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### Communication rights, democracy & legitimacy : the European Union

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## **THE ROLE OF COMMUNICATION RIGHTS IN THE DEMOCRATIZATION OF THE EUROPEAN UNION**

### **Abstract**

The supranational architecture of the European Communities (EC) which gives direct effect to its law combined with the indirect legitimation of European Union (EU) decision-making bodies other than the European Parliament have posed challenges to “traditional” conceptions of democracy that warrant normative re-thinking of its core assumptions and, consequently, the notion of citizenship itself.

It is argued here that in order to alleviate what has been termed the “democratic deficit” of the Union, it will be mandatory to supplement the ongoing legal constitutionalism with political constitutionalism (Bellamy, 2001) that emphasizes the opportunities of active participation of European citizens in constituting themselves in an ongoing process of disagreement, dialogue and compromise. A deliberative approach to European democracy constitutes the basis of the present argument which concludes by proposing that communication rights ought to be conceived of not only as fundamental human rights, but as citizenship rights in evolving models of supranational democratic legitimacy.

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## 1. Introduction

The backlashes of the ratification process of the 1992 *Maastricht Treaty* (Treaty of the European Union – TEU) had been the proverbial sings on the wall that made clear that the benevolent attitude of European citizens towards European integration could no longer be presupposed. What had been commonly referred to as the “permissive consensus” seemed not to have endured a long practised elite-driven integration from above. The more recent experience of the shelved ambitions to give the EU a formal *Constitutional Treaty* has once more emphasized a fundamental need that has not been properly addressed.

Today, intergovernmentalist decision-making in the tradition of classical bargaining diplomacy is no longer sustainable for or compatible with the nature of the European polity. It has become evident that it will be crucial to focus once more on the essence of what the EU aspires to become in political, social and moral terms and to re-state and possibly renegotiate its underlying logic. The supranational nature of the European polity is simultaneously challenging “traditional” conceptions of democracy, legitimacy and citizenship based on the liberal, representative nation-state model that cannot be simply supplanted from the national level to the supranational. The project of further integration thus forces scholars, policy-makers as well as its citizens at large to re-think the core assumptions of democracy in an era of accelerating globalization and regional integration.

The current supranational architecture of the EC goes far beyond being a regulatory entity with merely economic tasks to facilitate the well-functioning of a market. The process that has gradually enhanced the powers and competences of what has become the EU was partly instigated by external pressures,<sup>1</sup> partly consciously encouraged by governing elites and partly driven by institutional actors such as the European Court of Justice (ECJ), whose case law has triggered a largely unforeseen and independent development of Treaty provisions.<sup>2</sup>

What has become clear by now is that the indirect legitimation – which may have been viable in the early stages of the EC, when an instrumental logic may have warranted a purely outcome-based legitimation (as conceptualized by Scharpf, 1999) – is neither theoretically sufficient nor realistically sustainable anymore. The pace and intensity of integration that has taken place has clearly created a discrepancy between the degree of impact of supranational rule-making and accountability of rule-makers. While traditionally, legislative processes were nationally bound, democratically structured and legitimated, the structure of the EU has

challenged this, often without “explicit thematisations of the substantial and principled aspects of the changes and the problems that arise” (Sand, 1998: 273). This lack of democratic control of the policy process is perhaps most problematic in the First Pillar (EC) given its supranational character. However, an expansion and intensification of decision-making through the Second (Common Foreign and Security Policy, Title V TEU) and Third Pillar (Police and Judicial Cooperation in Criminal Matters, Title VI TEU) together with their impact on national policies and law have given rise to increased concerns due to the lack of parliamentary and also judicial control (see Stie, 2008; Peers, 2007).<sup>3</sup>

This has led to much talk about and research into what has come to be called the “democratic deficit”. This, in turn has been the basis for the normative underpinning of current debates on how the democratization of the EU ought to look like rather than keeping with merely functionalist approaches to describe the “spill-over” effects of various developments. As Abromeit pointedly summarizes:

Die Vermutung eines Pfades in eine bestimmte Richtung – nämlich Demokratisierung – sagt noch nichts aus über die Art des demokratischen Systems, das auf solche Weise quasi-automatisch erreichbar ist, und enthebt uns nicht der Notwendigkeit des Nachdenkens darüber, welche weitere Institutionalisierung der spezifischen Situation der EU angemessen und welche Konstitutionalisierung bürgerschaftlicher Selbstbestimmung in dem speziellen Kontext am förderlichsten ist.<sup>4</sup>

(2003: 44)

The central question leading the below inquiry will be what role communication processes play in models of democratic legitimacy of the EU and what consequences this has for the conception of European citizenship. First, the debate within international relations scholarship concerning the “democratic deficit” will be briefly sketched. Then, the importance and function of communication in ideas about democratic legitimacy will be highlighted with a special emphasis on the implications of deliberative democracy for the EU context. Finally, it will be argued that from this perspective, communication rights ought to be considered as a set of rights that is essential for political citizenship of the EU.

## **2. Locating the democratic deficit**

Explaining and defining the nature of the EU for analytical purposes has proven to be an extremely difficult task and is likely to remain on the research agenda for some time to come (Eriksen & Neyer, 2003). This difficulty is in large part due to the fact that the EU cannot be

properly described in terms of either the vocabulary of international organizations or the nation-state.

Considering the complexity and novelty of the European construct, then, it is not surprising that the meaning of democracy would be more contested than in the settings of the modern nation-state. The standard version of the democratic deficit as it is discussed in political sciences usually includes (a) the lack of European political parties, (b) the weakness of the only directly elected representatives' body, the European Parliament (EP), and (c) a power bias favoring executive institutions in the EU (Follesdal & Hix, 2002: 4). The diffusion of power in its multi-level governance structure has sparked further worries about its lack of accountability and transparency while the large amount of autonomy that some actors have assumed in giving shape to integration weakens legal certainty and constitutional control mechanisms. Increasingly, this emphasis on the procedural aspects of democracy modeled along the nation-state model has come to be supplemented by approaches which focus on more substantial elements of legitimate rule-making such as identity formation, the existence of a public sphere and political citizenship of the EU.

### *2.1. International Relations and the EU*

The integration of the EU can be regarded as quite an interesting experiment for international relations theory (Pollack, 2001). International relations approaches to the EU center on different aspects of its organizational and institutional structure of decision-making. They all have in common the recognition that known formulas of democracy cannot be applied to the EU, but vary largely in their assumptions about the feasibility and desirability of institutional reform in order to make the Union more democratically controllable and accountable. Still, the interaction among nationally legitimated actors and their relation to the supranational power structure remain the main points of attention.

Classical realist or neorealist scholars have contributed little to theorizing about European integration processes. This is not too surprising since the very foundations of realist theory about international relations is in fact challenged by a cooperative entity as far-reaching as the EU, since the assumptions of anarchy, power and self-interest can only be of very limited value to explain its nature and dynamics.<sup>5</sup> Another realist school of thought, referred to as intergovernmentalism, holds slightly different assumptions about the implications of international anarchy and the preferences of states, which make the

prospects of European integration look somewhat brighter. From this perspective the EU “rests on the separate constitutional orders of states” (Chrysochoou, 2001a: 3), while mutual interdependence of Member States becomes the driving force of cooperation and integration that make “liberal peace” possible. Looked at from this perspective, the democratic deficit then arises since the EU takes over tasks which had never been assigned to it by the Member States. This in turn makes the supranational institutions take integrating steps that exceed the original anticipations and agreement of the Member States.<sup>6</sup> Through the transfer of authority, the EU has further decreased the powers of national parliaments in the policy-making process while at the same time increasing the powers of the executive (after all, one of the main legislators of the EC, the Council, is recruited from the national executive power). Eventually, even though the Member States continue to be the formal decision-makers, the independence of the ECJ and great influence of the Commission on the preparation of decisions has resulted in “an uneven polity field with all of these actors at times playing unexpected roles” (Sand, 1998: 278).<sup>7</sup> This implies that, once established, supranational institutions can take on a rather uncontrollable life of their own, subsequently interpreting the mandate to create a common “internal market” in their very own ways far beyond democratic accountability. There is thus a “policy drift” since the EU ends up doing things that the majority of citizens approve of. Commonly, this “drift” is attributed to the fact that governments can undertake policies that they could not on a domestic level resulting in a neoliberal regulatory framework for a single market (Follesdal & Hix, 2002: 6).

Another point of view places processes of globalization at the centre of analysis. Here, the structural problem is seen in the combination of national institutions having lost the capacity to effectively regulate due to the emergence of globalization and European institutions being unable to fulfill the minimum conditions to be called democratic. The loss of leverage by governments on multinational corporations, some of which have annual turnovers that dwarf some countries’ annual gross national product (GNP), has long been a major worry to many observers (see Strange, 2003). Today, the nation-state has lost the capacity to effectively regulate the economy and provide social security because it finds itself caught up in an international competition for investments, resulting in a “race to the bottom” and the eventual sell-out of the European welfare state (Habermas, 2003). While territorial boundaries have largely lost their relevance for economic activity, growing economic interdependence erodes national sovereignty and thus accountability of national politicians.

A growing part of authority that is being lost by nation-states is taken over by an increasingly powerful private sector, which supplants the political decision-making process. Regional modes of multilevel governance such as the EU have emerged partly as an answer to the challenges of a globalizing market. However, the extent to which economic integration has proceeded in the European context is seen to be unique and the most far-reaching development because it fundamentally changes the preconditions of national sovereignty.

Simultaneously, critics argue that the political and social integration of the Union has not matched its economic counterpart (Ward, 2004). The multilevel nature of governance is then the key source of the EU's democratic deficit.<sup>8</sup> The real trouble here is not the transfer of authority from the national to the supranational level, but rather the diffuse nature of authority at the various levels. As Wessels puts it, the powers of national and European administrations are "fused", which menaces clarity of decision-making processes, since competences have ceased to be clearly definable and decisions cannot be unequivocally traced back to specific institutions (1998: 214). As a consequence, transparency is virtually non-existent and the citizenry's will ceases to be effectively implemented through voting. Even though there are elections for the European Parliament they are treated as "mid-term national contests" while national campaigns hardly contain European issues (Follesdal & Hix, 2002: 5) and European media do not give comprehensive coverage of EU issues (Machill, Beiler & Fischer, 2006). Democratic control accordingly loses its effectiveness because the electoral link between voters and their representatives is ruptured: elections cannot be used to punish wrongdoing of representatives and accountability is inevitably compromised. In effect, decision-making processes are moved out of reach of any democratic electorate and left to complex, non-formalized networks that can hardly be held accountable.

### *2.2. The Babylonian problem and the "no demos" critique*

Another broad category of approaches to the Union draws attention to elements beyond the purely institutional aspects of the EU edifice and subsequently aims at what Chrysochoou (2001a: 7) terms the "socio-psychological aspects" of the deficit. A strand of this reasoning that emphasizes the importance of extra-institutional elements sees the democratic potential of the EU rather pessimistic. It concentrates not on the constructive *potential* of ongoing political processes, but on the current *lack* of a common European identity and commonly shared values to serve as a basis for integration of the heterogeneous values and

ideas about the good life (*inter alia* Gerhards, 1993). Also, the lack of a shared idea of a common good – also referred to as “civic we-ness” – is often seen as the root of the democratic deficit and the resulting lack of legitimacy of European-level decision-making (Chrysochoou, 2001*b*; Bellamy, 2001). One of the major sources of this deficiency is located in the missing opportunities of citizens to engage in a common public sphere in which visions on the good life could be properly discussed among citizens; there is an insufficient exchange of information and opinions between the institutions and citizens and among citizens beyond national borders.

### **3. Legitimacy as an issue of communication**

The feasibility of European democracy may be doubted most severely by authors such as Dieter Grimm (1995), Philip Schlesinger (1999) and Fritz Scharpf (1999), who are skeptical towards the practical possibility of anything resembling a European public sphere to emerge and thus regard a short-term democratization of the EU to be impossible. After several rounds of enlargement, their arguments may resonate even more when considering today’s EU of 27.

Two main arguments re-surface in their works that seem to indicate that a European public sphere must be a pointless endeavor.

First, the large variety of languages and subsequent variety of frames of meaning are seen as a major obstacle for a pan-European public sphere (van de Steeg, 2002). The assumption is that, even if the same issues were discussed in different Member States in different languages, communication in the sense of mutual understanding would still be impossible, since language is not neutral, but always the carrier of a certain view of the world and as such inherently value-loaded. From this perspective, the emergence of a public sphere beyond linguistic frontiers is unthinkable due to the variety of cultural contexts of the various speakers and listeners that keep interfering with communication. The diverging interpretations of information would thus stand in the way of a discourse to emerge between linguistically heterogeneous publics, perpetually doomed to misunderstanding. A further variation of the argument van de Steeg (2002) distinguishes refers to the variety of languages that supposedly disables discussion and dialogue among the citizens of the EU. While the criticism here does not extend to the absence of a common set of meaning in the constructivist sense, the inability to express opinions and exchange information is considered

as an insurmountable obstacle, precluding any possibility for democracy to extend to the European level. Logically derived from the above, another variant of the linguistic argument emphasizes the absence of a commonly mastered European *lingua franca* that could provide every citizen with the skills to efficiently communicate as the basic condition for a public sphere built on a common set of meanings. This criterion implies the existence of one common language or else the ability of all citizens to speak all EU-languages as a *sine qua non* condition of a viable public sphere.

Second, there is the so-called “no *demos*” claim, which denies the existence of a European polity, based on a common identity and values, which in turn is regarded as a *prerequisite* for the feasibility of a European public sphere. The basis of such ideas on communitarian democracy is that at its core there exists “a people”. More specifically, there is a subset of the people, who are entitled to participate in the act of governing; a *demos*. This *demos* is assumed to be a pre-existing community connected in an understanding of a common destiny and good, united by national identity and a minimal amount of solidarity among citizens within the national borders.

Majoritarian rule is subsequently legitimized by a formal aggregation of individual interests (through voting) as well as by the obligation of decisions to be justified in a public sphere characterized by openness, plurality and freedom, which provides for the accountability of ruling institutions. Rousseau’s fiction of a social contract that is made between individuals to *create* their governing institutions and attributes to them their powers sees the overarching state-structure as an outcome of collective will-formation of individuals who may subsequently choose to elect representatives that will decide for them on matters of daily management. Here, a citizen identity is a necessary *precondition* for any democratic form of governance. This in turn makes legitimacy depend on a variety of pre-political social variables such as social homogeneity or a commonly shared identity and sense of belonging. Thus, democracy becomes to mean substantially more than merely a certain procedure to ascertain rule by the people that can theoretically be installed to govern the relations within any congregation of individuals. It requires that this congregation already – *before* the political process can legitimately result in commonly binding decisions – has to consider itself a people.

A common identity plays a central role in Grimm's argument (1995) – this identity, however, does not have to stem from any pre-existing commonality such as ethnicity. Rather, he emphasizes the ability to communicate about common goals and problems, which he sees as a prerequisite for a European discourse and identity to emerge. Still, while Grimm's conception of a *demos* does not depend on some pre-political constellation of society and can thus be constructed through communication, there is still no such *demos* to be found and little hope of one emerging under current circumstances. If not explicitly excluding the possibility of a *demos* to emerge in a process, Grimm (1995) emphasizes that it is the lack of a relation between public opinion and the decision-making structure, which poses the problem. Since there are no European media, parties or other means of linking the two, there is not enough social cohesion to achieve a democratic EU – a lack which cannot be alleviated by state institutions or national media, either. Accordingly, a pan-European media system based on a *lingua franca* is the mandatory prerequisite of a European *demos* to emerge. This, he considers, is the only way to accomplish democratic governance of the Union – and an impossible task.<sup>9</sup> Similarly, Scharpf (1999) maintains that democratic self-government is dependent upon a high degree of cultural homogeneity. The EU's prospects to become a democratic entity are assessed to be dim. As Kielmansegg puts it:

Europa, auch das engere Westeuropa, ist keine Kommunikationsgemeinschaft, kaum eine Erinnerungsgemeinschaft und nur sehr begrenzt eine Erfahrungsgemeinschaft.

(1996: 55)<sup>10</sup>

So, whatever the amount of formally democratic procedures of European governance, there still remains a lack on the side of the polity which precludes legitimacy. Usually, the emergence of a European identity is thus tied to the emergence of a European public sphere while the opportunities for identity formation in the face of cultural, linguistic and ethnic differences are considered to be rather marginal. Since there is no European public sphere, there is no common identity and thus no chance for democracy on a European level, the line of argument could be summarized. The two strands of argument both lead to the seemingly inevitable conclusion that “the public sphere is delimited by the state's borders” (van de Steeg, 2002: 505). This conclusion has however been criticized for its overly simplistic assumption that a European public sphere will have to be comparable to and look much like the national public spheres. In fact, the early work of Habermas has frequently been

criticized for a similar logical error, when he idealized the national polity as a single national public sphere (Schlesinger, 1999: 265). As van de Steeg (2002) argues, all the above stated critical arguments can easily be applied to the nation-state setting: linguistic problems, cultural differences that complicate communication and understanding, technical problems and a variety of identities within the sometimes rather arbitrary boundaries of nation-states. Those problems, however, do not seem to be considered as an insurmountable obstacle for the emergence of a public sphere and the development of a discourse under conditions of national pluralism.

Furthermore, it should not be forgotten, that the nation-state is a rather recent product of long historical, and sometimes painful developments. If one thinks for example of the heterogeneity of the German “Flickenteppich”<sup>11</sup> before a deliberate linguistic and cultural policy was implemented to sustain nationhood, at least the notion of *pre*-political community as a condition for a valid *demos* seems rather like a reminiscent of 19<sup>th</sup> century romanticism. On the other hand, one may wonder whether there is indeed such a lack of communality among Europeans to preclude the possibility of the existence of a *demos*. After all, some basic tenets of communality can be discerned in certain attitudes and values such as the adherence to the separation of church and state or the abolition of the death penalty, which clearly distinguish it from other, even Western, “communities” (American Environics, 2006: 38). In addition, experiments such as a deliberative polling of 362 European citizens conducted in 2007 indicate that increased communication between citizens with very different starting points, opinions, languages and backgrounds can contribute to a better informed citizenry, resulting in changes in initial attitudes and thus to the emergence of more commonality (such as evidenced in converging views of citizens from new Member States towards those of the old Member States).<sup>12</sup>

In addition, a focus on the lack of a “community of values”, viewed as the obstacle to democratization, raises the question of a specific set of values, which in turn would necessarily create a Europe based on a rather rigid set of axioms. Such an approach would create a powerful mechanism of in- and out-group distinction, which bears the risk of a “Fortress Europe” to emerge and may result in a clash with human rights protection of minorities (Eriksen & Fossum, 2004: 443; Habermas, 2003). Similarly, Weiler (1999: 238) has argued that the principled precondition of homogeneity of ethno-cultural polities as tribe-like entities is caught up in an overly limited vision of *Volk* and *Staat*, which generally

precludes any possibility of an international system of democratic participation to emerge, and thus the democratisation of the European Union.

Considering suggestions that linguistic and cultural homogeneity are a necessary precondition for *any* kind of democratic legitimacy, also Esser (2003: 20) identifies a paradoxical vicious circle that the skeptical authors ultimately base their claims on: on the one hand, the deficit of the public sphere *results in* the democratic deficit since there is no common linguistic background, no collective identity and no pan-European media system. On the other hand, the very fact that there is no public sphere is also a *result of* the democratic deficit, because governments and not citizens vote for or against laws, which should be dealt with discursively in the public sphere. This leads to the rather fatalistic conclusion that there is no breaking the vicious circle and thus no chance for democratization of the EU. Such a claim could easily lead to a self-fulfilling prophecy and inaction given both deficits cause each other (Eder & Trenz, 2004), whereas the assumption that a common identity could in fact be a result of a common discourse is too easily dismissed.

Emanating out of a constructivist perspective on international relations, built on the works of Alexander Wendt (1992), identity and preferences are conceptualized not as given or exogenous to the political process, but as social constructions which are impacted and changed by the very course of European integration (Christiansen, Jørgensen & Wiener, 1999). They stress the necessity to study European integration as a process, a “*move* from interstate bargaining to politics within an emerging polity” (Idem: 537). Theories of identity formation and language in its relation to the creation of social reality are then major issues on the research agenda.

As Habermas points out in this respect, it would be false to confuse a

nation of citizens (...) with a community of fate shaped by common descent, language and history (...) [Such a misconception would underestimate the] voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs.

(2001a: 15)

Likewise, Eriksen and Fossum emphasize, “a rights-based Union could, over time, become a value-based community in that the establishment of rights could spur identity-forming processes and a community ethos” (2007: 5). This approach could be compared to what Habermas has termed the emergence of “constitutional patriotism”.

So, whereas writers in the tradition of deliberative democracy that address issues of “post-national” democracy would largely share the skeptical authors' analysis of the lack of a European identity or *demos*, they challenge their conclusions since they believe democratic citizenship can establish an “abstract, legally mediated solidarity among strangers” that can sustain integration instead of an existing identity (Habermas, 1995: 305; 2003: 98). Thus, a consequence of the deliberative democratic model would be to dissolve the amalgamation of *ethnos* and *demos*, which in turn requires the abandonment of “mind-sets on which nationalistic, exclusionary mechanisms feed” that have shown to be so disastrous in the event of two world wars (Habermas, 1998: 152).

As he summarizes the conditions for the democratic will-formation within the EU:

The initial impetus for integration in the direction of a postnational society is not provided by the substrate of a supposed “European people” but by the communicative network of a European-wide public sphere embedded in a shared political culture.

(Idem: 153)

In sum, there is wide agreement among scholars of international relations and political philosophy that the EU's development constitutes an ongoing challenge to traditional assumptions about the nation-state, democracy and the nature and normative content of international cooperation. There is a worrying imbalance between the EU's political and legal development, which has but intensified in parallel with the degree of integration and which has not been tackled adequately so far. The diagnosis of a “democratic deficit” of the European Union has become common wisdom. Still, it seems that speaking of a “democratic deficit” may long have unduly limited the theoretical discussion to focus on institutional designs and the levels of representation. This may reinforce a vision of European democracy along the lines of long practiced routines within the nation-state, while it must be a hopeless endeavor to try mold the EU to its likeness. Still, a large portion of thinking and research in this area is tainted by the inability to imagine legitimate rule beyond the known arrangements and models of the nation-state and is thus limiting itself to a rather narrow vision on representative democracy. This may come as no surprise, since we are inevitably confined to the analytical tools of the past when trying to understand situations of the present.

This also applies to those skeptical authors who mostly make their claims along those lines of traditional models of national public spheres, highlighting linguistic obstacles to communication and mutual understanding. While it has been argued that their arguments seem to be stuck in an outdated fixation on an idealized notion of culturally homogeneous, national communities in a common *Sprachraum*, many of the technical impossibilities of a European public sphere have been rendered obsolete by recent developments. Currently, the idea of a pan-European public sphere has lost some of its attraction to empirical research since firstly, there is hardly any pan-European media, and secondly, the costs that are involved with analyzing media performance on such a scale are prohibitive from a research economic perspective (Machil, Beiler & Fischer, 2006).

A “less ideal” model of a European public sphere has come to dominate the empirical research agenda. Since there is no common language and no European media, Gerhards (1993; 2001) has suggested conceptualizing a European public sphere as the “Europeanization” of national public spheres. A number of research projects has been conducted using this model (e.g. Eder & Kantner, 2000; Koopmans & Erbe, 2004). But even looking at reality from this less demanding perspective, there is little evidence for the emergence of a European public sphere. So far, the EP has not been successful in establishing itself as public forum (Brüggemann, 2005), while the EU still lacks not just a telephone number but also “a face” (de Vreese, 2003). Thus, the practice of bringing the EU into national public spheres by “going local” seems to remain the most promising strategy (Idem: 29), at least until proposals for the establishment of positions such as the European Foreign Minister or permanent President of the Council as proposed in the *Constitutional Treaty* would be implemented.

So, most of the above mentioned perspectives reason from what we know from modern Western liberal representative democracy in the form of nation-states. Works of liberal philosophers such as John Locke, Stuart Mill and Joseph Schumpeter have built the basis for the liberal-reflexive perspective on the public sphere (Doyle, 1997). Democratic elections are the means through which citizens express their collective will. This expression legitimizes all decisions taken that affect the community, which results in a set of collectively binding rules that can claim legitimacy only on the basis of collective will formation of the citizenry. The controlling mechanism toward democratically elected politicians hereby is the constant threat of not being re-elected, assuming a rather direct link between will formation,

election and policy. In order for citizens to be able to actually make up their mind for whom to vote, however, they need to be in the position to access information about the possible candidates in the first place (Gerhards, 2001: 137). Thus, the general yardstick for democracy in this respect is taken to be the *principle possibility* to get informed, while the public sphere becomes an intermediate institution between the state and civil society (Esser, 2003: 12). In its modern version of neoliberalism, the role of the state has become to guarantee private (proprietary) freedom while enabling the working of competitive capitalist markets (Cunningham, 2005: 14). This has translated into policies of privatization and deregulation during the 80s and 90s, which have altered national as well as international policies concerning media industries (Thomas, 2005).

The market is trusted as a mechanism of maximum individual freedom and the “natural selection” of the “best ideas” through its competitive nature. Accordingly, the traditional liberal approach emphasizes representation and transparency and generally focuses on political communicative actors mediating between the nation-state and citizens through political information. At the national level information on national politics is mostly delivered by means of mass media. A public sphere thus created can serve as a source of legitimacy by exposing decision-making processes to public examination, which in turn can lead to changes through voting. The liberal model would not require too much from a European public sphere. It would seem to be sufficient to make political processes transparent and thus principally enable democratic control through mere reflection (Esser, 2003).

Yet, it may not be very fruitful to discuss the EU just in terms of what we know. The dominant paradigms of international relations as a discipline are not the most promising approaches to an entity which is characterized by its transcendence of just that: *international* relations. Rather, its at least partly *supranational* character and its complex interaction between different levels of power and decision-making have brought many to believe it necessary to approach it as a “polity in its own right” (for example Eriksen & Fossum, 2004). This polity then is clearly in need of legitimacy that lives up to the standards at the heart of modern demands of democratization and freedom that goes beyond merely the protection of “the four freedoms” within the EU.<sup>13</sup> Increasingly, the promise of modernity to bring about a progressive emancipation of all groups in society is being mirrored in a demand for more popular control of political processes, even beyond the traditional borders of the nation-

state. New technologies, especially the Internet that have been hailed as “inherently democratizing” have but increased the expectation of accountability, transparency and participation. Talk of a *democratic* deficit may then first and foremost be of significance because it indicates a broader deficit of the new governance structure that undermines the norms of *legitimacy* that have served national democracies’ moral self-understanding.

“Legitimacy” in turn is clearly a normative concept, which is relative to time and location. When it comes to thinking in the context of the EU, like “democracy” the concept is also often reduced to the legality or procedural correctness of law-making (Meyer, 1999). It must be pointed out, however, that legitimacy does not solely depend on the technical soundness of procedure, but has procedural *as well as* substantial elements. One much-cited categorization to capture the concept is Scharpf’s (1999) distinction of input and output legitimacy. Output legitimacy, on the one hand, emphasizes the outcome rather than the procedural characteristics of political procedures. The legitimacy of a polity is here based on its problem-solving capacities, while efficiency and effectiveness become central points of reference. Input legitimacy, on the other hand, emanates from the degree to which the political process succeeds in mirroring the will of the people in its policies. Also more differentiated approaches such as Walker’s (2001) emphasize the multi-faceted nature of legitimacy of political systems. In this model he distinguishes between (a) performance, (b) regime and (c) polity legitimacy, thereby integrating all the above mentioned aspects of legitimacy into a conceptual grid. The three, closely interrelated dimensions respectively relate to (a) the efficiency and efficacy of the system, (b) the “overall institutional framework through which the entity in question is constituted and regulated” (Idem 5) and its representative quality and (c) the minimum conditions that must be fulfilled to conceive of the EU as a political community, or polity.<sup>14</sup>

3.1. *Deliberative democracy and the legitimacy of European governance*

*“A key difference between democratic and non-democratic systems is that in democracies the ‘governed’ are heard by the ‘governors’. Democracy is at the core a process of deliberating; it is a discursive process. Without conversation between the electorate and the elected as well as within the electorate, the democratic ideal is replaced by fascist, bureaucratic, or plutocratic systems of government.”*  
(Hamelink, 2004b: 208)

It was largely the shortcomings of the assumptions of liberal representative democracy that became visible within the national context that inspired democratic theorists to elaborate alternative paradigms of democracy, justice and legitimacy. The Kantian ideal of “publicity” has a prominent place in many of those contemporary ideas, which centre on deliberation as a basis for the moral validity of democracy. As Venturelli (1998) resumes, clearly, it was the Habermasian (1990) reassertion of the principle of publicity as a principle of legitimacy which lies at the root of much contemporary writing on democratic theory from authors such as Iris Young, Benjamin Barber or Sheila Benhabib. At the heart of Habermasian thinking about the legitimacy of political systems is the law, which must be the outcome as well as the guarantor of institutional preconditions that ensure the legitimate creation of the norm itself (1990). The authority of those norms in turn is derived from the preceding rational, democratic process rather than the form or content of the norm. This process carries the weight of legitimizing the law, which demands that all possibly affected persons could in principle agree in rational discourse on legal norms as legitimate. In this vision it is communication between moral subjects which justifies a certain norm. If all can agree on a norm to govern their relations in a free and rational dialogue, the norm assumes moral validity. With his theory of communicative action, Habermas is thus in fact re-establishing the principle of publicity “by isolating, identifying, and clarifying the normative *conditions* required for the practice of social and political communication” (Venturelli, 1998: 23, *emphasis added*). By making these conditions explicit,

Habermas defined validity claims in which the sender of communicative message must meet the receiver’s demands from him or her in order to engage in communication. In other words, the interchangeable relationship between right-duty and demand-responsibility.

(Dakroury, 2009: 79)

So, in order to enable a rational dialogue to take place in a given society, Habermas lays an

emphasis on a “democratic environment” as a necessary condition (Idem: 78).

Deliberative democracy can be conceptualized as an ideal type. One of the beneficial outcomes that are believed to be inherent of this process is the ability of its participants to review their own positions in the light of an enhanced understanding of the issues at stake. So, from a deliberative perspective, it will have to be the process by which decisions are reached rather than merely their substance which determines their legitimacy. As Stie explains:

The assumption is that if an issue has been properly treated in a fair process, the likelihood that those who were opposed to the outcome will nevertheless respect it as a legitimate constraint on their behaviour despite the fact that their position was rejected in the final decision-taking moment. The deliberative approach assumes that if there is a prospect for such a fair process preceding decision-making, majority vote can be democratically legitimised (...) Without such prior processes, on the other hand, the actual act of voting becomes nothing more than an arithmetic number at a given point in time.

(2007: 2)

Therefore, in these models of legitimate decision-making the existence of public debate is crucial to provide for the opportunity to discuss policy proposals among those who will be bound by them under conditions of freedom, rationality, equality and publicity (Eriksen, 2006: 6). It should be made explicit at this point that it may be impossible to meet the high formal demands that are often made for communicative processes to count as “deliberation” on a mass scale, which is thus not be the aim of what has been termed deliberative supra-nationalism. While normative deliberative theorists such as Habermas originally departed from the assumption that there was such a thing as a universal principle or common good underlying the processes of self-government, more recent variations on the Habermasian conception of the public sphere concur when they eliminate the claim of consensus from their definition of the aims of public discourse. For example, Eriksen has more recently argued that it may be necessary to move away from the idea of consensus as the only legitimate outcome of deliberation and realize that indeed, “working agreements” could be understood as something between a “communicatively achieved consensus and a strategically bargained compromise to fill in the lacuna left open by the established discourse-theoretical typology” (2006: 5). As Stie points out the process of translating the abstract ideals of deliberative democracy to empirically tangible prescriptions is, however,

“still in its infancy” (2007: 2).

Yet, the “general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results” could be seen as the prime source of legitimacy of democratic procedures (Habermas 2001*b*: 110). Deliberative theory departs from the idea that in principal, every individual whose autonomy is impacted by collective decisions should be entitled to take part in the deliberations that precede those decisions, conditioning the quality of participants in deliberation as being equal, autonomous, respectful, consistent and willing to accept other people’s perspectives as expressing moral views (Gutmann & Thompson, 2002). Thus, accessibility and transparency are crucial features of a viable dialogue (Bellamy, 2001: 24). Having been exposed to public criticism, including by those constituting minorities, having been tested and being based explicitly on considerations of all interventions is assumed to attach moral validity to decision taken through this process (Chambers, 2004). So, to achieve conditions that enable an approximation of this ideal it is crucial to establish mechanisms that can ensure inclusion and participation in order to mitigate existing power imbalances biasing decision-making (Stie, 2007).

Concerning the quality of deliberations, various requirements are formulated such as procedural rules prescribing reciprocity (Gutman & Thompson, 2002). There are furthermore often implications for the quality of reasons given by participants, which are presupposed to be generally looking for agreement and putting forward arguments that could be considered “reasonable” by all others. If it is accepted that moral validity of political concepts is not external to discourse, it also becomes a vital criterion to “hear the other side”, which in turn requires disputants to “drop purely self-referential or self-interested reasoning” in the search for arguments which may be compelling to other participants of the dialogue and thus demanding a high degree of mutual respect and reciprocity (Bellamy, 2001: 24). As Young (2000) points out, however, restricting acceptable modes of speech to orderly, rational and eloquent reason giving may itself work as a powerful mechanism of exclusion of views.

Finally, deliberative democracy implies that there is a causal relationship between decision-making and its preceding phase of deliberations.<sup>15</sup> So as not to leave it at the symbolic mutual granting of rights to each other, however, there has to be a link between the “communicative power” that creates the law and the administrative and executive powers. Such a link would then have to be materialized in a public sphere, which would subsequently need a high degree of inclusion, since all affected must be heard; it would be open to every

kind of issue and not be prone to domination of hegemonic interests.

Following Young's argument (2000), theorizing the concept of the public sphere in a complete framework of what she calls "communicative democracy" then mandates two adjustments to the typical understanding of deliberative democracy: (1) deliberative democratic processes in complex mass society are not necessarily face-to-face, nor centred or unified, but rather dispersed and mediated, while (2) public communication covers more modes of communication than merely making claims or giving reasons, but includes such forms as art, culture and protest.

Deliberative theorists have set out to construe an alternative normative framework to sustain democratic values at the supranational level. What Dryzek (2000: 1) has identified as a "deliberative turn" in contemporary democratic theory has equally affected thinking about the EU's further integration progress and the options available for its legitimation. While there are a great variety of perspectives on this concept, most draw on the Habermasian conception of communicative justice as the cornerstone of democratic legitimacy.

As Habermas himself observes concerning the paradoxical situation the EU is in at this moment of its development:

Market-creating policies are self-referential insofar as each step toward market deregulation means a disempowerment or self-limitation of political power as the medium for realizing collectively binding decisions. A political attempt to catch up with markets, by contrast, reverses this process: It is a reflexive politics under reversed conditions. And since the democratic construction of political power relies on communicative processes which alone authorize the application of power, political communication too must be directed toward the goal of a self-reflexive appropriation of a politics of this sort – even at the cost of displacing other mechanisms for regulation.

(Habermas, 2003: 95)

From this perspective then, the creation of the European Union has so far not resulted in "strengthening of the political per se" since it has not risen beyond an exercise in "intergovernmental market construction" (Idem). Yet, this exercise has by no means remained beyond the realm of what ought to be democratically controlled, even though the term "regulatory" may suggest a merely technical role of EU rule-making. Without the capacity to engage also in redistributive policies, the EU may indeed be caught up in a "race to the bottom" since its mode of decision-making remains an institutionalization of a

weighing of national interests. In order to alleviate its democratic deficiency, which would be yet more outspoken in case of a broadening of capacities of political action at the EU level as proposed by *Eurofederalists*, it would be necessary to simultaneously broaden the basis of its legitimacy, which in turn requires an “expanded basis of solidarity”: “civic solidarity [...] will have to be appropriated by citizens of the Union such that Swedes and Portuguese, for example, are prepared to stand up *for each other*” (Habermas, 2003: 97).

As discussed earlier, Habermas considers the emergence of such a civic solidarity as the outcome of a process, since “democracy itself is a legally mediated form of political integration” (Idem).<sup>16</sup>

Deliberation then must be seen as a process of communication that must fulfil a number of criteria concerning the quality of arguments used as well as concerning its formal nature (inclusion of all who are affected by a certain decision into the prior deliberation and the requirement that no point of view be *a priori* excluded from deliberations are examples of those criteria). Many theorists of deliberative democracy, however, at least implicitly assume the primary locus of deliberation to be institutions such as courts or the legislature (for example Gutman & Thompson, 2002; Chalmers, 2003), while those that emphasize discourse ethics, would locate deliberative practices primarily in civil society (Young 2000: 167). This divide can be seen also within the studies of the EU where it seems that during the past years an empirical turn is discernible (Naurin, 2007: 3), producing studies that consider the deliberative quality *within* institutions as empirical lacmus test for legitimacy (see Joerges & Neyer, 1997; Niemann, 2004; Naurin, 2007). Still it must be recognized that a glaring lack of information and participation of the citizenry at large cannot be remedied by the most deliberative of procedures among only an elite (Stie, 2008). Thus, communication as a way to enter into the realm of political authority includes, but is not limited to, the introduction of deliberative processes within political decision-making fora or relatively small-scale attempts to create more direct feedback channels between citizens and EU institutions (such as Internet fora). Eventually, a public sphere that could sustain the high requirements of deliberative supranationalism must also include mass-mediated communication processes as an arena for communicative action.

Beyond their emphasis on procedural matters, deliberative theorists of European integration also tackle substantial aspects of the deficit by means of processes of deliberation. The latter are then seen as a means to supplement and enhance<sup>17</sup> the

imperfect nature of democratic procedures to award political authority to citizens while at the same time providing a binding element that could compensate for a lack of a shared identity, facilitating the development of the congregation of European citizens into a full-fledged polity.<sup>18</sup> When it comes to this community aspect, there is far-reaching consensus among most deliberative theorists that communication, under certain conditions, is an inherently identity-conferring process. Increased communication in a public sphere is believed to have as one of its side-effects the creation of political community through collective learning (Eder & Trenz, 2004). The communicative actors here cannot be limited to the group of political representatives that are obliged to create transparency, compete for votes and thus legitimize decisions, but must necessarily include collective civil society actors to engage in rational dialogue in order to meet the discursive condition – in fact, it is the various social associations in civil society that *constitute* the public sphere in this view (Charney, 1998: 103).

The model of deliberative democracy can be aptly described as a “framework of social and institutional conditions that facilitate the expression of citizens’ concerns and ensures the responsiveness of political power”, thereby “intrinsically enhancing the legitimacy of government or governance” (Jakubowicz, 2004: 5). Legitimacy of political procedures is thus no longer sought exclusively in the formal aggregation of preferences through voting, but encompasses much deeper citizen participation, while conceptualizing the citizen essentially as a holder of rights (Eriksen & Fossum, 2004).

So far, the concept of deliberation has been generally applied (and tested) either among small groups under almost ideal face-to-face conditions (see *inter alia* Luskin, Fishkin & Jowell, 2002) or within decision-making institutions such as Parliaments or committees (see Joerges & Neyer, 1997). However useful the former for municipal decision-making processes and the latter for increasing legitimacy of internal institutional decision-making processes may be, those approaches will not be useful to ordinary citizens of Europe to get access to those institutions nor to facilitate more genuine exchange among them on a larger scale – let alone beyond borders. Accordingly, in order to apply the ideal of deliberation to the issues at stake, those communications processes that take place outside those institutions and between them and citizens as well as the mass media as communicative platforms of a larger scale become of crucial importance.

Here, deliberation is conceived of not as a way to claim moral rightness, nor as an

explanatory concept to conceptualize integration, but as a process that could enable collective will-formation and legitimize decisions taken at EU level through its inherent characteristics (inclusiveness, freedom, participation) and potential outcomes (“civic wellness”, identity, mutual understanding, learning) – it is seen here as a complementary aspect of post-national democratic organization that would have to supplement institutional fixes to the democratic deficit of the Union. This view clearly has consequences for the requirements of a European public sphere as well as citizenship and constitutionalism of the European Union.

Lastly, it seems useful here to briefly revisit Walker’s dimensional approach to legitimacy and to make explicit the application of theories of communicative power to them. This way, the relevance of communication rights for understanding and evaluating possible avenues to address the EU’s legitimacy deficit will become clearer.

For what Walker has termed *performance* legitimacy, deliberation is of less importance, since its prime function is usually seen in the normative force to secure norms of justice in the political system of the EU. However, there are also assumptions about its potential to ensure “better” outcomes since it builds on the interchange of knowledge and opinions between a large variety of participants, which may ultimately yield real insight and wisdom (see e.g. Young, 2000). What Kant referred to as the public use of reason would then ensure that the need to justify one’s positions and to face opposing views and possibly new information and insight on the issue at stake would result in inter-subjectively tested and thus better outcomes.

When it comes to *regime* legitimacy, deliberative theorists would tend to emphasize that the ability of the polity to self-govern in the EU is indeed not secured sufficiently through formal, aggregative modes of democratic influence and that it would have to be enhanced through broader inclusion of those affected by norm into prior deliberations. As Young explains the need to broaden inclusion in democratic processes, there is a “reinforcing circle between social and economic inequality and political inequality enabling powerful actors to use formally democratic processes to perpetuate injustice or preserve privilege” (2000: 17).

*Polity* legitimacy is indeed one of the prime concerns among deliberative theorists for whom political authority is indeed not exercised solely – or even effectively – through mere

representation, which certainly in the EU is far too removed to support a sufficiently direct feedback link between voter preferences and actual policy performance to be called accountable. Rather, this authority is located in the dispersed communication processes that take place in the public sphere. To translate such communication into actual “authority” that can impact decision-making, deliberative elements would have to go beyond mere optional, non-binding consultation, however. Surely public opinion can be a forceful pressure on politics, but at the supranational level where individual actions of national politicians within EU institutions remain obscure and a viable public sphere can so far only be found within the traditional nation-state setting, this is not yet a force to be reckoned with.<sup>19</sup>

#### **4. Communication rights as citizenship rights**

*“The demand for new rights of association, participation and access is part and parcel of the creation of new types of governance that supplement, cut across, occasionally subvert and supplant current systems of representative democracy in order to create a European public sphere”*  
(Bellamy, 2001: 34)

Calls for a right to communicate have been on the agenda of international politics since the 1970s (Mansell & Noordenstreng, 2006; Carlsson, 2003).<sup>20</sup> Still, today there is no commonly accepted definition of either information or communication rights (Hamelink & Hoffmann, 2008). In the modern liberal conception of democratic legitimacy, which is the foundation of most European nation-states, more than free elections and majority rule is already required from political systems. State power is restrained by claims of individual citizenship rights, while the concept of constitutionalism becomes a central feature of democracy (Stein, 2001: 493). Bellamy (2001: 15) has further distinguished juridical from political constitutionalism. The former includes the rule of law, protection of basic rights, and the separation of powers between institutions. The latter centres around the “constitutive role of citizenship” which emphasizes the active role citizens play in constituting themselves in an ongoing process of disagreement, dialogue and compromise. Instead of focusing on the existence of a predefined “community of values” or uniform identity as a precondition for democracy, in a deliberative logic the binding element of supranational citizenship must be found in this self-constituting opportunities it provides. In order to reach the full democratic potential of a polity then, “civic competence” is a mandatory feature of citizenship: the institutional

capacity of citizens to enter into the realm of political authority on a socially equal basis with a view to sustaining a vital public sphere (Chrysochoou, 2002). Citizenship then implies more than mere passive approval of a set of rights granted “from above”. As Weiler pointedly remarks, “you could create rights and afford judicial remedies to slaves” (1999: 336). If the paramount challenge to democracy is seen to be freed from “interest formations that exclude others (and, thereby, create permanent inequalities)” (Bennett & Entman, 2001: 3) the central entitlement of citizenship then becomes the capability that membership of a community awards to actually change and renegotiate its very terms and conditions. Thus, as Habermas (2008) applies this idea to the EU: “a body politic cannot be designed such that the very act of its creation excludes alternatives to the prevailing market liberalism”.<sup>21</sup> Chrysochoou describes three democratic potentials of Union citizenship that relate to (a) civic participation, (b) giving access and a voice to all involved and (c) strengthening of “bonds of belonging” (2002: 764). In his understanding of civic learning, he converges with Eder’s (1999) notion of the public sphere as a forum for societal learning processes. This “civicness” Chrysochoou argues, is the basis for sustainable institutional and democratic transformation and integration of the Union, since it fosters the identification with a European common public good to be jointly pursued beyond the narrow boundaries of the nation-state, thus enabling common will formation beyond political horse-trading with an eye on exclusively national interests. The emergence of such civic attachment is linked directly with a shift from what Bellamy and Warleigh described as “an ethics of integration to an ethics of participation”:

a deliberative process whereby citizens reach mutually acceptable agreements that balance their various communitarian commitments in ways that reflect a cosmopolitan regard for fairness.

(1998: 448)

The sequence of Treaties establishing the EU has taken into account some of the needs of more political and social integration by establishing the notion of European citizenship (introduced by the *Maastricht Treaty* in 1992). Yet, it is explicitly not meant to substitute but to supplement national citizenship. Thus, it comes into play as an additional layer of membership of a political community which transcends but does not replace the nation-state.<sup>22</sup> Nonetheless, it is an indication of the shifting nature of integration from a purely economic rationale to a process towards a more political entity. As such, EU citizenship is a

logical instrument to recognize the constitutive role of citizens and empower those who thus far had primarily been the addressees of supranational decision-making. The decision to include a *Charter of Fundamental Rights* into the *Treaty Establishing a Constitution for Europe* further reflected a rights-based understanding at the basis of Union citizenship. Nonetheless, this citizenship seems to have remained a rather hollow concept in reality given that 7 out of 10 European citizens say to know little or nothing of the workings of the European Union<sup>23</sup> and turn-out for European Parliament elections has been decreasing consistently (from 63 % in 1979 to 43.2% in 2009).

Prominently, Eriksen and his colleagues (see *inter alia* Eriksen, 1999; Eriksen & Neyer, 2003; Eriksen & Fossum, 2004; Eriksen, 2005) have contributed extensive writings that build forth on such an understanding of legitimacy to progressively formulate a comprehensive normative framework for deliberative practices in the European Union.<sup>24</sup> Also here, the capacity to engage in communicative action becomes a central tool for the exercise of political authority of a citizenry whose power to influence decision-makers by means of voting is not sufficient to satisfy the requirements of democracy. In a Habermasian tradition, they emphasize a communicative rationality of integration that can sustain a democratic polity of scale and great heterogeneity without compromising basic rights and freedoms for the sake of efficiency.

This may indicate a certain degree of *convergence* between a European commitment to democracy and the protection of human rights, which here become a fundamental *prerequisite* for democracy to function instead of merely an addition. Without the rights that protect and enable the process of deliberation, which is seen as the bedrock of legitimacy in these models, citizenship can at best be an incomplete status, at worst an inconsequential nomination. To put citizens into the position to engage in deliberation then is a vital task of public authority as much as implementing the rule of law or the outcomes of elections. Venturelli (1998) accordingly makes a strong case against what she refers to as a utilitarian version of liberalism that confines the functions of public authority to ensuring the free enjoyment of private liberties. Contrasting a utilitarian justification of freedom of speech, as advocated by Mill, that must be granted in order to ensure peaceful coexistence and individual self-interest, she focuses on the Kantian notion of “publicity” derived from the idea that fundamental human dignity demands the moral sovereignty of citizens (Idem: 14).

Venturelli further points out that the idea, as elaborated by Kant, of freedom as

reason in fact demands much more of a public sphere than mere reflection, since “that freedom involves certain fundamental prerequisites of communication and a set of public policies guaranteeing its necessary structure in order for political legitimacy to prevail” (Idem: II). In her reconstruction of Kantian liberalism, it also becomes clear that merely the guarantee of negative freedom rights cannot suffice as a basis of legitimacy of authority. Consequently, policy-making that concerns public communication is an essential activity of public authorities that demands more than mere non-interference. The capacity to communicate as such becomes a fundamental civic competence.

The trends of liberalization and commercialization of telecommunication and mass media had led Golding and Murdock already in 1989 to link those developments to the notion of citizenship, which they argued to be greatly dependent on various communication resources in mass mediated democracies. Their analysis of these trends in the UK led them to propose the addition of “communication rights” to the set of citizenship rights which had been introduced by Marshall in his classic essay of 1949 (*Citizenship and Social Class*).<sup>25</sup> Today, there is ample agreement on the fact that information has become a major – if not the defining – factor in developing forms of social organization. This transition from an industrial to an information society<sup>26</sup> also has wider implications for politics and law. In response, proposals of a new set of “information rights” were brought forward, which would ensure equal opportunities, protection and participation of all citizens in addition to those “classic” civic, political and social rights that have come to be seen as the core of citizenship rights from the eighteenth century on (Bovens, 2002). Their assertions have a clear link with the reasoning of deliberative democratic theorists who conclude that when the essence of freedom and self-determination becomes a “public use of reason” this conversely means that any obstruction to knowledge, information and participation in public deliberations would amount to “a violation of the moral-political rights of mankind” (Venturelli, 1998: 11).

Equally referring back to Kant, Splichal (2002: 6) argues that any “public use of reason” cannot take place in a society in which the notion of publicity is translated into merely the personal right to property, thus reducing it to the concept of the “freedom of the press”, which have led to “profit maximising operations of private media capital and consecutive alliances with power elites [that have] muted the bark of the 'watchdog'”. This, he continues, necessitates the re-establishment of a citizen's right to communicate by means of active regulation and the allocation of sufficient public resources in order to secure an

open information and communication system:

With no public use of reason in the media, which is based on the right of citizens to be heard, there is no democracy. With public use of reason only in the media, there is no democracy either: democracy also rests on the principle of dialogue, not only mass dissemination.

(Splichal, 2002: 15)

While in liberal theories on representative democracy, freedom of expression and assembly are recognized as fundamental prerequisites to enable the emergence of a public sphere and thus democratic will-formation, deliberative theories command, but mostly only implicitly acknowledge, an even more central and far-reaching role of rights pertaining to communication processes. This is because deliberative democracy attaches a more direct link between those modes of communication and decision-making.<sup>27</sup> The concept of full-fledged political citizenship becomes of paramount importance for the EU when it is not envisioned as merely a problem-solving entity or a community of values, but a “rights-based union”, which is in need of more direct legitimation (Eriksen & Fossum, 2004: 438). To establish a system that enables fair cooperation in the long run and in the absence of a sufficiently homogeneous political culture among Member States, basic rights are here a fundamental element of the integration rationale, which is based on a procedural, rights-based notion of legitimacy, which once enforced, would require “decision-makers (...) to pay attention to a wide range of popular opinions (...) to obtain legitimacy” (Idem: 445). Here, deliberation is not anymore a way of claiming moral rightness of a consensus, nor an element set exclusively *within* the institutional setting of the EU, but becomes essentially a framework shaped by policy and law which has to ensure “equality of arms” of participants in deliberations, who grant each other certain rights. Communication rights are not merely an enabling condition for public will-formation, but essential tools in the hand of citizens to enter into the realm of political power, assuming vital functions of accountability, justification and responsiveness of political actors, making communication an essential civic competence. Democratic regulation of communication would then have to aim at an

equal availability of influence on different forms of public communication, particularly mass media, so that no citizen would have more institutionally-guaranteed influence of public (or collective) affairs than any other.

(Splichal, 2002: 16)

This way, deliberative theorists go back to the original idea behind the principle of publicity as

a critical impulse against injustice based on secrecy of state actions and as an enlightening momentum substantiating the region of human liberty and making private citizens equal in the public use of reason.

(Idem: 20)

To summarize, deliberative democracy ultimately requires more than mere non-restriction of the freedom of speech and goes further to imply the facilitation of communicative processes that include the rights to access to information, to be properly informed and ultimately the “right to be heard”. Even more, it requires for those rights to be put into the context of a forum where all perspectives converge and to which every European citizen has access. The meaning of citizenship thus gains prominent importance for thinking about how a European democracy could come about and implies a rights-perspective that goes beyond mere negative, protective rights against state interference to include positive rights of inclusion and participation that may demand obligations to act rather than merely to refrain on the side of public authority. Those rights are then not only an additional requirement to formally democratic decision-making procedures but instead their very enabling conditions. To come closer to the ideal of deliberative democracy, communication rights become part of the minimum, procedural requirements of democracy to work effectively. They are then not merely an external restriction to the exercise of authority to protect the private sphere of individuals from state interference, but are conceptually internalized in the democratic process and thus ought to be regarded as essential elements of political citizenship. Subsequently, in democratic theories that emphasize deliberative opportunities of citizens as a source of legitimacy, communication rights ought to be especially emphasized among other rights in newly emerging supranational governance modes and as such possibly added jointly to the catalogue of entitlements of European citizenship.

## 5. Conclusion

*“Federalize their wallets and their hearts and minds will follow.”*

*(James Madison)*

Much like Madison and Jean Monnet did, functionalists<sup>28</sup> of today believe that the mere fact of intensifying (economic) integration will eventually have to take the peoples of Europe on a natural progression of shared solidarity, turning them into European citizens on the way. So far, the assumed spill-over effects, however, have proven to be insufficient and the Union is left in need of sounder democratic foundations.<sup>29</sup> Even though the substitution in the Treaty of “European peoples” by “European citizens” has already had (presumably unexpected) legal consequences<sup>30</sup>, the notion of citizenship will have to be filled with yet more substance, if it is to live up to the democratic aspirations of the EU. The gradual process of European integration, undemocratically initiated and driven since by elites, has only relatively recently been recognized as a development that is seriously calling into question the basic assumptions of liberal representative democracy in the face of the increasing impact of supranational law-making. The EU is facing the paradox of presenting its citizens with many *faits accomplis* while at the same time claiming to count democracy to its core values and aims. The “permissive consensus” of its citizens that had supported – and thus indirectly given legitimacy to – the European project thus far has clearly reached its limits and political apathy (as mirrored in steadily declining turn-out to EP elections which reached a new record low in 2009 with 43,2 % of European citizens going to the ballot boxes) and distrust have substituted complacency. The setback in the ratification process of the Constitution has made this clear once more: when finally being consulted on a major issue *after* most important decisions on the general course and aim of integration had already been taken without them behind closed doors, Dutch and French citizens clearly brought the message home. The challenge remains to find ways to give back the emotional and intellectual ownership of Europe to its constituent elements: its citizens. If Europe is not to compromise its moral aspirations, this challenge will mean overcoming the limited national vision on democratic processes that has become second nature to scholars, politicians and citizens alike and to re-state the normative principles on which future models ought to be based. These principles will then have to translate into modes of supranational governance that can approximate its underlying ideals.

The fact that the emerging systems of power and authority are less simple and more distant from citizens is deplorable but realistically inevitable. This, however, does not make it obsolete for new forms of supranational governance to meet basic demands of democratic legitimacy. On the contrary, it makes it even more important to ensure mechanisms of public accountability by exposing decisions taken to public scrutiny and to facilitate a broad understanding of complex issues at stake, thus enabling active participation of citizens, which is so vital in making the European project anything more than an exercise in market integration, discredited by its subjects and ultimately paralyzed by increasing indifference, or worse, suspicion. As Nieminen emphasizes the tension between the need to create more centralized decision-making structures and the parallel transfer of more political powers to the EU on the one hand and the sovereignty of its Member States on the other is but intensified by the fact that legitimacy of the system remains solidly based on the concept of national sovereignty (2007: 3).

Legitimizing European policy-making ultimately remains a fundamentally moral issue, not a question of technical problem-solving. The essential function of communication rights of citizens then is to recognize everyone's fundamental entitlement to be taken into account during decision-making processes that affect her or his life and to take part in the philosophical exercise of defining a European vision on the "good life".

It has been argued above that facilitating broader citizen participation in European democratic processes depends to a large degree on the protection of existing and the proactive creation of new European-wide communicative spaces as the precondition for deliberative elements that could elevate democracy beyond the limits of the nation-state. *Communication* instead of mere information, representation and reflection has therefore become a center piece in works of various thinkers when it comes to modern political organization and especially supranational institutions such as the EU and ought to be actively supported by the regulatory framework of the Union, promoting the emergence of a public sphere, protecting the diversity of available communicative platforms and securing and enabling every citizen's free and equal participation in communication processes. The requirements that are proposed for legitimate rule-making are thus to be seen not merely as guidelines and objectives for governance, but in fact be conceptualized as new *rights* that citizenship of the Union commands.

In this sense, the reasoning about the importance of communication for political

legitimacy converges with (but goes beyond) recent legal philosophical claims to enhance citizenship rights in “information societies” as proposed for example by Bovens (2003). Communication rights go further than information rights that would enhance opportunities of citizens to gain access to relevant information (Curtin, 2000; van Bijsterveld, 2005) to include rights relating to the quality of and opportunities provided to participate in deliberations.

Far beyond merely fostering a market-oriented economic system, the facilitation of a non-distorted, inclusive, participatory public space then is an important mandate of authorities in democratic societies. As Venturelli analyses in detail, however, it has been the former goal that has informed European information policy for many decades and mandated the liberalization of information since the end of the Cold War, intensifying since the 1980s (1998: 28).<sup>31</sup> The outcome of those trends has been a weakening of democracy since despite the fact that the formal conditions of democracy may be fulfilled, the particular structure of public space “is increasingly biased in the direction of proprietary social interests” (Idem).

Since communicative action is per definition a dialogical way of communication, as Hamelink points out, “this proposal for a discursive ethics requires the freedom for people to engage in forms of public and private dialogue” (Hamelink, 2004a: 208). This opportunity to engage in dialogue, however, is being threatened due to “the absence of institutions that could protect the private and public spheres from the reifying dynamics of the economic and administrative systems” with the result that “participatory relations drawn from the public practice of reason have been increasingly pushed to the margin” (Venturelli, 1998: 27). In order to reach its citizens and involve them actively in deliberation on issues of public concern, a favorable regulatory environment must be created and maintained in order to meet the basic conditions for an institutionalized public sphere. In this context, the notion of the public sphere as discussed above becomes operable again as “a network that gives citizens (...) an *equal opportunity* to take part in an encompassing process of focused political communication” (Habermas, 2001a: 17, *emphasis added*).

While the condition of principally equal access to the public sphere can hardly translate practically into general access of all citizens to all media channels, the opportunities for participation in the media system of all interest groups must principally be given. A communicative platform must be provided for the non-commercial, state-independent

exchange of opinions and ideas that can ideally claim to reflect the full range of plurality in a society. This can only be achieved through strong, protected public service media. The protection of public service traditions within Member States as well as the promotion of the emergence of a European public space would thus be a task of the European legislator.

While horizontal links between the peoples of the EU are complicated by the absence of a pan-European media system, the vertical flow of information from the institutions (via de mass media) to its citizens (see *inter alia*, Anderson & McLeod, 2004; Kaitatzi-Whitlock, 2006) as well as the limited conception of participation that is advanced by the institutions (Magnette, 2003) has been the subject of criticism.<sup>32</sup> Another development, which is widely watched with uneasiness, is the increasing emphasis on security after the events of 9-11 that has triggered limitations on well-established individual rights such as the freedom of expression or the right to privacy (e.g. Mansell & Nordenstreng, 2007). As Hamelink argues

as the freedom to engage in public and critical political dialogue becomes restricted with such justifications as “war on terrorism” and “national security,” a right to communicate becomes urgently needed in order to expose the deception of pseudo-democracies.

(2004a: 208)

The implication of recognizing communication rights would be they would have to be taken into account by public authority when elaborating legislation and policy that relate to the exercise of those rights. The EU is one of the actors vested with public authority whose rules affect the public and private communication environment and is as such a relevant subject for further analysis.

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- <sup>1</sup> Such as the breakdown of the Bretton Woods system and globalizing tendencies more generally that make collective action necessary (Habermas, 2003).
  - <sup>2</sup> Examples of a fundamental event that was not preceded by elementary public debate and certainly not the result of gradual consensus-building have been the declarations of supremacy and direct effect of the European Court of Justice. Case 26/62, *Van Gend & Loos* [1963] ECR I; Case 6/64, *Costa/ENEL* [1964] ECR 585.
  - <sup>3</sup> The *Treaty on the Functioning of the European Union* (the “Lisbon Treaty”) would *inter alia* eliminate the current Pillar structure.
  - <sup>4</sup> Translation by the author: “The assumption of a path in a certain direction – namely democratization – does not tell us anything about the nature of the, in this way quasi-automatically attainable, democratic system. Also it does not exempt us from the necessity of thinking about which form of further institutionalization would be best suited for the specific situation of the EU and what kind of constitutionalisation of civic self-determination would be most constructive in the special context”.
  - <sup>5</sup> Especially puzzling it must be from this perspective to see integration continue even after the breakdown of the Soviet Union and the unification of Germany. Also the German unification process, in realist terms, should have increased worries of other Member States about German hegemony – however, German unification and the end of the Cold War instead coincided with the *Maastricht Treaty* and European integration has all but slowed down in the meanwhile (Pollack, 2001). Contrary to realist assumptions, the EU institutions have provided smaller countries with opportunities to ensure a relatively strong voice in Union politics – as exemplified in the Benelux countries’ successful resistance to changing their structural over-representation in the Council in the final negotiations of the *Nice Treaty* in 2000 (Idem: 224). Also, with the adoption of the co-decision procedure, the position of smaller countries has effectively been improved, since their relative over-representation is even stronger in the European Parliament than in the Council.
  - <sup>6</sup> This may be an especially salient point when it concerns the European Court of Justice, whose interpretations are sometimes rather unforeseeable, partly due to the fact that European legislation is often based on painstaking compromises, which are expressed in rather general language, thus prone to interpretation. This issue is also sometimes referred to as a principal-agent problem.
  - <sup>7</sup> Sand also explains the dominant emphasis on the free market and competition that has influenced Union policies in many domains as a possible side effect of the earlier Court decisions on supremacy and direct effect.
  - <sup>8</sup> As Menéndez points out some authors would understand “governance” as a full-fledged alternative to government. This would mean that “old” standards of democracy are going right down with the nation-state to be substituted by a network governance of stakeholders, NGOs and interest groups.
  - <sup>9</sup> Indeed, so far truly pan-European media have either been highly dependent on public funding

(Arte), are confined to Brussels (Voice of Europe) or have failed (The European). Even EureNews is not commercially viable, while it has managed to reach an audience of more than seven million viewers per day (Brüggemann, 2005: 62).

- <sup>10</sup> Translation by the author: “Europe, also the narrower Western Europe, is not a community of communication, hardly a community of memory and only in a very limited degree a community of experience”.
- <sup>11</sup> This expression literally means “patchwork carpet”. It denotes the many culturally, linguistically and politically heterogeneous territorial entities (today the federal Länder) that make up Germany.
- <sup>12</sup> For more information on the project see: (<http://www.tomorrowseurope.eu/spip.php?article169>). [Retrieved on 14 February 2009].
- <sup>13</sup> Venturelli forcefully argues it is the primary weakness of contemporary liberal theory to conceive of freedom as merely the protection of individual property rights instead of the more comprehensive “public freedom” (1998: 16).
- <sup>14</sup> Walker’s categorization is well applicable to three strategies of legitimation which have been proposed by Eriksen and Fossum as possible options for the further path of integration of the EU (2004).
- <sup>15</sup> This does not necessarily mean that any decision which is taken must be based on the argument agreed by all to be the best, but can also translate into the claim that any decision must legitimate itself by referring to the preceding deliberation as source of autonomous and persuasive reasons for action (Chalmers, 2003). The latter reading may be more realistic, since it seems hard to establish an unequivocal causal empirical link between deliberation and decisions.
- <sup>16</sup> Again, this process will not happen automatically, but will have to be nurtured by means of gradually gearing national debates about the future of Europe that would have to become “synchronized within national public spheres that are networked across Europe” into the emergence of a European party system, European civil society movements and eventually transnational mass media (Idem: 98). This latter, however, Habermas sees conditioned by the willingness and ability of national education systems to develop a common linguistic basis for the citizens of Europe (idem). A shared political culture would be the result of the emergence of a European civil society and “arenas in which the political parties can directly address the decisions of European institutions and go beyond mere tactical alliance to form a European party system” (Habermas, 1998: 153).
- <sup>17</sup> It is important to note here that deliberations are not, however, conceptualized as substitute to representation but rather as a supplement. Clearly, it is not merely the lack of a transnational public sphere, but also the institutional structure that need to be reformed – however, without a public forum for inclusive deliberation, not even such an institutional reform could be conducted in a manner that would result in a legitimate outcome.
- <sup>18</sup> In order to warrant referring to a political community as “polity”, Walker (2001) identifies two important aspects: (1) a degree of autonomous political authority vested in the community as well as (2) what has been referred to as a “feeling of belongingness” (Weiler 1999) or “civic we-ness” (Chrysochoou 2001). While the former is largely a matter of enabling the effective participation of citizens in the political decision-making processes of the EU (which in itself poses rather complex questions of feasibility), the latter facet touches on a more socio-psychological aspect of political community which includes matters of commonly shared identity, values and historical

experience.

- <sup>19</sup> Above that, it is important to note that even within this smaller scale setting, modern liberal democracies are facing the problem of increasing de-politicization of the populace and a lack of congruence between the will of the people and government action (as a recent example, the decision to invade Iraq by some European governments against the will of their people should be remembered).
- <sup>20</sup> For an overview of resolutions relevant for the right to communicate up to now see: (<http://www.righttocommunicate.org/viewGroup.atm?sectionName=rights&id=2>). [Retrieved on 14 April 2009].
- <sup>21</sup> The original text reads: "Ein Gemeinwesen darf nicht von vornherein so konstruiert sein, dass schon die Anlage des Gebäudes Alternativen zum bisher vorherrschenden Marktliberalismus ausschließt".
- <sup>22</sup> Even before the notion of European citizenship was formally introduced, certain freedoms and rights had been granted to citizens of the EU's Member States, giving national citizenship a European dimension. After Maastricht, the initial suspicion of many legal scholars that the notion would remain toothless and of primarily symbolic relevance, was soon to be proven wrong.
- <sup>23</sup> Eurobarometer figure as cited by Commission Margot Wallström at her presentation of the *White Paper on Communication Policy* to the European Parliament on February 2, 2006.
- <sup>24</sup> See publications of the RECON as well as ARENA working paper series online at: (<http://www.reconproject.eu/projectweb/portalproject/Publications.html>). [Retrieved 13 June 2009].
- <sup>25</sup> Their arguments for such an addition emphasize the social component of citizenship in increasingly heterogeneous societies in which resources are not evenly distributed, which then must include the capacity to assert oneself in the public realm and be taken into account.
- <sup>26</sup> Bovens describes the dominant features of this information society to be *deterritorialization*, *turbulence*, *horizontalization* and *dematerialization*. These greatly impact the functioning of the state based on the rule of law. Since the nation-state is no longer firmly in control of all aspect of society due to growing internationalization, democratic control in the traditional sense within the nation-state is increasingly insufficient. Technological and social unpredictability and turbulent development demand a sort of flexibility that could undermine legal certainty. The primacy of politics is under pressure from a shift from the arena of politics to the executive and civil society networks. Lastly, the increasing use of and reliance on information systems in executing policy (such as e.g. concerning immigration or tax) has converted *street-level* bureaucracies into *system-level* bureaucracies which are entirely based on stratified sets of uniform information that leave no place for individual space for maneuver (2002: 17).
- <sup>27</sup> In Habermas' original construction of the public sphere, politics would become the implementing tool of a collectively agreed upon consensus. This ideal type has, however, been adjusted by Habermas himself, while he acknowledges that "discourses do not govern. They generate a communicative power, which cannot substitute, but merely influence the administrative one" (1990: 44, *translated by the author*).
- <sup>28</sup> Abromeit (2003) in fact would put most deliberative theorists into this category, since she takes them to believe that the progressive introduction of deliberative processes will eventually lead to

the alleviation of the democratic deficit.

- <sup>29</sup> Undertakings such as the foundation of monetary union for example would have required genuinely democratic economic governance, whereas the Amsterdam reform failed to install this and instead deemed a college of fifteen finance ministers a sufficient match for the power of a central bank (Mancini, 1998: 31). Even more disappointing, however, may have been the lack of commitment to enrich the sparse catalogue of rights that comes with Union citizenship. The notion was legally introduced into the quasi-constitutional structure of the EU by the 1992 *Maastricht Treaty*.
- <sup>30</sup> See cases such as C-209/03 *Bidar* [2005] ECR I-2119, Case C-184/99 *Grzelczyk* [2001] ECR I- 6193, and Case C-148/02 *Garcia Avello* [2003] ECR, I-11613. Here, the European Court of Justice has repeatedly emphasized that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.
- <sup>31</sup> This trend, she further argues, is based on the unconvincing idea that “the difference between the private proprietary interests of the information industries and the public participatory interests of citizens can be decided according to the criteria of which dimensions concern only owners and investors of capital and consumers” (1998: 33). By upholding this claim, they negate what she sees to be the original liberal claim “to link all politically consequential decision-making to the legally guaranteed deliberative will-formation of the citizenry not merely to the role of communication-technology innovation in sustaining proprietary growth and product consumption” (Idem: 34). Even according to less demanding standards it has been questioned, if the media under conditions of successive privatization and growing commercial pressures can in fact be considered capable of delivering the informative political functions considered necessary as a basis for citizen opinion formation (Meyer, 2001; Bennett & Entman, 2001).
- <sup>32</sup> The inherent characteristics of the “Community method” may be one of the biggest obstacles for an active citizenry. As Magnette points out, “as long as the Commission, which initiates policies, considers itself to be a body designed to bypass political conflicts and forge compromise *before* public deliberation takes place, the politicization of the EU will remain very difficult” (2003: 157). Similar considerations apply to the lack of coverage of the EU in national media. While reporting EU issues requires a high degree of expertise and an editor who is willing to run “unsexy” stories on “Brussels” the long-term nature of the decision-making process, its complexity and opacity make it a challenging endeavor to inform the citizen. National politicians routinely play the “blame game” to shift responsibility for unpopular decisions to the remote and faceless bureaucratic body while journalists’ framing of EU issues in a national perspective is unlikely to foster anything like a shared feeling of European solidarity.