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## **INTRODUCTION**

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

The roots of the current system of sovereign nation-states are often seen in 1648, when the Peace of Westphalia established the basic principles that have formed the basis for the rules for peaceful coexistence of today's international community. Ever since some basic assumptions had been agreed upon which have guaranteed sovereignty of the nation-state over its territory and citizens, national governments have taken over the task of "governing" those states. The appropriate form of its government has changed continuously, slowly moving from feudal systems of power via constitutional monarchies to representative democracies – following the requirements of changing social, economic and political developments that shaped ideas about citizenship and statehood and created new necessities for governments to cope with.

Now, the very concept of national sovereignty is being called into question by new global challenges that demand supranational cooperation and solutions, such as pollution, climate change, global financial crises and large scale global poverty, which seem to imply a weakening claim to sovereign decision-making of the traditional nation-state. The League of Nations (established in 1920) was one of the first very ambitious projects of international cooperation that tragically proved its weaknesses in the face of war prone nations on the eve of World War II. The creation of subsequent international organizations – especially the emergence of the United Nations (UN) system – has been one answer to the challenges to traditional concepts of sovereignty as a way of compensating the loss of authority of the nation-state in some fields of policy-making. Processes of increasing and accelerating international integration, subsumed under the term "globalization" have caused a transition from policy-making under monopolistic government control to a more complex system of interrelated processes of decision-making at various levels and including new actors alongside governments, which has been described by the term "governance".<sup>1</sup> This transition took place first at the nation-state level in response to the decreasing ability of traditional politics to retain exclusive control over all processes touching on domains within their political responsibility. Policies of privatization and the increasing importance of international trade have been two of the main sources of this decrease. On a global level,

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regulatory regimes have emerged to answer new needs for regulation and coordination of domains that lie beyond the reach of any one nation-state alone.<sup>2</sup>

However, it can be questioned if the traditional democratic notion of a legitimate way of organizing political community can be stretched as far as to include the mechanisms of international organizations without going beyond an acceptable threshold, “since the means for holding domestic bureaucracies accountable to democratically elected leaders are far stronger and more extensive than the means for holding international governing elites accountable” (Jakubowicz, 2004: 4).

Furthermore, meaningful changes have taken place due to the recent phase of globalization that go beyond the creation of new intergovernmental institutions: the emergence of international law, human rights law and upcoming global civil society movements as well as the transnationalization of the economy (that has been intensified by rapid technological advance, which has for the first time created the possibilities for truly global business entities) have enlarged the group of actors to be dealt with in policy-making processes. These changes have impacted the reality of the international community consisting of an exclusive group of state entities, opened up spaces for participation of other actors and called for consideration of other societal institutions.<sup>3</sup>

Some scholars, in fact, see the whole concept of the nation-state crumble and fall due to a lack of legitimacy and authority in the face of the forces of globalization, which, according to their arguments, leave nation-states helplessly toothless towards global capital volatility and an increasing permeability of territorial boundaries in terms of migration, terrorism or information entering via satellite TV or the Internet (e.g. Strange, 2003; Mathews, 1997; Rodrik, 1997).

It is, however, hard to deny that the nation-state still is at the centre of major policy decision-making and has not lost its ultimate power concerning many areas of regulation. Still, it is equally hard to overlook a whole range of new actors that come into action in domains that had traditionally been government monopolies. The emergence of these new actors is partly the result of deliberate action of governments on the one hand (intergovernmental institutions), and a response to a lack of effective government action and protection (civil society movements) on the other.

All these developments have given rise to a highly complex system that evades

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traditional descriptive vocabulary about national governments and policy-making. What the world is witnessing today are processes of “governing without government”.<sup>4</sup>

This shift of the *locus* of policy-making power away from the monopolistic level of national governments is also referred to as “multilevel governance”. Another novel aspect of multilevel governance is its overlapping territoriality. The levels of governance are multiple; from the local, national, regional to the global whereas the process of policy-making can in fact take place at many levels simultaneously.

The imperative to come up with modes of governance in order to cope with new global challenges that must be tackled in a coordinated manner across borders is indisputable. While the current phase of globalization<sup>5</sup> has certainly been sped up by new means of (tele-) communication and technological advancement generally, the manner, speed and priorities that guide this phase of globalization are largely a matter of deliberate choice (Habermas, 2003). It is then equally clear that a change in the mode of governance requires the explication of normative considerations about the principles around which this new system is to be organized. Introducing new actors besides governments holds the promise of more participation, increased accountability, legitimacy and transparency.

Since the 1980s political forces that favour neo-liberal economic orthodoxies have prevailed (such as the monetarism advocated by British Prime Minister Margaret Thatcher) over public service centred ideas of the nation-state and its tasks (Gray, 2002). Accordingly, the current period of integration on a global scale is mainly driven by economic imperatives in the spirit of a neo-liberal paradigm under the leadership of its most powerful advocate, the United States and international organizations such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organisation (WTO).<sup>6</sup> The so-called Washington Consensus<sup>7</sup> that has coined worldwide policies of the above institutions results, however, in high pressures on virtually all governments to follow the trend by opening up their markets to foreign direct investment, liberalizing their economies and privatizing their public services, often to the detriment and in direct opposition to national democratic will (Klein, 2008). The mechanisms of growing interrelatedness of the economy on a global – or at least regional – scale have resulted in growing interdependencies and have arguably begun to lead their own lives, making it ever harder for single nation-states to escape from its logic. It has also become a common claim made by governments justifying their policies that current trends

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of free trade and liberalization have resulted in a power shift favouring corporate capital and thereby reducing the space to manoeuvre for the nation-state (Strange, 2003).

Looking at overall trends in the emerging system of global governance reveals that the democratizing potential of multilevel governance is not (yet) fully being used. In fact, as O'Siochru and Girard (2002: 34) argue, the transition from a hierarchic mode of governance by governments and multilateral organizations, which has prevailed for decades, to a mode of self-governance may result in outcomes where market driven interests tend to win it over public service ideals. This judgement was shared by the analysis of global governance in the 1999 Human Development Report, which emphasized the imbalanced nature of the emergence of a global governance system in favour of private, corporate interests.<sup>8</sup>

The developments of globalization and global governance provide the context within which several processes of regional integration can be placed. Thus, organizations such as the African Union<sup>9</sup>, the North American Free Trade Agreement (NAFTA)<sup>10</sup> or the Latin American MERCOSUR<sup>11</sup> can be seen, at least partially, as the result of pressures put on nation-states by globalization. Among those projects of regional integration, the European Union (EU), by "pooling" sovereignty of its Member States, has arguably reached the most far-reaching stage of integration and may thus serve as a model<sup>12</sup> for studying the dynamics and problems of regional integration.

In sum, the transition to governance has generated novel challenges to the concept of democracy and the related notion of legitimacy – thinking about which has thus far been rooted in the nation-state – and requires scholars to question their paradigms and everyone to (re)state the normative principles in which the emerging modes of governance ought to be rooted. This is certainly one of the most notable challenges to the current system of European governance, which has pioneered a system of overlapping authorities based on the principle of subsidiarity. Also in this context, participation in governance by civil society and the private sector will have to be a crucial element in the future. Still, even without considering this multitude of non-governmental actors, the nexus of European governance institutions in itself constitutes an immensely complex system that generates novel questions about the quality of this new form of governance, which does not only include the EU, but also institutions such as the Council of Europe (CoE) that only partially overlap in their membership. The EU can be considered the most advanced model of regional integration, if it was only by virtue of its unique supranational element.

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In times of intensifying internationalization of policy- and lawmaking, also an increasing amount of issues that relate to communication simply have to be confronted at a European level. As Venturelli points out, the necessity of transnational regulation has as a consequence that “most states [become] law-takers rather than lawmakers” (1998: 3), since the rule of law is the dominant vehicle of supranational governance, especially in the information sector. This, she adds, is particularly true in the context of the EU, which can “employ the treaties of the Community as a constitution in the production and interpretation of information policy and law that is binding on a union of member states” (Idem). This way, what is at first sight economic or trade policy concerning the establishment of an internal information market can profoundly impact the political and cultural fabric of the polity. Increasing economic pressures have also affected European media and cultural industries, while the EU exists within the tensions of those global developments, trying to balance unfettered free market capitalism with its “unity in diversity” agenda<sup>13</sup> and preserving its cultural integrity under pressures of US imports of cultural products. In the European context, multiple institutions that design the regulatory framework for media (such as the EU institutions at the supranational level and the CoE and the European Court of Human Rights (ECtHR), which remain at the international level<sup>14</sup>) are engaged in a highly complex architecture. New rounds of GATS (General Agreement on Trade in Services, 1995) and WTO negotiations, harsher competition in the audiovisual sector coupled with unparalleled capitalist forces pressurizing media companies, new efforts to push further into the direction of deregulation and new technologies demanding harmonized legislation all mean that “the nation-state cannot act in isolation in this area – there’s simply too much to lose” (Ward, 2004: ix).

So, economic globalization has also affected media and communication markets around the world. National telecommunication providers have been privatized and multilateral agreements on property rights<sup>15</sup> and trade<sup>16</sup> have further encouraged the commodification of media products while largely ignoring the content dimension of communication and information.

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### *Communication and human rights*

After World War II, one of the first things that were addressed by the newly established UN was the issue of freedom of information and related rights. Only about twenty years later, changes in technology and their economic, social and political implications brought about developments which were soon to be described as a transition from an industrial to an “information society”. This “next stage” in the project of modernity was often hailed to bring about new possibilities of economic prosperity, democratization and development (Howcroft & Fitzgerald, 1997). Since its first pronouncement, the concept has also been widely criticized for its oversimplification, its ideological bias towards economic liberalization or the technological determinism that has brought it about, which would render it useless as an analytical concept (Webster, 2000; Garnham, 2000). Nonetheless, it would be wrong to dismiss the notion as an entirely inconsequential bubble of modern discourse, was it only because it has also penetrated policy and law discourses that impact economic and social issues in many nation-states, supranational and international organizations and agreements.

When satellites became a reality, their potential to enable truly interactive communication beyond spatial barriers among and between the peoples of the world, to some it had seemed as a moral imperative to establish a new “right to communicate” that would mirror the entitlement of all to participate and thus have their voices heard in an increasingly global communicative space (d'Arcy, 1969). This claim to the recognition of a new human right can be seen as a political expression emanating from an understanding of democracy that requires a participatory model of public space, which today is increasingly formulated in opposition to current policies of liberalization. Accordingly, as the current form of globalization goes ahead, the analysis of the threats to free and inclusive communication that had initially been identified to be governmental control and manipulation of media have somewhat shifted to focus on the

inability of governance structures to curb the commercialisation and commodification of media and communication and hence to moderate the specific distortions and vested interests that are thereby promoted.

(Ó Siochrú, 2003: 2)

Without an explicit political decision to actively give shape to those developments there is thus reasonable concern that the current policies of liberalization may leave us

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with a transformed public space characterized by fracture and segregation, incapable of supporting the structures of civil society and the democratization of participation and interests in the determination of common concerns.

(Venturelli, 1998: 1)

If the call for a right to communicate from its inception had a political dimension, indeed a fundamentally participatory democratic orientation, the arguments raised then have become all the more relevant in light of more recent developments in technology, economy and political organization (Mansell & Nordenstreng, 2006). New technologies such as the Internet and transborder satellite broadcasting require new modes of dealing with an increasingly deterritorialized media system. While media consumption remains largely tied to the nation-state due to linguistic and cultural preferences, technological developments have resulted in increasing relevance of the international dimension of media regulation. Traditional political approaches to media regulation are outdated at an ever greater pace by rapid new developments that have resulted in increasing convergence of “new” and “old” media and means of communication, so that more flexible modes of governance have to be found that go beyond national territory. The necessity to address these policy areas which are often considered to be a matter of economic or technological concern from a democratic, political perspective is related more specifically to the issue of legitimacy of supranational modes of governance such as the EU, which have led to a renewed debate concerning the role of communication in modern democracy.

### *The European Union as an emerging polity and actor in governance*

The European Union is of particular interest in this study, since on the one hand it has emerged as an increasingly influential actor when it comes to the governance of communication-related issues and on the other hand it has reached a considerable level of regional integration. While interpretations of the extent to which this new entity is - or ought to be - taking over sovereignty from its Member States diverge, the supranational nature of its legal order has become an undeniable reality since the European Court of Justice's (ECJ) declaration of the supremacy of European Community (EC) law.<sup>17</sup> Moreover, the transfer of competences is not of a temporary nature, but indeed meant to be final as reflected in the interpretation of the ECJ and the fact that so far no secession clause has been included in the various treaties that constitute the legal framework of the EU.<sup>18</sup>

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Arguably, there are still only limited *exclusive* competences of the EU, and Member States have been reluctant to increase the extent of autonomous law-making at the supranational level. On the other hand, the competences attributed by the Treaties establishing the EC and the EU respectively are successively being interpreted and touching areas that have not been originally intended as falling within European competence such as criminal law<sup>19</sup> or environmental<sup>20</sup> policy.

It is still in the process of expansion, taking on more competences that affect the nature of the media landscape and communication processes within and among its Member States and has explicitly declared the promotion of democracy and human rights as among its moral aspirations. As such, it can be considered as “an initial example for a form of democracy beyond the nation-state” (Habermas, 2003: 94). At the same time, the EU has been grappling with a “democratic deficit” that does not seem to be a matter of purely institutional reform and which has given rise to intensified debate concerning the nature of post-national democracy and legitimacy of rule-making. The EU then makes for an interesting case study since it is the most far-reaching experiment in regional integration and is in many respects facing the democratic challenge of what has been termed the “postnational constellation”, which forces us to rethink notions such as identity, nationhood and political association in the face of globalization and multiculturalism (Habermas, 2001). In the process, the realization that the transfer of competences to the supranational legislator cannot be justified without a certain minimum of democratic control and the original plans for a sustainable peaceful coexistence not be realized without a more political and social integration has led to various attempts to address the non-economic dimensions of European integration. Turning an internal market exercise initiated by intergovernmental negotiations into a democratically organized institution of regional governance, however, has proven to be difficult. Yet, the difficulties do not take away the fundamental importance of this undertaking:

The democratic procedures and arrangements that grant united citizens the chance for collective self-determination and political control over the conditions of their own social existence can only diminish as the nation-state loses its functions and capabilities, *unless some equivalent for them emerges at the supra-national level.*

(Habermas, 2003: 92, *emphasis added*)

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Given especially the impact of EU generated law on national legal systems, practices of intergovernmental bargaining removed from parliamentary controls and immune to public debate and scrutiny are no longer acceptable. Yet, the gradual expansion of the organization that has become today's EU, in territorial as well as legal terms, has not been matched sufficiently by a move from "arcane politics" (Brüggemann, 2005) to the nurturing of a European polity, that could sustain intensifying legal and economic integration and in which citizens maintain sovereign control of commonly binding rules. The most recent symptom of a dissonance between the pace and manner of integration and degree of political integration has been the recent setbacks of the proposed *Constitutional Treaty*, the ratification process of which had been marked by a lack of public debate and information as well as an emphasis on markedly national angles and interests (the latter may be a direct result of national referenda).

It would be overly ambitious to claim this study could address the full range of issues which contribute to the political character of the ever-changing, multilevel construction that is the EU or propose a solution to its deficits. Nonetheless, it is argued below that the concept of communication rights bears considerable relevance for the debate about legitimizing European policy-making. Communication processes are essential to realize the potential of a European polity and to empower European citizens by engaging in communicative action. In the case of the EU, it is of special importance to protect individual rights that pertain to communication, facilitate the full democratizing potential of mass communication and the emergence of a European public sphere.

Concerning human rights within Europe, the *European Convention on Fundamental Freedoms and Human Rights* (ECHR) of the Council of Europe is evidently the most important source of legal protection. Especially Articles 10 and 8 which deal with the freedom of expression and the protection of private life respectively are of relevance here.<sup>21</sup> Here, it will be specifically law and policies brought forward by the EU that will be at the centre of attention in this study for a number of reasons.

First, while the EU does not have an explicit mandate concerning the rule of law, human rights or democracy towards its Member States but is in fact the product of a project of bringing about a single market, it is nonetheless bound to respect the rights set out in the ECHR (Art. 6 *Treaty on European Union* (TEU)) and routinely refers to democracy and human rights as guiding principles. Second, despite their primarily economic rationale, many EU and

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EC instruments clearly do have repercussions for other domains. Analysing the EU as a case study is then highly relevant since its law and policies are having widespread and deep impact on the nature of communication processes within its remit; often intruding into the sphere of rights traditionally protected by European human rights instruments (Asscher, 2002: 153). In fact, the EC's primary *raison d'être* being the creation of a single market brings about an inherent paradox. Its competences to regulate are limited to this aim, which means that initiatives under the so-called "First Pillar"<sup>22</sup> are usually based on economic rationales with a bias towards liberalization even when trying to regulate for the benefit of increasing the democratic content of European communication. Furthermore, the creation of the Second and Third Pillar, concerning defence and justice and home affairs respectively, have clearly expanded the reach of rules made at the EU level, if under different decision-making procedures and with different degrees of intrusiveness. The events of 11 September 2001 have given additional momentum to European cooperation among EU Member States as well as third parties in the so-called "war against terrorism", which is threatening to undermine human rights standards that had been thought well-established, often without even rudimentary parliamentary control or prior public debate on effects and policy alternatives while legally binding on national legislatures. Third, it is argued that the European Union, understood as an emerging polity in its own right, is struggling with a democratic deficit which mandates the recognition of communication rights as a matter of citizenship and thus their facilitation and protection in the course of European integration.

In sum, even though other actors such as the Council of Europe are clearly more explicitly engaged when it comes to human rights and democracy within Europe, understanding how the EU itself affects the environment of communication is an important endeavour. While on the one hand communication rights are playing an increasingly important role in political philosophy concerning developments towards the "information society" and the legitimacy of the EU, the framework of those rights is also increasingly shaped by the outcomes of supranational law- and policy-making.<sup>23</sup>

### *Structure*

The present work is comprised of five separate studies, which share a common preoccupation with the theoretical construction and practical implementation of rights pertaining to communication processes. First, the international debate around the right to

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communicate - and later communication rights - in political as well as activist and scholarly circles will be sketched, their content specified and some open questions and challenges identified in order to clarify the use of the concept in the present work. It reviews approaches to and the development of ideas about communication rights in order to locate the present study in a political discourse that has been going on for about forty years.

The second study will then relate the concept of communication rights to emerging paradigms of deliberative democracy. It will set out to clarify the relevance of the concept to an emerging discourse about the meaning and requirements of democracy at the supranational level. The discourse on the “democratic deficit” will be briefly outlined. Finally, an alternative approach to democracy and the public sphere will be presented that is argued to be more suitable for realizing the claims and promises of the “information society” and which may thus hold the potential of legitimizing the process of regional integration. The relevance of communication rights specifically for the emergence of the EU as a sustainable democratic polity will then be elaborated from the perspective of deliberative democracy. The implications of such an approach for policy will be the basis of the subsequent analysis.

In the following three studies, some aspects of the reality of and potential for the implementation of communication rights within the structure of the EU will be discussed. Having argued for the recognition of communication rights as essential entitlements of meaningful European citizenship, relevant areas of EU law and policy will be identified which shape the conditions of communication and the nature of media systems and thereby affect the realization of those rights. Subsequently, two more detailed case studies will concern the evolution of a right to information within the EU and its direct relevance to the protection of European human rights standards, specifically the right to a fair trial, in the recent cases of blacklisted terrorism suspects.

There are a number of limitations inherent in the choice to approach these issues from the perspective of communication rights. Since these rights are as of yet neither uncontroversial nor uniformly defined, the theoretical conceptualization and historical contextualization requires much attention here, while at the same time the broad scope of their application makes it impossible to elaborate on all their implications in practice. Also, by choosing the EU as unit of analysis, domestic as well as other international developments are explicitly excluded here. By focusing on the EU this work aims at pointing the policy debate at the nature and quality of the communication environment as a fundamental issue

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of citizenship and the right to democratic self-government beyond the merely procedural right to vote. Communication rights are therefore the normative foundation of subsequent analysis of law and public policy concerning the constitution of the “information society”.

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<sup>1</sup> Governance is then conceptualized as a process, which involves a variety of actors (such as governments, civil society organizations, and commercial entities) that together "steer" by means of policy implementation, thereby taking over tasks that since the emergence of the modern nation-state had been under exclusive government control.

- <sup>2</sup> As an example, one could think of the international trade regime that has been built through the various GATT rounds and has since been enforced through dispute settlement mechanisms of the World Trade Organization (WTO). Also other organizations such as the World Bank and the International Monetary Fund could be seen as part of this “regime”.
- <sup>3</sup> Even though, these developments are widely acknowledged, the central tenet of international organizations such as the UN and international law in general is still firmly based on the traditional assumption of the world order consisting of sovereign, equal and unitary actors: national-states. This also has consequences for legal standing of Non-Governmental Organizations (NGOs) before international courts and the responsibilities and liabilities of private enterprise under international law, which do not seem to be adequate anymore in the face of current developments.
- <sup>4</sup> In 1992 a Commission on Global Governance was established by former West German chancellor, Willy Brandt, which in their 1995 report issued the first, rather vague, definition of governance as: “the sum of the many ways individuals and institutions, public or private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive in their interest” (Commission on Global Governance, 1995). Following this initial definition, numerous, mostly technical, definitions have been put forward in order to pin down the precise meaning of the evasive term. For example in the Human Development Report issued by the United Nations Development Program, governance was defined negatively as “not government” but rather “the framework of rules, institutions and practices that set limits on the behaviour of individuals, organizations and companies” (1999: 34). The helpfulness of the various contributions has, however, been limited when it comes to deriving practical implications (Padovani, 2003). Already in 1995 two major differences to traditional policy-making were acknowledged, when governance was described as a *process* rather than an isolated decision and as involving not only formal institutions and regimes (governments and international governmental organizations), but also *informal* arrangements. This understanding of governance opens the door to a whole new class of actors who are seen as possibly becoming legitimate actors alongside state-dominated policy-making bodies.
- <sup>5</sup> The reference to the *current* phase of globalization indicates the author’s recognition that in modern history, the world had known periods of international interconnectedness equivalent – depending on the choice of indicators even more intense – to what is witnessed today (for further examples, see Held & McGrew, 2003).
- <sup>6</sup> The 2009 global financial crisis may have eroded this consensus, yet, at the time of writing, it seems by no means clear that a fundamental sea-change will in fact take place as a consequence, for example in the form of global regulations of financial markets.
- <sup>7</sup> The Washington Consensus refers to a set of policies first put forward in 1989. This set of rules included prescriptions such as privatization, trade liberalization and openness to foreign direct investment, which were believed to promote economic growth in Latin America. The prescribed set of rules was later also summarized by the World Bank in its Poverty Report 2000.
- <sup>8</sup> Again, in 2005, the United Nations Development Programmes' Human Development Report pointed out how the international trade regime is favoring developed nations rather than being used in its full potential to ensure equitable development of the poorest nations.
- <sup>9</sup> Established as a successor to the earlier African Economic Community and the Organization of African Unity in 2001, the AU has now 53 member states.
- <sup>10</sup> Established in 1994 by the US, Mexico and Canada.

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- <sup>11</sup> Established in 1991 by Argentina, Brazil, Paraguay, Uruguay, the Mercado Común del Sur (MERCOSUR) has also evolved around a free trade agreement between those countries.
- <sup>12</sup> This does not necessarily refer to a role model, but rather an example that merits study since it could enhance our knowledge and understanding of the challenges and possible solutions of regional integration exercises.
- <sup>13</sup> The proposed EU constitution drafted by the European Convention in 2003 contained a list of all the “EU symbols”, such as Europe day and Beethoven’s anthem. It also established an overall “motto” of the Union: the notion of “united in diversity”.
- <sup>14</sup> While the Council of Europe remains based on the traditional structure of international negotiation between sovereign nation-states that is well known to international relations theory, the structure of the European Union has brought forward a form of authority that goes beyond mere international agreements to include the autonomous exercise of power on the *supranational* level of the European Commission.
- <sup>15</sup> Such as on Trade Related Aspects of Intellectual Property Rights of 1994.
- <sup>16</sup> Such as the General Agreement on Tariffs and Trade, established in 1948, which resulted in the foundation of the World Trade Organization in 1995.
- <sup>17</sup> First, the Court pronounced the autonomy of the EC legal order and then, a year later, its supremacy over national law. Case 26/62 *Van Gend & Loos* [1963] ECR 1. See also Case 6/64 *Costa/ENEL* [1964] ECR 585.
- <sup>18</sup> Such a clause could, however, be found in the *Draft Treaty Establishing a Constitution for Europe*.
- <sup>19</sup> For eight years, the Commission had tried to introduce legislation criminalizing the worst environmental offenses. There had, however, been enormous disagreements concerning the adequate legal basis of such an instrument. The ECJ eventually had to intervene and issued a 2007 decision to confirm the Commission's right to require Member States to impose criminal sanctions for certain environmental damage, while leaving the decision on the type and level of the sanctions to the Member States (Case C-440/05 *Commission v Council* [2007] ECR I-9097).
- <sup>20</sup> See e.g. Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777. See for a more elaborate analysis of the development of environmental objectives in relation to the internal market in the EU framework Hedemann-Robinson (2007).
- <sup>21</sup> For an overview of the interpretation of those rights by the European Court of Human Rights (ECrHR) see Ovey and White (2006). The Council of Europe has furthermore brought forward other instruments in this context such as the so-called *Cybercrime Convention*. The latter has however widely been criticized for not providing the same degree of protection than would be granted by the ECrHR (for example Taylor, 2004).
- <sup>22</sup> The EU consists of three so-called “Pillars”. The first Pillar is the European Community (EC), the second and third concern Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (PJCC) (formerly Justice and Home Affairs (JHA)) respectively.
- <sup>23</sup> Yet, norms put forward by the Council of Europe retain their relevance as normative guideline for critical evaluation. Also the case law of the ECrHR remains important, since even though its interpretations are primarily relevant for protection within the national legal order, they are also of importance for the EU legal order since Community judges frequently draw on Convention provisions as sources of inspiration to interpret EU law. It should be noted here, however, that there is no guarantee that judges in Luxembourg will advance a similar interpretation of the law to that of judges in Strasbourg (Asscher, 2002: 138). This divergence could be remedied would the EU become a signatory to the ECHR.