Coal and Steel Community (ECSC) of 1952) – especially Germany – after the experience of two consecutive World Wars inspired the first steps on the path of integration that ultimately led to the formation of the European Union.

So, surely the original incentive to start the process of integration was the hope to prevent more bloodshed. However, it is important to acknowledge that despite the deeply political objectives of the Schuman Plan that proposed the ECSC, from the outset the means of integration chosen have been almost exclusively economical. A functionalist logic lay at the core of that choice. The assumption of an automatic progression that would take federalist principles to create a supranational body concerning a specific area of the economy to “spill over” into other domains and eventually unite European states more broadly. In the words of the Schuman Declaration of May 9, 1950:

(...) there will be realised simply and speedily that fusion of interests which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions. By pooling basic production and by instituting a new higher authority, whose decisions will bind France, Germany, and other member countries, this proposal will

TRANSITION I

lead to the realisation of the first concrete foundation of a European federation indispensable to the preservation of peace¹

The logic that underpinned the choice to bind European powers together by means of mutual strategic economic interest has thus been primarily functionalist. The “balance of power” approach had made way for ensuring a legal structure built on the idea of “pooling power” to ensure peace on the continent. After the World War II an unprecedented period of peace has been enjoyed by the members of what has become the EU.

Subsequent events have furthered integration at a fast pace. After the initiative of a European Defence Community and a European Political Community had failed, the next significant step in the codification of European relations became the Treaties signed in Rome (1957) that established the European Economic Community² and the European Atomic Energy Community (EAEC or Euratom). In 1963, in a revolutionary decision, the European Court of Justice declared the Community legal order to be autonomous; another year later, the Court added its finding of supremacy of that order over its national counterparts.³ The notion of an “autonomous legal order” with an authority in its own right had been established. The Court was further to be the last arbiter when it came to the status of European law in relation to national law.

The growing amount of competences and institutions has been accompanied by the introduction of representative bodies (such as a Common Assembly created by the Treaty of Paris, 1951, which grew into the European Parliament⁴) to compensate the discrepancy between traditional interstate decision-making procedures and the sweeping consequences of direct effect of certain European regulations which effectuates the principle of supremacy.⁵

During the last decades several remarkable steps have been taken that have broadened as well as intensified the scope of cooperation in Europe and that have successively adjusted the institutional structure to keep up with the increasing ambitions of the project. After a difficult period during the 70s in which the integration process stagnated as a consequence of the oil crisis of 1973 and British reluctance, the 80s saw a further impetus for integration: the Schengen Agreement (1985 and 1990) about the abolition of border controls and a treaty amendment that led to the Single European Act (1986), which gave the aim of establishing a European internal market its legal reality, were important new developments. The various rounds of enlargement, monetary union and the creation of more far-reaching

competences and common institutions have gradually led to a formula for decision-making that supersedes a modus of close cooperation and, with the establishment of truly supranational institutions, has merged into a process of integration.

The pace and direction of integration has led the EU to gradually take over some of the core competences of the nation-state - such as monetary policy, but also policy concerning issues such as immigration or environmental protection - and simultaneously to create its own legal system that affects national legal systems.⁶

While the concept of indivisible sovereignty has lost much of its original meaning and international relations scholars are still struggling to deal with the emerging new structures adequately, the gradual transfer of authority to the supranational level is proceeding, Regulations and Directives are issued that alter national legislation, European courts deliver judgments that affect people's lives in all of the Member States and new countries are joining the Union.

Beyond the internal market

With the entry into force of the *Maastricht Treaty* (1993), Union citizenship became a legal reality (Articles 17-22) and has led to a rather surprising and unanticipated volume of case law.⁷ Notably, it was also in the *Maastricht Treaty* that the thus far *implicit* political aims of the EC were made *explicit* aims of the EU (Eijsbouts et al., 2004: 13). These aims are formulated in Article 11 TEU and place a responsibility on the Union "to safeguard [its] common values, fundamental interests, independence and integrity" and to "develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".

At the same time documents such as the *Charter of Fundamental Rights of the European Union*⁸ have indicated the acknowledgment that Europe's ambitious pace of integration requires certain basic tenets of legitimacy, while initiatives to "bring the Union closer to its citizens" have included efforts to improve the EU's institutional information policy, transparency and their service to the media.

Accordingly, the idea of a "People's Europe" - that has been around as a counterweight to a "Trader's Europe" exclusively concerned with the creation of a common market since the 70s - has gradually grown firmer roots in the discourse about the nature and future of the EU.

After the introduction of a common currency in 1999 and the average of qualified majority voting in the Council with the 2001 *Nice Treaty*, the 2004 *Treaty of Rome* that proposed a *Constitutional Treaty* that would fuse the EC and the EU Treaties (and thus abolish the current pillar structure) has marked the latest step in a development that has transformed the economic cooperative into a union that explicitly aspires to be more than merely an internal market. Establishing a framework for peaceful coexistence by using economic interdependence as a binding force has evolved into a common project of more political integration – an “ever closer Union”.

The most recent step in the process of constitutionalizing the EU has been initiated by the *Laeken Declaration* and the follow-up Convention on the Future of Europe (February 2002-June/July 2003), which produced the *Draft Treaty establishing a Constitution for Europe* that was stopped from entering into force by two popular no-votes in the French and Dutch referenda in 2005. Most recently, the ratification of the succeeding *Lisbon Treaty*⁹, which was to amend the existing Treaties rather than replace them with a constitution in order to retain the workability of the EU even with currently 27 Member States, has been stalled by the Irish no-vote of June 2008.

The shock and confusion after the backdrop of the constitutionalization process that have gripped Europe still remain firmly on the agenda and have given impetus for renewed reflection on its legitimacy deficit. This first failure to adopt a constitutional document is but the most recent indication of a fundamental deficit. Even though the Convention itself had been set up as a deliberative body (Magnette, 2003), the importance and symbolic character of such a document mandated a high degree of public debate and involvement. However, the kind of mobilization necessary to include citizens into the shaping of their common future should arguably have taken place *prior* to the constitutional referendum in the process of deliberation and agenda-setting – not only after politicians had agreed on a common ground, seeking *a posteriori* approval of an ill-informed citizenship, stripped of participatory opportunities to influence the preceding debate. In fact the process of constitutionalization could have been a welcome opportunity to initiate European-wide public debate and give momentum to the emergence of a European public sphere (Habermas, 2001). Yet, mass media did not particularly care about the European Convention, while the Commission's substitute was the “On the Future of Europe” website – with limited success: “a big stone was thrown into the water but it created some rather small circles” (Brüggemann, 2005: 59).

TRANSITION I

Another major organization should not be left out of sight when thinking about the ideals that underpin the idea of “Europe”. In 1950, the Council of Europe (CoE) was founded, which has remained an intergovernmental organization comprising 47 members today, including all EU Member States. The *European Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR) drawn up under its auspices remains the most well-enforced regional human rights instrument worldwide and its guardian, the European Court of Human Rights (ECtHR) in Strasbourg, issues authoritative interpretations of the Convention binding on all signatories.

The aspiration to make the human rights commitment of the emerging EU more explicit can be found in Article 6 (2) of the *Treaty on European Union* (TEU), which acknowledges:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

After World War II and the subsequent formulation of the *Universal Declaration of Human Rights* (1948, UDHR) and the ECHR (1950), the evolving European agencies can also be conceived of as an embodiment and guarantor of a certain set of common values such as democracy and human rights as a common denominator for the normative aspirations and commitments of its Member States. While this aspect should be seen as an explicitly stated standard of achievement rather than a statement of historical fact, its relevance also becomes clear when considering that membership of the Union has also been conditioned by adherence to certain minimum standards.¹⁰

The normative aspiration of the European project to be a democracy and protect human rights of its citizens is thus clearly spelled out. Its novel form of organization, however, also poses new questions and concerns, especially when it comes to key prerequisites for a human rights friendly political form of organization. Lacking a common European identity as well as sufficient mechanisms to ensure electoral accountability the project of further integration is doomed to go beyond the threshold of traditional conceptions of democracy – arguably it already has – thus eventually alienating its citizens and compromising European human rights traditions and the legitimacy of its governance system. In Nieminen’s analysis, the European crisis then is ultimately the outcome of an

inherent tension “between the two different logics or value systems that the EU attempts to nurture; market-based economic logic versus democratic logic of social and cultural values”, the latter of which has yet to be tackled (2007: 5). The very constellation of the EU with its inbuilt bias towards economic integration, a fragmented human rights regime and the inadequacy of traditional modes of popular control over representatives may considerably complicate the implementation of such normative goals. On the other hand, the loss of space for maneuver that has affected nation-state capacities to act autonomously under conditions of increasing globalization may make the EU the one actor capable of ensuring the effective translation of popular will into policy. So, for example, European-wide policies might be the only way to sustain something like a welfare state model in the face of increasing global trade liberalization.

Accordingly, also within academic discourse, a “normative turn” is discernible in the literature on this issue (Bellamy & Castiglione, 2003). There is extensive research on topics surrounding the (lack of) democratic legitimacy of the European Union addressing its cultural, social, political and legal dimensions. Making explicit the normative foundations of the project of European integration often remains contested, since there is hardly a broad consensus on a set of common values and the EU’s *telos* remains disputed.

In the following section, the relevance of the concept of communication rights for the ongoing theoretical debates concerning the legitimacy of political organization at the EU level will be discussed.

References

Bellamy, R. & Castiglione, D. (2003). Legitimizing the Euro-`polity' and its `Regime'. The Normative Turn in EU Studies. *European Journal of Political Theory*, 2(1): 7-34.

Brüggemann, M. (2005). How the EU constructs the European Public Sphere. Seven Strategies of Information Policy. *The Public*, 12(2): 57-74.

Eijsbouts, W. T.; Jans, J.H. & Vogelaar, F.O.W. (2004). *Europees Recht. Algemeen deel*. Druk 1. Groningen: Europa Law Publishing.

Eriksen, E. O. & Fossum, J. E. (2004). Europe in Search of Legitimacy: Strategies of Legitimation Assessed. *International Political Science Review*, 25(4):435–59.

Habermas, J. (2001). Why Europe needs a constitution. *New Left Review*, Vol. 11: 5–26.

Magnette, P. (2003). European Governance and Civic Participation: Beyond Elitist Citizenship? *Political Studies*, 51: 144-160.

Nieminen, H. (2007). Towards democratic regulation of European media and communication. Paper for the ECREA Symposium "Equal Opportunities and Communication Rights: Representation, Participation & the European Democratic Deficit", Brussels, 11-12 October 2007.

¹ Available online at: (<http://www.ena.lu/>). [Retrieved on 22 May 2009].

² With the entry into force of the *Treaty of Maastricht* in 1993, the EEC has become the First Pillar of the EU: the EC.

³ Case 26/62, *Van Gend & Loos* [1963] ECR 1; Case 6/64, *Costa/ENEL* [1964] ECR 585.

⁴ The first elections held by universal suffrage took place on 7 and 10 June 1979. This resulted in an increase in numbers of Members of the European Parliament from 198 to 410.

⁵ While within the legal literature there is still some degree of confusion about the central issue of direct effect of European law in the national legal order, Eijsbouts et al. (2004) propose to take the possibility of the individual to directly appeal to European legal norms before a national judge as the central criterion to speak of direct effect. In the meanwhile, the criteria for direct effect the ECJ set forth in *Van Gend & Loos* have been somewhat relaxed and can be understood to require a legal norm to be unconditional and sufficiently clear in order for it to have direct effect in the domestic order. This means that not only regulations can have direct effect but also other norms that fulfill these criteria. Norms that originate from Second and Third Pillar instruments, however, seem to be excluded here. Article 34 TEU excludes the direct effect of Third Pillar instruments while there is no role for the ECJ within the political realm of decision-making under the Second Pillar. There may, however, be some leeway for further development, at least within the Third Pillar. See for example the advise of Advocate General Mengozzi in the cases of *Segi* and *Gestoras pro Amnistía* who sought redress concerning their placement on a terrorism blacklist on the basis

of a Common Position (Joint Cases Case C-355/04 P *Segi and Others v Council* [2007] ECR I-000 and Case C-354/04 P *Gestoras Pro Amnistía v Council* [2007] ECR I-0000). He concluded that the ruling of the CFI resulted in a lack of judicial protection which could not be accepted within the EU legal order. He eventually found the power and duty to ensure effectiveness of such protection to exist at the Member State level, whose courts should, in the last instance, have the power to *void* EU acts where fundamental rights are violated (para. 98, 99).

⁶ How the various constitutional courts of Member States deal with European law is in itself a highly interesting issue and still constantly in motion. Famously, in the so-called *Solange* cases, the German *Bundesverfassungsgericht* has drawn its own line in the sand to limit the effect of European law in its domestic order. Those interactions will, however, not be the subject of the present study.

⁷ See for example Case C-224/02 *Heikki Antero Pusa* (29 April 2004) or, more recently, Case C-192/05, *Tas Hagen* (26 October 2006).

⁸ Under the new Lisbon Treaty, the Charter would be given legal force. The significance hereof would become clear only with case law clarifying the effects of its new status.

⁹ Formally the *Treaty on the Functioning of the European Union*.

¹⁰ See Article 7 TEU.