Communication rights, democracy & legitimacy : the European Union

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TRANSITION III

As has become clear in the previous section, communication rights encompass not only a wide array of issues, but are also subject to a divergent spectrum of legal and policy areas, which are not easily located within European governance. The fact that they are not recognized as a coherent set of rights may be one of the main reasons for this dispersed situation. Another is the nature of the EU's competences transcending the borders of Member States. It is thus beyond the reach of the present study to give a comprehensive and detailed analysis of each of the relevant domains.

By means of a case study, the focus will then subsequently lie on one of the rights, which has come to the forefront of international discussions about the legitimacy of governance beyond the nation-state[1] and which has been developing dynamically especially within the EU during recent times: the access to information.

The case against secrecy

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives"
Letter from James Madison to W.T. Barry (1822)

Most often, the access to information is tied to discussions of transparency, regarded as an essential element of democratic systems since it enables a dialogue between the echelons of power and the general public that is thus enabled to make an informed evaluation of ongoing decision-making processes. Without access to information, it would be inconceivable that viable public deliberation could take place. The degree to which information is clear and accessible thus becomes an important criterion for democratic legitimacy, since openness is a precondition for accountability and citizen participation (Stie, 2007). In this context the freedom of information[2] has also been referred to as the "oxygen of democracy" (as cited in Mendel, 2003: iii), since the checks and balances in a democracy can only validly function on the basis of a public that has the right to scrutinize the actions of their leaders and engage in public debate about their actions. The function of transparency in a democracy then is to hold authority accountable and is served by means of enabling citizens to hold public authority liable in order to "counter 'a capture' of public institutions

by special interest groups" (Stein, 2001: 494). If relevant information about matters of public interest are made *arcana imperii* no viable public reflection is conceivable, which, in addition to rendering decisions taken weakly legitimized, bears the great danger of the abuse of power. Secrecy then is seen to undermine democracy and to result in "distrust, cynicism and apathy among citizens and closed minds among policy makers" (Bunyan, 2002).

An emerging international standard

While the first law on access to information can be found as early as 1766 in the Swedish *Freedom of the Press Act*, the past fifteen years have seen a surge in freedom of information laws worldwide (Access Info Europe, 2006).[3] According to Banisar (2004), a number of reasons have contributed to this development: (1) international pressure emanating from bodies such as the Council of Europe, the UN or the World Bank, (2) developments towards the "information society" including the proliferation of the Internet and trends to introduce e-government services that have created an increased demand for openness, (3) the inclusion of the right to access information held by government into (new) national constitutions and (4) the occurrence of and reaction to corruption and scandals. The latter has been intensified after the fall of the Berlin Wall in 1989 and with the growth of civil society groups demanding access which contributed to a wave of new laws in the late 1990s and early 2000s (Right2Info.org, 2008). In addition, the preoccupation with this specific right corresponds to an increasing complexity of governance in a globalizing environment, which has not only affected the abilities of national authorities to govern, but which has also brought new actors into play, ranging from private business and non-governmental organizations to international and supranational organizations, who are not democratically accountable. In fact, when rule-making that is directly impacting citizens is no longer the exclusive domain of democratically elected national governments, it has been argued that the right to information in fact becomes a civil right within information societies (Bovens, 2003).[4]

Today, access to information is widely held to be an essential human right which is mirrored in an increasing number of treaties, resolutions and guidelines adopted by international organizations. Accordingly, while in 1990 only 13 countries had access to information laws in place, as of June 2008, it were 78 and the number is likely to rise

considering that many countries are in the process of legislating on the issue (Right2Info.org, 2008).[5]

In 2006, of the 46 member states of the Council of Europe 39 had laws in place regulating the right to access to information held by public authorities, whereas 32 went beyond guaranteeing a right merely to official documents to include a broader right to information (Access Info Europe, 2006).

In addition, these recent developments have not stopped short at the national level. In 1998 the United National Economic Commission for Europe adopted the so-called *Åarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.*[6] In November 2008, the Council of Europe adopted the more general *European Convention on Access to Official Documents*.[7] With the intensification of national and international developments concerning the right to access to information, a number of common standards are now slowly emerging such as the equality in access irrespective of nationality or citizenship, the irrelevance of the requestor's motivation for seeking access, the application of provisions to all public bodies and acceptable time limits and costs to process a request for access (Access Info Europe, 2006).[8]

Openness as a human rights standard and in the jurisprudence of the ECrtHR

The freedom of information was recognized early in the history of the United Nations, when the UN General Assembly in 1946 adopted the Resolution 59(1), acknowledging the freedom of expression as the "touchstone of all the freedoms". In the Universal Declaration, the freedom of information is set up as part of the freedom of expression. Article 19 includes the "right to *seek* information", implying a positive obligation by governments and other holders of information to principally make information accessible. Under Article 10 of the European Convention, there is no such provision and thus, no principled right of access to public information. Even though, the ECrtHR had already made concessions concerning the right to information on environmental hazards[9], the ECrtHR had further maintained a similar interpretation of the scope of Article 10 as in the *Leander*[10] case, where it had stated that:

> The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that *others wish or may be willing to impart to him*. Article 10 does not, in circumstances such as those of the present case,

> confer on the individual a right of access (…) nor does it embody an obligation on the Government to impart (…) information to the individual" (*emphasis added*)

In three other cases between 1989 and 1998[11], the Court did nonetheless recognize that to deny access to the information in question did violate the right to private and family life under Article 8 of the Convention and imposed a positive obligation on the state to ensure respect for such rights. Effectively, the Court made sure to limit its reasoning to the specific circumstances of each case, however, and thereby limited the scope of the right to access to information severely by relying on the respect for private and family life, thus by no means establishing a principled recognition of freedom of information as part of the freedom of expression (Mendel, 2003: 13). Yet, in its case law on the freedom of expression, the ECrtHR had repeatedly made clear that the Convention's strong protection of freedom of expression rests in significant measure on the "public's right to know"', implying the right to freedom to receive information through the media.[12] The individual citizen's "right to know" about the processes and outcomes of decision-making on her or his behalf in turn makes it especially important to facilitate a maximum of access by journalists, since they must be enabled to live up to the "watchdog" function of the media. As Hamelink points out, "the unhindered access to public records will effectively contribute to independent journalistic investigation of crucial social issues", which refers to both the "agenda-setting function of the media and the often-cited watchdog function of journalism towards political leadership on behalf of the citizens" (2004: 46).

Only three years ago, in 2006, the ECrtHR for the first time ruled Article 10 of the *European Convention* to be applicable to a case concerning a refusal of access to administrative documents relating to a nuclear power station in the Czech Republic.[13] While eventually no violation was found, the Court here explicitly recognized that the refusal by Czech authorities did constitute an interference with the right to receive information under Article 10. It notably marked the first recognition of the Court that any restriction on this right would have to meet the requirements of Article 10(2), which means such a restriction must be prescribed by law, have a legitimate aim and must be necessary in a democratic society. Looking at earlier case law of the ECrtHR, it then becomes clear that in case a state refuses access to documents of public interest, serious public concern or ongoing political debate, the reasons given will be closely scrutinised by the judges to establish whether they were legitimate (Hins & Voorhoof, 2007: 125). Another expectation is that given the Court's

interpretation of the Convention as a living instrument, which is to be interpreted under consideration of present day conditions, a recognition of the ECrtHR of a general right to information of the public may be just a matter of time after the above mentioned *European Convention on Access to Official Documents* will have entered into force (Idem: 121). The emergence of a "European right of access to information" is thus clearly on the horizon.

While the EU is not a signatory to the ECHR, this recent case law may serve as a source of inspiration to the ECJ judges when faced with future cases in which they will have to interpret the scope and reach of the right to access to documents in the EU. Recent developments to incorporate a right to access to information, and commitments to make processes more transparent, into the European constitutional edifice have prompted the hope that the EU might even become somewhat of a pioneer in this regard (Curtin 2000; van Bijsterveld, 2004).

In sum, the past two decades, the freedom of information has slowly become an international standard (Goldberg, 2008), while an increasing amount of nation-states have implemented corresponding legislation.[14] In this environment, the "EU is in a position to make a positive contribution to constitutional renewal [...] in other words, the EU can make us sensitive to the constitutional demands of the future" (van Bijsterveld, 2004: 18).

The right to access to information and the EU

The link between information and a more accountable EU and the quest to alleviate its democratic deficit is rather obvious. In order to enhance accountability towards citizens, information must be available about the representatives' decision-making and outcomes. When political agendas are defined, interests are mediated and European legislation is developed, both individual citizens' and organized interests' input is vital for the institutions' fulfillment of their role; in congruence with the often-cited principle that EU decisions should be taken "as close to the citizen as possible". Historically, however, the European Union institutions unfortunately seem to have had very strong reservations when it comes to facilitating public insight into the proceedings behind the doors of negotiating rooms (Curtin, 2000; 2001). As Bunyan (2002) reminds us, it is precisely those policy areas (such as immigration and asylum or police cooperation), which are potentially the biggest threats to civil liberties and human rights which have been developed in secrecy – it is a rather recent development, and only after many fundamental decisions have already been taken, that

democratic control is strengthened by increasing the powers of the European Parliament. If, however, the legitimacy deficit is to be diminished and the citizenry in fact to regain the status of the sovereign in this highly complex system of governance, this hesitation and suspicion *vis-à-vis* shedding a "little sunlight" on its internal decision-making processes will prove counter-productive. In fact, if one recognizes open public debate as a *sine qua non* condition of democratic will formation, the implication must be to consider public access to governmental documents in terms of a fundamental *right* (Curtin, 2000: 8).

There is yet another effect of the evolution of "governance", which is especially important in the EU context and which makes the right to information even more pressing under present day conditions. In a time when "large corporations and government institutions have relinquished their position of sole pillars of wisdom and are dependent for their information supply and attempts to shape policy to a large degree on actors in the field", Bovens (2002: 320) stresses that transparency within the administrative process is of the essence (see also Lodge, 2008). Thus, all information necessary to participate in these processes, whether it emanates from public or private sources and whether it concerns legislative or administrative decisions would have to be accessible. This way, the right to information could not only contribute to increased democratic control and accountability, but also to making democracy more reflexive by enabling not merely the debate about outcomes, but by putting implicit starting points and underlying assumptions to discussion (Bovens, 2003: 96). This, of course, would necessitate making information public not merely during the implementation stage of policy-making, but already at the point of agenda setting and problem definition. During these stages, various informational inputs from all levels of society could work to enlarge the scope of problems perceived by policy-makers and to improve the eventual outcomes of policy-making. This may be of yet more importance within a polity which is characterized by a mode of "policy-making [that] often takes place in policy networks (...) [which] play an important role in *pre*structuring formal decisions" (Héritier, 2003: 818, *emphasis added*) and which still lacks the vital intermediary of a full fledged public sphere. Without access to information at the early stages of policy-making there is a clear danger of preferential access to the debate as well as a structural bias concerning the agenda. One of the biggest problems in this sense clearly is to counter preferential access, not only formally but practically. As Hériter (2003: 3) concludes it is

rather the imbalance in the use than the formal recognition of the right of access by citizens and organized interest groups, while the groups which are "already aware of the EU (…) are those who take advantage of the possibilities of access in this phase". EU decision-making processes and bureaucracy are complicated and made even more opaque and complex by a multitude of informal committees, policy networks and Council meetings. The increasing involvement of private parties during policy development and implementation in the EU is also challenging traditional ways of securing the "basic values of our constitutional systems" (van Bijsterveld, 2004: 24). In accordance to Boven's (2003) proposition concerning information rights within the modern nation-state[15], she argues that in systems like the EU transparency can thus best be seen as an emerging legal principle, which will have to supplement many of the functions of the principle of legality.

In the meantime, the right to access to documents specifically and the principle of transparency more generally, have gained a prominent place on the agenda of European integration during the last few years. Already in 2000, Curtin signalled three developments within the EU to be noteworthy in this regard: (1) a gradual "constitutionalization" of a right to access to information for citizens (see also van Bijsterveld, 2004), (2) the extension of this right beyond EU citizens to "any natural or legal person residing or having its registered office in a Member State" in the *Treaty of Amsterdam* and (3) an increasing facilitation of access to information in digital form. Especially since the *Treaty of Amsterdam* the European Union has progressively incorporated the commitment to transparency in its structures, explicitly connecting it to the debate about its "democratic challenge" (Idem, 2004: 21). The continuing tensions surrounding a *Constitutional Treaty* for the EU after the second popular no-votes in 2005 (in France and the Netherlands) and 2008 (in Ireland) respectively have once more given a forceful sign of the times that there remains a fundamental gap between the EU and its citizens.[16] Today, at least another two developments have made it yet more important to scrutinize this particular right within the EU framework: (1) the adoption of *Regulation 1049/2001* regarding public access to European Parliament, Council and Commission documents, which is currently under review, and the case law it has generated have had great impact on the form and nature of the right to access and (2) the preoccupation with security in the aftermath of the events of 9/11 has brought this emerging right under increasing pressure and has resulted in the adoption of highly invasive

measures, which are removed from public scrutiny and rely on secrete information inherently favoring executive discretion.[17] As Curtin puts it:

> Secrecy is in demand: it gives those in government exclusive control over certain areas of knowledge and thereby increases their power, making it more difficult for even a free press to check that power.
>
> (2003: 102)

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[1] Demands to make international organizations more open in order to make them more accountable have also led to developments similar to those that have taken place within nation-states within organization such as the UN or the World Bank (Curtin, 2000).

[2] There are other important aspects to freedom of information in addition to the political one, such as for example the access to one's personal information as part of basic human dignity. Also, there is the aspect of facilitation of effective business practices. From a human rights logic led by the spirit of Article 29 and 30 of the Universal Declaration, the freedom of information criterion could further be interpreted as placing a positive obligation on states to ensure that citizens have access to information about human rights. Those aspects will, however, not be considered here since they are less relevant to the concept of democratic legitimacy.

[3] A notable example is the South African constitution, which provides for a broad right of information, including from private entities, while placing the right within the framework of the enjoyment of other human rights.

[4] In fact, Bovens goes even further to argue for a set of information rights, which would include an active role of government to provide citizens with the relevant information to determine their legal position.

[5] For a lists of countries and territories with freedom of information laws see: (http://right2info.org/laws/Vleugels-Overview-86-FOIA-Countries-9.08.pdf). [Retrieved on 2 May 2009].

[6] As of 1 July 2008, there were 41 parties to the Convention. As the Commission points out, while the Convention is obviously about the environment, its significance goes beyond the issue to "the heart of the relationship between people and government (...) it is also a convention about government accountability, transparency and responsiveness" by creating rights and obligations concerning access to information, public participation and access to justice. See online: (http://www.unece.org/env/pp/). [Retrieved on 12 February 2009].

[7] There has been widespread criticism from NGOs concerning the Convention (see for example online: (http://www.access-info.org/data/File/Access%20Convention%20-%207%20Main%20Problems%20-%203%20March%202008%20-%20FINAL.pdf). [Retrieved on 13 February 2009]). In July 2008, the Parliamentary Assembly of the Council of Europe appointed a rapporteur to draft an opinion on the Convention. Paradoxically, also the subsequent adoption process of the Convention has been shrouded in secrecy.

[8] So, for example, in a recent case concerning a refusal of the Chilean authorities to grant access to information about a logging project, the Inter-American Commission on Human Rights unanimously found a violation of Article 13 of the *American Convention on Human Rights,* which it stated to protect the rights of all individuals to request access to state-held information, albeit within the exceptions included in the Convention (*Claude Reyes and others* v *Chile,* 19 September 2006). As Hins and Voorhoof (2007: 122) point out, the Court thereby particularly "stressed the connection between the right of access to information held by the State and democracy".

[9] *Guerra and Others v Italy* (App no 14967/89) 19 February 1998. Also, the political bodies of the Council of Europe had already taken steps towards recognizing the right to freedom of information as a fundamental human right. See for example the Recommendation No. R (81) 19 of the Committee of Ministers on Access to Information Held by Public Authorities as well as its Recommendation R (2002)2.

[10] *Leander v Sweden* (App no 9248/81) 26 March 1987.

[11] *Gaskin v United Kingdom*, (App no 10454/83) 7 July 1989; *Guerra and Others v Italy,* (App no 14967/89) 19 February 1998 and *McGinley and Egan v United Kingdom* (App no 21825/93) 9 June 1998.

[12] *Thorgeirson v Iceland,* (App no 13778/88) 25 June 1992, para. 63*; Castells v Spain,* (App no 11798/85) 23 April 1992, para. 43*; The Observer and Guardian v United Kingdom* (App no 13585/88) 26 November 1991, para. 59(b); *The Sunday Times v United Kingdom (II)* (App no 13166/87) 26 November 1991, para. 65.

[13] *Sdruženi Jihočeské Matky v Czech Republic* (App no 19101/03) 10 July 2006.

[14] For an overview see Access Info Europe (2006).

[15] He argues that, in a time when "material goods owned by an individual no longer dictate his or her economic and social position in society" while it has "become far more important to have (control of) access to information and information channels" the latter becomes an essential entitlement of citizenship (Bovens, 2002: 321).

[16] Still, there does not seem to be a serious reaction within the circles of power other than contemplating how the reform treaty can be pushed through anyway. As Habermas (2008) formulates it in a recent essay, "with this most recent *tour de force*, European governments have callously demonstrated that they alone are shaping Europe's future" (translated by the author).

[17] See Curtin (2003). For a more detailed analysis of the role of information specifically within the practice of terrorism blacklisting see Hoffmann (2008).