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National, Supranational, and Global: Ambivalence in the Practice of Civil Society?

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Metamorphoses: On the Geography of Civil Society

In the national context, talk of civil society has ceased. We are left with only a distant memory

of the protest movements of the tumultuous 1980s; whatever there was to analyse and criticise

has been analysed and criticised. But this appearance is deceptive because elsewhere, wars are

being waged. Civil protests have ascended into the supra- and transnational realms. Civil

society, in the form of organisations such as Amnesty, Attac, Greenpeace, Friends of the

Earth, the International Rivers Network and People's Global Action, busies itself by

uncovering the secrets of the opaque world of comitology – that network of EU advisory

committees – and acts as a counterbalance to the prevailing forces of the globalised world of

the UN, G7, the WTO, the IMF and the World Bank.

Whosoever chooses to accompany this exodus into the higher realms must acquaint

themselves with the varied usages of the term "civil society", for this nomenclature has a

changing and tumultuous history and an uncertain future. If one were to attempt to pinpoint

the whereabouts of civil society, one would trace, in the conceptions of political philosophy,

three noticeable changes of address.[1] From the age of the Greek *polis* up until the greats of

[1] For more detail on these changes, see G. Frankenberg, *Die Verfassung der Republik*, (Nomos: Baden-Baden 1996) Chapter 2

modern philosophy, Hobbes and Kant, civil society manifested itself in the twin guises of the political and public in formulas such as Kant's *civitas sive societas civilis*. Alternately, civil society can be conceived of as the natural border between the state-centric province of public transactions and the politically impoverished quarter of the private life; that is the "home". [2] Under the influence of early modern sovereignty theory and the philosophy of Montesquieu, the etymology of civil society gradually shifted towards the duality of political and civil spheres: the *Etat civil* no longer directly opposes the *Etat politique*. This notwithstanding, the contours of the civil landscape have not sharpened in focus. Often, theory settles on the opposition between the state on the one hand, and the society of private ownership on the other, which is stylised in the liberal paradigm as the opposition between authority and harmony. [3] The predicate, "civil" or "private" becomes synonymous with "non-state", the content and borders of which define property and market, and later, competition. Marx accordingly described civil society as the apolitical "sum of the material living conditions after the event of the English and French in the 18th Century".[4] After the exhaustion of the idea of the polis, and the waning of the liberal paradigm in an age of state interventionism, a conception is developing (often without reference to its Hegelian connections), in which civil society occupies a position between "Haus" (family and economy) and "Herrschaft" (state or authority). This followed the lead of Scottish moral philosophers and French physiocrats, who had distanced themselves from Artisotelian dogma, according to which the economy is

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[2] In the second half of the 20th Century, Hannah Arendt, in her philosophical texts, appeared as the heir to this *polis* tradition. See H. Arendt, *Vita activa oder vom tätigen Leben* (Stuttgart: W. Kohlhammer Verlag, 1960) and *Über die Revolution* (München: Hanser, 1974)

[3] A. Smith, *Wealth of Nations*, (Edinburgh, 1776)

[4] "Gesamtheit der materiellen Lebensverhältnisse nach dem Vorgang der Engländer und Franzosen im 18. Jahrhundert". See K. Marx, *Zur Kritik der politischen Ökonomie*, 1859, MEW 13 (Berlin 1951), 12; A. Ferguson, *An Essay on the History of Civil Society*, (Basil: London, 1789).

understood as the fundament of the "Haus", entirely separate from the political-public sphere. Civil society materialised as a societal phenomenon in connection with Tocqueville's observations on democracy in America; shackled neither by political nor private fetters, civil society is constituted by the diverse intermediary organisations with their various programmes, challenges, interests and projects. The term civil society can be understood as delineating an area, but, in the context of societal phenomena, it can more pertinently be conceived of as describing a practice, namely the self-organising activity of society in the resolution of unavoidable conflicts by civil means.[5] Secondly, the notion of civil society connotes procedural and institutional public life, which entails the influential participation of the citizen in politically institutionalised will-formation.

A coda to the early history of civil society: the post-liberal paradigm of an activist theory of politics and the idea of self organisation of society through voluntary associations played a central but temporally and spatially limited role in the "progressive era" in the United States, as New York intellectuals, in their urban milieu, briefly bade farewell to *laissez-faire* capitalism in favour of a systematically interventionist state. The current career of civil society is thanks to the model of the anti-totalitarian, social- and human rights orientated dissent movements in Middle and Eastern Europe in the late '70s and '80s. These movements, even for Western societies, catalysed the ripening of the idea of the civil society as a vision of a republican and radically democratic togetherness. [6] After the (re-)domestication of the term, the '90s heralded its notable worldwide proliferation, with an equally salient diffusion of variations of the post-liberal paradigm, for example, in China or in Islamic societies. This

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[5] To put it bluntly and somewhat imprecisely: democratic "dispute" culture

[6] From the extensive literature on this topic see, in particular: U. Rödel, G. Frankenberg & H. Dubiel, *Die demokratische Frage*, (Suhrkamp: Frankfurt/Main, 1989); E. Gellner, *Bedingungen der Freiheit. Die Zivilgesellschaft und ihre Rivalen* (Klett-Cotta: Stuttgart, 1995).

dissemination of the term led inexorably to considerable dilution of its meaning. The Chinese "civil society without democracy" typifies this semantic bankruptcy.

If anything, the silence enveloping civil society is localised in the national context of the West European state. With occasional exceptions, (e.g. the movement against Castor transportation) the peace, environmental, and women's movements seem to have their most active years behind them. In the theoretical discussions, all relevant arguments have been exchanged.[7] Even the Enquete-Commission of the German Parliament has put the sessions on the "future of bourgeois commitments" on ice. As was indicated at the offset, appearances deceive because the battles of (and about the concept of) civil society take place on the transnational plateau. The discovery of civil society in the EU and global(ised) context, in particular after the protests against the IMF, WTO and the politics of heads of state at G7 and G8 summits, means that it is worth questioning whether the semantic arguments have really been set aside. What role does civil society play in the transnational context? The following thoughts concentrate on a clarification of the usages of the term "civil society" (II); a discussion with the critics of those usages (III); the ambivalent approach of practice toward supranational civil society amongst an organised European civil society (IV); and on the international level with respect to a *global civil society* (V).

Civil Society as Utopia and Self-description

To know what one is talking about is always helpful, and this is particularly valid with respect to the politically and semantically loaded, oscillating, and fuzzy terminology of civil society.

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[7] For a meticulous digest of this topic, see A. Klein, "Der Diskurs der Zivilgesellschaft: Politische Hintergründe und demokratietheoretische Folgerungen" in *Politische Vierteljahresschrift* 43/4 (2002) 681-683. More comprehensively, see V. Heins, *Das Andere der Zivilgesellschaft: zur Archäologie eines Begriffs* (Transcript: Bielefeld, 2002).

The same is true, as will be shown, for critics of the discourse pertaining to civil society, and so three usages of the term "civil society" should be distinguished here:

First, civil society is a project: the utopia of a self-organising, democratic society, one respectful of human rights and civil liberties. Since the time of the philosophical founders of the liberal paradigm, this project has been idealistic, progressively drafting since its very founding the blueprint of a future and only partially realised civil society, in which people live together as interactive, peaceable citizens. Freely and independently, these people gather themselves into associations, in the public fora, cooperating and reaching mutual agreement on the communal transactions of society, under the rule of law and the constitution, without untoward interference from a despotic, totalitarian or paternalistic state, with measured tolerance for diversity and for the establishment of a minimal solidarity, conducive to social equality. [8] Tocqueville gave this project, the form and substance of which he (not necessarily erroneously) identified in American society, the title of "society of equality".

Second, civil society is used as a critical tool, which enumerates the elements of the project as normative, anti-authoritarian yardsticks. These yardsticks permit the disappointing reality to be compared (unfavourably) to an aspirational normative blueprint. In this context, civil society becomes a weapon which can be brandished in the face of an authoritarian regime, an officially regulated public sphere, curtailments of free expression, an entrenched system of governance or other institutional structures or phenomena which emasculate or undermine the public.

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[8] In addition, see J. Kocka, „Das Bürgertum als Träger von Zivilgesellschaft – Traditionslinien, Entwicklungen, Perspektiven" in Enquete-Commission's "Zukunft des Bürgerschaftlichen Engagements" at 16; and G. Frankenberg, *supra* note 1, Chpts 2 and 5.

Third, civil society functions as a descriptive or analytical term,[9] which separates a specific sphere, the non-political, the associative scene, or the realm of self-organisation from the province of the state. Alternatively, the term may be used to chart the borderlines between/beyond the state, the economy and the private sphere. Clearly, the words "between" or "beyond" (state and market) indicate, on the one hand, a transition to a post-liberal paradigm and, on the other, the inadequacy of the logic of this demarcation. In what follows, the logic of demarcation is converted into sheer heuristics; facilitating the analytical fencing-off of an area of action comprising the activities of clubs, social movements, and non-governmental organisations. This practice encloses a symbolic field of public discourse, with moveable boundaries, in which the public engagement of predominantly weak institutionalised groups, initiatives, societies and networks takes root. This field is adjacent, but not necessarily in opposition, to state and market.

The descriptive-analytical term usefully pertains to the practice of voluntary public associations. We can distinguish an *internal* and an *external* aspect, which are intertwined in this practice. For both, it is noteworthy that the predicate "civil" is of real import, and the players in this game, that is, the active citizenry, and the rules of the game, are distinguishable by virtue of a specific relationship to the law. The *internal* aspect describes the *integrative* significance of civil society. Here, "civility" is the watchword with respect to the modalities of civil disagreements. Civility implies on the one hand an ability and readiness of individuals to act in collectives (agency), and on the other an intimate relationship to the ethic of equality. In discussions in the realm of civil society, the actors signal their adherence to this ethic by

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[9] J. Alexander, ed., *Real Civil Societies – Dilemmas of Institutionalisation*, (Sage: London, 1998); H. Anheier, M. Glasius & M. Kaldor, eds., *Global Civil Society 2001*, (Oxford: OUP, 2001).

restraining themselves to civil means of conflict-resolution and by recognising the right of their opponents to voice their private or political interests in public fora. On the basis of this condition (the ethic of equality), conflict resolution in civil society creates or represents social capital and that minimum of solidarity, required by a society of individuals for its social cohesion. Now, this description of conflict resolution in civil society, or, a democratic argumentative culture, has clear normative implications. Crucial to the suitability of this terminology for civil society as a descriptive and not a prescriptive tag, is that these implications are not attributed to the observed reality, but are demonstrable in the observable practice of associations. If that is not the case, for example in civil war or where massive and systematic transgressions of the prohibition of violence are taking place, in hierarchically structured (inegalitarian) societies, or in highly paternalistic societies, the term civil society is inapposite. Similarly, the Chinese solution, of a civil society *sans* democracy is plain nonsense, or the sheer ideology of an autocratic strategy for the cementing of power through reforms from above. This type of regime has nothing in common with the definition of civil society proposed here.

The *external* aspect constitutes the meaning of civil society for the establishment of legitimately reached official decisions. As a result of efforts to influence the public, political office holders, institutions, or economic actors and groups, public associations, particularly those dedicated to freedom of expression and association, have a public utility. In this sense, civil society, with its specific organisational structuring of free will and its communicative rationality, mediates between the different sectors of national state society and its organisational forms (bureaucracy, market) and rationalities (power and exchange).

The difference between the internal and external aspects attaches to the everyday usages of the terminology and permits the more accurate rendering of the normative implications and the potential ambivalences of civil societal practice: civility or civil society characterises, as a democratic predicate, the manner of social intercourse in the form of spontaneous, voluntary self-organisation. It refers to the autonomy of the citizenry and the constitutional embodiment of the general rights and liberties of action and association. It is questionable whether or not the organisations and associations of civil society may lose their civil quality or be degraded where they are supported by the state or partially integrated into official decision-making processes, with its correlative demands of representative and responsible structures.

Civil society also refers to the place and mode of social intercourse in public arenas, that is, outside of the institutional or official (or economic) decision-making processes, and is, in a broad sense, geared towards the public interest. This republican-democratic component may be understood as the expression of special rights to political communication and participation in public fora. To that extent, the predicate, "civil", must be jettisoned where the activities of the citizenry lose that public quality, and/or when they are conducted in a strictly prudential manner. Finally, as a synonym for *civility*, civil society contains clear normative connotations, and prescribes a particular modality for conflict resolution and the pursuit of interests. Civility describes the self-denial of violent modalities, and, at the same time, implies tolerance and an ethic of equity: the actors in civil society come to the table as equal partners and renounce notions of preference or the natural right to violate the physical integrity of their contemporaries with force or duress. It follows that organisations no longer deserve or enjoy the tag of civil where they dispense with these notions of egalitarian, horizontal, civil confrontation, taking the law into their own hands.

If one insists, as I do, upon these components of voluntarism, public*ity*, and civility, then "civil" functions as a prescriptive term, which would presumably exclude the activities of the Mafia, the Ku-Klux-Klan, or clandestine, paramilitary, national-socialistic groups from its remit. That the understanding suggested here does not resolve all the conflicts is demonstrated by the sections on European and Global civil society. Incidentally, the various interpretations of the paradigm of civil society create tension. From the liberal point of view, civil society animates the democratic process and guarantees that social preferences and interests are properly voiced and represented[10]: political decisions enjoy greater legitimacy as a result. From the communitarian point of view, civil society, boasting a culture of voluntarism and its various trappings, actualises "common values" of a communal society.[11] From a republican point of view, civil society revitalises the idea of public freedoms, that is a democracy of association, or simply civil virtues that facilitate the running of a representative democracy. The strengths attributed to civil society are as formidable as the dangers that imperil its existence: it is considered a nostrum by liberals, a cure for the symptoms of excessive official interventionism, while communitarians regard community groups as a cosy homestead of shared values, preferential to the cold legal-bureaucratic environment; while republicans overburden members of the societal associations by obsessively fixating on their civil roles and responsibilities. At its base the spontaneous, self-organisation of civil society is threatened, either legally formalised, banalised, co-opted or governmentalised by state administrations, that is, incorporated into state decision-making procedures and/or overburdened with the imposition of tasks by the government.

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[10] For this, see K. A. Armstrong, "Rediscovering Civil Society: The European Union and the White Paper on Governance", in *European Law Journal* 8 (2002), 102 ff.

[11] R. Bellah, R. Madsen, S.M. Tripton, W.M. Sullivan & A. Swidler, *The Good Society*, (New York: Knopf, Random House, 1991).

Critique and Riposte

Before analysing the roles and abilities of civil society on the transnational level, I wish first to engage with several criticisms, in order to prevent avoidable misunderstandings accompanying us on our journey from the national to the transnational. The first criticism concerns the theoretical inflation of the description "civil society" from a sphere or sector of society (or a specific practice of associated actors) to an elaboration of the entire community, and this complaint should be considered in unison with the foregoing observations and terminological clarifications. Thereafter, it should be clear in the following discussion that, in the national context, a logically demarcated, total conception of civil society – for example as a total demos or an association of associations – is both theoretically and empirically implausible.

A further criticism aims at conceptions of civil society which, rather than exorbitantly inflating its meaning, attribute to it, as a politicised sector, a special role: namely as a policy centre. The criticism runs like this: "the semantics of civil society [can be seen] as a utopian vanishing point against the differentiated society of unity".[12] That in such besieged conceptions of the civil society it takes over the functions of which Luhmann disapproves, namely that of a normative or critical yardstick of an observatory or a policy centre,[13] would hardly be a scandalous condemnation unless, of course, the dicta of the founder of modern systems theory had the character of canonised remedies for the post-modern, disregard for which would incur social opprobrium from groups of believers. This criticism is not

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[12] On the object of the criticism, see: Rödel *et al.*, *supra* note 6. For further critique, see D. Richter,

"Zivilgesellschaft – Probleme einer Utopie in der Moderne", in: R. Eickelpasch &Armin Nassehi, eds., *Utopie und Moderne*, (Suhrkamp: Frankfurt/Main, 1996) 170 ff.; and, in agreement, U. R. Haltern, *Integration als Mythos*, (CUP: Cambridge, 1996) 87.

[13] U. Haltern, *ibid*

watertight: in reality, actors in civil society (like actors in other fields, but due to the politicisation of their practices, particularly those in civil society) perceive their activities as supplementary or complementary phenomena. Systems theory cannot evade this conclusion and still enumerates – not entirely ironically – a society of societies. To paint oneself a picture of the society of societies, or a world society, seems to be an anthropological *fait accompli.* That does not mean that in practice theoretically grounded functional differentiation should be abandoned, however in contradistinction to systems theory, the embattled action-theoretical viewpoint perceives the quotidian background assumptions – without also assuming that these are a correct description of society – and takes the political imagination of individuals seriously. It remains lodged in a pluralistic or, if you prefer, a polyarchical perspective: "Civil society no longer submits itself to an image of unity".[14]

This "criticism of unity", although slightly off-target, is not easily dodged, as it refers to a converging tendency of thinkers leading towards civil societal conceptions: politicism. This describes the overestimation and overburdening of the citizenry as "full time activists" of participatory democracy, in the realm of public freedom in a republic. Contrary to such a misunderstanding, probably arrived at due to the democratic question, it is worth noting that the members of social movements and networks do not have to make significant, enduring contributions in order to be understood as actors in civil society.

A third complaint arises apropos the normativity of the discourse about civil society, in that some conceptions read like the tenets of liberal constitutionalism. On the other hand, however, a civil society may not obtain without normative connotations and implications. Denormativised civil society would be mere society, the "civil" having been rendered otiose.

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[14] "Die Zivilgesellschaft fügt sich … nicht länger in das Bild einer Einheit". See Rödel *et al*, *supra* note 6, 101.

As an alternative to the nomenclature of "civil", a society might be termed "civilised", "orderly", "unofficial", or "regulated" in order to describe the distinguishing normative features of its social practice. It is not contentious that "civil society" presupposes a society that refrains from certain actions; we are not, therefore, discussing the purity of the conception, but its coherence and concordance with the observed phenomena. Not every form of protest deserves the title "civil", and it does not speak for the suitability of categorisations when civil society, by dint of its ethic of equity and self-restraint, is entitled, the "community of the well-intentioned".[15]

Additionally, the complaint that the conception of civil society is normative, can be met by ascertaining whether associations trumpet civility as a model for argumentation or protestations, alternatively, it can be determined from social practice. If one presumes that a relatively robust and enduring democratic, discursive culture signals that the actors feel themselves bound by a fundamental convention, a mere empirical fact of civil reason and restraint has been evinced. Above all, the (self-)annointing as a civil society offers only a vain snapshot, it tells us nothing of either the stability or subversity of the civil societal attitude of mind, or of its resistance to corruption and an overzealous, over-intrusive state.

The "European Civil Society"

Not entirely coincidentally, the terminology of civil society featured in the debates over the democratic tweaking of governance in the EU. The White Paper on Governance,[16] distributed

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[15] "Volksgemeinschaft der Gutmenschen". See V. Heins, *supra* note 7

[16] European Commission, European Governance: A White Paper, COM (2001) 428 final. In addition, see P. Craig & de Búrca, *EU Law – Text, Cases, and Materials*, 3rd edition. (Oxford: OUP, 2003), 173 ff. and for a critique on the contributions to the symposium, see: Responses to the European Commission's White Paper on

in July 2001 by the Commission, officially continues the discussion of the further development of community methodology and the Union's democracy. Its drafters pay attention to the growing cleft between the successes of European integration on the one hand, and, on the other, the disappointment and alienation of the "Europeans". [17] To questions such as how those who are governed from Brussels can be included in the community system, how their influence can be secured, and how the democratic deficit may be restituted, governance and civil society should be considered as being two of the possible answers.

What can still be detected in the anti-totalitarian dissident groups and civil movements in middle and Eastern Europe, can now also be identified in the context of the EU as a *top-down* project run by enlightened technocrats. The target of the reform project is, *inter alia*, the improvement of "rules, processes and behaviour that affect the way in which powers are exercised at the European level, particularly as regards accountability, clarity, coherence, efficiency and effectiveness". [18] For several years, especially with respect to subsidiarity and its traditional formulation, which informs the politics of constant consultation with "outside interest groups", the Commission has attempted to expand and formalise "open and structured

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Governance, www.jeanmonnetprogramm.org, in particular, G. Marks, F. Scharpf, P. Schmitter & W. Streeck, *Governance in the European Union*, (London: Sage, 1996)

[17] For more detail on this point, see J. Scott & D. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" *European Law Journal* 8 (2002), 1 ff.; O. de Schutter, "Europe in Search of its Civil Society" *European Law Journal* 8 (2002), 198 ff. and K.A. Armstrong, *supra* note 10.

[18] White Paper, Work Area no. 2.5, and subsequent. In addition see also: Economic and Social Committee. The Role and Contribution of Civil Society Organisations in the Building of Europe, CES 851/99 from 22.9.1999, Chpt. 5.2

dialogue" with the representatives of "organised civil society".[19] There is emphatic talk of citizens ceasing to be passive "objects" of the administrative process, and maturing into "stakeholders" who play active roles. The solution for the incorporation of civil society and corresponding direct responsibility is called, in the dry *communitese* of the Brussels administration, "regulated and systematic consultations".

The formalised and institutionalised structure of this (admittedly not new) partnership between Brussels elites and the civil society is expressed in both challenges and efforts: firstly, a full frame for the politics of consultation complete with principles and criteria; secondly, greater transparency for the consultations arrangement in the form of expert groups, advisory bodies and other fora with representatives of the civil society; and thirdly, a legal basis for the structured dialogue with the community of NGOs. This legal grounding was intended to acknowledge the role of NGOs and accredit them without, however, giving them procedural or concrete rights.

It is beyond contention that such reforms would improve the decision-making process on the supranational level, and would garner more wisdom, and certainly more legitimacy for the Commision's pronouncements. Equally obvious is the initial charm exhibited by the notion of a European civil society, that is the hope that as a fragmented and diverse *demos*, it can, a) realise a synthesis of national and supranational government and, b) institute a participatory democracy tailored to the European multilevel system. By virtue of their openness to plural membership, associations, networks and clubs are better positioned to sweep away the ashes of an ethnocentric nationalism than the notion of European citizenship. It can also be assumed

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[19] See the Brussels language regulation on the back of Art. 257 EC regarding the amalgamation of the Business and Social Committees (ECOSOC)

that the inclusion of the "organised civil society" in *European Governance* can smooth the transition from a mindset of goal-orientation to an ideal of *process*.[20] Of course, expectations should not be set too high, and, naturally, the civil society project should be regarded as an attempt to cautiously and in an orderly manner reform the elite, technocratic *Governance* regime. In particular, a wide berth should be given to risky experiments with direct democracy.

Whoever wishes to criticise the mode of incorporation of organised civil society into *European Governance*, should avoid a potential pitfall, that is, the EU-administration should not be accused of selective accreditation of civil associations. From the point of view of Brussels, this integration strategy is neither surprising nor illegitimate, let alone open to critique. The following observations question the assumptions that a *top-down* strategy is in the interests of the EU Commission and that it would concord with the *modus operandi* of an enlightened administration. Here, however, the perspective of civil society is expressly adopted and the representatives of that *corpus* are asked to reflect on whether or not the negative ramifications of their accreditation outweigh its benefits. If one considers the logic of the White Paper, and earlier statements made by the Commission and expert groups, a not entirely unproblematic *rank structure* for civil society reveals itself. The first rank constitutes the veteran social partners of the decision-making process, e.g. employers and employees.[21] They may be identified by a high level of institutionalisation and a transnational, union-based organisation, which without any friction, can operate in a multilevel system, while the number and importance of their represented members secures them influence in the Commission. The

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[20] On this decision, see F. Scharpf, *Regieren in Europa*, (Frankfurt/Main: Suhrkamp, 1999) and "Democratic Policy in Europe" *European Law Journal* 2 (1996), 136 ff.

[21] cf. Art. 138, 139 and 257 EC

gravitas of their interests, which they represent with real bureaucratic power, lies in the socio-economic realm. In second place, we encounter the "nobility" of the civil society: an inconspicuous albeit many-sided and diversely organised group of organisations, amongst which the NGOs stand out. (The latter are represented and accredited in Brussels, if predominantly on an informal basis.) Unlike the social partners, the second rank groups lack mass, and are elite organisations, *à la* Greenpeace, and part-NGO, such as the "Platform of European Social NGOs", and networks with democratic structures. They have a high profile as a result of their spectacular activities (after the fashion of Greenpeace) and imposing media presence, and they enjoy excellent organisational resources, professional expertise and close, familiar contact with the EU-administration. The interests they represent are less noticeable and more diversified than those of the social partners, while their chief concerns are environment, social, and human rights. Their rationality is demonstrated (preponderantly) in the professional advice of councils, in particular, the sub-councils of the administration: to this extent, they have recently, and prominently, and perhaps prematurely, constituted a new form of celebrated comitology.[22]

Regarding the civil associations of the third rank, a further internal differentiation can be made: in the Commission's opinion, such associations, by dint of their propagation of supra-regional issues and extra-territorial projects, are worth considering as candidates for sponsorship out of central funds. In contrast, the numerous and, for that reason conspicuous, other organisations, and equally, the "grass roots"-proletariat, are neither considered to be participants in a social dialogue nor regular consultation partners of the Commission, let alone

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[22] On comitology, see: C. Joerges, "'Good Governance' through Comitology?", in C. Joerges & E. Vos, eds., *EU Committees: Social Regulation, Law and Politics*, (Oxford, Portland: OUP, 1999) and J.H.H. Weiler, *The Constitution of Europe* (Cambridge, UK: CUP, 1999)

potential recipients of subsidies. In the opinion of the EU-administration, by reason of their local or regional organisation, they are not adequately representative. Further, and by dint of their often *ad hoc* emergence and orientation, they lack requisitely stable institutionalisation. Their spontaneity, unsuitability, (single-)issue-orientation and communicative rationality qualifies them as prototypical civil organisations but, this notwithstanding, disqualifies them as desirable sounding boards of a supranational authority. Here we see the borders of a deliberative European democracy, that is, a deliberative polyarchy. [23]

The marginalisation of a significant part of civil society's associations makes the heralding of a European civil society look questionable, particularly where only transnational structures and representative organisations (and these only selectively) are supported or encouraged. The Commission's *communiqués*, in particular the suggestions of the White Paper, also portend a division of civil society: A large part of the organisations of the third rank are neglected, contrarily those of the first and second rank are accredited and, though they have no concrete rights to judicial review, can inform themselves about the agendas of the Commission or its committees and, on the grounds of soft law such as codes of conduct, minimum standards of bureaucratic practice or partnership arrangements, represent their interests. This divided, and to that extent "organised" civil society will also be included in formal constitutional arrangements and integrated into the new, flexible, and supposedly transparent practice of governance. This integration of social partners and some NGOs has its price, for the beneficiaries are also expected to maintain minimal standards of representativeness, responsibility and transparency. The relationship of those fortunate associations of civil society with the EU administration is therefore reciprocal.

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[23] See for example: J. Cohen & C. Sabel, "Directly Deliberative Polyarchy" in *European Law Journal* 3/4, (1997) 313.

Eventually, this aperture of the Eurocracy may prove itself to be less of a genuine democratisation and more akin to a refined technique of rule, akin to Foucault's "gouvernementalisation".[24] The EU technocracy domesticates the organisations of civil society and robs these registered partners of a considerable amount of their independence and spontaneity, particularly to the extent that they become financially indexed to the Commission. This set-up functions as an early warning system, an agenda-setter, and a pool of expert knowledge. From one point of view, it is disquieting that the social capital and moral energy of associations of civil society, which, the historical record relates, tend to political innovation and social and political progression, remains unharnessed, to the detriment of the general European well-being and to the advantage of the hackneyed Brussels technocracy, which, having thusly colonised the civil associations, need not anticipate unsettling protest movements or political unrest. [25] From another perspective, the "gouvernmentalisation" of civil society is not free from ambivalence, which could operate in the favour of the latter: in so far as civil partners are served by the administration, they may operate in independence from administrative interference. The challenges and goals of civil society are incorporated into the hierarchy of sub-committees and, as a result of influence in the Commission will enjoy more weight as against the Parliament. [26] To the extent that associations of civil society are *ab initio* excluded, the administration courts the potential "besiegement"[27] of the fortress

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[24] M. Foucault, *Society Must Be Defended. Lectures at the Collège des France 1975-76* (New York: Picador, 2003)

[25] See C. Offe, *Civil Society and Social Order: Demarcating and Combining Market, State and Community,* Archives Européennes de Sociologie, vol. XLI (2000), 71 ff.

[26] An example of this is the influence of the Migration Policy Group upon the formulation of the EU's politics on migration.

[27] J. Habermas, *Faktizität und Geltung* (Frankfurt/Main: Suhrkamp, 1992).

Brussels by civil groups, networks and organisations in their traditional casting as resistance to the powers-that-be.

Might and myth of the "Global Civil Society"

Appearing in the early 90s, noticeably at the World Summit at Rio in 1992, and rapidly spreading to various other world fora, the *Global Civil Society*, has remained on the scene and in the headlines with spectacular protests, and global fora attended by thousands of representatives, with militancy in Seattle, Genoa and elsewhere, featuring campaigns against landmines, child labour and poverty and for the rights of indigenous peoples, women and political prisoners. Alongside ambitious aims propagated by international NGOs such as "planetary citizenship", "cosmopolitan democracy" or "new world order", less lofty goals, familiar to the European ear, take their place, such as public participation, consultation, transparency and political accountability. [28]

Globalisation is often acknowledged, perhaps too eagerly, as a midwife of *Global Civil Society*. What such a society can constitute and what it could achieve should not, however, be considered without at least a cursory clarification of the globalisation phenomenon. The various attempts at definition throw into relief two aspects of the new globality: first, the transcendence of space, borders, areas, and distances ("supraterritoriality)[29]; and second, a quasi-contemporaneity of processes of political decisions, economic production, and social

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[28] In addition see the contributions in I. Shapiro & C. Hacker-Cordón, eds., *Democracy's Edges* (Cambridge, UK: CUP, 1999); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995) and J.N. Rosenau & E-O Czempiel, eds., *Governance without Government*, (Cambridge, New York: CUP, 1992).

[29] J. A. Scholte, "Civil Society and Democracy in Global Governance", CSGR Working Paper No. 65/01, (January 2001).

communication.[30] That globalisation can be understood as a transformation of social geography and an amelioration of time constraints, can be observed in the development of new, complex and flexible forms of transnational political regulation and government (global governance, multilateralism) in transnational economic production (production chains), in the borderless flow of finances and communication (internet, cyberspace) and in the *a*national semantics of human rights, democracy and ecology. It goes without saying that the governance of transnational space without corresponding institutional arrangements guts any substantive conception of democratic legitimacy and transparency. [31]

On close inspection, *Global Civil Society* exhibits further characteristics: firstly, there is the weakening nation-state, facilitated by the post-cold war aperture of political possibility outside of and beyond conventional national politics, accompanied by theories of the minimalist state of the neoliberal variety; secondly, heterogeneous transnational organisations like the UN, the IMF, the World Bank and the WTO; thirdly, the internet, or more precisely, the technological revolution, the dramatic reduction in communications- and organisation costs facilitating a cyberspace-activism;[32] fourthly, a turn in the industrial states to

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[30] From the enormous amount of literature on the topic of globalisation, see in particular: R. Münch, *Globale Dynamik, lokale Lebenswelten*, (Frankfurt/M: Suhrkamp, 1998); J. Galtung, *Die andere Globalisierung*, (Munster: Agenda Verlag, 1998); E. Altvater & B. Mahnkopf, *Grenzen der Globalisierung* (Münster: Westfaelisches Dampfboot, 1999).

[31] For a critique of this discourse on global governance, see: U. Brand, A. Brunnengräber, L. Schrader, C.Stock & P. Wahl, *Global Governance – Alternative zur Globalisierung*, (Münster: Westfälisches Dampfboot, 2000) and Michael Zürn, *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance*, Frankfurt/Main: Suhrkamp, 1998); H-P. Martin & H. Schumann., *Die Globalisierungsfalle: Der Angriff auf Demokratie und Wohlstand* (Berlin: Rowohlt Verlag Taschenbuch, 1996).

[32] L. Lessig, *Code and Other Laws of Cyberspace*, (Cambridge, MA: HUP, 1999); Y. F. Lim, *Cyberspace Law*, (Oxford, New York: OUP, 2002)

nonmaterial values, which emphasise individual liberty and responsibility as opposed to state interventionism and control; and finally, a worldwide dissemination of the democratic idea and freedom of expression and a thickening of international principles and procedures born of the notion of the rule of law, which chaperone the activities of a *Global Civil Society*.[33] These conditions make it easier for NGOs to arrange themselves transnationally, to combat problems (intensified by globalisation) of war, poverty and authoritarianism, to thematise moral authority on the world stage and to challenge the "global players", economic and political, deploying influential speakers to galvanise public protest.

Every classification of associations that constitute the fragmented *Global Civil Society* runs the risk of underplaying the conspicuous diversity of worldwide and regional platforms, societies, fora and networks. Consequently, any criterion informing a categorisation must be able to distinguish between charitable organisations, transformative, democracy-orientated NGOs, political and technical NGOS or privately run BINGOs[34] and public-interest, international NGOs. Particularly prominent amongst the latter contributors to this humanitarian-universalistic picture are Attac, Friends of the Earth International, Amnesty International, Citizens' Action Against Hunger, Medico International, Greenpeace, Global Policy Forum und Public Citizen. Associations of this genus and mindset purposely distance themselves from the manifestations of international economic ideology; for example, neither the International Chamber of Commerce nor the World Economic Forum, which can count over 900 businesses amongst its members, were invited to the Earth Summit. It might well be the case that rather than the prudentially-driven BINGOs jeopardising the good name of the *Global Civil Society*, the real danger emanates from those associations which camouflage

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[33] For this, see H. Anheier & N. Themudo, *Organisational Forms of Global Civil Society*, 198f in M. Glasius, M. Kaldor & H. Anheier, eds, *Global Civil Society 2002* (Oxford: Oxford University Press, 2002).

[34] BINGO is the acronym for business-oriented international non-governmental organisation

themselves in altruism and infiltrate the sundry world fora. Especially poisonous to reputation are those associations that openly propagate anti-semitic, chauvinistic, racist or fundamentalist ideologies or those whose authoritarian organisational structure does not sit comfortably with a democratic, rights-based image. These poisonous elements are best filtered out with a precise, normative conception and energetic, argumentative defence of the notion of the "civil".

As in the context of the EU, where organised civil society is expected to compensate for a democratic deficit (next to institutional reforms), in the transnational context, the *Global Civil Society* is assumed to play a similar role, namely the bridging of the chasm between supra-territoriality and geopolitical self-determination. On the transnational plane, a plethora of associations, networks, and groups are active, which boast organisational and membership structures, spanning state boundaries and aiming towards global problem-solving.[35] Naturally, one should take care not to adopt a hasty idealisation of frequently uncooperative NGOs, jealous to guard their sovereignties; they cannot be championed as flagbearers[36] of a cosmopolitan democracy, and their performative capacity should not be overestimated.

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[35] C. Grzybowski, "Civil Society's Responses to Globalisation", in *Corporate Watch* from 8 November 1995; The Center for the Study of Global Governance, eds., *Yearbook Global Civil Society 2002*, Part II (Issues in Global Civil Society) – http://www.lse.ac.uk/Depts/global/Yearbook/outline2002.htm

[36] D. Archibugi & D. Held, eds., *Cosmopolitan Democracy: An Agenda for a New World Order*, (Cambridge: PUB, 1995); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, (Cambridge, 1997); and, finally, O. Höffe, *Demokratie im Zeitalter der Globalisierung*, (Munich: Beck, 1999), who has absolutely no place for civil society in his conceptions of cosmopolitan democracy. For a more sober assessment see the contributions in E. Altvater, ed., *Vernetzt und verstrickt – Nicht-Regierungsorganisationen als gesellschaftliche Produktivkraft* (Münster: Westfälisches Dampfboot, 2000); R.D. Lipschutz, "Reconstructing World Politics: The Emergence of Global Civil Society", *Millenium* 21 (1992), 389 ff.

Before overestimating the healing powers of the *Global Civil Society*, its ambivalent relationship to the nation state, the international political institutions and economy should be taken into account.[37] Like the state on the national level, the civil society of the transnational plane is dependent on institutional prerequisites, which it can neither produce nor guarantee. Features of the necessary growth environment for global civil activism include relatively functional democratic and rule-of-law informed institutions and procedures.[38] *Global Civil Society* can operate neither in an institutional vacuum, nor in a world of pure resistance. More realistically, this society, like its national and supranational sisters, relies on the state and international institutions, the decisions of which it can criticise and influence. *Global Civil Society* has an awkward relationship with international law: first, to organise itself, to articulate itself and find fora and followers; and second, to achieve durable results. Conventionally, therefore, civil associations put their trust in state institutions, legal process and warranties – human rights commissions, judges and a police force sensitive to civil liberties – for their own self protection and for the sanctioning of the torturers, child traffickers and environmental polluters that they uncover. Such associations ritually translate their demands into the universal language of human rights. Consequently, they function as amplifiers of sundry scandals, even where their campaigns are not directly targeted at the codification of prohibitions of various transgressions against humanity, e.g. production of

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[37] For this, see W. Streeck, "Einleitung: internationale Wirtschaft und nationale Demokratie", in: W. Streeck, ed., *Internationale Wirtschaft und nationale Demokratie*, (Frankfurt; Campus, 1998) 11 ff. On the disintegrating effect of the fragmented NGO scene on the system of institutions of international society, see R. D. Lipschutz, *supra* note 35, at 419.

[38] On the present institutional structure and the public international law rules, see S. Hobe, "Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht", *AVR* (1999) 152 ff.

landmines, child labour. [39] Paradoxically, the ambivalence of *Global Civil Society* towards state institutions and international law creates an environment in which particularly operationalisable and media friendly goals are adopted by governments, and deployed as state human rights policies.[40]

Otherwise, the relationship between civil society and the economy is more taut than NGOs are willing to accept. This ambivalence goes both ways. Whereas *Global Civil Society* silently requires a flourishing international capital market, the market relationships must be embedded in non-economic relationships in order to function relatively ergonomically. Economic transactions, as the classic commentators on economic liberalism recognised,[41] need a disciplined, calculable, and healthy socialised relationship; families and schools are, from this point of view, unreliable instances of socialisation. Capitalism requires, as a base, significant social capital, that is, trust[42] between actors and the stabilising effect of social norms, and it is not contentious that these norms cannot be economic in nature. [43] Social capital is rather the product of integral social relationships and the engagement of the citizenry generated not exclusively but notably through multiple memberships in associations. Relatedly, civil society and the economy, on all levels, are interested in one another because they presuppose one another.

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[39] A. Fischer-Lescano, "Globalverfassung: Los desaparecidos und das Paradox der Menschenrechte", *Zeitschrift für Rechtssoziologie* (2002) 217 ff.

[40] On this subject, see C. Vismann, "Das Recht erklären. Zur gegenwärtigen Verfassung der Menschenrechte" *Kritische Justiz* 3 (1996) 321 ff.

[41] Fundamentally, A. Smith, *Theory of Moral Sentiments* (Edinburgh, 1759). Also, N. Chandhoke, "The Limits of Global Civil Society", in Anheier, Glasius & Kaldor, *supra* note 33, at 35 ff, 50 f

[42] F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995).

[43] R. Putnam, "Bowling Alone: America's Declining Social Capital", *Journal of Democracy* 6 (1995) 65 ff.

The engagement of the citizenry can also produce problematic results in the global context,. These can, nevertheless, be highlighted from the perspective of the civil society itself. We owe the theory of collective action to the insight that close-knit social organisations tend to inefficient cartel building and corruption.[44] Observable on the transnational level is the trend that uncooperative, prudentially-motivated civil organisations have precipitated a re-feudalisation, and the institutions of international society, which should be deployed against various iniquities, can have a disintegrative effect.[45] These re-feudalising tendencies are intensified through the accreditation- and consultation-practices of the international organisations, which divide the civil society into two. The cautious, albeit optimistic analyses of the *Global Policy Forum* and other observers[46] reveal that, again, the unaccredited NGOs are left out in the cold and the accredited NGOs pay dearly for their insecure and limited consultative status. From the upper executive echelons of the UN, they are regulated and served by a soft law regime, presently susceptible to the pressures of the American government.[47] The WTO-guidelines for arrangements with NGOs[48] endorse on the one hand transparency, cooperation and consultation but, nevertheless, anticipate only non-binding

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[44] Putnam, *ibid,* at 76 with reference to M. Olson, *The Rise and Decline of Nations*, (New Haven: Yale UP, 1982) 2

[45] Lipschutz, *supra* note 35

[46] See, for example, J.A. Paul, NGO Access at the UN (July 1999) – http://www.globalpolicy.org/ngos/analysis; J. A. Scholte, "Civil Society and Democracy in Global Governance" in *Global Governance* 3 (2002)

[47] W.H. Reinicke, F. Deng, J-M. Witte & T. Benner, *Critical Choices, The United Nations, Network and the Future of Global Governance* (Ottawa: IDRC Books, 2000) xviii und 91 ff.; T. Brühl & V. Rittberger, "From International to Global Governance: Actors, Collective Decision-making and the United Nations in the World of the Twenty-first Century" in V. Rittberger, ed., *Global Governance and the United Nations System* (United Nations University, 2001) 1ff.

[48] For guidelines on arrangements on relations with Non-governmental Organizations – http://www.wto.org.

conferences on special themes and, since 2001, also the participation of representatives of select and registered NGOs on plenary meetings and briefings, the goal being "to increase the awareness of the public in respect of WTO activities". The guidelines can be interpreted as a strategy of legitimation through process in the Luhmanian sense, a tactic aimed both at the pre-emptive soothing of disappointment at policies and the absorption of potential protests.[49]

Despite these careful apertures and attempts at incorporation – for example, at the UN, UNESCO and also the WTO[50] - it would be highly premature to speak of their democratisation or of a noteworthy inclusion of the *Global Civil Society*. [51] This may be a sobering conclusion, but even more arid is the realisation that these central institutions of the system of intergovernmental governance – particularly the G8, the OECD, the World Bank and the IMF – exclude not only civil society but also the majority of their member states from their decision making processes.[52] The concern is not only a divided *Global Civil Society*, but also a divided transnational institutional mechanism. At the decision-making end of this

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[49] N. Luhmann, Legitimation durch Verfahren, (Berlin: Neuwied, 1969).

[50] H-J Prieß & G.M. Berrisch, eds., *WTO-Handbuch*, (München: PUB? 2003) 67 ff. and M. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, (Berlin: Duncker & Humblot, 2001) 261 ff.

[51] For a critical assessment, see R. Dahl, "Can international organizations be democratic?" in Shapiro & Hacker-Cordón, *supra* note 28, 19 ff., which characterises these organisations, including the EU, as "bureaucratic bargaining systems".

[52] See J.A. Scholte, "Civil Society. Speziell zum IMF hat sich der ehemalige Vizepräsident der Weltbank, Joseph Stiglitz", where this is very clearly expressed, in J.A. Scholte, "Globalization and its Discontents" (New York: The New Press, 2002). In addition, L.D. Brown, S. Khangram, M.H. Moore & P. Frumkin, "Globalization, NGOs, and Multisectoral Relations" in J.S. Nye & J.D. Donahue, eds., *Governance in a Globalizing World*, (Washington D.C.: Brookings Institutional Press 2000) 271 ff.

system, no thought is given to the inclusion of civil society through consultation-procedures or to making the deliberative process more transparent.

We cannot expect a divided civil society, ostracised from the dominant planetary power-bearers, to provide a workable alternative to a market-orientated international order. More probably, we can anticipate that the accredited NGOs will petition for improved conditions of cooperation and consultation in order to crystallise their status. They may succeed in enriching the agendas of international finance and trade organisations with social and environmental concerns and in increasing the transparency of decision-making processes. More cannot be expected of the global or European civil societies. In particular, we should not anticipate that normative structures that curtail the principles and interests of powerful states or more powerful companies will be institutionalised, nor should we foresee that the extreme global inequalities will be righted.

The prime "profession" of the associations of civil society is to attract media attention to iniquity, scandalising misfeasance, not to save the world. In this vein, these actors should seek recognition, not domestication. In the event that they are not successful in representing their legitimate interests in the relevant institutions, they should be mindful that the organisations of civil society have always prosecuted the good-natured besiegement of institutions, and this is the practice *par excellence* of the organised citizenry. This solace may console every level of civil society, be it national, supranational, or global.