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## European Union and its Civil Society: A Neverending Search for Accountability\*

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### Summary

Over the last ten years, while searching for additional sources of democratic legitimacy, the European Union (EU) has started to focus on its relationship with civil society. This article summarises the key points of two academic debates that focus on issues regarding civil society's inclusion in the European governance. The first part of this article examines the debate that developed in 2001 following the European Commission's publication of its White Paper on European Governance. As a key document for administrative reform of the EU, the White paper granted civil society a leading role in providing more inclusive and accountable Union policy making. However, social experts heavily criticized this document claiming that, in reality, its proposals would not bring European civil society any closer to the EU governance. The heaviest criticism was targeted at the non-legally binding nature of the White Paper's inclusion proposals. The article's second part examines how the issue of civil society's inclusion has been addressed in the ongoing European Constitutional debate. Here two principle streams of thought are highlighted. Advocates call for civil society's constitutional inclusion, viewing it as a step forward in making the EU closer to its citizens. Sceptics object to such inclusion claiming that it would jeopardise civil society's social independence.

*Key words:* European Union, European constitutionalism, civil society, governance, participatory democracy, legitimacy, accountability



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### *Research Methodology*

The written materials used to develop this paper were collected by extensive search of the EBSCO Academic Search Premier Database.<sup>1</sup> In order to identify the relevant articles and publications the terms “civil society” and “European Union” were keyed in. Secondly, the database was searched according to the names of the known authors. Additional materials were identified through the references cited within the articles. Twenty research articles were collected relating to civil society and the European Union. This paper will briefly discuss a number of key papers.

### *Introduction*

This article reviews the positions of various social researchers on the topic of the European Union and its civil society. It summarises the highlights of two academic debates that clearly emphasized the issues of civil society's inclusion in European governance; namely, the Debate on Union's White Paper on Governance and the Debate on Inclusiveness of European Constitutionalism. The structure of this article closely follows the aforementioned division.

Social fragmentation of contemporary societies caused a shift in the orthodoxy of political theory, where models of deliberative participatory democracy are increasingly becoming subjects of social research (Gray, 1995). The shift in political theory affected legal theory as well, where constitutionalism shifted its attention from political institutions to societal units and from national states to non-national political organisations (Weiler, 1999). Both debates in our focus were initiated as upshoots to the abovementioned dramatic social changes.

Starting from 1985 and the Reports by Pietro Adonnino's “People's Europe ad hoc Committee”, the European Commission continuously worked on strengthening and promoting Community's image for both its citizens and the rest of the world (Halterm, 2003). However, development of progressive relations with European civil society received the Commission's full attention only a decade later, as a part of its quest for additional sources of democratic legitimacy.

Issued in 2001, the White Paper on European governance, a key document for administrative reform of the EU, granted civil society a leading role in providing more inclusive and accountable European policy-making (Smismans, 2003).<sup>2</sup> A number of reports, studies and consultations preceded the writing of the White Paper.<sup>3</sup> As the most comprehensive Commission's document on civil society, it quickly elicited numerous comments by social researchers from various fields. The first part of this article analytically presents often very critical academic evaluations of the White Paper contents.

<sup>1</sup> <http://search.global.epnet.com>

<sup>2</sup> COM (2001) 428 final, 25 July 2001.

<sup>3</sup> [http://europa.eu.int/comm/governance/white\\_paper/index\\_en.htm](http://europa.eu.int/comm/governance/white_paper/index_en.htm).

Faced with sharp academic criticism, the principle argument in favour of the Commission is that the purpose of the White and the Green Papers is not to bring definite solutions but to increase public debate and encourage the interested parties' reactions. However, the scope and the repetition of academic criticism points towards the need for a change in the Commission's approach.

The second part of this article examines the issues of civil society's inclusion through some manifestations of European Constitutionalism. It presents various approaches on how and whether civil society should be constitutionally included in the Union's governance. Scholars are divided into those optimistic towards the inclusive potentials of the European Constitutionalism and those sceptic to them.

The article's concluding part brings some general conclusions on the topic. It shows that the Debate on the White Paper on European Governance and the Debate on inclusiveness of European Constitutionalism have more common points than it might seem.

### *Civil Society and Debate on the White Paper on European Governance*

Generally speaking, commentators welcomed the White Paper but critically concluded that it is not – even far – from satisfactory in terms of the depth of the analysis (Curtin/ Dekker, 2002).

The first contested issue was the White Paper's definition of governance: "Meaning rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence". For Deirdre M. Curtin and Ige F. Dekker the subjectivity of this definition is striking whereby the Commission effectively incorporates its own agenda into the definition it chooses to use, without at any stage making any reference to the many other ways the term "governance" is defined in the existing literature. Furthermore, social researchers criticized the narrow scope of that definition in the sense that it only focuses on reforming the Community method and on making it more efficient (Cygan, 2002; Curtin/ Dekker, 2002). On this point, Adam Cygan particularly objects to the absence of comprehensive proposals for bringing together the diverse political and decision-making methods within the EU and its Member States.

The simplistic view of civil society that the Commission adopted in the White Paper was criticised by a number of scholars. Oliver De Schutter identifies three separate rationales for improving the participation of civil society in the Union's decision-making processes: democratic-participatory argument, grassroots knowledge argument and diffusion of European perspective argument. In his view the White Paper's civil society discourse observes these different rationales as if they were simply complementing one another, rather than contesting with one another. Kenneth A. Armstrong notes that the White Paper seems unable to differentiate between reinforcing democratic process and providing services as two principle civil society functions. In his opinion, instead of aiming towards the inclusion of a more multiform, multilevel or multidimensional European civil society, the White Paper simply tries to improve the structure of its rela-

tionship with the trans-national civil society organisations.<sup>4</sup> Stijn Smismans also comments upon the White Paper's inability to take into account different rationales for civil society's involvement and the multilevel character of both European policymaking and European civil society.

An additional controversial aspect of the White Paper is the importance that it attaches to consultation. The White Paper views consultation as the method for bringing civil society into the EU governance (De Schutter, 2002; Michalowitz, 2004; Curtin/Dekker, 2002). According to Irina Michalowitz, limiting the inclusion method solely to consultation placed the Commission in opposition to the models of associative and deliberative democracy that aim to delegate tasks from governing institutions to civil society. The problem with consultation in De Schutter's opinion is that it risks remaining purely formal and could present a way of legitimising decisions, which depend on other parameters.<sup>5</sup> For Deirdre M. Curtin and Ige F. Dekker viewing participation exclusively through the spectacles of ordering the existing consultation practices enabled the Commission not to grant civil society participatory rights in some established legal form (notice, comment etc.).

The critique of the inclusion method chosen by the Commission brings us to the principal weakness of the White Paper as perceived by social researchers. This weakness could be described as the unwillingness of the Commission to formulate its relationships with civil society actors in terms of legal obligations and legally enforceable procedural rules (Cygan, 2002; Armstrong, 2002; Curtin/Dekker, 2002; De Schutter, 2002; Smismans, 2003; Azoulay, 2001). Adam Cygan specifically regrets that the White Paper proposals for reforming the EU decision-making do not reach as far as removing the Commission's sole right to initiate legislative proposals. In his words it is hard to see how the White Paper proposals will improve things in practice without fostering significant Treaty changes.

A number of preconditions which civil society organisations were supposed to meet if they were to participate in the European governance caused additional protest. Deirdre M. Curtin and Ige F. Dekker object to the conditionality whereby Commission commits itself to further consultations only in exchange for civil society's commitment to "tighten up their internal structures, furnish guarantees of openness and representativity and prove their capacity to relay information or lead debates in the Member States". Oliver De Schutter calls the representativity criteria "a highly debatable concept" capable of producing all sorts of manipulations. The question here is how we measure representativeness of civil society organisations. Is it to be measured only by

<sup>4</sup> By multiform Kenneth A. Armstrong refers to a pluralistic understanding of the forms of civil society moving from the civic participation of the individual, through loose networks of actors, to formalised and enduring organisational structures. By multidimensional Armstrong means the different roles played by civil society actors: from the promotion of political deliberation, to more or less structured processes of consultation and participation, to direct roles in the delivery of governance. By multilevel he means the inclusion of the diverse structures and traditions of national civil society actors, together with any sub-national and trans-national actors.

<sup>5</sup> As an alternative to simple consultation Oliver De Schutter proposes "committed consultation" which is to impose obligations on the institution which consults.

quantitative criteria or should we also to use certain qualitative criteria and if so, which one?<sup>6</sup> Kenneth A. Armstrong challenges the White Paper's inclusion preconditions since they promote civil society's governmentalisation; shaping civil society organisations modelled upon the government examples.<sup>7</sup> Governmentalisation, while contributing to the inclusion of the civil society's voice within governance, compromises the motives behind resorting to that concept. The same author also objects to the intentions for making civil society "responsible" through its compliance with the five principles set in the Commission's definition of governance.

### *Civil Society and the European Constitutional Debate*

Civil society received full attention of constitutional theory in the 1990s following, as Joseph H. H. Weiler calls it, a "rebellion" against the image of liberal constitutionalism which was seen as a paradigm for the European political order. Rebelling against liberal constitutionalism, Weiler strongly emphasises a need for re-conceptualising of democracy in the European Union by means of shifting the focus from political institutions to societal units (Ward, I.)<sup>8</sup>. Jürgen Habermas, Larry Siedentop, John Gray and others also advocated this post-liberal model of democracy and constitutionalism. Essentially this paradigm rejects universalistic authority and focuses on social factors as creators of peaceful coexistence in today's fragmented societies (Ward, I.)<sup>9</sup>.

The articles that analyse the EU and its civil society through the prism of European Constitutionalism can be divided into two principle streams of thought. The optimists regarding constitutional inclusion consider constitutional inclusiveness towards civil sphere as a step forward in bringing the Union closer to its citizens. The sceptics regarding constitutional inclusion object to such a role claiming that it would jeopardise civil society's social independence and that it is nothing but a scheme for obscuring the burning issues of the Union's legitimacy.

#### *Optimists to Constitutional Inclusion*

Neil Walker aims at importing the language of pluralism into constitutionalism. He advocates a careful expansion of the meaning of the constitutional onto a new terrain (*of civil sphere*). In today's largely post-national era of globalisation Walker considers this

<sup>6</sup> Although opposed to representativeness understood by the White Paper as an all-in criterion, Oliver De Schutter favours the existence of some less intrusive representation criteria such as permanent existence at the Union level, representing general concerns of European society, accountability to member states, etc.

<sup>7</sup> Governmentalisation refers not only to external governmental pressures for changes to the organisational structures and the strategies of civil society, but also to the internal self-organisation of civil society as it takes on the tasks of policy-influencing, decision-making, or service-delivery (Armstrong, 2002).

<sup>8</sup> Ward (2001) cites Weiler, 1999.

<sup>9</sup> Ward (2001) cites Habermas, 1996, and Siedentop, 2000.

expansion to be a way of overcoming traditional impasses and for using law as a means of experimentation and inclusion (Christodoulidis, E.)<sup>10</sup>.

James Tully has a vision of an agonistic form of constitutional democracy, the defining feature of which is irreducible disagreement. This radically divorces his position from consensus-oriented theory. He puts forward a practical philosophy not geared to “reaching final agreement on universal principle or procedures, but to ensuring that constitutional democracies are always open to the democratic freedom of calling into question... the prevailing rules of law, principles of justice and practices of deliberation” (Christodoulidis, E.)<sup>11</sup>.

Some scholars question the aforementioned models of radical constitutional democracy and their patterns of civil inclusion. According to Ian Ward and Michael A. Wilkinson these models are prone to the atomisation of interests and leave the issue of the political and cultural substance of post-nationalism unattended. They see the future of European constitutionalism, with its potential for civil society's inclusion, in the awakening of the “European political imagination” i.e. in the creation of a European public philosophy that reaches “beyond constitutionalism” and through which integration might further develop.

According to some social researchers the potential for civil inclusion through constitutional means lies in the development of certain legal principles. Armin von Bogdandy's European law's doctrine of principles is to channel and rationalise political and social conflicts by treating them as conflicts of principles which can be resolved according to the rules of legal rationality. The doctrine of principles, according to Bogdandy, must purify the content of the principles known from the national constitutions from the elements which apply only to a state. It then has to develop their content with a view to the specific form of polity that the Union represents. Instead of being static, Bogdandy notes, these legal principles should be constantly revised and adjusted to evolving social realities. Deirdre M. Curtin and Ige F. Dekker believe that further development of the principles of openness and participation would put an end to the Commission's current understanding of principles as purely political rather than in any sense legally binding phenomena.

#### *Sceptics to Constitutional Inclusion*

Emilios Christodoulidis criticizes Walker's and Tully's models of radical constitutional democracy on the grounds that they impose an impossible articulation of pluralism and agonistics on the one hand, and of constitutional law on the other. Christodoulidis' main fear is that civil society, once brought within the constitutional frame, would be weakened, co-opted, and would lose its political agency. Therefore, he advocates for the civil sphere to remain disorganised and to be represented only in the on-

<sup>10</sup> Christodoulidis (2003) cites Walker, 2002.

<sup>11</sup> Christodoulidis (2003) cites Tully, 1999.

going emergence of its practice, rather than as a pre-given subject (de Búrca, G; Walker, N.)<sup>12</sup>.

Ulrich Haltern points that in nation-states some legal texts – constitutions – embody the ideal historical meaning which links the present to the past, to some point of origin, like a revolution and the consecutive writing of the constitution. They construct an imaginative fabric that allows a state to inscribe its own identity into the identity of its citizens.<sup>13</sup> The Union texts, he notes, are not “ours”. They are just texts, empty shells with no roots. Rather than an embodied set of meanings, they are seen as a set of ideas without the power to make a claim upon the citizen. On these grounds Haltern builds his opposition to the idea of writing the Constitution for the European Union. He believes that the Union should forsake all its attempt at the nation-state folklore (flags, anthems, emblems, charters of fundamental rights, constitutions, etc.) and instead embrace the central ideology of “mainstream culture”, which seems to be liberal consumerism. The Union should consider confining itself to what is possible, the imagination of the political as consumption and market. Once it has renounced the stories of shared values and historically situated commonality the Union, according to Haltern, could become the first polity to adapt to the new conditions of today's post-modern existence of its citizens. Its claim to legitimacy would gain a more reliable foundation if it moves on without a constitution and gives up on its implausible “Citizen's Europe” discourse.

### *Conclusion*

By means of its proposals for civil society's inclusion into the European governance formalised in the White Paper on European Governance, the Commission tried to increase its own legitimacy and to contribute to solving the Union's democratic deficit. Social experts heavily criticised the White Paper proposals, objecting to its narrow definition of governance and its simplistic view of civil society. They opposed the Commission's insistence on civil society meeting certain standards such as representativeness and internal democratisation. Still, the White Paper offers what many consider an unsubstantial solution for involving civil society in governance only by means of consultation. The heaviest criticism was targeted at the non-legally binding nature of the White Paper inclusion proposals. Most White Paper commentators concluded that the Union has not yet worked out how to appropriately involve civil society in its governance. Social researchers largely agree that the only positive thing resulting from the White Paper has been the fact that the dialogue on more legitimate European governance and civil society has been initiated i.e. the acknowledgement by the European Union that it needs civil society in order to successfully amend and improve the existent model of its governance. If the Commission truly aims at creating more inclusive and accountable European policy-making, many scholars think, it will have to change its current “top-down” civil inclusion patterns for the “bottom-up” approach.

<sup>12</sup> De Búrca/ Walker (2003) cited in Christodoulidis, 2003.

<sup>13</sup> Ulrich Haltern argues in the vein of cultural theory of law that has been developed most forcefully by Kahn, P. W. (1997, 1999 and 2000, cited in Haltern, 2003).

The debate on Inclusiveness of European Constitutionalism turned into a real celebration of pluralism. It unified legal scholars with entirely different beliefs who used often sharply opposing assumptions in their analyses, and it united them in the common search for a correct involvement of civil society in European governance. While Niel Walker calls for a careful expansion of the meaning of the constitutional on the new terrain (*of civil sphere*); Emiliios Christodoulidis advocates for civil society to be represented only in the ongoing emergence of its practice. While Ian Ward advocates “integrity of universal jurisprudence” and “awakening of Europe's political imagination” as the ways of reaching beyond constitutionalism, Ulrich Haltern believes that the Union should do without a constitution and all the attendant pathos and patina. Recently composed Treaty Establishing a Constitution for Europe in its provisions on “Democratic life” defines participatory democracy as one of the principles that the Union is founded upon. Unfortunately, it doesn't further elaborate on that point, leaving the issue of civil inclusion unaddressed.

The debate on the White Paper on Governance has not been the only source of the Debate on Inclusiveness of European Constitutionalism. The latter had a much longer history, and was intensified in the last couple of years due to the reasons of immediate political necessity to bring about “A Constitution for Europe”. However, in our opinion it is justified to say that the academic objections on the non-legally binding character of the White Paper's proposals affected and additionally fuelled the Debate on Inclusiveness of European Constitutionalism. The White Paper commentators and the researchers of constitutional inclusiveness apart from doing European legal research and focusing on the concept of civil society had one more thing in common. Namely they had the same goal: to make the Union more accountable to its citizens. Accountability, of course, is a two-way thing. Civil society included in governance should be accountable to the European Union and the Union should demonstrate accountability towards the included civil society. Unfortunately, becoming legally accountable is precisely what European politicians tried to avoid. Legal accountability is not represented in the legally non-binding White Paper proposals just as it is nowhere to be found in the recently composed European Constitution. So far the Union politicians have been successful in withstanding the protests of the research community; for how long – remains to be seen.

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