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**Mountain or Molehill ?:  
A Critical Appraisal of the Commission White Paper on Governance**

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*A critical appraisal of the Commission*  
*White Paper on Governance*

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# **CIVIL SOCIETY AND THE WHITE PAPER - BRIDGING OR JUMPING THE GAPS?\***

**Kenneth A. Armstrong\*\***

## **1. Introduction - Between Concrete Achievements and Disappointed Expectations**

In its White Paper on European Governance published in July 2001,<sup>1</sup> the European Commission identifies the need to reform European governance against the background of a mismatch between the concrete achievements of European integration on the one hand and the disappointment and alienation of 'Europeans' on the other. One explanation for this incongruence, of course, would be to suggest that, contrary to the Commission's assumption, concrete achievements have not been much in evidence and the disappointment of ordinary citizens lies in the poor performance of the European Union (EU) institutions. Whatever the merits of this suggestion, perhaps a better explanation, and one that makes more sense of the Irish 'No' vote on the ratification of the Nice Treaty is that, regardless of the ability of the EU to deliver 'stability, peace and economic prosperity', what really counts is that those who are governed feel connected to, and can have influence upon, the system by which they are governed. The White Paper's assertion that 'results have been achieved by democratic means' is, therefore, a half-truth. For much of the history of European integration, the concrete achievements have been the product of transnational technocratic decision-making among elite political actors.<sup>2</sup> It is only in comparatively recent times that the EU has sought to acquire some of the bells and whistles of democratic constitutionalism. The question posed here is whether the concept of a 'European civil society' can assist in the development of a democratic constitutionalism which bridges the gap between society and transnational governance.

## **2. The Promises and Problems of 'European Civil Society'**

The promise of a concept of 'European civil society' is that it may help to bridge the gap between society and the structures of transnational governance in a way that is superior to two alternatives. The first alternative is a liberal constitutionalism which seeks to connect individual citizens to European governance through the granting of rights. This has tended to be the legal contribution to

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1 European Commission, European Governance: A White Paper, COM(2001) 428.

2 W. Wallace and J. Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent' in J. Hayward (ed.) The Crisis of Representation in Europe (Frank Cass, 1995).

theorising European integration<sup>3</sup> and it suffers from a number of defects: (1) the connection between transnational governance and society is constructed in terms of the self-interested and atomistic consumption of legal rights rather than offering a more social account of legitimation through active identification with, and support for, the structures which produce legal norms; (2) citizens are more often constructed as market citizens rather than as social or political actors; (3) market citizens may play an active part in the realisation of economic objectives, but otherwise they are passive as regards the setting of the objectives of transnational governance; (4) courts may not be the ideal institutional location for reconciling individual and collective interests; (5) the constitutionalisation of a 'higher' economic law may undermine national democratic processes of collective will-formation. The second alternative bridge might lie in strengthening the national constitutional legitimation of transnational governance. While this has obvious attractions, it is also obvious that asymmetries may appear between Member States in their manner and mode of constitutionalizing EU governance with consequences for the operational activities of the EU. To this extent, the EU must be able to claim a certain constitutional autonomy. Therefore, the issue cannot solely be resolved by retreating into domestic constitutionalism, but instead always remains one of the relationship between levels in a multi-level constitutionalism.<sup>4</sup> However, if the appeal to domestic constitutionalism is premised not simply upon a justifiable desire to protect important national social values, but, instead, upon the idea that the *demos* can only exist within the confines of the nation state, then this renders constitutionalism 'beyond the nation state' a virtual impossibility.

If the EU is caught between an atomised liberal constitutionalism on the one hand, and the enduring presence of the national *demos* on the other, the appeal of a concept of European civil society lies in the hope that, as a differentiated sphere of the *demos*, it can provide an intermediating civic sphere to connect society to transnational governance. As Weiler *et al* have suggested, it may be possible to disentangle the civic from the ethnic, resulting in 'contemporaneous membership in a national ethno-cultural *demos*, and in a supranational civic, value-driven *demos*,' which are mutually supporting.<sup>5</sup> In other words, civil society might be understood as a sphere of more active civic engagement differentiated from the ethnically national *demos*. While the sphere of European civil society has been traditionally conceptualised within the boundaries of the nation state, with the emergence of transnational governance and transnational organisations operating within the EU, one might also think of a sphere of European civil society in terms of transnational organisations participating in the development of EU governance.

The appeal of a concept of organised European civil society lies in its avoidance of the need for shared values and shared histories to underpin EU governance. Instead, the self-organisation of civil society into associations contributing towards the creation of a European public space of discourse and communication operating within and across different levels of government takes the pluralism of

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<sup>3</sup> See K. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36(2) Journal of Common Market Studies, 155, esp. 167-8.

<sup>4</sup> For an approach which seeks to construct EU governance within domestic constitutionalism see P. Lindseth, 'Democratic legitimacy and the administrative character of supranationalism' (1999) 99(3) Columbia Law Review 628. For somewhat different discussions of 'multi-level constitutionalism' see I. Pernice, 'Multi-Level Constitutionalism and the Treaty of Amsterdam: Constitution-making revisited?' (1999) 36 Common Market Law Review 703, and K. Armstrong, Regulation, Re-regulation, Deregulation: Problems and Paradoxes of EU Governance (Kogan Page, 2000).

<sup>5</sup> See Weiler, Haltern and Mayer, 'European Democracy and its Critique' in J. Hayward (ed.) The Crisis of Representation in Europe (Frank Cass, 1995), p 23.

society as its starting point. Thus, instead of looking to liberal projects to connect governance and its legitimation, the alternative may be something more like Paul Craig's civic republican reading of democracy in the EU. For Craig,<sup>6</sup>

*'Civil society, connoting in this context networks, movements etc., which organize to assert interests outside state-based and controlled political institutions, is accorded an important role in the deliberative process. Participatory democracy is thus seen as starting from the bottom up, from "groups of people dedicated to the disinterested search for the public interest in society".'*<sup>7</sup>

Moreover, free from connotations of ethnic nationalism, European civil society is open to a more plural form of membership than is currently offered by EU citizenship (*e.g.*, the inclusion of non-EU nationals as members of a transnational civil society).

However, the concept of 'European civil society' is open to different interpretations. At its broadest, European civil society would be multi-form, multi-dimensional and multi-level, while narrower versions of the concept would only include some of these elements. By multi-form, I refer to a pluralistic understanding of the forms of civil society moving from the civic participation of the individual (with attention paid to barriers to inclusion within the polity) through loose networks of actors to formalised organisational structures. By multi-dimensional, I mean a European civil society that occupies a number of different roles as regards the production of governance moving from relatively unstructured and *ad hoc* consultation of civil society actors through more structured participation in the policy-process through to direct roles in the delivery of governance. By multi-level, I mean a concept of European civil society which includes the diverse structures and traditions of national-level civil society organisations together with any transnational structures.

Not only can European civil society be interpreted in different ways, it can be harnessed towards different theoretical projects from liberalism, through civic republicanism, through to more recent 'Third Way' constructions. Each approach has its own implications not only for the role of civil society itself, but also for the role of government. Thus, it becomes clear that the rediscovery of civil society as means of connecting society to structures of governance is open to quite contrasting interpretations, which, in some variants, may have far reaching consequences for the transformation of governance structures themselves.

That reasonable people might differ about the meaning of 'European civil society' is hardly controversial. But the difficulty is deeper than this and goes to the heart of the issue of how to connect societies still rooted in the forms and structures of nation states with a system of transnational governance. Because, it is one thing to seek to bridge the gap between society and transnational governance through a differentiated civic *demos* rooted in the structures and traditions of national civil society actors (even if they choose to co-operate and organise transnationally). It is another to seek to bridge the gap through transnational structures autonomised from domestic structures which, instead, claim their legitimacy in terms of their transnational functionality and authority. The normative case for a more autonomised transnational civil society is, therefore, more like the case

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<sup>6</sup> P.P. Craig, 'The Nature of the Community: Integration, Democracy and Legitimacy' in P.P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, 1999), p. 41.

<sup>7</sup> *Ibid*, quoting from D. Curtin, *Post-national Democracy: The European Union in Search of a Political Philosophy* (Kluwer, 1997).



which Craig makes for the Community's inter-institutional balance,<sup>8</sup> or which Joerges makes for comitology,<sup>9</sup> and lies in the inclusion of a new constituency of voices, interests and expertise within elite transnational governance.

Thus, the reality may be less about European civil society's bridging of the gap between society and governance, and more about its jumping the gap in support of the legitimation of transnational governance through transnational structures. While this is a potentially defensible position, one needs to be clear on two things. First, national civil society actors may be excluded from access to policy-influencing or decision-making networks (a *static* problem). Secondly, there is a danger that legitimation through transnational civil society cannot make up for what is lost through the effects of transnational governance upon domestic structures of representative and participatory democracy (the *dynamic* erosion of legitimation). What is lost on the swings is not necessarily made up on the roundabouts.

### **3. The White Paper and the Rights and Responsibilities of European Civil Society**

The White Paper on European Governance<sup>10</sup> is, perhaps, at its most revealing in its conclusion that 'the Community method has served the Union well for almost half a century'.<sup>11</sup> It is hardly the clarion call for radical change. However, at numerous points, the White Paper talks of the 'reinvigoration' of the Community method or that, 'the Union must renew the Community method by following a less top-down approach and complementing the EU's policy tools more effectively with non-legislative instruments'. However, in focusing upon reforming 'the Community method' (i.e., policy-initiation by the Commission with legislative decision by the EP and Council, together with the Commission's role in the adoption of implementation measures), the White Paper itself struggles to cast its gaze beyond the EU institutional context.

Nonetheless, the corrective to this top-down tendency is the White Paper's call for the greater involvement of two constituencies of actors – (1) regional and local actors and (2) civil society. As regards the former, the White Paper identifies the need for a greater policy dialogue with sub-national actors as well as proposing more flexible implementation of EU policies through tripartite contractual relationships between the Commission, national and local government. What is not clear is whether this responsiveness to the sub-national tier of government is also intended to include broader participation of civil society actors in the policy-influencing or policy-implementing process at these levels. The lack of this sort of discussion points to the inadequacies of a working methodology which placed 'civil society' and 'decentralisation' in different conceptual compartments of the governance Work Programme. But, it is also symptomatic of a difficulty in extending the normative gaze of a 'European' debate on governance into the national and sub-national spheres.

My concern here lies principally with the role constructed for civil society actors within EU governance. Beyond the adoption of ECOSOC's definition of civil society as an organised sphere of

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<sup>8</sup> Above n 6.

<sup>9</sup> Ch. Joerges, "'Good Governance" through Comitology?" in Joerges and Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999).

<sup>10</sup> Above, n. 1.

<sup>11</sup> *Ibid.*, p. 34.

activity,<sup>12</sup> the White Paper adds little to the conceptualisation of European civil society except the ambiguous statement that, ‘civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people’s needs’.<sup>13</sup> We shift from a construction of civil society as a sphere of communication and of discourse to one in which civil society provides for the material welfare of its citizens through its role as a service provider. To be sure, both constructions can be identified in the relevant literatures. But it is one thing to see civil society as reinforcing the democratic process and, therefore, giving strength and vitality to public institutions, and quite another to conceptualise civil society as a service-provider if that means the absence or withdrawal of public institutions from the task of providing for the material welfare of citizens.

The ambiguity continues with the difficulty in reconciling the statements that civil society’s engagement with the EU provides ‘a chance to get citizens involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest’, while also suggesting that ‘participation is not about institutionalising protest. It is about more effective policy-shaping based on early consultation and past experience’. This point is quite important given that the rush to embrace civil society (whether by the EU or the WTO) in part arises because of the wide-scale protests which have attended meetings of the European Council, the WTO, the World Bank, etc. One might also take the Irish ‘No’ vote as its own form of protest. The dilemma of whether to embrace dissent and to use it to reflect upon the nature of EU governance, or whether to shun ‘uncivil’ society in favour of harnessing ‘civil’ society towards the (unchallengeable) objectives of the Union becomes apparent. The resolution of the dilemma apparently lies in the harnessing of transnational civil society, while hoping that the citizens will increasingly grow to accept the EU, rather than protest against it, if they can be made to understand it better. The possibility that this might have precisely the opposite effect does not seem to have been contemplated.

The clear emphasis within the White Paper is upon EU-level civil society actors. It is the relationship between these transnational organisations and the EU institutions (more particularly, the Commission) that the White Paper envisages improving through structured processes of consultation. Moreover, the focus of the White Paper is not just upon structuring relationships with transnational civil society; it is more about managing the *existing* relationships of dialogue than it is about building new mechanisms. No one doubts that better-structured relationships between the Institutions and transnational actors is desirable, but, first, civil society’s engagement with governance cannot be reduced to this assertion, and the lack of concern with a more multi-level or multi-dimensional European civil society is regrettable; and, secondly, one hardly needs a White Paper on governance to arrive at the conclusion that more structured consultation is desirable. What is not envisaged in the White Paper is that the Community method will itself be displaced by a transfer or sharing of governance activities with civil society actors (although this might be the result of the Open Method of Co-ordination or one of the possibilities of co-regulation discussed elsewhere in the White Paper). Instead, what is offered is structured ‘civil dialogue’.

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<sup>12</sup> ECOSOC Opinion, The role and contribution of civil society organisations in the building of Europe (OJ C329, 17.11.99); ECOSOC Opinion, Organised Civil Society and European Governance: the Committee’s contribution to the drafting of the White Paper (OJ C193, 10.7.2001).

<sup>13</sup> Above n 1, p. 14.

Following up on the ideas presented in the Working Group IIa report,<sup>14</sup> the White Paper proposes the compilation of an on-line database of European civil society organisations; the adoption of a (non-legally binding) Code of Conduct setting out minimum standards for consultation processes; and, where processes are well established, the possible use of ‘partnership arrangements’. However, the central message that emerges from the discussion of structuring consultation and dialogue processes is that ‘[W]ith better involvement comes greater responsibility’.<sup>15</sup> This responsibility takes on different forms. For example, in indicating that the Commission will establish an on-line database of civil society organisations, the White Paper considers that, for listed organisations, this ‘should act as a catalyst to improve their internal organisation’.<sup>16</sup> The introduction of a Code of Conduct is considered as providing standards which ‘should improve the representativity of civil society organisations, and structure their debate with the Institutions.’<sup>17</sup> Moreover, the White Paper is even more blatant in the idea that there is a *quid pro quo* for enhanced consultation rights when it comes to proposed ‘partnership arrangements’: ‘[I]n return, the arrangements will prompt civil society organisations 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’.<sup>18</sup> It is also noteworthy that, in its July 2001 Report, Working Group IIa considers that the use of ‘partnership arrangements’ ‘obviously constitutes an incentive for the NGO community to organise themselves in pan-European structures’. These themes of the need to structure the civil society relationship through the imposition of responsibilities upon civil society actors as regards their internal organisation and representativeness (governmentalisation), while also pushing towards the Europeanisation and federalisation of organised civil society (transnationalisation) have developed as key frames through which the role of civil society is being constructed within the White Paper discourse.

That civil society organisations have responsibilities finds more general expression in the White Paper’s view that civil society actors must also be subject to the principles of good governance set out in the White Paper, viz. openness, participation, accountability, effectiveness and coherence. Thus, the concerns with internal organisation, openness and representativity are the surface forms of this deeper desire to ground civil society in these norms of governance. While we expect that the exercise of public power will be conducted in the light of the values and principles associated with a normativised public sphere of decision-making, why and when should such principles attach to civil society?

If we think of civil society as largely a discursive, communicative or deliberative sphere, then any attempt to normativise civil society must primarily attend to the preconditions for discourse, *e.g.*, freedom of speech and voluntary association; openness to plural voices and participation of actors within discourse; and the removal of barriers to inclusion or marginalisation. While, to some extent, obligations are placed on civil society actors, the thrust of this normativisation lies with extending *rights* to individuals and groups, normally to be enshrined in law while the state takes on certain responsibilities both negatively (non-interference with the autonomy and self-organisation of civil

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<sup>14</sup> Report of Working Group IIa ‘Consultation and Participation of Civil Society’: [http://www.europa.eu.int/comm/governance/areas/group3/report\\_en.pdf](http://www.europa.eu.int/comm/governance/areas/group3/report_en.pdf).

<sup>15</sup> Above n 1, p. 15.

<sup>16</sup> Ibid, p. 15.

<sup>17</sup> Ibid, p. 17.

<sup>18</sup> Ibid, p. 17.

society) and positively (ensuring that the legal order upholds the rights of civil society while also attending to the barriers to the full enjoyment of the rights of citizenship). Duties may also be placed on governmental structures to provide funds for civil society actors both to provide the relevant infrastructure for civil society to develop, and, to prevent civil society discourse from reflecting only the interests of those with money. Curiously enough, the White Paper says little about the civil and political rights of civil society and makes no mention of funding.

But, in any event, the 'rights' which the Commission believes incur responsibilities are merely consultation rights which the White Paper itself is keen to ensure take the form of *a non-legally binding* Code of Conduct. The thrust of the approach, therefore, is less about the conferral of enforceable rights and more about the imposition of responsibilities that are suggestive of a governmentalisation of civil society in the sense of the use of rationalities and techniques through which civil society actors alter both their behaviour and expectations in order to facilitate the exercise of governmental power.

To be sure, once we begin to talk of civil society actors being involved more directly in the delivery of governance either alone or together with political institutions then such new modes of governance pose real challenges to how we have traditionally normativised government based on classical divisions between public and private law. But if all that is on offer is better consultation, then the emphasis upon the duties of civil society actors seems both misplaced and arrogant.

#### **4. Conclusions - the Paradox of Transnational Civil Society and the Ironies of Myopia**

If the Commission is serious about making sense of the gap between the EU's concrete achievements and the disappointed expectations of its citizens, then the lessons lie in the White Paper itself. In its focus upon a transnationalised and governmentalised European civil society, the White Paper asks what civil society can offer the EU in the delivery of the EU's policies or its message, instead of asking what it might learn from a civil society rooted as much in the structures and traditions of domestic civil society as in those of transnational organisations. At best, this is unwise neglect of the multi-level nature of civil society. At worst, it is a failure to move beyond the top-down model of European technocracy.

This is not to deny that one can give a credible theoretically defensible account of the role of transnational civil society in the support of processes of democratisation. One could, for example, defend a civic republican conceptualisation of transnational civil society as part of the processes by which different constituencies of interests are balanced and deliberation secured. But even this account would, nonetheless, recognise that, in a multi-level context, the issue of balance is not merely one of balancing interests within a level of governance, but also across different levels.

In the final analysis, we are left with both a paradox and an irony. The paradox is this: by placing so much emphasis upon the need for a transnationalised and governmentalised European civil society, the White Paper seems to undermine the very claims for the inclusion of civil society which prompted the search for a means of bridging the gap between society and transnational governance. In other words, if the consequence of transnationalisation and governmentalisation is autonomisation, then not only is the gap between transnational governance and society not bridged, more dynamically, domestic civil society actors may further lose influence as transnational governance and transnational

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civil society take on greater roles. The result is a paradoxical dilution of participative democracy (which parallels the dilution of representative democracy through transferring powers to the EP).<sup>19</sup>

The irony of all this focus upon transnational structures of organised civil society is that EU policies *do* open up spaces for civic engagement which *do* have potential to connect societal actors to transnational systems of governance. For example, the Open Method of Co-ordination - to which the White Paper shows an unnecessary defensiveness - has the potential for a multi-level governance which brings together both domestic and transnational civil society actors in important areas such as social exclusion. But in its paranoid defence of the Community method, the Commission, ironically, blinds itself to the current and future possibilities for civic engagement with EU governance.

The conclusion may well be that the White Paper ought not to be taken too seriously. What counts is what really happens on the ground in particular policy spheres. But, in so far as the White Paper does indicate the general trend of the Commission's vision of European civil society, it is a myopic vision that fails to grasp the multi-form, multi-dimensional and multi-level nature of European civil society. The Commission's vision is not helped by donning the distorting lenses of its own institutional defensiveness and its hankering for the Community method.

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<sup>19</sup> See Weiler et al above n 5.