31

Civil society in an integrating Europe

Dawid Friedrich

At the end of the first decade of the 21st century the engagement of civil society actors has gained normality in everyday European and global governance processes. At the global level non-governmental organizations (NGOs) and advocacy networks, as the most important representatives of what has become called civil society organizations, entered centre stage of transnational relations, particularly since the world conferences of the United Nations (UN) of the 1990s (among many others Keck and Sikkink 1998; Martens 2002; Risse 2001). At the European level the inclusion of civil society organizations in European policy processes also increased at that time, a development that was widely supported by European institutions (Saurugger 2006; Smismans 2005) in the wake of the European Union’s (EU) governance turn (Kohler-Koch and Rittberger 2006; Smismans 2006a).

Consequently, since the mid-1990s the evolving body of European and global governance literature has made civil society research one of its top priorities, establishing a huge body of literature with different theoretical accounts and empirical foci: there are sociologically oriented accounts of the emergence of a European or a transnational civil society, institutional accounts about the self-interest of international organizations to include civil society, and normative accounts about civil society’s potential to increase the input and output legitimacy of European and global governance. In addition to the scholarly diversity, also political expectations related to civil society are diverse, ranging from hopes for increased governance efficiency, improved democratic legitimacy, to the establishment of a genuine European citizenry. In this situation of academic and political diversity, it is often hard to discern in which cases the term ‘civil society’ is used in order to describe an empirical development or as a rhetorical figure in order to make a political statement.

In order to bring structure into this complexity, this chapter focuses on both the historical and the rhetorical developments of the ‘European civil society’. The parallel consideration of both developments is particularly appropriate in this field because the concept of ‘civil society’ is broadly and diversely applied in both research and in politics. It can be demonstrated how closely research is linked to empirical developments. The experiences of EU governance are taken as primary example for the extent to which civil society can be formed within institutional formations that are ‘above’ the state. Hereby, the EU is understood ‘as a laboratory for broader processes such as globalization, institutionalization, and socialization’ (see also Jachtenfuchs 2001; Pollack 2005b: 268).
This chapter pursues a reconstructive strategy that seeks to give an overview about both the origin and development of the so-called ‘European civil society’ and the changing language that has been used to conceptualize these non-state actors. It is argued that for most of integration history, the language changes coincide with the deepening of the integration process, but that in recent years we have observed a decoupling of the civil society rhetoric from the actual empirical advancement in EU integration, as some political actors started to use the normative promises of civil society strategically by overloading it normatively. The chapter concludes by arguing that recent developments suggest a move away from the civil society language and a return to the older language of interest representation, a development that will certainly be normatively less exciting, but perhaps ideologically less exaggerated.

The evolution of civil society actors: From market actors’ administrative rights ...

Today’s prominence of the ‘European civil society’ is based on a strengthening of the rights of non-state actors to partake in European policy processes throughout European integration, as well as on a changing language characterizing those actors, which over time became more inclusive and couched in civic terms. The following reconstruction of the incremental development of the ever deeper inclusion of non-states in EU governance discerns four stages in European integration history, from the inclusion of ‘market actors’ towards ‘social actors’ and ‘interest representatives’ to, finally, ‘civil society’ actors.

The initial Treaty of Rome (1957) of the six founding members of the European Economic Community (EEC) largely foresaw European integration as an economic project. Consequently, the individual citizen was hardly addressed at all, let alone the vision of a European civil society. Even those legal provisions that directly confer supranational rights to individuals, above all the rights to move freely and to non-discrimination for reasons of nationality remain embedded in a market paradigm (Wiener 1998: 152) and construct a market citizenship rather than political citizenship (Shaw 1997). Following this market logic, but incrementally expanding it, it was particularly the European Court of Justice (ECJ) that contributed to the European integration process’s increasing social embeddedness (Caporaso and Tarrow 2008), both regarding a democratic European citizenship (Friedrich 2009b) and regarding participatory rights for non-state actors (Bignami 2003). It is this latter avenue that proved to be an important first step towards the later inclusion of civil society actors in European governance.

In the 1970s businesses were the main actors that were supposed to bring life into the idea of a common European market. Some of them, feeling that an unjust burden was placed upon them by European law, started to ask the ECJ for support—and often received it. First, the ECJ introduced the principle of the inclusion of all those concerned with a decision of the European Commission, particularly in the areas of competition, anti-dumping and structural funds. In an ECJ decision made in 1974 (C-17/74), concerning the European Commission’s imposition of certain conditions on an association of marine paint manufacturers concerning the establishment of a world-wide sales network without having been given the opportunity to object prior to the decision, the Court introduced a general rule not foreseen in the founding treaties that ‘a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known’ (Bignami 2003: 5). However, this rule only applied to those actors who were directly (negatively) affected by a decision of the Commission.

In parallel to this juridical development, the ECJ commissioned a ‘general right of access to the file’ (Bignami 2003: 6ff.) for these market actors. Several procedural elements were introduced to enable businesses to exercise this right: the Commission had to issue a statement of objections
to which the concerned parties could give a written reply. Moreover, an oral hearing of the parties must be held, and the Commission had, in order to finalize the process, to publish a detailed decision in which it accounted for its position in the light of the hearing and written contestation by the parties. These rights have been further developed and have become included in the Charter of Fundamental Rights which established a right to good administration (Article 41 CoFR), including the ‘right of every person to have access to her file’ (Article 41 (2) CoFR) and the right to be heard if a decision has direct effect.

It is remarkable that these rights, established in competition law, are quite far-reaching. In fact, Bignami calls the procedures in competition law the ‘Community Rolls Royce of administrative adjudication’ (Bignami 2003: 7). Nevertheless, it is important to stress that in the 1970s it was not the intention, either of the ECJ or of the Commission, to democratize its proceedings or even to create measures of participatory democracy that would have made the policy-making processes, as opposed to the administrative processes, more open and accessible for actors of a European civil society. Instead, it was more about introducing elements of basic procedural fairness in European administration.

... via social partners’ self-regulatory rights ...

In the 1980s economic integration accelerated with the formulation of the internal market in the Single European Act (1986) and the goal of a common market programme with a single currency was formulated (and formalized in the Maastricht Treaty 1993). As European integration deepened economically, the scope of the inclusion of non-state actors in European policy processes also increased. Interestingly, though, the language became more socially inclusive. The influential, then-incoming President of the European Commission (1985), Jacques Delors, recognized that European economic integration had to be flanked by a social and employment dimension, if it were not to lose contact with its citizens. For the participation of non-state actors, this expansion of the depth of European integration had significant consequences, for the mere inclusion of individual economic actors in administrative and legal proceedings within the limited policy area of competition was deemed to be insufficient.

Rather, some emphasis was given to the self-regulative abilities of the European social partners, established by European associations of trade unions and employers’ associations. In 1985, stimulated and supported by the European Commission, a ‘European Social Dialogue’ was thus initiated with the so-called Val Duchesse process, named after the first meeting place. This was an attempt to revive the failed processes of concertation between the social partners and the Commission of the 1970s (Falkner 1998, 2006; Johnson 2005; Smismans 2004). Today, there are several Social Dialogues, which include both bipartite and tripartite arrangements as well as Sectoral Dialogues.

From today’s perspective this institutional invention, the Social Dialogue, is notable for the development of a European civil society. This is so because the EU has been from the very beginning, since the Treaty of Rome in 1957, in possession of an institution that is designed to bring together labour and capital, namely the European Economic and Social Committee (ESC). The ESC consists of nationally nominated representatives of labour, capital and various other civil interests. In its early days, it was an open question as to whether the ESC would even become stronger than the Parliamentary Assembly, a decision which was made in the negative long ago. The ESC never succeeded in establishing itself ‘as more than a discussion forum where capital and labour could find each other, launch their prepared papers and mature a certain sense of interdependence’ (Middlemas 1995: 385). Above all, unlike the Social Dialogue, it never acquired the power for making binding decisions.
This leads to the clou of the Social Dialogue, in its bipartite and most prominent form. Under the Treaty of Maastricht’s Social Protocol, a co-decision right of the European social partners was established, initiating institutionally guaranteed rights to formulate self-regulatory frameworks. The mandatory consultation of the social partners on Commission proposals in the area of social affairs was introduced and an option given to the social partners for negotiating framework agreements. Such agreements among the social partners are to be generalized by adoption in the Council, of which there have been three since then: on parental leave (1995), on part-time work (1997), and on fixed-term contracts (1999). One can thus speak of the introduction of a ‘principle of horizontal subsidiarity’ (Platzer 1998: 110) to European social and employment policy-making. This was a significant move to strengthen the ability of key non-state actors to obtain self-determination via the introduction (and possible failure (Streeck and Schmitter 1994: 185ff.)) of corporatist structures (Falkner 1998).

... via interest groups’ lobbying rights ...

Interestingly, this corporatist trend was simultaneously accompanied by increasing pluralist structures of interest representation and lobbying in the EU (Clays et al. 1998; Eising and Kohler-Koch 2005; Greenwood 1997, 2003; Wallace and Young 1997). From the late 1980s–early 1990s interest groups mushroomed in Brussels; it is not possible to identify precise numbers of such groups, as Greenwood shows by presenting the different numbers put forward by a variety of authors (Greenwood 2003: 8ff.). One can, nevertheless, maintain that the growth rates at the European level are in line with those at the international level, which saw an expansion of internationally active NGOs particularly from the late 1970s (Martens 2002). With a focus only on European federations, Kohler-Koch (1992: 18) sees the peak of foundations surrounding the Treaty of Rome in the late 1950s–early 1960s, but an explosion in numbers of lobby groups in the aftermath of the Single European Act (1987) (Kohler-Koch 1992: 36). This literature tells us that a growing number of hugely diverse private actors are present in Brussels, having developed from mere ‘listening-posts and liaison groups’ (Butt Philip 1985: 2), to actors trying actively to shape and gain stakes in the EU’s policy-making processes. The European Commission and the European Parliament, in particular, have long been widely regarded as very open and receptive to the concerns of stakeholders (Butt Philip 1985: 21).

Since then, a gradual shift in political and academic debates on interest representation/lobbying towards civil society is observable, and here lie the roots of today’s normatively laden civil society language. This beginning can be illustrated by two approaches of the EU towards non-state collective actors in the early 1990s. The communication on ‘An open and structured dialogue between the Commission and special interest groups’ (COM(1992) 2271 final) expresses the viewpoints of the European Commission towards lobbying activities, distinguishing between non-profit and for-profit interest lobby groups. Parallel to this communication, non-state collective actors other than the social partners or special interest groups have been addressed in Declaration 23 of the Treaty of Maastricht, not least owing to German insistence given on the eminent role of welfare associations within the German welfare system and their fears of European intrusion (Kendall and Anheier 1999; Kuper 1997). The declaration stresses the importance of co-operation between the European Community (EC) and charitable associations and foundations as the institutions responsible for social welfare establishments and services, but it largely remained an example of ‘symbolic policy-making’ in the EU’s social policy realm (Kendall and Anheier 1999: 288). These two different ways of conceptualizing the nature and role of non-state collective actors suggest that the Commission’s attitude was largely dominated by output-oriented interests, such as gaining expertise or improving the quality of genuine EU-level legislation.
However, since the mid-1990s the inclusion of non-state actors in EU policy processes was welcomed with increasingly normative undertones in academia and politics, and the term ‘civil society organizations’ was increasingly applied to describe these actors. The particular normative expectation attached to civil society actors referred to the much discussed democratic deficit of the EU. The participation of civil society organizations has started to be seen as contributing to the democratic quality of governance processes beyond the nation-state, a debate that resonates not only in European governance, but also global governance literature.

Since the mid-1990s the phrases ‘civil society’ and the ‘participation of civil society organizations’ in governance processes pushed other terminologies aside. It is this development of a far-reaching rhetoric that signposts, from today’s perspective, the end of the close link between concrete steps of deeper inclusion of non-state actors in EU governance and the words used to describe these developments.

When the member states of the EC decided to move forward in European integration by presenting the Treaty establishing a European Union (the Maastricht Treaty 1993), some member states felt that it was time to give their people a greater say in accepting this new Treaty. Referenda on the Maastricht Treaty were held in Denmark, France and Ireland, and caused significant disturbance owing to the Danish no and the almost lost referendum in France. Suddenly, the member state governments and the European institutions could not deny that the assumed permissive consensus of the European public for deeper integration had begun to falter, and a vivid political and academic debate about the EU’s democratic deficit began (Follesdal and Hix 2006; Jensen 2009; Kohler-Koch and Rittberger 2007; Moravcsik 2002). The European institutions made some efforts to increase democratic legitimacy by, first, strengthening the representative elements within the EU system. Indeed, since then the European Parliament has gathered considerable power, and qualified majority voting, as opposed to unanimity, has almost become the formal default decision making mode in the Council. Second, a debate about good governance and participation emerged—partly stimulated by, and partly itself stimulating, the academic debate. This debate peaked for the first time with the publication of the Commission’s White Paper on European Governance (COM(2001) 428 final), which tried to (re-)shape the system of European participatory governance, and then resulted in Article I-47 on the ‘Participatory Democracy’ of the failed constitution for Europe (Finke 2007; Kohler 2009).

This move towards participatory democracy as a possible remedy for the EU’s perceived democratic deficit can be understood as a response to the crisis of representative democracy in its parliamentarian shape. Advocates of European democracy started to seek alternative democratic institutions and agents that promised to contribute to the democratization of the European governance system beyond traditional democratic representation. Indeed, the EU polity’s complex, polycentric multi-level system challenges democratic models and practices that are familiar from the nation-state context. At the same time, this complexity opens up new avenues for participatory activities in the light of the shift from hierarchical government to co-operative and less hierarchical forms of governance. Governance promises greater opportunities for the involvement—and thus self-governance—of citizens, and it was this avenue through which the concept of civil society and its organizations came to the forefront of political and academic discourses on governance and democracy in Europe.

An important step towards normatively (over)loading the inclusion of non-state collective actors was the invention of the term ‘Civil Dialogue’ by Padraig Flynn, Commissioner of the then Directorate-General (DG) V for Employment and Social Affairs, in the mid-1990s. At the beginning Civil Dialogue was also perceived more from a functional perspective, because the
DG V felt the need to find allies that would speak up for European social policy in order to prove its own relevance, given the hostility of many member states towards social policy initiatives in the early 1990s. Furthermore, the European Commission had taken increasing notice of the “legitimacy capital” of such a civil dialogue’ (Smismans 2002: 11, emphasis in original) and the role of such actors as important agents in newly established soft modes of governance.

In any case, in 1996 the first European Social Policy Forum took place and brought together over 1,000 participants mainly from social policy NGOs. It aimed to start a consultation process regarding the general principles of a European social policy, and resulted, among other things, in the establishment of the Platform of European Social NGOs, which is, to date, one of the key actors in the Civil Dialogue. Following the second Social Policy Forum in 1998, the Commission and the Social Platform agreed to establish a biennial consultative meeting between them (Cullen 2005: 5). Apart from this, and unlike the Social Dialogue, the civil counterpart still lacks more concrete institutionalization, and it took until the Commission’s discussion paper, ‘The Commission and Non-Governmental Organisations: Building a Stronger Partnership’ (COM(2000) 11 final) for it to overcome the confines of social policy.

In this process, the normative expectations with regard to the participatory inclusion of non-state actors began to flourish in the public discourse: first, in the Commission’s 1997 communication, ‘Promoting the Role of Voluntary Organizations and Foundations in Europe’ (COM(1997) 241 final), which linked the Commission-NGO relations to the Treaty of Maastricht’s Declaration 23 under the concept of voluntary organization; second, in the 2000 NGO discussion paper which started to speak about participatory democracy; and third, of course, in the influential ‘White Paper on European Governance’ (COM(2001) 428 final). Now, the ‘lobbying’ or ‘special interest groups’ language was pushed aside by the ‘civil society’ language.

As Stijn Smismans (2002) elaborates, the credit for finding a wording which offers sufficient conceptual imprecision to capture many different forms of organizations and participatory activities while simultaneously upholding a positive normative connotation goes to the ESC. With its opinion ‘The role and contribution of civil society organisations in the building of Europe’ (OJ 1999/C 329/10), the ESC—stuck between the European Parliament and the Social Dialogue, and looking for a new identity and relevance—tried to re-invent itself as interlocutor between the European institutions, the European citizens and organized European civil society. With remarkable theoretical depth, the ESC made some efforts to show that the participation of civil society organizations (CSOs) adds to the flourishing of democracy and argued that it, the ESC, would be the appropriate institutional forum for organizing the civil dialogue as the appropriate form of participatory democracy in Europe (Armstrong 2002: 116ff.; Cullen 2005: 21ff.). The committee defines CSOs as ‘the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens’ (Paragraph 7.1 of the opinion), and distinguishes between different types of CSOs, namely the social partners, other social and economic players, NGOs, community-based organizations and religious communities (Paragraph 8.1 of the opinion). This conceptualization of CSOs, the ascription and elaboration of their normative function for achieving European democracy and the catalogue of CSO types proved to be very influential and is frequently picked up, inter alia, in the Commission’s Governance White Paper (COM(2000) 428 final: 14) (Armstrong 2002).

At the crossroads: Democratic civil society participation or interest groups consultation?

Finally, the term ‘civil society’ replaced other terms, such as voluntary associations or NGOs, and has dominated much of the political and academic discourse on participatory governance.
and democracy in Europe ever since. Many observers conceive organized civil society as a
transmission belt (Steffek, Kissling and Nanz 2007) between the citizenry and political processes,
given their sufficient inclusion in deliberative policy processes (Ruzza and Della Sala 2007;
Smismans 2006b). In particular, new and soft modes of governance, such as the open method of
coordination, became a focal point of interest, but empirical accounts came to rather sceptical
accounts of their democratic potential (De la Porte and Nanz 2004; Friedrich 2006; Kröger
2008).

This ‘civil society’ language in EU research and politics contains, thus, on the one hand strong
references to democratic theory. Individual citizens are perceived as collectively constructing a
European civil society, pointing to the societal capacities for self-organization through its associations,
social movements and public discourses (Calhoun 2001: 1897; Cohen and Arato 1992: ix;
Habermas 1996: 367). On the other hand it contains a clear functional element by highlighting
the important contribution of civil society to better and more effective European governance.
Through this relation of input and output legitimacy (Scharpf 1970) in the ‘civil society’ language,
a reconciliation between ‘system effectiveness’ and ‘citizens’ participation’, an antagonism so
prominently stressed by Robert Dahl (1994), was envisioned by the European institutions. This
‘Third-Way-ish’ vision has undoubtedly proved to be stimulating for many practitioners and
observers, but did not lead to conceptual clarity on what a ‘European civil society’ entails (Finke
2007: 20; Freise 2008). To some extent the expectations attached to a ‘European civil society’,
which are displayed in the normatively laden language, accelerated the ‘civil society’ talk and
 detached it from concrete empirical developments in the relations of civil society organizations
and EU governance. It is an example of how a concept was socially constructed by strategic
usage of discourses and ideas by specific actors from the top, above all the European Commission
(Freise 2008; Saurugger 2006: 3; Smismans 2003).

Conclusion

The reconstruction of the evolution of civil society actors’ inclusion in EU governance confirms
findings on interest representation that spoke of a ‘co-evolution’ of the emerging European
political system and the scope of non-state actors (Eichener and Voelzkow 1994; Kohler-Koch
1997). Initially, participatory rights of non-state collective actors were requested and designed
for only a limited scope of actors, namely market participants. Over time, participatory provisions
have been broadened in scope, expanding first to the social partners and today encompassing
both special interest and public interest organizations under the heading of European civil
society. However, this expansion in scope has been paralleled by decreasing regulative breadth.
While businesses have gained hard participatory rights in instances where they are directly
concerned, the social dialogue is organized as a mixture of clear rules with a treaty base and
several accompanying, non-obligatory dialogical processes.

To date, the system of participation for civil society organizations in European governance
remains encased in a soft and lofty language, full of normative pathos but with little substantial
provision. In addition, the more actors have, at least potentially, gained access to EU policy-
making processes, the less explicit the rules for participation have become, but the higher the
normative expectations have grown. Progress in the infrastructure for civil society participation
lags far behind the intensity of the civil society discourse, suggesting the superiority of the efficiency
dimension over the democratic dimension of civil society participation. Arguably, the latter
dimension is restricted to expectations of EU institutions to gain from the legitimizing power of
the civil society discourse itself without undertaking concrete steps towards institutionalizing
mechanisms of democratically meaningful participation (Friedrich 2008). At the end of the day,
it has become hard to distinguish between ‘civil society participation’ and ‘lobbying’, and the ‘civil society’ research in EU governance has been in danger of re-telling old lobbying stories in the guise of democratic participation.

However, in the wake of the European Commission’s ‘European Transparency Initiative’ (2005), the pendulum apparently has begun to swing back from the recent focus on civil society’s democratic participatory impact towards consultation of interest groups. The updated Commission’s civil society website (since June 2006), for instance, is tellingly devoid of any ‘participation’, ‘democracy’ and ‘civil society’ language, but speaks instead of ‘lobbying registers’ and ‘interest representation’, having clearly lost most of the high normative pathos which characterized this website’s predecessor. Thus, the future of organized civil society in Europe resembles rather a neo-pluralist regime (Friedrich 2009a; Greenwood 2007) of some supranational NGOs with privileged access to the European Commission and other actors, than a system of regulated deliberative participation (Friedrich 2009a) which seeks to make use of the legitimizing power of mutual discursive justifications among all actors of a policy process.

European integration has moved beyond its original economic confines, but its future shape is still undecided. The more the EU assembles state-like functions, the more urgent the need for societal underpinnings, unless the people of Europe consent to being technocratically ruled from Brussels. Otherwise, some form of European civil society will have to play a role, and its organized form is one element of it. The decoupling of the EU integration process and the ‘civil society’ language suggests a maturity of the European polity, where an organized civil society has reached its limits as substitute for a European citizenry, so that it consequently starts to be looked at more realistically as part of a pluralist politics with its specific democratic strengths (issue representation) and weaknesses (inequality of interests). Other additional elements are imperative in order to speak about a comprehensive and vivid European civil society, above all a trans-European public sphere and trans-European social movement that buttress its organized form at the administrative centre. These latter elements, though, cannot be subject to conceptual and institutional engineering, as were, to some extent, the currently existing civil society organizations in Europe. Instead, they have to gradually emerge in a process of a growing awareness of the people in Europe as a people of Europe.