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Misrecognitions: associative and communalist visions in EU media policy and regulation, from Television without Frontiers to the Audiovisual Media Services Directive (AVMSD)

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Abstract

The author considers the relationships between the media, democracy and culture in Europe. Notably, the relationship between media representations of European Union politics and public perceptions and thus the extent to which the cohesion of the European Union depends on a “communalist” congruence of polity and culture or on “associative” relationships. He proposes that the importance of media and culture in the European Project is over-estimated and thus misrecognised. Rather than popular disenchantment with Europe being due to negative media representations he argues that it’s national politics which mobilises voters who have few opportunities to act in respect of strictly European politics.

He contrasts the provisions in the draft European Constitution on communications networks, what he names ‘associative’ infrastructure with “communalist” provisions on content and culture. Whereas the Constitution empowers the Union to take positive action in respect of networks it can only take supporting action in respect of culture. The EU’s major initiative in communications content, the Television without Frontiers (TVWF) Directive of 1989, brought together both associative and communalist elements of the ‘European Project’. But its successor, the draft Audiovisual Media Services Directive (AVMSD) addresses new policy cleavages the country of origin principle; the scope of the Directive in respect of ‘non-linear’ online services; and stronger protection of minors.

If culture is not the European social glue, as communalists prescribe, what is? The author argues that it’s the functionalist ‘*methode Monnet*’ –where political cohesion derives not from common culture (or language) but from facts and acts which force new relationships and new forms of collaboration engendering ‘the dense web of commercial, economic, political and legal links’ (Piris 2006: 1) which distinguish the EU. Rather than the communalist issue of collective cultural identity which characterised the era of TVWF the author proposes that the era of the AVMSD will be concerned with the associationist issue of freedom of expression.

Misrecognitions: associative and communalist visions in EU media policy and regulation, from Television without Frontiers to the Audiovisual Media Services Directive (AVMSD)¹

Introduction

European policy, whether the ‘high politics’ of the Constitution or more specific areas, such as negotiation of the terms of the successor to the Television without Frontiers Directive (TVWF), develops rapidly. Any commentary that engages with current issues and events therefore risks rapidly passing its sell by date. In consequence I’ll try and identify a number of the structural issues that bear on the relationship between the media, democracy and culture in Europe. Notably, the relationship between media representations of European Union politics and public perceptions; the extent to which the cohesion of the European Union depends on what Ernest Gellner (1983: 43) called the congruence of polity and culture; and the relationship between the media and what Max Weber (1964 [1922]) called associative and communal forms of social organisation.²

Media scholars, but not we alone, have tended to over-estimate and thus misrecognise the importance of media and culture in the European Project. Although there’s an abundant scholarly literature which questions theses of strong and direct media effects, much debate about the media and Europe attributes weak sentiments of attachment to deficiencies in the media and sees in the persistent consumption by Europeans of media works emanating from outside Europe a threat to social and political cohesion and thus to the ‘European Project’. But the principle of EU cohesion lies elsewhere, rather than being what Weber (1964 [1922]) called a ‘communal’ society the EU is an ‘associative’ society: a society bound together not by what Weber called ‘subjective feeling’ but by ‘rationally motivated adjustments’ (Weber 1964: 136).

Moreover, obstacles to the advancement of the European Project which lie in high politics are projected onto the media and thus misrecognised. In high politics, the impasse presented by the stalling of general ratification of the European Constitution contrasts with the striking and enduring long term successes of the EU in sustaining an integrative ‘dense web of commercial, economic, political and legal links’ (Piris 2006)³. An achievement which also is misrecognised because of the pervasive belief in the importance of the congruence of polity and culture (Gellner 1983) as a necessary basis of social cohesion: a belief which necessarily attributes a great importance to media of cultural reproduction.

In the domain of EU media and communications policy and regulation, an era, the Television without Frontiers era, dominated by communalist questions of European identity is giving way to a new era, that of the Audiovisual Media Services Directive (AVMSD), likely to be focused on an associative issue - the extent to which freedom of expression may be safeguarded.

Looking at the European Union in 2006 through ‘communalist’ eyes we might see it as fragile and incomplete but looking at it through ‘associative’ eyes it may rather appear as a remarkable achievement. If the latter, one might see the impact of media and communications in and on the EU to be either marginal or benign: the EU has enlarged the liberties of all of us, its citizens, it has provided an economic framework in which prosperity and economic security has risen, has built mutual confidence between its Member States which has not only meant we have remained at peace (with each other at least) but have also found negotiation of intra-European conflicts more tractable. Testimony to these achievements is amply provided by the EU’s ability to attract new states to membership and to reinvent itself accordingly. If the former, then one may see media and communications, and their putative inadequacies, as a

decisive factor in the halting progress towards the ‘ever closer union’ proclaimed in the European Treaty⁴ (an objective, incidentally, which logically can never be reached – there is always more uniting to be done) and the supranational, or federal, Europe which will embody and promote such ‘ever closer union’.

And where one starts is likely to influence the conclusions one reaches. Whilst there’s always room to improve it’s important to recognise that, compared to most parts of the world, democracy in Europe seems in good shape. In spite of the EU’s legendary ‘democratic deficit’, the EU has successfully sustained itself since the 1950s and continues to grow. Nowhere among the Member States is there a serious move to secede from the Union and though the Constitution, all 482 pages of it, (European Communities 2005) has yet to be ratified by 10 of the Member States, non-ratification has not seriously impeded the EU from carrying on carrying on. Doubtless the Union would work more efficiently, and perhaps even more democratically, with a full time President of the European Council, an EU Foreign Minister and so on. But much of the Constitution is a rationalisation and codification (and has long been overdue) of existing Treaty provisions which, of course, remain in operation. And one may also doubt whether we are seriously disadvantaged by the non-implementation of some new provisions – perhaps we do not lose too much by our motto ‘United in Diversity’ remaining in abeyance.

The EU and the Member States.

True, the EU is less perfectly accountable than are the national⁵ governments of its Member States. But that is nothing new and reflects Monnet’s original structure of 1951 of a ‘Haute Autorite’, the precursor of the European Commission, to direct the European Coal and Steel Community from which the EU has developed. However, to focus on the imperfections of EU representative democracy and/or the lack of direct democracy in the EU may lead us to underestimate the importance of a complex web of systems and institutions which do hold the Commission to account. The Parliament and Council are, of course, chief among these and the importance of both bodies has grown, and rightly so. But they are not the only relevant instances: the Commission’s practice of extensive consultation and its own collegial structure are other cases in point. Moreover, the requirement that the Commission accounts for its activity, its decisions being subject to review (and sometimes to being overturned - notably in the European Court of Justice) also provide important forms of accountability. And one could argue further, although perhaps mischievously, that some of the EU’s striking successes, such as the effectiveness of its Competition Directorate, are due to their relative imperviousness (when compared to many equivalent national bodies) to political direction.

However, rejection of the Constitution by voters in two of the founding six countries, France and the Netherlands, (and who can doubt that other countries would have joined them had the Constitution been further put to popular vote), suggests that national politics continues pervasively to exert a greater power to mobilise voters than does European politics. And without citizens’ participation in politics, democracy and accountability are necessarily imperfect and incomplete – as the Commission’s 2006 White Paper on a European Communication Policy acknowledges (European Commission 2006b: 4). Doubtless there were voters in both France and the Netherlands who voted, both for and against, on the merits of the Constitution but it’s hardly in doubt that many votes were cast as responses to national issues. And given that political parties are chiefly organised at a Member State, rather than EU wide, level and that many of the issues which touch voters most directly – health, tax, social security, education – are national, not Union, prerogatives it is not surprising that the political allegiances of EU citizens remain chiefly focused nationally.

Indeed, for most of us the opportunities to act as citizens are far stronger in a national than in a European context. France and the Netherlands⁶ were exceptional in giving their citizens the

opportunity to vote on the Constitution, ie participate in democratic deliberation and decision making, on the most recent important political question concerning the 'European project'. Thus far, only four of the Member States which to date have taken a position on the Constitution have done so after a popular vote: two (Spain and Luxembourg) have voted in favour and two (France and the Netherlands) have voted against. 13 Member States have endorsed the Constitution without a popular vote and 8 have yet to take a position. It can hardly be said that the organisation of high politics in the EU is of a kind likely to engender the visceral sentiments of affiliation, emancipation and adherence that, putatively, distinguish communal societies. Rather we see a practice of European politics where only a minority of citizens have actually been given the opportunity to deliberate and decide on the future of Europe: France, Luxembourg, the Netherlands and Spain are the honourable exceptions to a rule where, in the other 13 Member States to have taken a position (all of which have endorsed the Constitution), the decision was taken at the Member State political level. Essentially, it seems, European high politics, France, Luxembourg, the Netherlands and Spain excepted, excludes the citizen and affirms the overwhelming importance of decision making at Member State level.

The putative weakness of such affiliation to the EU as there may be seems at least as likely to be attributable to the organisation and conduct of high politics as it may be to the deficiencies of the mass media. As to media treatment of Europe, it's true that respondents to the Eurobarometer survey on 'the Future of Europe' wished for 'better information by the media' (Eurobarometer 2006: 12) and that some respondents are cited as believing that 'the media often spreads word of problematic or negative aspects of the European Union' (Eurobarometer 2006: 21) but these are unsurprising findings and are not necessarily evidence of inadequacies in media coverage. Indeed, it would be cause for concern if the media did not spread word of problematic or negative aspects of the European Union. But perhaps negative sentiment about the EU is not (wholly) due to the media. As Bauman (2004), Lyotard (1984) and many others have testified, few hearts race when confronted by trans-national institutions and their bureaucratic outputs.⁷ Bauman's object of opprobrium was the Maastricht Treaty but the 482 pages, from Preamble to Final Act via 3 parts, 36 Protocols, 2 annexes and 50 declarations, of the (English version) Constitution for Europe is a further case in point.

Media representations and political disenchantment.

Here again we may assert that the media are less significant than is the practice of European high politics. Negative coverage of the EU is not necessarily a malign sport of irresponsible mass media: there is quite a lot to be negative about! Further, and here I risk a banal insistence on the obvious, there are profound differences in values and visions attaching to Europe both within and between Member States. These are the stuff of European politics just as analogous differences of value and vision are the stuff of national politics. It is not surprising, or necessarily to be deprecated, that the media of one Member State may tend to construct as flaws what the media in another Member State constructs as strengths. But it's simply not true that all media coverage of Europe, and the EU, is negative. Even in the UK where Eurobarometer's finding that a 'weakness of positive perceptions and/or.... abundance of criticism' concerning the EU is 'a permanent feature in that country' (Eurobarometer 2006: 9) will surprise few. Piquantly, an enquiry into BBC news coverage of the European Union, commissioned by the BBC's Governors and undertaken in 2004 found grounds for the perception that BBC coverage of Europe is systematically biased in a pro-European way (BBC 2005: 3). Whether this inadequate treatment, because excessively positive, is damaging to the EU is an open question.

However, despite the BBC, there can be no doubt that much reporting of the EU in the UK is critical – even hostile. But this could also be said of reporting of the UK Government. Moreover, in the UK at least, negative sentiment about the EU tends to focus on what

Davidson (1993) called ‘high politics’ whereas other aspects of EU policy and practice, such as trade liberalisation and the single market, are viewed more positively⁸. But high politics is what the media tend to cover. It lends itself better to personalisation than does what Piris (2006: 1) called ‘the dense web of commercial, economic, political and legal links’; a web which the EU has successfully spun and which underpins our co-operation today and generally improves the lives of us all.

Moreover, in the UK at least, reporting of high politics tends to be adversarial. The BBC has commented (in its own defence) that

An adversarial approach is the cornerstone of many key British institutions, such as Parliament and the courts. A robust exchange of views is acknowledged not as a way of generating heat but of casting light on a subject. Broadcasting is no different

(BBC 2005a: 3).

However, adversarial traditions or not, it’s not surprising that the high politics of the Union, the focus of media attention, are represented critically for high politics is currently at an impasse where, I refer again to the high politics of the Constitution, the European ‘democratic deficit’, France, Luxembourg, the Netherlands and Spain again honourably excepted, has been unavoidably and insistently obvious.

However, the incomplete ratification of the Constitution is not the only sign of political disenchantment in the Union. The fall in numbers of voters in successive elections to the European Parliament (from 63% in the first election in 1979 to 45.7% in the most recent election in 2004) is another instance of growing citizen disenchantment throughout the EU. This significance of this decline can, perhaps, be discounted by noting declines in political participation in Member States’ elections (even so a more than 17% drop remains considerable) but rejection of the Constitution is not so easily massaged away. But to attribute either (or both) impasse or disenchantment to the influence of the media depends on determining, first, whether there is a causal relationship between adverse media coverage and critical sentiments and, second, in which direction the causality runs.

The difficulty of securing ratification of the Constitution in all 27 Member States face the Union with a series of difficult choices. Basically, either to carry on carrying on, as we are doing; or to adopt again the ‘variable geometry’ strategy used when Denmark and Ireland respectively rejected the Maastricht and Nice Treaties (that is provide the dissenting countries with sufficient derogations to enable their electors to accept the Treaty) or, thirdly, to hope that, somehow, the profound differences within and between Member States that led to rejection can somehow be reconciled and the maximalist version of the Constitutional Treaty adopted by at least 50% of electors in every Member State which puts the Constitution to a popular vote. But the latter seems unlikely – even without considering the likelihood of ratification in countries where the Constitution has not yet been formally considered it’s important to remember that France’s rejection of the Constitution followed the very narrow (50.8% to 49.2%) acceptance of the Maastricht Treaty by French voters⁹. Are the problems the under-reporting of European issues, hostile reporting of European issues or even the absence of pan-European media? Is there not more than a whiff here of projection of difficulties onto the media which actually lie elsewhere – in politics.

The EU and media and communications policy.

Let me turn from these observations about the media and the EU to the EU and the media. There are a variety of issues current; media pluralism and concentration of ownership, the relationship between public service broadcasting and competition policy and regulation, and the drafting and discussion of a replacement to the Television without Frontiers (TVWF)

Directive. All these take place within a macro context where the Constitution, and the extant Treaties, have very little to say about media and communications: the Constitution refers only to freedom of expression, network infrastructure building and the audiovisual sector only as a subset of artistic creation.

Article II-71 on freedom of expression and information provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

This provision may seem banal because so familiar from Article 10 of the European Convention on Human Rights (ECHR), Article 19 of the UN Universal Declaration of Human Rights, Article 11 of France's Declaration of the Rights of Man and of the Citizen, Article 5 of the German Basic Law, the United States' Bill of Rights and in many other national instances. However, Article II-71 is not hedged around with exceptions as is the corresponding Article 10 in the European Convention on Human Rights.¹⁰ It entitles EU 'citizens' to transgress rhetorical boundaries, offend, verbally and in writing, against established cultural codes and conventions and assert, in speech and writing, their differences.

In order to bring together the varied expressions sanctioned by Article II-71 the Constitution text provides for the Union to exercise powers to develop communication networks. SECTION 8 of the Constitution, TRANS-EUROPEAN NETWORKS Article III-246, states:

1. To help achieve the objectives referred to in Articles III-130 and III-220 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, **the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.**
2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union. (My bolding).

Here, it's worth noting that these Constitutional provisions apply only to telecommunications networks, that is to 'carriage' and what we might name 'associative' infrastructure. Weber foreshadowed such an exercise of political authority and prioritisation in referring to 'extremely important conditions in the fields of communication and transportation' and identified 'the services of the railway, the telegraph and the telephone' (Weber 1964: 339) as particularly important.

As regards content and culture, the Preamble to the Constitution proclaims Europe to be 'a continent open to culture, learning and social progress' and in Article I-3 part of cl 3 affirms 'It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'. Again, these are essentially permissive provisions, accepting of difference but not ones which foster a communalist Union. The Constitution empowers the Union only to take **supporting** action in respect of culture – attributing significantly less importance to culture at the European Union level¹¹ than to telecommunication networks or to, say, agriculture, energy, the environment and transport.

Chapter V SECTION 3 CULTURE Article III-280 provides:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas:
 - (a) improvement of the knowledge and dissemination of the culture and history of the European peoples;
 - (b) conservation and safeguarding of cultural heritage of European significance;
 - (c) non-commercial cultural exchanges;
 - (d) artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Constitution, in particular in order to respect and to promote the diversity of its cultures.

There is, of course, also the transposition into the draft Constitution of the celebrated ‘Amsterdam Protocol’ – the Protocol on the System of Public Broadcasting in the Member States - as Protocol 27 of Part IV of the draft Constitution. But, essentially, the protocol is a subsidiarity provision which makes clear that Member States can establish public service broadcasting so long as this does not adversely and disproportionately affect competition and trade¹².

We have a paradox – there is little about media and communications explicitly defined in the European Union’s formal constitutional texts yet the impact of the EU on media and communications in Europe has been considerable: establishment of the single market in television, liberalisation of telecommunications across the Member States are inconceivable except in the context of the EU. The impact principally has come through the application of basic treaty provisions to the organisation of European markets.

The most high profile of the Union’s media initiatives, the TVWF Directive, described by the European Commission as the ‘cornerstone of the European Union’s audiovisual policy’ (see <http://europa.eu/scadplus/leg/en/lvb/l24101.htm> on 22.8.2006), came into being as a market integration measure. And the most comprehensive set of measures taken by the EU in media and communications, the telecommunications liberalisation package of 2000 (which included the e-commerce Directive) and a succession of judgements in the ECJ judgements (see the useful portal at http://ec.europa.eu/comm/avpolicy/info_centre/library/case_law/index_en.htm on 14.7.2006) underpin this emphasis. The EU’s major initiatives in media and communications have been on what, more than 10 years ago when I drew a distinction (Collins 1994) between liberal and *dirigiste* EU policy visions, I called the liberal side. Now I think these might better have been defined as associationist and communalist. These liberal/associative initiatives have been balanced on the *dirigiste*/communalist side by some successful defensive battles to mitigate the effect of the operation of markets, such as the Amsterdam Protocol (Protocol 27 of the Constitution at p 379), the MEDIA Programme (to be expanded to MEDIA PLUS, see http://ec.europa.eu/comm/avpolicy/media/index_en.html on 14.7.2006) and the reining back of some of the maximalist liberal proposals in the Convergence Green Paper (European Commission 1997). Why so? Because the terms of the

European Treaty, and the Constitution, are fundamentally friendly to a liberal market order; liberals go with the flow, *dirigistes* swim against it. But neither position has achieved an overwhelming ascendancy – indeed how could one expect such an outcome? For political opinion and values within each of the Union’s Member States is divided along similar cleavages.

The historical shaping of EU media and communications policy.

When the Treaty of Rome was promulgated, in 1957, we may doubt whether anyone imagined that its provisions would ever apply to posts, telecommunications or broadcasting for at the time these¹³ were organised as national monopolies. The competition provisions of the Rome Treaty, so central to Monnet’s vision of the European Communities, were unlikely to have been thought applicable to broadcasting and telecommunications – not least because there was little inter state trading of these services. Yet the creation of a single market and the competition provisions of the Treaty, revised and reissued in the Constitution, have profoundly reshaped European broadcasting and telecommunications. But we also have to acknowledge that these sectors have been reshaped more than others.

Clearly more than one factor is at work. Bartle (2005) has observed that the European market for telecommunications services is much more fully integrated than that for electricity though both are subject to the same European liberalising policies – that is the integration of markets and intensification of competition. It seems this is because established technologies are a more powerful constraint in realising these policies in electricity supply than they are in provision of telecommunication services, notably because the supply of electric power over distances leads to significant energy losses whereas in telecommunications there’s no comparable constraint.¹⁴

Cable relay systems, high powered communication satellites, fibre optic cables, digital compression and the adoption of GSM and IPTV standards have intensified competition, integrated markets and eroded national authority over electronic communications. But whilst there now hundreds of separate television channels available to European viewers and significant levels of intra-European trade in broadcasting services, broadcasting is clearly a less fully integrated and Europeanised a market than is telecommunications. For, I suggest, two reasons: first, intra-European linguistic and cultural differences continue to both inhibit development of pan-European services (see, *inter alia*, Collins 1998); and, second, Member States continue to exert, and strive to maintain, significant levels of national control in broadcasting - as the current support by a majority of Member States for an end to, or qualification of, the ‘country of origin’ principle in the draft Audiovisual Media Services Directive (AVMSD) suggests.

Nonetheless, the combination of technological change and the liberalisation of markets, playing out the logic of the provisions of the Treaty of Rome, has changed the European media and communication landscape. New technologies made it possible for broadcasting (and telecommunication) services to be efficiently provided from outside the borders of individual Member States and a succession of ECJ judgements (see, *inter alios*, Sacchi, Debaue and Mediawetl¹⁵) demonstrated that, under the terms of the Treaty, these activities were lawful. And in 1984 the celebrated Television without Frontiers Green Paper (Commission of the European Communities 1984) was published, foreshadowing the Directive of 1989 (European Council 1989). The TVWF Green Paper opened the door to the liberalisation of Member States’ television broadcasting markets under the cloak of European integration conveniently provided by the European Parliament’s earlier Hahn Report (European Parliament 1982). The Hahn report flourished the banner of European unification and argued that this would come about by European media fostering sentiments of a shared European identity. Hahn stated:

European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as European identity. A European identity will only develop if Europeans are adequately informed. At present, information vis a vis the mass media is controlled at national level

(European Parliament 1982: 8).

Television without Frontiers brought together both associative and communalist elements of the ‘European Project’: market integration, liberalisation and associationism on one hand and European identity building and communalism on the other. The term ‘identity’, used by Hahn, became a central issue of concern to European broadcasting and audio-visual policy during the next two decades¹⁶. European identity politics both provided a convenient rationale for advocates of protection and subsidy of the film and television sector and also expressed the conviction of many who believed that European political institutions would lack legitimacy and durability if the political structures of the EU were not mapped on to a congruent cultural identity. Essentially, European identity politics projected onto a large canvas the classically nationalist scenario of making polity and culture congruent (Gellner 1983). But whereas classic nationalism sought to give political expression to an antecedent cultural community the European identity project sought to create a European cultural community, through the modern mass media, in order to sustain and legitimise the antecedent political institutions of the European Communities/European Union.

Various attempts were made to enact Hahn’s scenario by establishing pan-European television services (see *inter alia* Collins 1998) but the most important actual effect of European broadcasting policy and politics, principally articulated through Television without Frontiers and the application of the competition provisions of the Treaty, has been an intensification of competition in national broadcasting markets (though also assisting the circulation of services between adjacent states sharing a language – eg between Austria and Germany, Belgium and France, Ireland and the UK) rather than an engendering of a portfolio of pan-European services – still less a pan-European cultural identity. Moreover, as is well known, as the number of European television channels has grown so has the proportion of television programming of non-European origin (notably in fiction and entertainment) broadcast (see *inter alios* the yearbooks of the European Audiovisual Observatory eg European Audiovisual Observatory 2005) screened in Europe. Although, such concerns may sometimes seem overstated: as the Commission’s report (European Commission 2006) on the proportions of European and non-European content on EU television (albeit of the 15) found, in 2002 European works accounted for 66% of TV transmission time in the EU.

Moreover, though the Commission, in its most recent report on the implementation and effect of the TVWF Directive (European Commission 2006), found a slight decline (less than 1%) in European television content compared to the previous year, the overall trend was upward. More and more channels were complying with the terms of the TVWF Directive, even though in the year 2002 the number of channels had risen by 12%. In the accession states the Commission found that in 2003 60% of European works were scheduled and in early 2004 that total had risen to 62% with compliance also rising from 77% to 83% (European Commission 2006: 7). One might claim this data as evidence that the European content quotas mandated in the TVWF Directive (albeit only ‘where practicable’) are working well – this is certainly a major theme in the most extensive study of the issue known to me (Graham 2005) which found ‘a strong indication that Article 4 has had an appreciable impact on the scheduling of European works’ (Graham 2005: 17). But one might also claim that the Directive has little practical impact since the amount of European content offered by television broadcasters exceeds significantly the levels required in the Directive: the Directive’s floor is below the level that the market is providing. Graham (2005: 17) also found that ‘The ratio of European works on a primary channel is also positively correlated

with its audience share' ie that (at least in the 'primary channel' market) high levels of European content could be attributed to viewer demand as well as to quota requirements.

Moreover, the integration of EU television markets has also seen the growth of pan-European media firms, such as Bertelsmann/RTL and Canal+, and some firms have successfully overcome the linguistic and cultural differences of EU Member States to offer a portfolio of products across the EU – Endemol and FremantleMedia are cases in point. But there have clearly been unanticipated consequences arising from the Directive. Perhaps the disproportionate accrual of benefits to large EU Member States¹⁷ could have been anticipated but not everyone would have anticipated either of two unanticipated consequences of measures to support European works which arose from the Directive itself and from additional, more stringent, requirements formulated by some Member States. First, Member States' own support policies, as Graham (2005: 17) found, have 'acted as barriers to cross-border trade, thus possibly inhibiting cultural exchanges among Member States'. And, second, that there has been a narrowing of the range of imported material as importers have tended to maintain their imports from the USA at as high a level as possible and thus squeeze out works from other non-Member States: for example Canadian television exports fell from \$611m in 1999/2000 to \$270m in 2004/5 – a fall attributed to 'increased demand for domestic programming in the European Union' (see CRTC 2006: para 7).

From TVWF to AVMSD.

The current discussions on the successor to Television without Frontiers (TVWF), the draft Audiovisual Media Services Directive (European Commission 2005), pose some fascinating and paradoxical issues. New cleavages have appeared - instead of the perennial conflict over European content quotas and the putatively adverse effects on European identity, and thus on the European project, of television programming imported from outside the EU (and notably from the USA) the main points of debate about the draft Audiovisual Media Services Directive (AVMSD) concern three different issues: the country of origin principle; extension of the scope of the Directive to 'non-linear' online services; and stronger duties of protection from unwanted and harmful content (notably protection of minors and the incitement of hatred)¹⁸.

Technological change has again altered the framework in which policy unfolds. The Commission's draft acknowledges that 'transmission time quotas are not an option in an on-demand world' (European Commission 2005: 5) and consequently it proposes in the Draft Directive only a maintenance of the status quo that 'Member States shall ensure that media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works' (European Commission 2005: 24).¹⁹ However, proponents of mandatory support for European content have shifted their advocacy from mandatory quotas to a mandatory requirement for broadcasters (whether linear or non-linear) to fund, rather than screen, European content.²⁰

However, the draft AVMSD also proposes to extend the scope of the TVWF Directive by extending its provisions to cover on line, 'non-linear', as well as, 'linear', conventional broadcasting. It does so in response to technological change and, because of the potential substitutability between online and broadcast services, on grounds of technological neutrality²¹. The Commission also proposes to amend the country of origin principle - that is the principle that television services emanating from any one EU Member State (the country of origin) are treated in the same way as services originating in any other.

Country of origin or country of reception?

Although the country of origin principle has been the keystone of the single market in television, the changes proposed would codify established European Court of Justice case law²² whereby a Member State (MS1) can apply its own rules to broadcasts by a broadcaster established in another Member State (MS2) under certain conditions. That is, MS1 would be able to exercise ‘country of reception’ powers if two conditions were satisfied: first, if the broadcasts from MS2 are directed at MS1 and, second, if the choice to establish an enterprise in MS2 was made with the sole purpose of evading the legislation of MS1. Alternatively, the language of a service may be proposed as a criterion to assess whether a broadcast from MS2 is directed at a specific Member State(s), to MS1 and/or MS1+. Adoption of this criterion might effectively address a specific current issue, notably the establishment in the UK of non-English language services targeting Nordic countries but adoption of this principle would not address cases such as francophone Belgian service targeting France or a UK English language service targeting Ireland.

However, 13 Member States have proposed a more radical change to the ‘country of origin’ principle than the Commission has so far proposed – they propose that it should be replaced by a country of reception principle.²³ This means that a Member State would be able to discriminate against exogenous services which did not conform to the specific requirements of the receiving Member State. This would seriously compromise the single market in television established in 1989 by the first TVWF Directive. It also sheds an interesting and perhaps unanticipated light on the political issues to which I referred earlier and touches directly on the question of how much union there should be in the EU. For at least 13 Member States there has been too much union in the EU television market. And, intriguingly and perhaps surprisingly, the UK is among those advocating the ‘unionist’ country of origin principle. Surprising though only if one sees the issue as political whereas, if seen as an economic issue, the UK’s position is unsurprising for it’s one of the Member States that has been able to harvest significant economic benefits from the single market in television – 51% of traded UK television exports are to the EU (ONS 2005: 3).²⁴

Putting the country of origin principle into play puts at issue the wider normative relationships between politics, economics and culture in EU television and the degree to which subsidiarity should apply in the organisation and regulation of broadcasting services. Seen from an integrationist point of view, whether cultural, political or economic, maintenance of the country of origin principle is important. But from another point of view, the single market in television, based on the country of origin principle, has unleashed a race to the bottom where cherished protective measures, such as keeping children’s television free of advertising or requiring a programme schedule that balanced information, education and entertainment, have been, or are in danger of being, washed away. As too, so the argument goes, have high production standards, distinctively European content and a responsible stance towards the viewer all of which, in theory at least, have fostered and facilitated provision of broadcasting services which enable viewers both to come to a well founded understanding of the world (and/or participate in national and/or a European public sphere) and to develop their cultural tastes. In this view of things, the country of reception is seen as the locus where citizens’ and consumers’ interests can best be secured. Or perhaps this last statement is better reformulated as ‘the country of reception is **now** seen as the locus where citizens’ and consumers’ interest can best be secured’ for a few years ago, when the European Parliament tried to mandate the V-chip, the EU was seen as the most effective and appropriate locus.

Extending the scope of the Directive.

In the AVMSD the Commission also, and controversially, proposes extension of the scope of the Directive beyond conventional television broadcasting to include a wider range of

audiovisual media services. This, from one point of view, makes eminent sense: new communication technologies and standards have made it possible to deliver television like services in a host of novel ways which would not come under the provisions of the TVWF Directive. Accordingly, if regulation is to be technologically neutral and continue to capture effectively such benefits as the established regulatory regime has been able to secure, the new Directive should be drafted to bring relevant new services under the regulatory umbrella of the AVMSD. However, from another point of view, the AVMSD threatens to do too much by chilling competition from new entrants to broadcasting-like markets and by suppressing incentives to innovation. The UK regulator of electronic communications, Ofcom (2006: 2) has observed that the AVMSD ‘perhaps inadvertently, catches a significant number of new third generation mobile and web-based services, including videoblogs, online video games, webcams, online newspapers or magazines which carry significant amount of video content, and even individual websites that host user-generated content’²⁵. If broadcast and broadcast-like services are to be treated in the same way and if the perceived adverse impact of an extension of broadcasting regulation to new services is well founded, broadcasting regulation should be liberalised rather than new service regulation tightened.

The clarification which a new Directive could deliver is timely because there is, currently, some uncertainty about the distinction between the provisions of the e-commerce Directive (European Parliament and the Council 2000), and the effect of the European Court of Justice Decision (of June 2nd 2005) in *Mediakabel*²⁶. The e-commerce Directive provides that:

television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society service

whereas the ECJ in *Mediakabel* found that near video on demand services **were** broadcasting services and therefore subject to national and TVWF regulations. The dividing line between video on demand and near video on demand may be difficult to draw in practice and there is some similar uncertainty as to whether the distinction between linear and non-linear services, drawn in the new draft Directive can be sustained.

The UK national electronic communications regulator, Ofcom, has proposed that, rather than attempting to distinguish between linear and non-linear services – a distinction which Ofcom believes is hard to sustain - , the Directive

should be limited in scope to cover *only* those services which “look and feel” like television broadcasting (e.g., television delivered over IP networks – IPTV). These are also the services with respect to which consumers reasonably expect a higher level of protection by public authorities

(Ofcom 2006: 3)

other services should be regulated under the e-commerce Directive.

Television and the European Project.

Discussions around the potential scope of the AVMSD thus reflect concerns about the impact of technological change on established broadcasting interests and on the effectiveness of consumer protection but also concern the scope and character of the ‘European project’. Whilst matters touching the realisation of the European project, which formerly were very much to the fore in discussions of TVWF (notably European content quotas because of their putative importance for European identity), have become somewhat muted the proposed move

from a country of origin to a country of reception principle suggests a retreat from the market integration which, from the beginning of the European Communities, has been the lynchpin of European union.

The country of origin principle, formerly seen by both ‘liberals/associationists’ (for its single market effect) and ‘*dirigistes/communalists*’ (for its potential to bond European television viewers into a collective European identity), as indispensable has come under attack. The country of origin principle is considered to have been responsible for the expansion and commercialisation of European broadcasting, and thus for an increase in demand for non-European programming, for increased ‘one way’ flows of content within Europe (from large countries to small), and for undermining cherished national principles in content regulation (such as the exclusion of advertising from programmes directed to children). The economic integration (of broadcasting markets) has been seen to be hostile to cultural, and thus political, integration: if the European project is to be advanced the single market in broadcasting has to be dis-integrated – even if this shifts the locus of control away from the Union and towards Member States. The congruence of interests between liberals and integrationists that once made possible the promulgation of TVWF has unravelled thus making the AVMSD a site of intense and thus far unresolved controversy and conflict.

Just as evaluation of the ‘ises’ and ‘oughts’ of European media policy and practice depends on initial assumptions about whether the glass of European democracy is half full or half empty, so consideration of media and the European Project turns on the definition of the European project. Is the European Project the embrace of the whole of Europe – the widening definition? Is it making the EU more state like – deepening? And, if deepening, is deepening to make Europe more social (the Maastricht Social Agreement and its transmission into the Constitution as the ‘Social Policy’ Article III 209-219 pages 99-104²⁷); more efficient (the Lisbon Agenda); more open (the liberal, or if one wants to tip the argument, the ultra liberal agenda); or is it to bring culture and politics more fully into the arena of high politics?

If we are to talk of deepening, we must ask what new competencies should the EU have? And, if the EU is to have new competencies, it follows that Member States’ competencies will diminish in the degree to which EU competencies grow. But this is not the place to consider whether Union competencies should grow in education, health, social security, tax, defence or any or all of a number of other areas which have been canvassed. Although the evidence, such as it is, is that it’s in these areas, rather than in culture or media, that those European citizens who want a deepening of the Union, or put another way, a more widely defined European Project want the Union to take on more competencies. When asked how best to strengthen European citizenship respondents tended to nominate harmonisation of social welfare systems (followed by a common Constitution and citizens’ right to vote in all elections in the Member State where they reside) as the best way to strengthen European citizenship:

For almost a third of respondents, the harmonisation of social welfare systems, for which each Member State is currently responsible, would be a good way of strengthening European citizenship (Eurobarometer 2006: n 251 p 45).

Inevitably the findings from survey research are mixed and open to interpretation: ‘Eurominimalists’ and associationists may foreground the Eurobarometer findings that culture appears ‘by nature as one of the last and most legitimate “private domains” among national States’, that it ‘is not perceived as a priority as a direct action subject for the EU’ and received ‘rather few comments’ from respondents. Whereas ‘Euromaximalists’ and communalists might emphasise Eurobarometer’s mention of the ambitious ‘idea of the development of a form of European cultural supra-nationality – common roots, defence of specificities, notably in the face of the ‘Americanisation’ of the world – rich with all the features and cultural identities of each Member State

(Eurobarometer 2006a: 44).

Here again the media may be somewhat less important than we media scholars have been inclined to suppose: it's the democratic deficit and universal welfare entitlements which seem to be the issues which concern Europe's citizens rather than the media. Culture also seems relatively low on the priorities of those whom Eurobarometer polled on the future of Europe and on citizenship in Europe. But, of course, the strength or weakness of popular sentiment on an issue is not always a decisive indicator of its importance.

Identity, Europe and cohesion.

Traditionally, the case for extending EU competencies in media and communications and for an enhanced role for Media and Communications in the European Project has rested on the communalist presumption that European identity must be fostered in order to lend political legitimacy to the EU and thus strengthen social cohesion in the EU. Unless the EU is grounded in a sentiment of belonging shared among European citizens – in Weber's terms 'communalism' – it will lack viability and durability. This shared sense of belonging, a common culture, will be the social glue to hold together the European political community and without such a glue the community will be fragile indeed.

The belief that the legitimacy and durability of political institutions, states, depends on their symmetrical relationship to cultural communities, nations, is both pervasive and long established. National states in which the principle, as Gellner put it, of political and cultural congruence (Gellner 1983: 43) exemplify the normative model. Given the pervasiveness of nationalism in Europe, the cradle of nation states, it's not surprising that the doctrine of nationalism – that is of a congruence between polity and culture – is projected onto the EU. Hence the familiarity to us all of statements often attributed to Jean Monnet such as: 'We are not forming coalitions of states, we are uniting men' and/or 'If we were beginning the European Community all over again we should begin with culture'²⁸.

There are obvious difficulties in 'beginning with culture' – or even in continuing with culture – and in creating what Eurobarometer called a 'European cultural supra-nationality' (Eurobarometer 2006a: 44); that is in making polity and culture congruent on a European scale. Language provides the most obvious case in point – the EU has 20 official languages. But as well as identification and fostering of similarity **within** the putative national political community the nationalist project also identification, and perhaps fostering, of difference from those **outside** the putative community. However, much of what Europeans have in common they also share with others.

Louis Hartz's terrific book *'The Founding of New Societies'* (Hartz 1964), marvellously retitled in its French version as *'Les enfants de l'Europe'*, testifies to Europe's success in exporting its culture and values across the world – and notably to Europe's daughter societies in North and South America, Australasia and Africa. The novelist Anthony Burgess made the same point when claiming that 'If we wish to speak of a single European culture, we shall find it only in a tolerant liberalism which accepts those impulses which seem to be disruptive' (Burgess 1990: 21). Identity is thus both a force which unites those who are similar and divides them from those who are different. And Europe shares so much culturally with those beyond the continent of Europe that attempts to define a communalist European identity, shared only by those under the umbrella of a European political institution and distinguishable from other identities, are likely to end only in disappointment and frustration.

This issue has, in our domain at least, focussed for the last couple of decades on the USA and on a sometimes frantic effort to build European cinema and television production which could succeed in displacing the American in the viewing habits of Europeans²⁹. But among a

number of reasons for American success must be included what Hoskins and Mirus (1988) have called the low cultural discount³⁰ which attaches to American product in European markets, a low discount factor rooted in the relative cultural proximity of Europe and America: proximity consequential on the export of European values (and populations) to its daughter societies as Hartz testified. But latterly the steam seems to have gone out of concern about the possible erosion of difference between European and American identities and cultures under the influence of films and television programmes from the United States.

There seem to be several reasons for such a change. First perhaps because the foreign policy and practice of the USA has over the last five years or so alienated the sentiments of many Europeans (as it has of many Americans); second because of a recognition that the impact of American audio-visual works, both economically and culturally, has been somewhat less than was once feared. Less both in the sense that the flood, emotive word, of American product which attended the rapid opening up of European audio-visual markets in the 1980s has subsided as competition has intensified and the demand, always there, for European production (but perhaps a different kind of production than before – one more attuned to popular taste) has been supplied. And third because of the decline, though far from total elimination, of credence in the classically nationalist and communalist presumption that polity and culture must be congruent if political institutions are to be robust and legitimate. Quite simply we no longer believe, as once we seem to have done, that Europe is so fragile as to be over-turned by one more percentage point of Hollywood product on European screens.

As the EU has grown and as its constituent parts have become more multi-cultural and multi-ethnic, so the difficulties of realising such a politico-cultural congruence have nudged sentiments and thinking towards acknowledging that the classic political nation-state structure, based on mutually supporting and symmetrical political and cultural institutions, is neither necessary nor inevitable. Rather as religious toleration, born out of the necessity of avoiding the perpetuation of unwinnable religious wars, decoupled politics from religion in the C17th³¹ so too we have seen, at the macro-level at least, the beginnings of an associationist decoupling of politics and culture. The protean, hybridised, character of culture, (always the case but as Europe's populations have become increasingly diverse, increasingly acknowledged) has become inescapably evident as the composition of national populations has changed with a consequential impact on so called national cultures. But the EU itself has also had an enormous impact in 'de-singularising' the allegiances and identities of its citizens: we all, in varying degrees and in different ways, inhabit European as well as national identities.

Association, functionalism and Europe.

But if culture is not to be the European social glue, as communalists advocate and prescribe, then what is? First, I think it's important to acknowledge that the glass is certainly not less than half full – the EU has survived, thrived and grown for nearly 50 years. It is a fantastic and unprecedented achievement. But its principle of success has not been that of a nationalist congruence between polity and culture. Rather it's been the functionalist 'methode Monnet' – a system of engendering political cohesion not on the basis of a common culture or language but of creating facts and acts which force new relationships and new forms of collaboration. The successes and strengths of the EU are rooted in association, and in 'functional' relationships between Europeans and EU Member States, rather than in communalism and congruence between polity and culture. If this is so, the non-ratification of the Constitution, which tries to make unambiguous what might be better left indeterminate, may in fact be helpful to the European Project if by that we mean carrying on carrying on, embedding 'the dense web of commercial, economic, political and legal links' (Piris 2006: 1) which have accumulated and sedimented as the '*methode Monnet*' was designed for them to do.

The functional model of European integration was formulated explicitly by David Mitrany in his last major work *'The Functional Theory of Politics'* (Mitrany 1975). One of Mitrany's disciples summarised the functional theory as the idea

that man (*sic*) can be weaned away from his loyalty to the nation state by the experience of fruitful international co-operation; that international organization arranged according to the requirements of the task could increase welfare rewards to individuals beyond the level obtainable within the state..... individuals and organizations would begin to learn the benefits of co-operation and would increasingly be involved in an international co-operative ethos, creating interdependencies

(Taylor in Mitrany 1975: x).

At least some of this may seem somewhat starry eyed, 'an international co-operative ethos' perhaps overstates the level of peace and harmony which reputedly informs meetings of the European Council (but there may also be few national cabinets which regularly enjoy the sweetness and light of a national co-operative ethos). But it's surely right to claim that common institutional structures do create interdependencies. And that's the core of the '*methode Monnet*' – trenchantly asserted by Monnet himself when he contrasted the process of practical institutional collaboration to the search for the snark of European identity: 'While fifty-five countries were meeting in Lome or Brussels to seek their common interests, our diplomats were holding pointless debates about European identity' (Monnet 1978: 499).

The game of selective quotation from Monnet is great fun and many play it. But my point is not to assert simply and single-mindedly that Monnet spoke only of '*la methode Monnet*' and never of the importance of sentiment, of culture and belief. But rather to suggest that we misrecognise Monnet, and the EU, if we over-emphasise culture and under-rate function. None other than Altiero Spinelli, one of the founding fathers of the EU, coupled Monnet's and Mitrany's names together as functionalists:

Mitrany who became the theoretician of functionalism. Jean Monnet during the war years had elaborated the idea of applying the functional approach..... and from this emerged the European Coal and Steel Community, the first.... example of a functional supranational authority

(cited in Mitrany 1975: 75).

The focus on culture and identity that our professional field leads us towards sometimes leads us to misrecognise the achievements, the robustness and the proven worth of functional, rather than nationalist, methods of building Europe. For the European Union is an instance of what Weber identified as an 'associative', rather than a 'communal', society.

'A social relationship' Weber argued 'will be called "communal" if and so far as the orientation of social action - whether in the individual case, on the average, or in the pure type - is based on a subjective feeling of the parties, whether affectual or traditional, that they belong together. A social relationship will, on the other hand, be called 'associative' if and in so far as the orientation of social action within it rests on a rationally motivated adjustment of interests or a similarly motivated agreement, whether the basis of rational judgement be absolute values or reasons of expediency'

(Weber 1964 [1922]: 136).

Weber's distinction between associative and communal relationships echoes the well known distinction (which Meinecke 1970 [1907]) made, and which has been comprehensively explored by Smith 1991, 1995) between 'civic' and 'ethnic' nationalism. It also suggests

resonances of Toennies' (1988) distinction between '*gesellschaft*' and '*gemeinschaft*'. Smith asserts that associative, or civic, societies are a majority of contemporary states: he states that fewer than 10 per cent of United Nations member states are nation-states (Smith 1995: 86).

There is therefore both an empirical case for the viability of the associative model, of which the EU is an instance, and also a pragmatic case. Because associative cohesion, or civic nationalism, is based on adherence to a shared body of law and social rules and conventions which are both exercised and accepted as being impartial between different ethnicities (or other social groups or collective identity bearers), it potentially offers a more inclusive basis than does classic politico-cultural congruent nationalism, for a society which is tolerant of difference and which can guarantee rights independent of class, creed, colour, nationality or cultural identity to its citizens.

In contrast to 'Television without Frontiers', where much debate focused on the 'communalist' question of European content quotas, the draft 'Audiovisual Media Services Directive' suggests a shift towards a more 'associative' frame of reference. Certainly, the two central issues (of country of origin v country of reception as a locus for regulation and how regulation is to become technologically neutral – whether 'broadcasting' principles and practice are to be projected onto new media or the reverse) suggest a different set of concerns and assumptions.

Coming to terms with media change: the draft AVMSD and convergence.

The AVMSD proposal to extend television (linear service) regulation to non-linear services represents one way to address the challenges posed by convergence. Convergence is generally understood to be effect of digitalisation in eroding distinctions between different networks, technologies and established systems of service delivery through digitalisation. The European Commission, in its Green Paper on Convergence (European Commission 1997), asserted that 'digital technology now allows both traditional and new communication services - whether voice, data, sound or pictures - to be provided over many different networks'. Pre-convergence, communications regulation has tended to be technologically specific: different services have been offered, and different regulatory regimes applied, to communication over wireless networks (radio and television broadcasting), to wired networks (voice telephony) and to printed paper (newspapers, magazines and books). Convergence also makes different networks and services substitutable and thus opens up the possibility of a particular service being provided under different regulatory regimes: for example, a film might be accessible via broadcast television, theatrical exhibition, video on demand (VoD) or purchase/rental as a DVD or video cassette.

The Commission's Convergence Green Paper of 1997 identified three alternative regulatory responses to convergence:

1. Current vertical regulatory models would be left in place. This means that different rules apply in telecommunications and audiovisual/broadcasting sectors, and to a lesser extent in publishing and IT.
2. Develop a separate regulatory model for new activities, to co-exist with telecommunications and broadcasting regulation.
3. Introduce a new regulatory model to cover the whole range of existing and new services (European Commission 1997: 34).

Each of the Commission's three proposals would, if implemented, impact differently on established regimes in different Member States. The case of Germany exemplifies the difficulties which would attach to either of options 2 and 3: because the German Basic Law,

the *Grund Gesetz*, specifies broadcasting jurisdiction resides with the Laender and Telecommunications with the Bund: implementation of regulatory convergence across broadcasting and telecommunications in Germany would be very difficult. The federal division of powers in Belgium poses analogous challenges. The third option identified by the Commission admits the possibility of establishing the ‘new regulatory model’ as either a projection of the old onto the new or the new onto the old.

Convergence and substitutability poses obvious challenges to established regulatory regimes, including TVWF. If a work is regulated under the TVWF regime when accessed via broadcast television and under another, notably the e-commerce Directive, when retrieved via a VoD network there are obvious possibilities of regulatory arbitrage and evasion. The AVMSD is drafted so as to apply to online (non-linear) services the same type of regime as has operated in broadcast television – it is thus a version of options 1 and 2 canvassed by the Commission – though it is as yet unclear, and a matter of intensely disputed interpretation among those contributing to the consultation and drafting process, precisely what will be included and what excluded from the scope of the AVMSD.

The draft AVMSD and freedom of expression.

The draft AVMSD further poses the challenge of proportionality – of extending an established remit in new circumstances but without extending it too far. Criticism of the draft AVMSD contends that the AVMSD extends the reach of regulation too far, eg to blogs and online newspapers, and that its effect will be to chill and compromise the right to freedom of expression featured in the Constitution (Article II-71).³² In this respect the terms of the draft AVMSD contrast with the EU position defined in the e-commerce Directive where the importance of freedom of expression is stated explicitly.³³

It’s important to acknowledge that (except for some absolutists) the issue aroused by the AVMSD is not one of regulation or no regulation but of the appropriate level and manner of regulation. Freedom of expression is a hard doctrine, the entitlement to freedom of expression is meaningful only in hard cases –if freedom of expression does not extend to ‘speech’ that some find offensive and to expression that some may judge harmful, a right to freedom of expression is an empty right. Few argue that there are no cases where an exception to a general entitlement to freedom of expression should not be made.

However, there is then the important second order issue of whether exceptions, such as those respecting minors³⁴, should be a matter for the law in general or for statutory regulation. Or, putting a specific case, should the Internet and/or broadcasting be subject to regulation beyond that which applies generally to speech and writing? If it is judged that, on balance, it is better to rely on the law in general rather than on sector specific statutory regulation, and I think this is the direction in which the current now flows, then the role of self and co-regulation is likely to become more important (as the AVMSD signals). It is clearly better that relevant institutions develop their own codes and procedures to foster lawful behaviour just as it is better that each of us as an individual acts lawfully of our own volition rather than because we are compelled to do so by a vigilant policing.

If the era of TVWF was one where debate and concern focused on the communalist issue of collective cultural identity then it seems likely that the era of the AVMSD will be one of concern about the associationist issue of freedom of expression. In the UK at least the context in which the AVMSD is under consideration is one of increasing Government pressure on freedom of expression. It would be comforting to believe that the UK was exceptional among EU Member States in this respect. Porter (2006) provides a convenient (and chilling) account of recent UK Government initiatives: relevant instances include the requirement to secure written permission to demonstrate within a kilometre of Parliament; control orders on those

under suspicion of terrorism before trial which curtail their freedom to use electronic communications; arrest of the octogenarian heckler of the Foreign Secretary during his speech to the Labour Party conference under Section 44 of the 2000 Terrorism Act; the response of the Minister of State at the Home Office, Fiona McTaggart (formerly, it is scarcely credible, a Chair of 'Liberty'³⁵), to the closure of the play 'Behzti' who argued that the playwright and demonstrators, (who threw eggs and stones, broke windows, injured police and successfully suppressed the 10 scheduled performances of the play), were equivalent acts of the exercise of an entitlement to freedom of expression.

The provision of the Communications Act 2003 that Ofcom must have regard to the need only to secure 'an appropriate level of freedom of expression' (CA 2003: 1.3.(4) (g)) is eloquent. As too is the Government's publication of its *Consultation on the Possession of Extreme Pornographic Material* (Home Office and the Scottish Executive 2005) which proposes suppression of lawful material distributed over the Internet (the term 'Extreme Pornographic Material' may be thought to tip the argument). Moreover, the Racial and Religious Hatred Act 2006, despite successive Parliamentary defeats which led to softening of the Government's original drafts, contains provisions bearing on freedom of expression which were first presented in the Anti-Terrorism, Crime and Security Bill in 2001 and then in the Serious Organised Crime and Police Act 2005. These are to the effect that use or display of threatening words with the intention of stirring up religious hatred is to be unlawful. True, intention is the key matter and is notoriously hard to demonstrate but, despite the mitigation provided Section 29J of the Act that:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system

the effect of the Act is unlikely to do other than chill the exercise of our entitlement to freedom of expression.³⁶

Perhaps surprisingly, but one must never overestimate the coherence of so large and baggy a beast as a Government, the UK has argued in its contribution to the drafting of the AVMSD that the inclusion in the draft Directive of a clause (3e at the time of writing) which requires Member States to ensure that audiovisual media services do not contain any incitement to hatred³⁷ is too broadly drawn and would have a negative effect on freedom of speech. The UK also argued that the unified application of a single policy to broadcasting and on-demand services would have a disproportionate and adverse impact on freedom of speech (see DCMS 2006). Similar arguments for distinguishing between broadcast and on-line services have been made elsewhere.

The free expression civil society organisation Article XIX's response to the Council of Europe's proposals to apply regulations devised for broadcasting to the Internet (and in particular the institution of a right of reply in respect of Internet publication) brings home the potential adverse impact of the AVMSD proposal to apply broadcasting (linear) regulation to online (non-linear) services. As Article XIX argues, such a strategy would not recognise or appropriately acknowledge the distinct characteristics of the Internet. Article XIX states:

It has become trite to note that the Internet is unlike any other form of mass communication and cannot be regulated in the same manner as the broadcast sector or the print media. However, the draft Recommendation proceeds on the basis that all websites that contain frequently edited and updated information on matters of public interest should be seen as forming part of 'the mass media'. The only exception it

allows is for websites ‘operated by individuals.’ This is a significant oversimplification of the enormous variety of content found on the Internet, with the result that an enormous range of information would be subject to the right of reply. As envisaged by the current draft, the scope of the right to reply with regard to Internet publications would be analogous to granting a right of reply in relation to every published book, and even to pamphlets.

Under the regime proposed by the draft Recommendation, websites such as those run by human rights organisations, the Council of Europe or political parties – which are all frequently updated, edited and contain information on matters of public interest – would be classified as belonging to the ‘mass media’ and be obliged to grant a right of reply to those who allege that their rights have been infringed by incorrect factual statements. To give a concrete example, the administrator of the website of a human rights organisation would have to grant space to the spokesperson of a military dictatorship or any undemocratic government to respond to alleged factual inaccuracies that may be impossible to verify. Or a government representative would be able to post a mandatory reply on the site of a political opposition party, to refute allegations of corruption. In the latter case, a refusal to comply might lead to reprisals being taken against the website, including it being ordered to shut down.

The scope for abuse of a right of reply, thus formulated, is significant. Governments or other powerful figures in society would be able to crack down on critical websites by launching abusive requests, using up the limited resources of such organisations. It is a well-known fact that defamation law is often abused for a similar purpose. The introduction of the current draft would hand repressive figures another tool with which to crack down on critical media, instead of introducing rules to control such undemocratic behaviour.

Furthermore, the draft Recommendation fails to take into account the fact that considerable sections of the World-wide web are not suitable for the sort of regulation proposed. Human-edited web directories such as Yahoo! or dynamically edited news sites such as Google News that crawl thousands of other news-sites to collect articles on the basis of predetermined criteria will fall within the scope of the draft Recommendation. However, they merely function as gateways to the web and it is neither realistic nor reasonable to expect them to grant a right of reply in regard to the information to which they refer visitors

(Article XIX 2003: 7-8)³⁸.

Conclusion.

The statist conception of the nation has to be replaced by the social and the cultural conception. The nation can no longer be defined by the creation of a unitary space in which citizenship transcends social and cultural diversity. It must be characterised by the quest for inter-cultural communication and social solidarity. It must be a united society that brings people closer together and tears down barriers, but in cultural terms it must encourage a dialogue

(Touraine 2000: 227).

The word ‘conclusion’ suggests a firmer and more confident closure than is probably appropriate to this paper. The cluster of linked propositions and commentary which precedes these closing comments do not point towards a clear conclusion but rather towards two kinds of further propositions.

First, a situated and specific proposal which derives from my analytical commentary on the draft AVMSD where I argued that there are three novel structuring forces at work in contemporary EU broadcasting policy. Notably, a significant resiling from the established governing principle of European broadcasting policy, the country of origin/single market principle; an as yet unresolved debate about whether consistency in regulation is best achieved by projecting broadcasting regulatory principles and practices onto new media or *vice versa*; and a shift in the fundamental value debate that informs EU audiovisual and broadcasting policy from communalist to associationist questions.

And second, a proposition of greater generality, that the relative importance of the media and European high politics has often been misrecognised and that the turbulence in the course of the European Project which we are now experiencing is better understood as arising from the conduct and character of European high politics rather than from media representations.

Here a caution is appropriate and salutary: generalisation about the EU is dangerous. Each of the 27 Member states has a different formation, a different perspective and a different set of practices. Generalisation, based as mine is (and perhaps of most of us) on long standing experience of only one of the 27 is likely to be speculative and possibly inaccurate. Moreover, as is well known, UK perspectives are often thought to be distinctive, Stephen George (1990) referred to the UK as the EU's 'awkward partner'. Perhaps so, but perhaps each of the 27 constituent states has its own awkwardness. And if so we may better conduct our common European affairs and secure our common European interests by thinking of ourselves as engaged in a Weberian associative project, where principles of cohesion and collaboration are largely functional (in Mitrany's sense) rather than communal and resting on strong cultural affinities and communalities.

The EU has shown that a multi-cultural, multi-linguistic political community can survive, thrive and benefit those who live in it without the 'thick', visceral, shared experience of strong cultural community and mutual identity recognition. Indeed I think this is one of the great achievements of the EU. It has demonstrated that shared language and cultural values are not essential to the creation and maintenance of durable and effective political institutions. Of course, there are difficulties in the EU enterprise which are not present, or not so insistently present, in national political enterprises but so too are there possibilities and successes which go beyond what's achievable under a classically national umbrella. And the national umbrella looks more and more leaky in a world where sovereignty must more and more be shared if it is to be exercised effectively and in a world where fewer and fewer of us are covered by normative national umbrellas as our European societies pluralise and become more multi-cultural, multi-linguistic and multi-ethnic. We have the opportunity to realise our communalist and associative relationships at different levels and through different institutional forms. As Alain Touraine has argued, statehood and (national) identity need to be decoupled. I find his argument no less convincing in the context of the EU than I do in the context of nation states.

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¹ A version of this paper was first presented at the conference on European Media and Democracy at the University of Copenhagen October 2006. The author acknowledges with pleasure the helpful comments both of colleagues at the conference and of Tony Bennett who commented on a subsequent pre-publication draft.

² See my “Associative or Communal Society? The Globalisation of Media and Claims for Communality” (Collins 2000) for a more extensive discussion of these terms.

³ Piris was chair of the legal secretariat dealing with the drafting of the Constitution.

⁴) This provision does not appear in the draft Constitution.

⁵ I use the term “national” as a convenient shorthand – however, there are many instances of an imperfect congruence between nations and states in Europe.

⁶ The Dutch vote on the European Constitution was the first national referendum to take place in the Netherlands.

⁷ Lyotard referred to the old poles of attraction represented by nation-states, parties, professions, institutions, and historical traditions losing their attraction. And stated “it does not look as though they will be replaced, at least not on their former scale, The Trilateral Commission is not a popular pole of attraction. “Identifying” with the great names, the heroes of contemporary history, is becoming more and more difficult. Dedicating oneself to “catching up with Germany,” the life goal the French President seems to be offering his countrymen, is not exactly exciting (Lyotard 1984: 14). Baumann wrote: ” Reading through the text of the Maastricht Treaty – the document sketching the future of Europe and the target towards which half a billion Europeans are called to work – one would hardly be overwhelmed by ‘constitutional patriotism’ of the kind in which Juergen Habermas discerns an emergent, detoxified version of national and community sentiments; or by any other strong feeling, for that matter, except tedium and ennui” (Bauman 2004: 24).

⁸ Davidson stated” the antithesis between high politics and pragmatic trade liberalization has been the most consistent theme in the running policy debate between the members of the Community, and it has regularly pitted the United Kingdom against the original Six” (Financial Times, 19.1.1993, p v).

⁹ There was no referendum on the Maastricht Treaty in the Netherlands, however fewer than 40% of Dutch voters turned out in the 2004 elections to the European Parliament.

¹⁰ Article 10.2 of the ECHR states "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". At <http://www.pfc.org.uk/legal/echrtext.htm> on 14.7.2006.

¹¹ Many Member States, of course, attribute great importance to cultural policy and may consequently regard it as more appropriately addressed as Member State level.

¹² The relevant text states: "insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

¹³ Use of absolutes, such as "all", are (almost) invariably lethal to the writer. There are (almost) always exceptions – such as the telephony co-operatives of the Nordic countries, municipal telephony in Hull England (and some Nordic countries), the *Laender* broadcasters in Germany (both Hull and the *Laender* broadcasters were publicly owned local monopolies) and non-national radio services (such as Radio Free Europe). But despite such exceptions monopolies prevailed throughout Europe and exceptions to this rule were principally located outside the "six" who were parties to the Treaty of Rome.

¹⁴ Of course, sectoral differences in technology also do not explain everything. Further factors are relevant – as Bartle (2005: 116) observes France's support for a single European electricity market is linked to France's surplus in electricity generating capacity which incentivises French exports of electricity.

¹⁵ See the classic cases: *Sacchi*, Case 155-73. Judgment of the Court of 30 April 1974. at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973J0155:EN:NOT> on 14.7.2006; *Debaue*, Case 52/79. Judgment of the Court of 18 March 1980. At <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61979J0052:EN:NOT> on 14.7.2006 and *Mediawet I*. Case C-288/89. Judgment of the Court of 25 July 1991. At <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0288:EN:NOT> on 14.7.2006.

¹⁶ But the term "identity" is absent from the Constitution. A keyword search found two uses of the word "identity" – one in connection with the status of churches (Article I-52) and one in connection with identity cards (Article III-125).

¹⁷ For example, more than half the UK's 2004 TV exports went to Europe (ONS 2005: table 5).

¹⁸ The draft proposes insertion into the Directive of the clauses: "Member States shall take appropriate measures to ensure that audiovisual media services under their jurisdiction are not made available in such a way that might seriously impair the physical, mental or moral development of minors" and "Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (CEC 2005: 24).

¹⁹ Because transmission quotas (eg 50% of European works) make no sense when content delivery is on demand, consumer pulled rather than supplier pushed, proponents of mandatory support for European content now tend to advocate a requirement for broadcasters, whether linear or non-linear) to fund, rather than screen, European content. Consequently, promotion of European content is likely henceforth to be effected through subsidy and support programmes such as "Film Online" (to promote online delivery of European audiovisual content – see http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#filmonline on 15.7.2006) rather than through regulatory requirements imposed on broadcasters.

²⁰ Promotion of European content is henceforth more likely to be effected through recourse to subsidy and support programmes such as “Film Online” (to promote online delivery of European audiovisual content – see

http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#filmonline

on 15.7.2006) than through regulatory requirements imposed on broadcasters. See also the Commission’s proposals (CEC 2004a) for development of the MEDIA programme.

²¹ Of course, technological neutrality might be achieved by liberalising the regulation of television (linear services) as well as by applying television regulation to on-line (non-linear) services as the Commission proposes.

²² See Case C-23/93 TV 10 SA v. Commissariaat voor de Media, paragraph 21.

²³ As is well known, in the Draft Services Directive the country of origin principle has not been adopted for all sectors– among other sectors both telecommunications and audiovisual services have been excluded (see European Commission 2004b and 2006a).

²⁴ In other economic domains the same pattern of Member State behaviour is to be found: Bartle’s reference (2005: 116) to France’s support for a single European electricity market again provides a relevant case in point.

²⁵ It may be that Ofcom’s concern is somewhat over stated – a Commission source has commented that newspaper (and, doubtless, other text based sites) sites would come under the Directive only if the majority of their content was made up of moving images.

²⁶ See OJC 182/16 of 23.7.2005 at

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_182/c_18220050723en00160016.pdf

on 15.7.2006.

²⁷ See also Title III “Equality” Articles II 80-98 and Quintin and Favarel-Dapas (1999).

²⁸ The first citation is generally attributed (though the attribution has not been checked by the author) to Monnet’s speech in Washington DC on April 30 1952. However, although it is often cited, the author has found no source for the second statement attributed to Monnet.

²⁹ It’s worth noting that the European view of the USA is by no means fixed – earlier moments in the formation of the “European Project” were distinguished by pervasive expressions of philo-Americanism, not least by Monnet and other founding fathers of the EU such as Hallstein.

³⁰ Hoskins and Mirus (1988: 500) define this as ”A particular programme, rooted in one culture, and thus attractive in that environment, will have a diminished appeal elsewhere as viewers find it difficult to identify with styles, values, beliefs , institutions and behavioural patterns of the material in question”.

³¹ Alarm at the prospect of an “alien” Islam entering a notionally Christian Europe in the form of Turkey’s possible accession to EU membership suggests that such ancient ghosts still stalk some European consciousnesses.

³² A further node of opposition to the AVMSD rests on the belief that the AVMSD will inhibit innovation, raise prices to consumers and slow the responsiveness of services to consumer demands.

³³ Cl 9 of the preamble states: ”The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression”.

³⁴ See, *inter alios*, the Commission’s Recommendation on Protection of Minors and Human Dignity at http://ec.europa.eu/comm/avpolicy/reg/minors/index_en.htm

³⁵ The leading UK civil liberties group.

³⁶ See Racial and Religious Hatred Act 2006 Chapter 1. At

<http://www.opsi.gov.uk/acts/acts2006/20060001.htm> on 7.7.2006.

³⁷ Based on sex, racial or ethnic origin, religion or belief, age or sexual orientation.

³⁸ The UK and the Slovak Republic reserved the right of non-compliance to the resulting Council of Europe Recommendation in respect of online services. See [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2004\)16&Sector=secCM&Language=lanEnglish&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2004)16&Sector=secCM&Language=lanEnglish&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679) on 11.7.2006.