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**Closer to the citizens?  
European constitutional processes, communication  
policy and publicity**

by

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## Abstract

This essay proposes that the emergence and failure of the debate on the EU constitutional reform depends, amongst other things, on the rise of what it calls ‘publicity’ as public policy and governance function: the public management of communication aimed at creating public sphere, improving political communication, participation and trust, building consensus and legitimacy for a governance agency. Publicity originally emerged from the domain of public relations in corporate governance and bears some similarity with commercial marketing and political propaganda. By analysing the constitutional process, this essay provides a short genealogy of publicity within European governance: from publicity concerning specific institutions and epistemic communities, namely the courts and the jurists, to its gradual extension to the general public. Finally, the essay addresses the normative question, ‘What is to be done?’. What can we learn from the failure of the constitutional debate? Should Europe remain a matter of technicians and lobbyists, or should it strive toward becoming a democratic polity? In the latter case, how should Europe improve the quantity and quality of political communication within its public sphere?

## Key-words:

European Constitutional Process, Communication Policy, Democratic Deficit, Deliberative Democracy, European Citizenship, Laeken Declaration, Constitutional Treaty, Lisbon Treaty.



Still unborn and already compelled to walk around the streets and speak to people

Franz Kafka, *Diaries*

## 1. Introduction

In December 2001 the European Council, gathered in Laeken, adopted a Declaration on the Future of the EU committing the Union to becoming ‘more democratic, more transparent and more efficient’. According to the Laeken Declaration, one of the main challenges facing Europe was to bring the European institutions ‘closer to its citizens’: the problem was ‘how to bring citizens, and primarily the young, closer to the European design and the European institutions?’. In order to face the challenge, at Laeken the European leaders set up a Convention designed ‘to pave the way for the next Intergovernmental Conference as broadly and openly as possible’. They also created a forum for organisations representing civil society ‘in order for the debate to be broadly based and involve all citizens’.

Regardless of the outcomes of the constitutional debate – a failure, as I will try to show – the idea of promoting a public debate in order to bring Europe closer to the citizens deserves careful scrutiny. The project of strengthening the legitimacy of a given governance agency by promoting a public debate as wide and inclusive as possible is relatively new, curious and – I will argue – worrisome. The slogan ‘closer to the citizens’ – coined in 1975 by the Tindemans Report and codified in 1992 by the Maastricht Treaty<sup>1</sup> – invites us to examine the changing relationships between transnational governance, constitutional reforms and communication policy.

Undeniably, there is something new going on. Until now one of the traditional purposes of liberal constitutionalism, indeed the classic one, has not been to bring the institutions closer to the citizens, but to distance and protect the citizens from institutions that were already too close. Liberal constitutionalism sharply distinguished between state and civil society – between *bourgeois* and *citoyen*, between political equality and social inequality, between public law and private law as well as between electorate and representatives – in the effort of keeping civil society as separate as possible from the state, and vice versa.



Liberal constitutionalism distinguished them in the attempt to separate the civil society from the potentially intrusive and oppressive government and, reciprocally, in the attempt to protect the state from the particularistic interests and private appetites of civil society. It is clear that from a liberal perspective the project of bringing the citizens closer to the public authority – no matter if it is the state or the European Union – in order to gain their consent, trust and participation, is at least suspect.

From a democratic perspective also, the idea seems surprising and questionable. Indeed, the project of bringing the European Union closer to the citizens says something about an authority which self-critically perceives itself as being not fully democratic, remote, far away from the public, almost private, an authority which in order to react to this situation tries to democratise itself. However, the idea of bringing Europe closer to the citizens is not equivalent to the notion of democratisation, which it implies. Firstly, the project cannot be easily identified with the ideal of self-government because the power which has become closer to the citizens still remains distinct from the citizens. ‘Bringing the power closer to the people’ and ‘power to the people’, whatever they mean, are not synonymous expressions, and the ‘general will’, whatever it is, is not willingness to become closer to the citizens in order to be more accessible.

Secondly, and most importantly, the project of bringing Europe closer to the citizens cannot be easily identified with the ideal of self-government because here the issue at stake is to increase the legitimacy (in a sociological sense) of the European Union to strengthen an existing authority, and democratisation is conceived solely as a means to that end. Democracy is not conceived of as a precondition for legitimacy (in a normative sense) of government, as an intrinsic value, but as a precondition for efficiency of the political process, as an instrumental value. Public authority is not regarded as a means of democratic self-government, but self-government is considered as a technical device for enhancing the effectiveness of the decisions adopted at the European level.

The thesis I intend to explain and argue for is that the creation and the failure of the constitutional debate has much to do with the gradual development of what I will call ‘publicity’ as policy object and governance function (§ 4.): the attempt to catalyse the public sphere by means of a communication policy aimed at fostering political debate, at creating participation and trust, and at building consensus and legitimacy. Publicity originally emerged from the domain of public relations in corporate governance and bears some



similarity with commercial marketing and political propaganda. By analysing the constitutional process, I will provide a short genealogy of publicity within European governance: from publicity concerning specific institutions and epistemic communities, namely the courts and the jurists, to its gradual extension to the general public (§§ 2. e 3.).

The rejection of the Constitutional Treaty shall be regarded, amongst other things, as a rejection of publicity, and it can be taken as a starting point for addressing the normative question, ‘What is to be done?’ (§ 5.): What can we learn from the failure of the constitutional debate? Should Europe remain a matter of technicians and lobbyists – a common market organization, an international forum for intergovernmental bargaining, an unpolitical ‘regulative State’ – or should it strive toward becoming a democratic polity? In the latter case, how should Europe improve the quantity and quality of political communication within its public sphere?

## 2. The secret origins

Every institution has a right to privacy, every organ has an inner life that is the expression of the independence attached to it ... There are not only individual secrets, there are also collective ones

Paul Reuter, *Le droit au secret et les institutions internationales*

During the first period of European integration history, in the 1950s and the 1960s, the issue of the relationship between Community institutions and public opinion was rarely addressed and, when it was addressed, it was usually answered in the sense of the consciously planned and practised exclusion of Community politics from the general political debate. This was a consequence of the political impasse of the European federalist movement, of its cultural and political defeat in post-Second World War period, and of the resulting prevalence of an essentially bureaucratic, technocratic, ‘neofunctionalist’ understanding of European dynamics.

In crafting the Community institutions, Jean Monnet and his collaborator, the jurist Paul Reuter, were inspired by the model of the administrative authorities in the United States (Gerbet 1992, R. Mogan 1992): ‘to entrust independent personalities with the responsibility of exercising a semi-judicial, administrative or even economic function’



(Reuter 1979: 65, Reuter 1955). In 1957 the French international law scholar René-Jean Dupuy recognised in the High Authority (the forerunner of the Commission) ‘the first historical example of the international advent of technocrats’ (Dupuy 1957: 564). One year later, Ernst Haas explained the ‘emphasis on elites in the study of integration’ with the ‘bureaucratized nature of European organizations of long standing, in which basic decisions are made by the leadership, sometimes over the opposition and usually over the indifference of the general membership’ (Haas E. 1968: 17).

During this first phase, the public debate on European issues never fully ceased, but the politics of European integration remained to a great extent an *affaire de haute administration*, decided by narrow political, technical and economic elites, largely dependent on the activity of the experts. ‘The idea of European unity was pushed on the dead track of study groups and cultural debates’ (Mammarella-Cacace 2008: 23). The politics of European integration was not inspired by the highly demanding and somehow intangible ‘European ideal’ but – in a more modest and pragmatic way – it resulted from the interaction of more or less accountable authorities: the Community institutions, the national governments, the courts. The opinion of the general public was nearly absent from the dynamic. Indeed, if we give credit to the influential historian Alan S. Milward, the diplomats deliberately kept European integration away from the influence of popular will, ‘for popular opinion if allowed to intrude too early might well have stopped the whole construction’ (Milward 2000: 17). Definitely, at the time Europe did not aim to bring itself ‘closer to the citizens’.

Besides, it is commonly known that the success of the European Court of Justice (ECJ) in its ‘constitutionalising’ endeavour (Slaughter et al. 1998, Weiler 1999, Stone Sweet 2004) – i.e., the success of the autonomous, proactive constitutional policy that the ECJ expressed during the 1960s and the 1970s – was the result, at least in part, of the ‘benign neglect of the powers that be’ (Stein 1981: 1). Paradoxically, the ECJ could draw advantage from the ‘legislative gridlock’ following the empty chair crisis, from the self-interested unconcern of the Member States’ governments, from the ‘silent’ cooperation of the national judiciaries (Martinico 2009). Ultimately, the ECJ could draw advantage from the absence of the citizen – from lack of public interest in Community affairs.

In order to explain constitutionalisation in a time of political crisis of the European project, political theorists often stress the role of the national courts, their interest in self-



empowerment – as if that interest does not deserve to be investigated and explained as such – and the role of private litigants. Constitutionalisation appears thus to be the result of a ‘spill-over’ dynamic between the courts, the academic jurists and the practitioners, the lawyers and their clients, i.e., the litigants – mainly private companies and professionals. Public opinion, let alone social movements, hardly played any role. According to Milward, ‘to judge from contemporary newspapers the most serious question in the middle of that decade [the 1960s] for the future of a united Europe was the price of wheat’ (Milward 2000: 224). According to Carl Schmitt, the EC had obtained an ‘effective political neutralization’ of certain conflicts, regulative problems and decision-making procedures: ‘the attempt to realise the political union of Europe by means of neutralizations (so called integration)’ (Schmitt 1972: 177-178 note 4 – added footnote to the 1963 edition of *Begriff des Politischen*).

After all, neofunctionalism proved to be, if not a self-fulfilling prophecy, at least a good theory of European integration: in order to create a common constitutional structure, highly controversial political issues should be kept away (Tranholm-Mikkelsen 1991, Rosamond 2000: 100, Hooghe-Marks 2006).

### 3. Publicity in practice. A short history

The social as a script, whose bewildered audience we are  
Jean Baudrillard, *Simulacra and Simulation*

The situation began to change in the 1970s and the Maastricht Treaty marked the turning point. Actually what changed was not the role of the citizen in the European dynamic: the Maastricht Treaty and the ‘semi-permanent treaty revision process’ which started after Maastricht were not the product, not even the indirect product, of some strong political movement favouring the deepening of European integration. Political initiative simply shifted from the ECJ – or, more precisely, from the circuit of ECJ-national courts-private litigants – to the governments of the Member States. However, this shift occurred in the context of the erosion of the so-called ‘permissive consensus’ – the attitude of passive and detached acceptance that until now had supported the process of European



integration within the national public opinions of the Member States. So, in short, what changed was not the role of the citizen in the European political process as much as the political costs of the enduring exclusion of public opinion from the European dynamic.

After Maastricht, such costs became unbearable: suffice to recall the *Maastricht-Urteil* of the German Constitutional Court, the initial Danish ‘no’ vote to Maastricht, the very close referendum in France, and the problems that ratification caused to the government in the UK. As Gráinne de Búrca observes, ‘it is largely since the Maastricht process that the debate on the European Union has been in terms of a ‘crisis’ of legitimacy’ (De Búrca 1996: 349, De Búrca 2004: 561). The perception of a crisis of legitimacy meant that the time had come for the European Union to develop an information and communication policy (Shore 2000, Haltern 2003, Schlesinger 2007). The European institutions and the national governments had now to seriously consider the largely new issue of ‘bringing Europe closer to the citizen’.

Actually the idea of bringing Europe closer to the citizen, that is the attempt to reduce the legitimacy deficit by creating discussion, participation and trust, was not at all new in the experience of European integration. One may argue that the main function of the European Parliament has been to perform this kind of function by ‘rousing the European public opinion’ (Dehousse 1965: 67), raising consciousness and sponsoring the European ideal and European policies<sup>II</sup>. Moreover, the practice of ‘bringing the jurists closer to the ECJ’ has been a common concern of the Commission and the ECJ since the 1960s and 1970s. Already at the time of the ECJ-led constitutionalisation process we can individuate the first steps of publicity as transnational governance function. The integration process could only advance to the extent that the Community was able to create public involvement and participation in its activities. At the beginning the scope of this ‘public’ was actually quite narrow, almost private: the ‘epistemic communities’ (Haas P. 1992), and especially the jurists. Pro-European jurists started to speak openly of ‘European propaganda’ as a ‘vital social and individual need for the formation of the civic consciousness of the citizens’ (Valenti 1973: 116). The legal culture of the Member States became the target of a comprehensive set of initiatives aimed at creating information and discussion on EC law (Vauchez 2010, Id. 2008, M. Rasmussen 2010, Cohen 2007, Itzcovich 2006: 305-306, Schemers 1974: 448, Schermers-Waelbroeck 2001: 228-229, H. Rasmussen 1998: 118). As the challenge consisted – according to one of the most



authoritative and influential judges at the ECJ of the time – of creating a ‘transnational judicial branch’, therefore the ECJ was charged with the task of establishing a true ‘judicial diplomacy’ with the national courts (Pescatore 1975: 113). The goal was to create a European ‘Community of law’, and so a European community of judges and lawyers had to be constructed (Pescatore 1975: 113). In this way, European law discovered communication as a problem and as a resource.

At the time, the European communication policy was mainly focused on the national judiciaries. However, already in this early phase the project of bringing Europe closer to someone began to address the general public. As the first step toward getting closer to the citizen is to see what the citizen thinks about Europe, the creation of Eurobarometer in 1973 should be mentioned, although it still represents a ‘passive’ stage of publicity. Publicity became active and citizenship-building became a conscious policy objective only after the Copenhagen Summit in 1973. Here the Heads of State and Government issued a Declaration on the European Identity according to which the ‘defining the European Identity’ involved ‘taking into consideration the dynamic nature of European unification’ and ‘reviewing the common heritage, interests and special obligations of the Nine’. The Declaration provided some guidelines for developing the ‘special rights’ of the European citizen, and one year later, at the Paris Summit of December 1974, the European leaders established a working group lead by Leo Tindemans to study the issue of the special rights and the issue of the European passport. The 1975 Commission report *Toward European Citizenship* strongly supported the introduction of a European passport and argued, among other things, that ‘such a passport would have a psychological effect, one which would emphasize the feeling of nationals of the nine Member States of belonging to the Community’ (Commission 1975). The Tindemans *Report on European Union*, released in 1975, included a chapter on ‘People’s Europe’ and, as far as I know, it coined the motto ‘Europe must be close to its citizens’ (Tindemans 1975). It was followed in 1983 by the European Council’s *Solemn Declaration on European Union* (the Stuttgart Declaration, 19 June 1983), which acknowledged the common objective of promoting ‘closer cooperation on cultural matters, in order to affirm the awareness of a common cultural heritage as an element in the European identity’ (European Council 1983).



Following the disappointingly low turnout in the 1984 elections for the European Parliament, the European Council at Fontainebleau considered ‘it essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world’ (European Council 1984). Therefore, the European Council set up an ad hoc committee for a ‘People’s Europe’ – the Adonnino Committee – charged with the elaboration of proposals on matters such as the European passport, the adoption of a flag and an anthem, the creation of European football teams etc. The report of the Committee urged action in the areas of culture and communication: ‘It is also through action in the areas of culture and communication, which are essential to European identity and the Community’s image in the minds of its people, that support for the advancement of Europe can and must be sought’. The report envisaged a wide range of initiatives to address the ‘minds of European people’, the most surprising of which was the creation of a ‘Euro-lottery’: ‘to make Europe come alive for Europeans, an event with popular appeal could help promote the European idea’ (Adonnino 1985: 21).

One of the aspirations of the Treaty of Maastricht – surely not the most important one – was to make European institutions closer to the citizen: the Member States were ‘resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen’ (Preamble of the TEU; see also Article A, now 1 TEU). At Maastricht these declarations of intent translated only into some constitutional *maquillage*, such as changing the name of the European Economic Community to ‘European Community’ and introducing a section on citizenship in the EC Treaty.

In this regard it is worth recalling that European citizenship has always been totally dependent upon national citizenship and almost void of normative content. It is little more than the right to petition the Ombudsman and to vote in elections to the European Parliament: ‘a list of civil rights of marginal value. If they have a greater value it is undoubtedly symbolic.’ (Ward 2003: 268, Closa 1992); ‘some fancy words on a piece of paper’, which do not ‘confer on the holder any rights which he or she did not already have’ (Guild 1996: 30). However, the introduction of European citizenship succeeded in generating political rhetoric and academic debate. The studies on European citizenship generally reinforced the ‘normative turn’ of contemporary political philosophy and political



sciences (Bellamy-Castiglione 2003). Participation in the public sphere, belongingness in the political community, which once were the premises of a citizen's rights, became the objective of the codification of the citizen's rights: bringing the citizens closer to the EU by making them aware of the rights they already have.

Participation and belongingness were interpreted as a possible outcome of several European promotional campaigns<sup>III</sup>, amongst which the drafting of the Nice Charter of Fundamental Rights deserves particular attention. As Rubio Llorente wrote (2003: 405), the Charter had a 'pedagogical and, in a certain sense, propagandistic purpose', as its goal was 'to help us to appreciate the rights that the legal order of the European Union has guaranteed for years'. According to Gráinne de Búrca (2004: 562), it was a 'showcase "Charter of Rights"'. Instead of creating new rights, the Charter reaffirmed pre-existing rights as they resulted from the constitutional traditions of the Member States, international instruments such as the ECHR, and the ECJ case law. Its innovative effect was almost insignificant. Moreover, the provisions set out in the last chapter of the Charter were designed to make sure that the Charter could have no effect on the legal orders of the Member States and on the vertical distribution of competences. Some argued that, due to drafting deficiencies, the Charter might even have threatened the supremacy of EC law over national law (Lisberg 2001). In comparison with the ECJ's settled case law, the Charter unintentionally narrowed the scope of fundamental rights protection in EC law<sup>IV</sup>. Nonetheless, the Member States gathered in Nice were not 'courageous' enough to incorporate the Charter into the EU primary law: the Charter exhibited too much of a constitutional tone, it seemed to threaten national sovereignty and therefore for a long time it remained a non-binding political declaration, a source of soft law. Especially in the United Kingdom, the publicity about the constitutional nature of the Charter, by raising identity-based concerns, might have had destabilising effects on the government's European policy. The Constitutional Treaty incorporated the Charter, and the Lisbon Treaty reached the same practical effect by means of a short cross-reference (*renvoi*). The United Kingdom and Poland opted out. In 2007 the Member States, in an effort to save the constitutional reform process from the pernicious effects of this useless Charter, introduced a dangerous distinction between 'rights' and 'principles', the latter being not 'judicially cognisable' according to article 52(5) of the Charter.



To sum up: the Charter unintentionally created both bad law and bad politics. European constitutional law has tended to become extremely ‘soft’, almost impalpable, in order to avoid being politically unacceptable at the national level. But soft law, being non-binding, requires publicity in order to be effective, and thus it might well be intrusive, irritating and distortive for public opinion and the political process.

However, it is apparent that the main achievement, and eventually the most visible failure of European constitutional publicity, is represented by the Convention, the Constitutional Treaty and the wide range of institutional initiatives and official documents aimed at sustaining the public debate in Europe. Among the latter, the most original and imaginative Commission policies; *Plan D for Democracy, Dialogue and Debate* and the *White Paper on a European Communication Policy* should be mentioned<sup>V</sup>. In order to strengthen and stimulate dialogue, public debate and citizen participation during the period of reflection (‘a wide-ranging discussion on the European Union – what it is for, where it is going and what it should be doing’), the *Plan D* proposed several EU initiatives and actions – assistance for Member States in the organisation of national debates, visits by Commissioners to Member States, the European Round Table for Democracy, and European Goodwill Ambassadors. The *White Paper on Communication Policy* proposed ‘a forward-looking agenda for better communication to enhance the public debate in Europe’. The proposals ranged from adopting a ‘European Charter on Communication’, to ‘empowering the citizens’ by ‘improving civic education’, ‘working with the media and new technologies’ in order to give ‘Europe a human face’, ‘understanding European public opinion’ by setting up a special series of Eurobarometer polls, a network of experts in public opinion research, an observatory for European public opinion, and, most importantly, ‘doing the job together’, i.e., involving the Member States, other EU institution, the political parties, the NGOs, etc., in the creation of ‘a robust European debate’.

All this was perfectly in line with the main goal of the Convention, which was – as I have already said – to broaden participation in the ‘constitutional conversation’ and to promote public discussion on the institutional reform process in order to achieve greater legitimacy for its outcomes: ‘what the constitution demands from us is that we genuinely engage in debate precisely as if there were a European constitution’ (Palombella 2005: 357). True, some of the issues under discussion at the Convention were highly technical and politically sensitive, such as the voting procedures and the composition of the institutions, the



distribution of competences, the simplification of the treaties, the overcoming of the division into three pillars, the creation of a normative hierarchy, and the inclusion of the Charter. A democratic public debate on these issues was highly improbable as well as pointless and not desirable in the perspective of achieving greater legitimacy and effectiveness for European law. Other issues under discussion were of a purely symbolic nature: The Convention urged the European people to debate the establishment of a European Constitution which was already largely in force and functioning and on the content (Christian roots?) of a Preamble which was as legally irrelevant as it was rhetorically overloaded<sup>VI</sup>. A wide-ranging and open discussion on the adoption of the idols of modern politics, the relics of the age of the nation states, such as flag, anthem and motto, should have begun<sup>VII</sup>. The point was that there should have been debate and participation in order to have legitimacy: the general public should not have remained the 'ghost at the IGC table' (De Witte 2002: 48), as it has always been; it should have been brought at the centre of the stage, under the spotlight of publicity.

Unfortunately, the public was revealed to be ghostly – evanescent, uncanny, and indistinct, almost unintelligible, and nonetheless hostile to the constitutional discourse and publicity. The debate on the future of Europe proved to be the last concretisation of the 'Euro-lottery' stream of European polity-building, and the bet was lost. It comes as no surprise that the Lisbon Treaty is almost the institutional photocopy of the Constitutional Treaty, deprived of all constitutional 'pathos and patina' (Halter 2003). 'In a purely legal reading, the difference between the two Treaties is lost or made a matter of cosmetics' (Claes-Eijsbouts 2008: 1). Nor is it surprising that the evanescent public is urged to vote and vote again, until it gets it right, by learning and accepting, as happened in Denmark and Ireland<sup>VIII</sup>, or until the public simply disappears, as has almost happened for the elections of the European Parliament. For the first time in their history, the Dutch, traditionally one of the most pro-European peoples of the EU, were called to vote on a consultative referendum and they all got it wrong by voting in mass against the Constitutional Treaty. Their opinion will no longer be required; there will not be another Dutch referendum on the Lisbon Treaty.

True, the results of the referendums cannot be attributed to one single cause. This consideration, however, cannot but reinforce the finding about the essentially 'publicitarian' nature of the whole constitutional debate. As no clear and univocal question



was formulated in the referenda, no informed and reasonable choice could be made. Being almost politically unintelligible, the results of the referendums were also of little political relevance – they did not provide the decision-makers with a clear course of action: what precisely should have been changed in the Treaty, what could have been kept? The citizens' response to the referenda could not but be 'ignorant, irrelevant and ideological' (Moravcsik 2006: 227)<sup>IX</sup>, as they were confronted with confusing and ill-formulated questions. Baudrillard was right in believing that the reforms foreseen in the Treaty eventually would have been adopted, no matter the result of the referendum: "The vote is fixed. If the "no" side wins the day this time, they will make us vote again (as in Denmark and Ireland) until the "yes" wins. We may as well vote yes right now.' (Baudrillard 2005). The major political parties, the quality press and the opinion makers agreed on the 'yes' – 'progressive Europeanism became the general code of conduct for political actors to appear in the media' (Trenz 2007: 108-109<sup>X</sup>). The referenda appeared as mere means of legitimisation that the politicians were using to promote their own views. They had already decided, and thus the 'no' at the referendum 'was not a no to Europe, but a no to the unquestionable yes' (Baudrillard 2005). To put it differently, the 'no' vote in the referenda was, amongst other things, a 'no' to the reduction of politics to publicity; it was a 'no' to the attempt to eliminate that unpredictable and indeterminate element which distinguishes political processes from administrative procedures and liturgical ceremonies.

The fact remains that, if the point of the constitutional debate was to bring Europe closer to the citizens in order to make its authority more legitimate and more effective, then – regardless of any opinion one may have as to the merit of the adopted reforms – it is difficult to imagine a more spectacular failure – a preposterous, irreparable failure, which urges anybody interested in the European project to reflect in a detached but radical way upon how things have gone and how they could have gone differently. Before doing this, let us try to better understand what are we talking about when we talk about publicity.

#### 4. Publicity in theory. The concept

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According to Chris Shore, at the turn of the 1990s the ‘emphasis on consciousness-raising as a strategy for bringing Europe “closer to its citizens” and creating “Europeans” signalled a new departure in EU approaches to the neglected domain of culture’ (Shore 2000: 45). However, already during the constitutionalisation phase, in the ECJ and the Legal Services of the Commission a new way of ‘interact[ing] with the public, secur[ing] professional expertise and explor[ing] the interest definitions of private actors’ was taking shape: a new approach that ‘no longer [had] much in common with the way that traditional bureaucracies [had] defined their relationship with the public’ (Joerges 2001).

Thus, in the 1960s and 1970s communication became the object of a distinctive policy aimed at catalysing the public sphere, fostering political debate, creating dialogue and trust: what I propose to call ‘publicity’, both in the sense of creation of *Öffentlichkeit* – and in particular creation of a public sphere as open, transparent and enlivened by political debate as possible – and in the sense of advertisement, consensus-building, public opinion management and agenda-setting strategies. The concept of publicity tries to express the threshold of indistinction and mutual confusion of these two processes that characterises the European constitutional process and communication policy.

In the constitutional debate constitutional publicity boomed and eventually failed. Indeed, one may wonder if there is really something new going on. After all, publicity may not be a new governance function, it may well be just the latest example of other well known political processes and power relationships. We know that ‘creating allegiance has been an unremitting effort by the nation-state since its origins’ (Milward 2000: 25, Anderson 1991, Hobsbawm 1990, Sassen 2006). The sense of belonging to a community produces an attitude of prompt compliance which lies at the basis of legitimacy. In the case of nation states, such a feeling of belongingness was by no means a pre-political bond emerging spontaneously from social cooperation; on the contrary, it has been artificially created by the state, which eradicated local cultures, transformed traditional ways of life, created a public education system, set up national myths, official national history, armies and banners of allegiance such as flags, anthems and nationalistic rhetoric. As we have



seen, the European constitutional process and the other publicity initiatives might even bear some vague similarity to this approach to nation-building.

However, there is something new in the contemporary European publicity, something that makes it different from the nation-building experiences in Europe. Publicity is a distinctive way of managing political communication that promotes public discussion in order to strengthen the legitimacy of the decisions to be taken. It aims at catalysing the public sphere, encouraging debate and discussion, in the effort to build consensus on the outcomes of the political process. The goal might be conventional – to enhance the authority of a governance agency, to create allegiance to a political community in the making – but the means to that end are quite new. The key-word is discussion, dialogue, and in this respect publicity is clearly distinct from propaganda. The new European identity-building process is not primarily based on coercion, but on publicity.

True, the project of bringing Europe closer to the citizens bears an uncanny similarity to the old-fashioned political propaganda. Both are the object of public policies and operate with communication and not with coercion. But propaganda aims to destroy public opinion, while publicity, even when it fails, aims to create it. Publicity may be intrusive, but it is not a violent and destructive intervention in the general political communication. Publicity is a communicative proposal requiring attention, not a unified system of beliefs requiring acceptance. It aims to create public concern and interest, not obedience.

Moreover, publicity is one possible response to the legitimacy deficit which affects the European Union – according to the intentions, ‘publicitarian’ consensus should be the premise of voluntary acceptance and compliance – whereas propaganda is a manifestation of political sovereignty and cultural hegemony. Propaganda conveys a message that is already embodied in social movements, political parties, mass organisations, and everyday conversations; the message is invariably already present in the community addressed by propaganda, it is deeply rooted in the social spheres that propaganda colonises. Although it might be seen as an expression of the regime’s weakness, propaganda as such consists in the exercise of power and strength. On the contrary, publicity is an expression of weakness and lack of authority. There is no political sovereignty behind publicity, there is just the ‘autonomy’ of a set of agencies, institutions and processes. There is no hegemony behind the message conveyed by publicity, but simply lack of interest, unconcern, unawareness.



Publicity is distinct from propaganda but both have in common the fact of being vertical, top-down forms of political communication: both contribute to the ‘inner colonisation of the *Lebenswelt*’, as Habermas would say; they endanger the autonomy of the civil society, and corrupt the ‘general intellect’. Publicity may well create public opinion and consensus, when it succeeds, but it impoverishes the public sphere and hinders political innovation. The ultimate end of publicity might be the catatonic stupor of the consumer-spectator-citizen.

The project of bringing Europe closer to the citizens bears an uncanny similarity not only to the idea of propaganda – bringing the citizen closer to the power – but also to the idea of bringing a (political) good closer to its customers (citizens), which is at the core of marketing: ‘the selling of Europe’ (Weiler 1996<sup>XI</sup>). Indeed, publicity is much more similar to advertisement than to political propaganda, and historically the practice of publicity arose from the ground of corporate governance and public relations (Fasce 2000, Marchand 1998, Ewen 1996). Politics makes itself publicity – both in the sense that it makes advertising for itself and in the sense that it becomes publicity – and, as consequence, publicity makes politics, it becomes a possible form of political action, conveys political contents and invites to participation. As Baudrillard (1981: 88) wrote,

‘It is not by chance that advertising, after having, for a long time, carried an implicit ultimatum of an economic kind, fundamentally saying and repeating incessantly, “I buy, I consume, I take pleasure,” today repeats in other forms, “I vote, I participate, I am present, I am concerned” – mirror of a paradoxical mockery, mirror of the indifference of all public signification?’

Finally, as well as propaganda and marketing, the affinities between European publicity and the theory of deliberative democracy are also important and deserve to be emphasised. As is well known, the theory of deliberative democracy is inspired by a tradition of Enlightenment and Kantian moral philosophy according to which publicity is a condition of the legitimacy of public authority. Kant advocated freedom in the public use of reason, as ‘the prohibition of publicity impedes the progress of a people toward improvement’, and enthusiastically saluted the birth of public opinion seen as the ‘disinterested participation’ in an event – the French revolution – which was addressed to



the universal mankind (Kant 1798: 233 ff., Kant 1784: 54 ff.). He assumed as ‘transcendental formula of public right’ the principle according to which ‘All actions affecting the right of other human beings are wrong if their maxim is not compatible with their being made public’ (Kant 1795: 126). Here publicity meant the possibility of criticism and thus the possibility of progress and continual improvement of the human race.

This classical concept of publicity is not without relationship with European publicity understood as a function of transnational governance. However, the relationship is that of a historical nemesis or ironic reversal. The reason is that, since the 1980s and the 1990s, the classical concept of publicity has been resumed and revised by a group of theoretical proposals destined to have great influence on the European studies and, more generally, on the political semantics and political practices in Europe and elsewhere: the theory of deliberative democracy.

The idea spread that collectively binding decisions are legitimate insofar as they are the outcome of public discussion and rational argumentation, and of the consensus as wide as possible that follows that discussion (Habermas 1992, Bohman-Rehg 1997, Bohman 1998). Democracy is no longer the government of the people, by the people, for the people. It is not *volonté générale* expressed by means of general laws, nor is it merely a procedure for aggregating individual preferences into collective decisions or for selecting political *élites*. Democracy is even less ‘constituent power’ – collective counterpower that is inherent to society and resists any attempt to enclose it in a definitive legal formalisation. Instead democracy is the set of essentially procedural requirements that allow for the reproduction of an understanding-oriented communicative action in the public sphere and thus for the rational formation of political will and public opinion. There is democracy when the political system, instead of autistically closing upon itself through an autoreferential communication, is affected by the sense contents that come out of public opinion by means of formal channels (e.g. general elections) and informal channels (e.g. socialisation processes, widespread participation etc.). For Habermas the problem is thus how to ensure the survival of the communicative preconditions – such as direct universal suffrage, personal secret ballot, fundamental rights protection, effective freedom of information etc. – that allow for the feeding of debates on the common good; debates,



both within the state and in civil society, which, according to the theory, should be as open, inclusive, transparent and informed as possible.

In order to achieve a level of public communication of such kind, the 'legal medium' is crucial and therefore Habermas believes, with regard to contemporary European politics, that it is indispensable to move towards constitutionalization (Habermas 2001). In order for a European constitution to be viable it is necessary to promote the creation of a European civil society, a European public sphere and a common European political culture. A European constitution-building process could help to establish a kind of civic solidarity that is no longer based on ethnic belongingness but on dialogue or, better, on the common goal of continuing to maintain a dialogue by taking part to the same political community.

It is clear that the European constitutional debate and the other publicity initiatives are an attempt to implement institutionally the theory of deliberative democracy (Closa 2005). The constitutional process was an effort to reform the Treaty revision procedure according to that theory: to bring the Treaty revision 'out in the open' in the transparency of a debating European public sphere and far away from the closed doors of the intergovernmental conferences and diplomatic negotiations; to create the opportunity for a common discussion on the future of Europe in order to invert the trend that each Treaty revision must be accompanied by national debates often oriented toward domestic issues and always non-communicating, isolated one from the other. The relationship with the theory of deliberative democracy is evident, as Habermas acknowledged<sup>XII</sup>. The goal was to bolster the legitimacy of collective decisions on the constitution of Europe by submitting them to a process of preventive debate, public discussion, through which a consensus as wide as possible should have been reached.

This is the reason why it is appropriate to speak of an ironic reversal, by means of the theory of deliberative democracy, of Kantian publicity into publicity as governance function. For Kant publicity was the principle that makes possible a convergence of politics and morality: the possibility of an improvement towards the better, the possibility of progress. In the European constitutional process, publicity does not aim at granting the subordination of politics to morality (justice) nor does it aim at granting, as the old-fashioned propaganda used to do, the subordination of morality to politics (obedience); instead, contemporary publicity should produce the harmonic and pluralistic



correspondence of morality and politics – ‘good governance’. Thus it purports to create, if not the possibility of progress, at least a legitimate presumption of consent to the institutions and decisions of the common polity.

## 5. What is to be done?

The quest for ‘universals of communication’ ought to make us shudder

Gilles Deleuze, *Control and Becoming*

The premise of the constitutional debate was ‘the idea that institutional reforms could significantly improve the democratic quality of the Union and, by thus strengthening its normative legitimacy, bolster popular support for EU institutions’ (Hurrelmann 2007: 343). The goal was to decrease the legitimacy deficit by improving the democratic quality of the EU institutional architecture. However, the constitutional process revealed that the EU could not rely upon a silent majority – let alone a ‘debating majority’ – with regard to far-reaching treaty reforms, even if the EU might still enjoy a certain degree of ‘permissive consensus’ – passive and detached acceptance – for the ‘normal operations’ of ordinary politics<sup>XIII</sup>.

I think that the challenge of democratising the EU today has less to do with the institutional reforms than with the destruction of that ‘permissive consensus’ surrounding the EU’s normal activities. Permissive consensus originates from the relative unconcern by the public about European policies, its lack of interest and knowledge about the EU and its institutions, and from the relatively high degree of trust that the EU institutions enjoy in the public opinion of several Member States. According to the Eurobarometer, the trust placed in the EU is higher than that placed in national governments and parliaments. But if the goal is to democratise the EU, then the challenge is to end such disinterest and ignorance, and the trust-by-default relationship with the EU. The challenge of Europe is the destruction of the silent majority.

Note that the solution to the democratic deficit might well increase the European Union’s legitimacy deficit<sup>XIV</sup>. Democracy produces legitimacy – voluntary acceptance – but it also produces illegitimacy – conflicts, resistance, non-compliance, disobedience.



Democracy presupposes the existence of conflict, and disagreement is essential to democracy no less than procedures. A democratic polity cannot enjoy full legitimacy, and a fully legitimate authority – an authority that encounters no opposition and is always obeyed – cannot be democratic in nature.

Therefore, the issue of democratic deficit should be sharply distinguished from the issue of legitimacy deficit. In a pluralist legal space, the legitimacy deficit might be structural and, most importantly, it might even prove to be a political opportunity if we believe that cross-cutting and flexible authorities and allegiances can help to shape an open and inclusive political community. The legitimacy deficit might hint at a community which is freely chosen, rather than based on ethnic belongingness, tradition, authority and coercion.

If the democratic deficit were addressed and resolved, then its solution might not necessarily produce legitimacy and in any case it would not be achieved by means of institutional reforms. The quality of democratic life does not depend solely on rules, rights and procedures. Fundamental rights, the rule of law, fair election and voting procedures, indispensable as they are, may not be sufficient to ensure democratic self-government. Democracy is not only a set of rules, it is also an event which sometimes happens, sometimes not. In order for it to happen, there must be people capable of engaging in meaningful political discussion and effective political action. Democracy requires procedures and constitutional standards as much as it requires dissent and conflict. Thus, if we want the EU to become a democratic polity, permissive consensus should not be supported by publicity. It should be abolished and replaced by wide-ranging political discussion and focused disagreements. Even non-compliance with European law and effective campaigns against EU policies might in some cases be welcomed.

The European project has much more to gain than to lose from becoming the subject of political and social conflicts and harsh political debate, on one condition. Public debate should not address many of the so-called EU's constitutional issues currently under discussion. The debate should address the substantive issues of European politics, issues usually covered by permissive consensus; it should affect the 'normal operations' of the EU, its everyday decision-making processes<sup>xv</sup>. If the goal is to promote meaningful public discussion on 'the future of Europe', an inclusive political debate that produces public involvement and democratic decisions, then the object of such debate should be the policies and the decisions of the EU as well as of the Member States. Not only the future,



but also the past and present of Europe should be discussed, if the goal is to create a European public sphere and to democratise European governance.

There is no point, however, in promoting public discussion on the procedures and competences of the European institutions and of the governance agencies in general. Policy decisions directly affect people's lives – both of European citizens and of non-Europeans – while procedures affect us only indirectly. Procedures change too quickly, and perhaps it is better so. Procedures are not the kind of 'future' we can really choose. We lack too much information for making conscious decisions concerning procedural matters, and we also lack time and interest in gathering such information, because procedures affect our interests only indirectly. Paradoxical as it may sound, EU constitutional law may not be as politically relevant as the ordinary policies of the EU, the 'secondary norms' (the rules of recognition, change and adjudication) may not be as relevant as the 'primary norms' (the rights and duties of the citizens), the 'higher law' may not be as relevant as the lower, and the 'law that regulates power' may not be as relevant as the decisions actually taken by the power.

Unfortunately, the constitutional debate has not only been strongly hetero-directed and based on publicity, but it has also been almost void of substantive political contents and policy decisions. An astonishing example is provided by the provisions in the military instruments of the fight against terrorism. These provisions received little academic attention and no media coverage. Nonetheless, here we find some of the most radical and potentially controversial political decisions of the Constitutional Treaty, all preserved by the Lisbon Treaty.

Nobody knows, even in France and the Netherlands, that the Constitutional Treaty literally *constitutionalised the Bush doctrine* of preventive war. Under the 'solidarity clause', the EU can 'mobilise all the instruments at its disposal, including the military resources ... to ... prevent the terrorist threat in the territory of the Member States' (Article I-43 CT; new Article 222 TFEU after Lisbon). The Constitutional Treaty made it clear that the EU 'may use civilian and military means' in the course of 'joint disarmament operations ... conflict prevention' and that the EU 'contribute[s] to the fight against terrorism, including by supporting third countries in combating terrorism in their territories' (Article III-309 CT; new Article 43 TEU). If the Constitutional Treaty had been approved by the national referenda, the Europeans would have had a Constitution stating, in its first part, that the



‘Member States shall undertake progressively to improve their military capabilities’ (Article I-41 CT; new Article 42 TEU)<sup>XVI</sup>. The Constitutional Treaty and the Lisbon Treaty employ the words ‘terrorist’ and ‘terrorism’ eleven times, in the attempt to be ‘terroristically’ closer to citizen, one is tempted to say<sup>XVII</sup>.

However, the constitutional debate officially administered has not addressed these potentially controversial provisions. A sort of selective and collective amnesia occurred in the quality newspapers, the political parties, the NGOs and academia, and the general public remained, and still is, totally unaware of the reforms going on. The democratic nature of the constitutional debate could not be more effectively refuted.

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<sup>I</sup> ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken *as closely as possible to the citizen*’ (Article 1 TEU; the 1997 Amsterdam Treaty added the clause ‘as openly as possible’).

<sup>II</sup> According to the Italian ambassador Gerardo Zampaglione, the task of the European Parliament was to be ‘an effective animator’ of the public opinion, and to ‘arouse public interest towards specific issues’ (Zampaglione 1965: 311). For Piet Dankert, president of the European Parliament in 1982–1984, the Parliament, lacking real political powers, was just a ‘non-political pressure group’ (Dankert 1984: 8)..

<sup>III</sup> Shore (2000: 54) recalls the 1993 De Clercq Report on information and communication policy. Written by a ‘committee of wise men’ composed mainly of communications professionals and public relations experts, the report coined the slogan ‘Together for Europe to the Benefit of Us All’, suggested that Europe ‘must be presented with a human face: sympathetic, warm and caring’, and that the European institutions ‘must be brought closer to the people, implicitly evoking the maternal, nurturing care of “Europa” for all her children’. From the standpoint of public relations, the De Clercq Report – received with indignation by journalists – was a spectacular own goal.

<sup>IV</sup> According to Article 51, ‘The provisions of this Charter are addressed to the institutions and bodies of the Union ... and to the Member States only when they are implementing Union law’; therefore, at first sight, the provisions of the Charter do not apply to the Member States acting in derogation law, as held by the ECJ, Case C-368/95, *Vereinigte Familienpress Zeitungsverlag- und vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 ECR I-3689. See Dougan 2008: 663.

<sup>V</sup> Commission 2005b: ‘restoring public confidence in the European Union’, ‘publiciz[ing] the added value that the European Union brings’, ‘assisting national debates’, ‘stimulating a wide-ranging public debate’, ‘promoting citizens’ participation in the democratic process’. Commission 2006: ‘Communication should become an EU policy in its own right, at the service of the citizens’. See also three communications adopted by the Commission between 2001 and 2004 dealing with information and communication (Commission 2001, 2002, 2004) and *Action Plan on Communicating Europe* (Commission 2005a), formulating specific proposals.

<sup>VI</sup> The Preamble of the Constitutional Treaty, which contains statements such as ‘to forge a common destiny’, ‘United in diversity’, ‘the great venture which makes of it [Europe] a special area of human hope’, etc., is the more publicity-inspired part of a text, the Treaty, that for the rest is mostly unreadable. In the Preamble the members of the Conventions even manage to declare themselves ‘grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe’ – that is, they congratulate themselves, on our behalf, for having written what they have written in the Treaty.

<sup>VII</sup> As J.H.H. Weiler has rightly observed with regard to the creation of European citizenship, these symbols of belongingness represent ‘a failure of the imagination. An inability to think of citizenship in any terms other than those resulting from the culture of the State and the Nation’ (Weiler 1996).



<sup>VIII</sup> Dutch referenda on the Treaty of Maastricht in 1992 and 1993, Irish referenda on the Treaty of Nice in 2001 and 2002, and the next Irish referendum on the Lisbon Treaty in 2009, after the first rejection in 2008.

<sup>IX</sup> *Ignorant* because individuals have no incentive to generate sufficient information ... *Irrelevant* because publics are likely to react to efforts to stimulate debate on non-salient issues by “importing” more salient national and local (or global) issues with little to do with the matter at hand ... *Ideological* because intense efforts to stimulate electoral participation tend to encourage symbolic rather than substantive politics’ (Moravcsik 2006: 227).

<sup>X</sup> ‘[T]his misunderstanding of progressive Europeanism as speaking in the name of the public has ultimately added fuel to the present impasse of constitution-making ... The challenge is rather to make sense of the new spaces of politicisation that are breaking with the consensus culture of the EU.’ (Trenz 2007: 109).

<sup>XI</sup> ‘Almost uniformly in every single Report and Resolution, official and unofficial, I have read on the IGC the same phraseology is employed when the issue of citizenship and rights is discussed: The problem is defined as alienation and disaffection towards the European construct by individuals. The medicine is European citizenship. What is the content of this medicine? Human Rights, more rights, better rights, all in the hope of bringing the Citizen “...closer to the Union”’ (Weiler 1996).

<sup>XII</sup> See his criticism of the Lisbon Treaty and the comments on the constitutional process: ‘A political constitution was supposed to create European citizens out of bearers of mauve-coloured passports and the mobilization of citizens during the constitution-founding process could already have contributed to this goal. The intention, at any rate, was to promote a higher level of participation from citizens across national frontiers in a more visible process of political will formation in Strasbourg and Brussels. Instead of this, the slimmed-down reform treaty now definitively sets the seal on the elitist character of a political process which is remote from the populations’ (Habermas 2009: 80 f.).

<sup>XIII</sup> According to Hurrelmann (2007: 352 ff.), ‘the ‘permissive consensus’ model still performs remarkably well’, and ‘contrary to the hopes that are often placed in this kind of ‘forced’ participation [the constitutional debate] as a mechanism to generate EU attachments, the result might actually be reduced support for the EU’. See also Sedelmeier-Young 2006: ‘A widespread sense of crisis ... in the wake of the negative referendums ... Yet beyond these eye-catching events ... the EU went on to have quite a successful year’.

<sup>XIV</sup> The same point is made, although with different arguments, by Weiler 1991: 84.

<sup>XV</sup> Walker 2004 distinguishes between first-order disagreements – conflicts of interests, ideologies, values and identities – and second-order disagreements – concerning ‘the nature of the institutions of justice necessary and appropriate to address and decide upon the resolution of these first order differences’. I am here arguing that European public discourse should be mainly interested in first-order disagreements.

<sup>XVI</sup> See also Article I-41 CT (new Article 42 TEU): ‘The Union may use them [common security and defence policy] on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’; however, ‘Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation’.

<sup>XVII</sup> The first reference to terrorism was made by the Treaty of Amsterdam (fight against terrorism as objective of the police and judicial cooperation in criminal matters), and the second reference was made in the Treaty of Nice (measures establishing minimum rules to be progressively adopted).

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