Communication rights, democracy & legitimacy : the European Union

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CONCLUSION

COMMUNICATION RIGHTS, DEMOCRACY AND LEGITIMACY: A CASE STUDY OF THE EUROPEAN UNION

Communication as a human right has been discussed internationally since the inception of the UN system. Since, it has vanished and reappeared from the international political agenda, new issues have emerged, while many old inequalities remain and potentials for and threats to private and public communication have intensified. While neither the "right to communicate" nor "communication rights" have to date been formally adopted, their underlying moral claims have inspired extensive civil society activism around the globe, especially on the eve of the World Summit on the Information Society (2003/05). A related reasoning concerning the imperative of ensuring citizens' information rights under changed circumstances of the "information age" can be found in legal scholarship, whereas in political philosophy an increasing emphasis on the vital importance of communication processes for democratic organization, especially in times of globalization, is discernible.

These arguments also apply to the EU today and provide relevant insights in the most pressing challenges that come with the organization of democratic politics beyond the nation-state more broadly. They have here served as the basis for deriving the relevant components of analysis and to argue for the recognition of communication rights as essential elements of citizenship of the EU. While it has been recognized that the implementation of communication rights would not be a silver bullet that would guarantee the solution of all legitimacy problems of the EU, *ipso facto* creating civic solidarity and empowering the citizenry, they are put forth here as a minimum enabling condition. Analysis has been based on standards contained in existing human rights instruments, more specifically in the ECHR, since the obligations it entails are authoritative on the basis of the underlying consensus and contain the very basis on which the realization of communication rights must be built. Yet, it has also included the broader legal and policy environment that has an impact on the possibilities to exercise communication rights in a meaningful way in order to contextualize and thus make visible in what ways European policy and law-making is influencing them.

Limitations

In the present study, a deliberate choice has been to look at the EU as a separate actor whereas obviously, it acts within an interdependent web of governance. On the one hand,

this has been informed by considerations of its direct influence on national legal systems as well as its exemplary function in showing the challenges faced by an emerging postnational polity. The EU is a highly relevant actor since it is a *de facto* threat to the realization of communication rights, while at the same time it could potentially be a highly effective protector of these rights at the international as well as national level.[1]

On the other hand, due to its nature most existing analysis of the European Union tends to evaluate its impact either on the basis of its economic mandate or, more recently, on its growing competences under the Third Pillar. The perspective that has been chosen here has brought with it a necessary limitation due to the EU's confined competences, however. So, for example, considering the issue of Public Service Broadcasting, it remains in the hands of Member States if and how to organize the sector, while it is European legislation concerning competition that is limiting their options. Only the latter has been considered here. For the same reason, some of the areas which have been argued to be vital to nurture a democratic European polity, such as education, remain elusive since they stay firmly in the domain of power of the nation-states that make up the Union. The focus on the EU may also have led to a misconception with the reader which is often created by national politicians when they engage in "policy laundering", blaming "Brussels" in national public debates for unpopular policies which they have had a hand in. Journalists are often complicit, mirroring in their reports the treatment of the EU as if it was a wholly independent third actor, somehow external to the political universe of national politics, while in fact, its Member States are its constituent parts and individuals that are elected nationally or appointed by national representatives, mold its political and largely its legal course. The EU's very structure seems to make this "blame game" exceedingly simple, since its complexity requires a high degree of expertise of journalists who report it and the time frame of its decision-making process often renders it unsuitable for the news rhythm. Let alone the difficulty for citizens to clearly see how they could possibly impact discussions in Brussels directly and visibly.

In the absence of a European public sphere, it would mainly have to be national journalists who could help to develop a less limited perspective on the EU by stepping out of the straight jacket of purely national interest to shed more light on the common enterprise of a united Europe. Partly, this realization is mirrored in the recent efforts to take European communication policy to the local level by engaging in strategic partnerships with Member States for implementation. Still, when it comes to fostering a more cosmopolitan outlook, a

purely top-down approach may have its limits.

European law and policy

It has been argued here that one major factor that contributes to the democratic deficit is the Union's communication deficit. Therefore, bringing about a pan-European public sphere firmly rooted in communication rights and the principles of participation, freedom, diversity and inclusion ought to become the focus of the policy agenda again, beyond the confines of one DG dedicated to institute a "right to be heard" by enhancing the EU's communication policy. Within the current framework of liberal market idealism that increasingly threatens to undermine the ideals of public service, it is thus of fundamental importance to recognize policies and law that impact communication processes in their democratic potential and thus fundamental political relevance. Without media that are independent from political power structures, free from excessive economic pressures and that include those voices that are not relevant to commercial considerations, the wide-spread lack of knowledge of and interest in the EU is unlikely to be alleviated.

While the essential content of the further development of the European project will have to be filled in by an interactive process from the bottom up, the establishment and protection of an enabling environment for communication among and between European peoples certainly is a matter of policymaking and legislation. Some of the most relevant areas of law that are affected by European rules and policies have been identified and described in the preceding pages. It has become apparent that European integration has brought about rules that have altered the communication environment of citizens.

After the failure of earlier experiments, the EU institutions have largely abandoned the idea of building a European public sphere based on a pan-European media system in the spirit of public service values. Rather, they have tended to leave the task to commercial media undertakings and tend to focus on strengthening "European champions" in fear of US cultural and economic domination by encouraging commercial cross-national broadcasting structures while relying on public service broadcasting to serve the "communicative needs of national democracies" (Ward, 2004: 124). The regulatory framework for PSBs and the current debate on the nature, extent and legitimacy of its financing however, may prove to amount to a slow but profound erosion of the very basis of a strong public service sector in broadcasting and may block its future development as public service *media* that could

explore the full potential of interactive new technologies.

The Commission has increasingly emphasized the conditions for external pluralism at the European level while largely ignoring the complex linkages to internal, content pluralism, assuming an overly simplistic relationship while fierce resistance of Member States has so far rendered regulation of the audiovisual sector largely beyond the realm of Union politics. Thus, at the European level, platforms for citizenship interaction are virtually non-existent and the communicative sphere is almost entirely driven by commercial concerns (Ward, 2004: 126). In the years following the *Television without Frontiers Directive* (1989/1997), the policy focus seems to have shifted from the principal "concern for information freedom for the citizen to participate in the political system, into freedom of the consumer to make market choices", whilst deregulation of communication was argued to be essential for economic growth (Sarikakis 2002: 82). In the period of increased liberalization and de-regulation, the focus of European communication policy has thus experienced a change in priorities, as it seems, away from the active promotion of citizen rights and freedoms with state intervention for the public good towards the protection of private interests (Idem: 83).[2]

European rules have also co-shaped the limits of freedom of expression when it comes to the protection of minors or the prohibition of discriminatory or hateful speech, sometimes broadening criminal provisions to a degree that may be irreconcilable with existing standards as held up by the ECrtHR. Also, the confidentiality of European citizens' communication and the protection of their personal data have been thoroughly impacted by European rules and agreements with third parties. In both areas, the political climate of a post - 9/11 world has contributed greatly to a comparatively restrictive approach of the EU which is directly imperiling well-established human rights guarantees. Under its auspices, Member States have dared implement measures that may have been inconceivable within the national political context, while judicial, parliamentary and public control is lacking and with it the safeguards that ought to be in place when measures eventually cut into the realm of individual rights protection.

In the context of fears of terrorism and a shift in the policy discourse from individual freedom to common security, fundamental communicative freedom rights are in danger to be weakened for the sake of an alleged boost in safety. Secretive decision-making; increasing surveillance of citizens and the ongoing erosion of data protection are but some examples discussed above that constitute a major threat to a viable public sphere and the firm

implementation of human rights in general.

Still, while the focus of analysis has been on the EU as a separate actor for reasons of scope and clarity, this is by no means to imply that it could be purely EU level action that could alleviate its democratic challenge. It is national politicians who would have to agree on and implement important policies such as concerning civic education aiming at the facilitation of European citizenship, who would have to treat "Brussels" fairly when representing European developments to their national publics. The complexity and "remoteness" of European rule-making that enables national as well as European politicians to have such a great impact on communicating European issues simultaneously assigns enormous importance to specialized NGOs that identify and monitor important developments at EU level and their implications as intermediary between European institutions and citizens. Therefore, transparency towards those organizations assumes an additional dimension here.

Accordingly, whereas transparency is certainly no "panacea for legitimacy" (Deckmyn, as quoted by Curtin, 2004: 13), it has been argued here that the most basic prerequisite of democratic control over European policy-making processes certainly is the possibility to gain timely access to relevant information. As such it is a "first step" into the direction of making the EU accountable (Idem). Still to date, the actual phase of deliberation and negotiation within the European institutions remains largely "insulated" (Héritier, 2003: 829), since the belief seems to prevail that unfettered openness at that stage would allegedly hinder reaching complicated compromises because all actors would have to be unyielding in their demands (Curtin, 2000*a*).[3] A mode of "negotiative democracy" (Héritier, 2003: 819) which characterizes the decision-making processes of the EU may then in itself seem to require a rather large extent of freedom from publicity, at least during the stage of deal-making. This may also explain why, during the early stages of introducing rules on access to official documents, the right to refuse access where this would be contrary to institutional interests in "confidentiality of their own proceedings" had figured prominently (Curtin, 2004: 3). The first reflex had been to shield the traditionally closed way of diplomatic negotiation.

Whereas the system of rules has become much more sophisticated through case law and the codification of *Regulation 1049/2001*, it is clear that without external pressure, many European Member States and European institutions are reluctant to improve the visibility of the decision-making process. The ongoing revision of the Regulation has yet again

underscored the fundamentally different national attitudes when it comes to the right to access to information with Member States split between supporters and opponents of more access and the unwillingness or inability of European institutions to apply the commitment of taking decisions "as open as possible" even when it comes to the very regime of openness itself.

Major issues that the current revision will address include the scope of the Regulation as *inter alia* defined by the definition of a document, the extent of the exceptions especially when it comes to excluding specific categories of documents, the opportunity for Member States and third parties to veto access, the relation of the right to access to other rights such as the protection of privacy and the nature of registers. At the time of writing, the EP has adopted a number of amendments in a plenary session on 11 March 2009 but postponed the formal conclusion of its first reading on the Commission proposal until the next legislative term while the Council is still negotiating a common position.

Constituting a European polity

> *"The fact that modern democracy and the nation-state have developed in tandem (…) does not indicate a priority of the latter over the former (…). Both have jointly produced the striking innovation of a civic solidarity that provides the cement of national societies."*
> *(Habermas, 2001: 16)*

The challenge Europeans face is nothing less than re-inventing democracy beyond the traditional context of the nation-state and its mechanisms to foster citizenship among the individuals that live within its borders. The experiment of European integration holds the promise of uniting diverse peoples of rich cultural heritage and a long history of mutual aggression, war-fare and hostility. Europe has as much been the *locus* of the most horrible crimes against humanity, often based on exclusionary constructions of nation and race, as it has been the cradle of major cultural and scientific achievements. The heterogeneous experiences of terror and accomplishment have shaped European identities for centuries and provide the canvas on which it will be future generations' task to project a peaceful, prosperous Europe, united in diversity and respect for human rights. For the success of any future model, it is of vital importance to take European citizens along the journey. A common creation of what it means to be European lies at the foundation of civic solidarity between historically distinct national *demoi*.

Constitutional politics is often considered especially fundamental to a polity, since it enshrines the most basic values and ideals that mirror and mould the self-image and aspirations of a society at large, making it a touchstone for the identity of a given community. A constitution for Europe could be conceived as yet another step on the way of "learning how to construct new and ever more sophisticated forms of a 'solidarity among strangers'" in a rapidly changing world that challenges many of the orthodoxies that have guided our beliefs about democracy, the nation-state and the nature and content of citizenship over the last centuries (Habermas, 2001: 21). Nurturing civic solidarity on a *supra*national level will then be the core challenge of European politics in the near future. Arguably, this is a huge task that requires a lot of courage, patience and above all, vision on the side of politicians, who are often operating in national contexts that are highly sceptical towards integration. Nonetheless, there does not seem to be an alternative if the idea of an integrated Europe is not to collapse and vanish into history books as yet another deluded utopia.

The European Union has, among other things, been characterized as the result of a "sequence of defensive reactions" (Castells, 2000: 340). This appraisal of the nature of the European project may historically be plausible. However, its implications for the positive construction of a common European identity, which could bear the future challenges, are rather dim. In case the EU will indeed prove incapable of attaching a more constructive dimension to its self-definition, its *raison d'être* may fade along with its citizens' memory of World War II. Certainly, no such new vision can conceivably be imposed from above. The *Treaty establishing a Constitution for Europe* could have been a formidable opportunity to open up deliberations on a large scale about what it means to be a European citizen, to trigger awareness of the *status quo* of integration and to stimulate critical self-searching about its future. Unfortunately, this opportunity was not fully utilised to encourage the bulk of Europeans to deliberate on their common future.

While the *Charter of Fundamental Freedoms,* as incorporated in the Treaty is a welcome collection of commonly agreed upon standards of achievement that shows "what links Europeans together normatively" (Habermas, 2001: 21), citizenship remains at the heart of the emergence of a democratic culture that will be strong enough to sustain the ambitious European project. The emergence of the civic-mindedness that citizenship requires in turn depends on a process of communication. Especially on the issue of constitutional politics, participation by the citizenship at large is imperative if the concluding text is to

resume the authoritative status of a document that defines the common ground of a society. Deliberative legitimation would have to be the touchstone of such an ambitious and important decision-making process in order to truly enhance the democratic potential of the Union. As citizen participation has obviously been lacking in the lead-up to the *Treaty establishing a Constitution for Europe*, so it necessarily has in a process of ratification in countries whose citizens were asked for their *a posteriori* approval of a pre-negotiated outcome.

It has become apparent that in the course of the development of the EU, the wider discourse about the democratic deficit cannot be separated from a discourse about what it means to be a European citizen. In this context, communication rights are here submitted to be the cornerstone of a set of fundamental rights that have to be fostered and firmly secured also at the European level. So for example, the traditional emphasis on control, accountability and transparency in the context of freedom of access to information, has already shifted towards contextualizing the issue in a discourse about citizenship rights and the rule of law (Curtin, 2000*b*). Communication rights ought subsequently be seen in the context of a form of democracy, in which deliberation not only takes place *within* decision-making bodies and includes not only those élite interest groups and "stakeholders" that are already involved, but that reaches out to potentially include all citizens. Viewed in such a context an additional relevance of those rights emerges as *citizenship* rights, fundamental to the future legitimacy of the European project.

In this way, the discourse shifts from the principles of "good governance" to the conditions of citizenship rights that empower all Europeans to participate in the constitution of their common project. The present discourse on European governance and the democratic deficit should consequently be placed into a larger context of citizenship rights and the promotion of civil competences and solidarity, amongst others, by means of a European communicative space.

Future research

Only after identifying the relevant areas of EU policy and law that affect citizens' communication rights a more coherent proposal for the design of a European approach to communication can be formulated to address the present shortcomings. While an initial step has been taken here to identify those areas, more detailed analysis like the one that has

been provided regarding the issue of access to information, will be necessary for each of those areas in order to identify lacunae in protection, potentials for facilitation and monitor progress. Especially developments under the umbrella of a "war on terrorism" are posing a great threat to established human rights guarantees in general and rights that pertain to communication processes in specific and ought to be closely followed. Analyzing these trends through the prism of communication rights could further contribute to a more coherent picture of how various legal and policy developments, that each may be well researched in isolation, have a combined effect.

When the aim is understanding and monitoring the complex framework of EU governance in order to improve public accountability, the increasing power of European level actors that perform "not only legislative tasks, but increasingly significant executive tasks and even what is often these days referred to as 'operational' tasks" ought to be high on the research agenda (Curtin, 2004: 13). As Curtin envisages,

> [t]his will most probably constitute the third phase of transparency, when the role of the citizens and their various representatives will be to design and participate in the architecture of a public accountability system of the EU.
>
> (Idem: 14)

Furthermore, it must be recognized that it is not only public authorities that limit people's communication rights in a world in which privatization and liberalization have rendered the strict legal distinction between private and public often bizarrely inappropriate. New ways will have to be found to balance different rights and freedoms under novel circumstances with specific attention to the preservation and enhancement of human rights, democracy and the rule of law in Europe.[4]

More generally, deliberative theory will have to face the conundrum of translating a naturally small-scale process of deliberation into a formula that could be a meaningful guidance for modeling deliberative practices in more and more large scale settings. Especially the importance of mediated deliberation processes will require investigation into the nature of media systems that would create the necessary conditions and that could serve as blueprint for future policy, especially on a regional and global scale. Moreover, the potential for and conditions under which existing and evolving arenas of communicative power, such as international social movements can ensure increased responsiveness of decision-makers

will be of increasing relevance for future research in this area.

Global Outlook

"In view of the subversive forces and imperatives of the world market and of the increasing density of worldwide networks of communication and commerce, the external sovereignty of states, however it may be grounded, is by now in any case an anachronism. Also the increasing global dangers which have long since united the nations of the world unwittingly into an involuntary risk society render a practical necessity the creation of politically competent organizations on the supranational level"
(Habermas, 1998: 150)

It has been argued that the development of governance structures beyond the nation-state is mandatory in an age of globalization and will require novel organizational structures of human social and political community. The challenges the EU is facing today are thus not only relevant to this confined region but are exemplary of global developments that challenge the notions of sovereignty, democracy and citizenship. While the EU is but one experiment to adapt to those new circumstances, it will be inevitable to re-think democracy in the context of regional and global governance.

One promising model of democratic organization that has been argued to hold the potential of alleviating the current dismays of political institutions removed beyond citizens' scrutiny and thus accountability is inspired by the ideal of deliberative democracy. In the present context, the mass-mediated *fora* of the public sphere are hereby of special importance. Their democratizing potential is being argued for as the major feature to be considered in policy-making and regulation.

In order to fully realize that potential, it has further been argued that any conception of deliberation will have to be put into the overall context of human rights and more specifically communication rights that go beyond the realm of the mass media. It is likely that more processes of regional integration will occur, if in different institutional adorn, in the face of global developments. Organizational forms such as the Southern Africa Development Community, the African Union or NAFTA are but a few examples. In all those cases, there will be a critical point when people whose lives will be impacted by decisions that are taken beyond the nation-state and its democratic control mechanisms will demand a stake, a voice in those proceedings. In these times it is simply no longer an option to shut out "ordinary" people from the negotiating rooms of international organizations where national sovereigns

take secretive decisions in the name of their subjects. Sovereignty has lost substantially on its claim to absoluteness in an increasingly interdependent world, in which ICT has not only enabled worldwide trade and the "embedding" of politics in markets, but also the emergence of new social movements that supersede national boundaries and that have started to demand accountability.

Information has by now widely been recognized as an essential good for citizens to function in modern societies. The introduction of the World Wide Web brought about new opportunities for interaction and thus ideas about new modes of political participation and organization. Especially within the technology community and early adopters, enthusiasm and visions of empowerment were voiced widely. Citizenship would be extended to and changed by "the net" – we were all to be become *netizens*.[5] Especially the novel opportunities, the imagination of what *could* be, have also led legal philosophers such as Bovens (2002; 2003) to develop arguments for the constitutionalization of a set of information rights as logical entitlement of citizenship in the information society. He has argued that the development from an industrial to an information society entails the necessity to give the ideal of citizenship a new shape; one which would require the constitutionalization of new rights to government information to account for the fact that it is not material goods but information which influences the economic and social position of individuals in societies. Therefore, he sees a demand for

> a different definition of the traditional civic, political and social rights, but also the development of a number of digital information rights that extend further than the current regime regarding open government and the freedom of information.
>
> (Bovens, 2002: 321)

With his reasoning about the coming about of what he terms the digital *Rechtsstaat* Bovens can be said to have demarcated a "quantum leap" within legal thinking about information rights, since he places a norm, which has traditionally been viewed as primarily important in order to ensure democratic control of decision-making, firmly within the context of citizenship rights (Curtin, 2000*b*: 41). Bovens concluded his later plea for a constitutionalization of citizens' information rights with the emphasis that "such embedment is particularly important in European constitutions, in light of the shift of political power in Europe from national political arenas to the European Union" (2002: 339).

His argumentation is enlightening not only because transparency is increasingly seen

as a requirement of "good governance" or even because it could lighten some of the burden of the democratic deficit, but because it is "squarely part of the citizenship discourse at its most fundamental level – that of democratic citizens in a fashion truly supplementary to their (political) citizenship at the national level" (Curtin, 2000*b*: 41). Clearly, this reasoning can easily be applied more broadly to as of yet less integrated organizations but also as an intellectual blueprint for future forms of post-national governance which seem increasingly inevitable.

As Habermas projects the potentially global relevance of theorizing the legitimacy base of the European Union:

> *Euroskeptics*, desperate in the face of the completed process of currency union, call for protection and exclusion; *market Europeans*, on the other hand, regard currency union with satisfaction as the completion of a European domestic economy. Distinct from both of these positions, *Eurofederalists* push for a process that will transform existing international treaties into a political constitution for Europe, as a way of achieving a broad basis of legitimacy for the decisions of the European Commission, the Council of Ministers, and the European Court of Justice. Finally, the *cosmopolitan* position is distinct from all three of these. Cosmopolitans see a federal European state as a *point of departure* for the development of a transnational network of regimes that together could pursue a world domestic policy, even in the absence of a world government.
>
> (2003: 96, *emphasis added*)

If the founding rationale of the European Union was a reaction to the devastations of war and a hope to sustain peaceful coexistence, its future moral significance could be to actively pioneer the application of the ideals of democracy and human rights in new forms of governance beyond the nation-state.

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[1] So, for example, concerning the issue of media pluralism in relation to the democratic function of the mass media, which has long been especially hotly debated in the case of Italy, European law could be of great influence. Also, choices that are made concerning liberalization and competition rules and their application to the audiovisual services are deliberately taken at the European level and might as well be reconsidered.

[2] For a forceful argument for a participative public space and analysis of prevalent logic of instrumental liberalism applied to information policy within the EU see also Venturelli (1998).

[3] It has also been argued that the different institutions of the EU would have to answer to different standards of transparency according to their varying degree of democratic legitimation (Settembri, 2005, Héritier, 2003). However, the direct legitimation of the European Parliament can hardly be construed to mean a less rigorous standard of transparency to be reasonably expected – after all, one of the crucial functions of this institutions would certainly be to link public debate and the decision-making progress, providing for a platform to enhance public deliberations on issues of common concerns. It may mean the lack of even rudimentary democratic legitimacy of the Commission's representatives makes its non-transparency even more serious compared to other institutions. Also, it is hard to imagine why politicians such as heads of state or ministers that come together in the Council, even if legitimized in their role by democratic elections, should from that point on be exempted from operating publicly and justifying their choices in open debate. Beyond this principled argument, it must be considered that the institutionalized and permanent nature of negotiations within the EU's institutions can hardly still be considered comparable to traditional diplomatic encounters. After all, there is a common constitutional project in the making with an ambition to create a supranational body-politic built on values such as democracy, the respect for human rights and the rule of law. It is then hard to understand why deliberations about issues such as a common immigration policy ought not to be conducted in public.

[4] A recent example may be the issue of liabilities of Internet Service Providers (ISPs) when it comes to copyright infringements. While under the *eCommerce Directive*, no active monitoring obligation was envisaged, divergent national interpretations of the Directive have led to legal uncertainties and have prompted some ISPs to respond by voluntary adoption of Internet filtering systems in order to prevent future liabilities.

[5] For an early elaboration of the term see for example. Noack (1996).