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INCLUSIVE GOVERNANCE? CIVIL SOCIETY AND THE OPEN METHOD OF CO- ORDINATION*

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INTRODUCTION

The point of departure for this chapter lies in a criticism made by Stijn Smismans that much of the discourse on the role of civil society in European Union (EU) governance has under-valued and under-analysed the role of civil society actors in 'new modes of governance' (Smismans 2003: 490). This chapter also picks up the thread of an argument raised in an earlier work that criticised the European Commission's White Paper on European Governance (European Commission 2001) as overly-preoccupied with attaching civil society to the institutional apparatus of the 'Community Method' of legislative governance while underplaying the potential of civil society actors within new modes of governance like the 'open method of co-ordination' ('OMC') (Armstrong 2002). The ambition of this contribution is, therefore, to seek to account for civil society in new modes of governance like the OMC.

It would be useful to describe the role that civil society actors are, or are not, playing in OMC processes. Indeed, it would be of value to compare and contrast the degrees of civil society participation in different OMC processes and across different Member States. Nonetheless, the principal preoccupation of this paper rests in articulating the conceptual basis through which to account for, or indeed critique, civil society's role in OMC from the perspective of democratic constitutionalism.

The argument develops in the following way. In the first section, the principal features of OMC as a new mode of governance are outlined. The intention is not to provide a history or description of different OMC processes (there is now a rich literature out there: see Hodson and Maher 2001; Trubek and Mosher 2001; de la Porte and Pochet 2002; de la Porte 2002; Regent 2002; Ferrera, Matsaganis, and Sacchi 2002; Armstrong 2003a). Rather, and focusing on the OMC process for social inclusion, some key features of this process are highlighted to facilitate the later discussion. The second section explores how best to account, on normative grounds, for the role of civil society in new modes of governance. It begins with Habermas's procedural democracy; proceeds through to an analysis of Majone's model of the regulatory state and its co-option by Moravcsik in the name of democratic 'realism'; and concludes with Tully's agonistic constitutionalism and Cohen and Sabel's directly-deliberative polyarchy. This sort of tour of the constitutional landscape is not entirely original (see especially Cohen and Sabel 2003). But it focuses specifically on the role of civil society and seeks to further develop the critical analysis of constitutionalism in the EU in the context of new modes of governance. The chapter concludes that notwithstanding the limitations of directly-deliberative polyarchy, its re-orientation of the methodology of critique from the horizon of the universal and ideal to that of the contextual and the practical offers us a way of both allowing civil society to get its hands dirty in processes of governance while also contributing to the normative quality of experimental governance. Whether or not such an openness to civil society renders OMC both an effective and legitimate technique of governance must,

on current evidence, be open to doubt, but more importantly, it must continually remain so.

OMC AS A NEW MODE OF GOVERNANCE

The open method of co-ordination, while much discussed as a new mode of governance, also evades easy description. The term can be used simply to refer to the governance technique that the 2000 Lisbon European Council gave birth to and baptised as OMC. This new governance ‘child’ – apparently combining centralised elements of objective-setting, co-ordination and monitoring with decentralised elements of domestic policy formulation and exchanges of best practice – is described in the Lisbon Presidency Conclusions as having the following characteristics:

- fixing guidelines for the Union combined with specific timetables for achieving the goals set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes.

OMC processes have been initiated in a number of policy spheres from social inclusion and pensions, to education and training. The post-Lisbon OMC 'children' draw their family resemblance first, from the 'grandparent' of the co-ordination process laid down for the multilateral surveillance of Member States' economic policies (Article 99 EC) and more immediately, from the 'parent' of the employment policy co-ordination process launched at the Luxembourg summit in 1997 (and formalized in Articles 125-130 EC Treaty). However, each OMC process has its own unique features and combinations of features. In this way, the Lisbon Conclusions are best viewed as an attempt to articulate the family resemblance rather than to provide the genetic template for OMC clones.

For example, and using the template of the employment strategy co-ordination process, the Lisbon European Council committed the EU and Member States to tackling social exclusion and making a 'decisive impact on the eradication of poverty' through the use of an OMC process based on:

- the agreement of a set of common EU objectives (the Nice Objectives);
- a commitment by Member State to submitting biennial National Action Plans ('NAPincls') on domestic strategies to tackle social exclusion;
- the monitoring and evaluation of the NAPincls through a process of review jointly by the Commission and the Council of Ministers;
- a mechanism for the peer review of examples of good practice;
- an agreement to develop a set of common EU social indicators (endorsed at the Laeken European Council in December 2001).

The OMC process on inclusion has a number of noteworthy features. First, and unlike the employment co-ordination process, there is no mechanism for issuing either individual or collective recommendations to the Member States, nor are there any European-level targets which are to be met. Secondly, the application of OMC in the social inclusion field also differs from both the economic and employment co-ordination processes because the EC Treaty does not itself specify the precise process to be used (something which the Member States could have written into the Treaty at Amsterdam at the same time as they were writing in the co-ordination process for the employment strategy). Instead, OMC is being used to give effect to Article 137(2) (a) EC which provides:

‘The Council ... may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion, *excluding any harmonisation of the laws and regulations of the Member States.*’

We have, then, a Treaty provision designed to encourage cooperation between Member States which is ‘open’ as to the process to be used and the actors involved, but is ‘closed’ to the possibility of legislative harmonization as an output of co-operation between Member States.

Thirdly, the OMC process on inclusion contains a specific procedural objective, namely, ‘the mobilisation of all relevant bodies’ (4th Nice Objective).

This objective – understood as including the promotion of the participation and self-expression of those suffering exclusion; mobilising public authorities at all levels in mainstreaming and co-ordinating policies to tackle exclusion; and promoting dialogue and partnership between public authorities, NGOs and social partners – has application not just to the policy processes Member States have or put in place, but indeed to the process of preparing the NAPincls. In this way, the 4th Nice Objective provides a point of leverage for civil society actors to advocate more participatory governance approaches to tackling social exclusion and to the OMC process itself.

Finally, to support the OMC process there is also a Community Action Programme which provides funding under different streams for processes of ‘peer review’ and, significantly for present purposes, for the core-funding of transnational networks working in the social inclusion sphere (note that capacity-building is restricted to the direct support of transnational networks rather than national members). The co-ordination process in the social inclusion field has developed to include a role for civil society actors at both national and transnational levels. It is this role which this paper seeks to conceptualise.

NEW MODES OF GOVERNANCE AND EUROPEAN CONSTITUTIONALISM

As Tully reminds us, new modes of governance, both within and beyond the boundaries of the traditional nation state, pose new challenges for those seeking to articulate theories and concepts of democracy and constitutionalism (Tully 2002: 211-214). To adopt the language of Christodoulidis (2003), we can

approach the development of new modes of governance from the perspectives of 'constitutional optimism' or 'constitutional pessimism'. Viewed pessimistically, such new modes of governance may transfer decision-making to institutions beyond the normative embrace of traditional national democratic structures. In a transnational context, the setting of binding rules to be treated as a higher form of law may restrict domestic (democratically-chosen) policy choices, while the processes by which such rules are agreed may themselves claim little by way of democratic legitimation. On the other hand, new modes of governance open up the possibility for us to question how well 'old' modes of governance serve us in providing democratic and constitutional legitimacy as well as suggesting new possibilities for democratic and constitutional experimentation. From this more 'optimistic' perspective, the very value of new modes of governance lies in the fact that they do indeed trouble or transgress settled understandings of democracy and constitutionalism. By unsettling our assumptions we must then make or re-make the case for old and new forms of governance, including making arguments that stem from concerns about democracy and constitutionalism.

In the specific context of the European Union, this tension is familiar. The development of comitology, European agencies and social dialogue have prompted favourable and unfavourable analyses and the emergence of OMC is not immune from such oscillations between constitutional optimism and pessimism. But the point is perhaps less one of adding up the pros and cons and seeing whether new modes of governance are to be welcomed or resisted and more one of better articulating the particular terrain on which such

judgments are made. Below, different constitutional interpretations of new modes of governance are considered. We begin by considering the long shadow cast by Jürgen Habermas's theory of procedural democracy over our understanding of the role of civil society in democratic legitimation.

The Shadow of Habermas

As Seligman identifies (2002), the turn to civil society in political theory and political philosophy since the Scottish Enlightenment has been predicated upon its ability to mediate certain sorts of tensions: 'the individual and the social; public ethics and private interests; and individual passions and public concerns' (*ibid*: 13-14). At the same time, and with the identification of the state and the economy as differentiated social sub-systems, civil society may also be understood as mediating and balancing relationships between the state, market and community (Offe 2000). Few theorists have been more influential in their articulation of this mediating role than Jürgen Habermas.

Habermas attempts to reconcile the individual and the social, the private and the public by steering a course that is normatively stronger than liberalism but weaker than republican theories (1996: 298). He seeks to account both for the private and public autonomy of the individual through a procedural model of deliberative constitutional democracy. This model rests upon a relationship and balance between the formal decision-making structures of the political system and the communicative structures of the 'lifeworld': a relationship mediated

through a 'public sphere', of which civil society constitutes an important element. Thus, for Habermas:

'Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres.' (Habermas 1996: 367)

Civil society, therefore, collects, organizes, thematizes and communicates public opinion to the formal structures of will-formation within the political system. At the same time, civil society reflexively attends to its own needs, ensuring its capacity to continue undistorted processes of communication and opinion-formation (Habermas 1996: 370).

If the legitimacy of the exercise of power by the political system relies upon deliberative *democratic* processes, it also relies on the *constitutional* embedding of such processes. Democracy and constitutionalism are, therefore, to be reconciled as self-reinforcing principles through which self-government can be realised. Legitimation through deliberative democracy is only possible through constitutional commitments to the prerequisites of a procedural model of democracy: the sorts of rights traditionally protected by liberal constitutionalism (e.g. rights of free speech and organization, property and

privacy, non-discrimination and equality); the constitution of the institutions of polyarchy (legislatures, courts, executive, political parties, voting structures); and the regulation of the circulation of power within the political system (including constitutional adjudication and judicial review). Moreover, as well as being central to the 'constitutional' underpinning of procedural democracy, law is also of general importance as the medium through which society – through democratic law-making processes – creates binding rules for itself and delegates powers to the administrative structures of the political system

Habermas's ambition is to stake out a set of normative and critical orientations through which to analyse and judge the democratic quality of governance practices. In this, Habermas affords civil society an important role in opinion-formation within the public sphere, mediating between the 'lifeworld' and the political 'system'. But as will be suggested in the following sections, this understanding of civil society cannot be easily appropriated by those seeking to articulate a role for civil society in new modes of governance. OMC processes are in tension with the institutional, constitutional and legal architecture underpinning Habermas's theory. Moreover, the trajectory of the governance of the welfare state in Europe points not to a (constitutionalized and democratized) EU as the successor to the nation state, but rather a multi-level engagement of institutions, constitutional and legal systems and actors (including civil society).

(a) Civil Society, the Political System and OMC

Although Habermas attributes an important role to civil society, he also limits that role. That is to say, Habermas makes clear on numerous occasions that, for the most part, all that civic actors within the public sphere can do is to seek to 'influence' formal decision-making within the political system rather than exercising political power:

'...public influence is transformed into communicative power only after it passes through the filters of the institutionalized procedures of democratic opinion- and will-formation and enters through parliamentary debates into legitimate law-making' (Habermas 1996: 371).

In seeking to maintain a separation between the communicative rationality of the lifeworld and the power imperatives of the system, civil society purchases its critical capacities at the expense of any actual power to decide. For Ashenden (1999), this idealization of civil society as a sphere outside of power undercuts any critical potential arising from civil society. Ashenden suggests that civil society is rendered up in Habermas's work as a normative presupposition and as an abstraction. Following Foucault, she suggests that only by considering the turn to civil society as a historically contingent occurrence can we truly hold up for judgment the practices of governance and indeed, civil society itself. In this way, the practice of criticism is not to be found within the idealization of civil society in relation to the power of the political system, but must be oriented towards uncovering the practices of civil society and their relationship to

practices of governance (we return to this issue below in the context of discussions of agonistic constitutionalism and directly-deliberative polyarchy).

Even if we were to accept the centrality of the balance between civil society and the formal democratic structures of the political system, this relationship is put into tension with modern developments in governance. We can approach this tension in two ways that are relevant to the present discussion. The first relates to the general implications of EU membership for the balance between civil society and representative democracy. The second concerns more directly OMC as a mode of governance.

In the context of the EU, the supply of democratic legitimation through institutions of representative democracy is weak for well-known reasons. Although Habermas would seek to remedy these deficiencies by recourse to a 'catalytic' constitutional process entailing the adoption of a formal constitution (supported by a referendum), a reinvigorated parliamentary structure, an active civic public sphere and a constitutional patriotism binding Europeans together (Habermas 2001), it is far from obvious that transnational representative democracy can bear the weight placed upon it to secure democratic legitimation for a Union of twenty-five or more states. Moreover, as Smith and Fine note (2003), Habermas pursues a 'twin-track' process of democratic legitimation: (1) deliberation within the informal public sphere (facilitated by civil society) and (2) deliberative will-formation within the formal structures of representative democracy. However, insofar as representative democracy is likely to remain weak in the EU (even if a Constitution is adopted), as Fine and Smith suggest, the consequence is a shift from a 'two-track' process of democratic legitimation

to a 'one-track' process (the centrality of civil society in promoting discourse and deliberation) that it unbundles the reciprocal relationship between formal and informal public spheres. From a Habermasian perspective this either means that civil society takes on a more central legitimating role than would generally be considered appropriate, or it indicates a potential delegitimation of EU governance.

More importantly for present purposes, however, is what happens when governance moves outside the formal structures of representative democracy. As Habermas himself recognises much of modern governance exhibits trends towards what he would view as the illegitimate power exercised by an administration freed from the traditional separation of powers and 'the diminishing binding force of parliamentary statutes' (Habermas 1996: 430). That is to say, the rise of the regulatory welfare state is associated by Habermas with the development of 'paragovernmental bargaining arrangements' and other relationships between 'administrative power' and 'social power' (the power of organized interests) that cut across the 'official' constitutionally-regulated circulation of power within the political system. It is also associated with the retreat of law and normative issues and the rise of new knowledge systems and functional regulatory demands.

While the use of 'social dialogue' at EU-level is perhaps the sort of example of paragovernmental bargaining that Habermas has in mind (not least because of its ability to result in binding legal instruments), OMC might also be viewed as part of this trend because the relationship between parliamentary structures, national and EU administrations, and civil society is recast. First,

OMC enhances the role of national and EU administrations. The European Parliament has no direct role in OMC processes (let alone being the instigator or author of such processes). Of course, given that OMC combines transnational processes of objective-setting, performance measurement, and review with decentralised processes of policy-making and legislating, then there *is* a role for *national* systems of representative democracy to become involved. Nonetheless, one cannot ignore the fact that national parliamentary systems are responding to instructions from national and EU administrations rather than the other way round.

Secondly, insofar as civil society actors do become involved in OMC processes, although not the same as the corporatist-style arrangements which Habermas critiques as the development of the 'therapeutic state', OMC is certainly closer to a model of governance that short-circuits rather than affirms the Habermasian ideal model for the circulation of power between civil society and the parliamentary complex. Thirdly, OMC processes certainly indicate a decentering of law and an increased role for the statistical construction and mapping of social problems (we consider the role of law more fully below).

While OMC is a complex governance instrument (the efficacy of which is still unclear), it is evident that it does not conform to a traditional governance model in which institutions of representative democracy promulgate laws that are implemented by an administration and interpreted by a judiciary. Therefore, one cannot simply account for civil society's role in OMC processes having in mind a Habermasian perspective that would be deeply troubled by such a reconfiguration of the relationship between representative and participatory

democracy. Habermas does recognise that his ideal model is in tension with new modes of governance and counsels both legislatures and courts to seek to ensure fidelity to principles of procedural democracy. He even suggests a need for the 'democratization' of the administration (Habermas 1996: 440). But compared with his elaborate understanding of the preconditions for constitutional democracy focused on traditional representative democracy, Habermas can only weakly suggest 'the interplay of institutional imagination and cautious experimentation' as a basis for democratizing the administration under alternative governance conditions. So although a greater involvement of civil society in influencing, monitoring and evaluating OMC processes might be an example of democratic experimentalism, Habermas offers us no clear guide as to what counts as legitimate 'influence' and illegitimate 'power'.

(b) Multi-Level Governance, the Welfare State and OMC

As will be apparent from the previous section, it is not that Habermas is unaware of the challenges that modern governance poses to the relationship between democracy and constitutionalism: quite the opposite as his work both on the European Union and on the rise of the regulatory welfare state make clear. The EU – as both a source of legal constraint on democratically-chosen domestic policies and as a legislative structure in its own right – has the potential to engender legitimation problems. The answer for Habermas is precisely the same as his response to the potential pathologies of the nation state: the constitutionalisation of procedural democracy within the EU (see S.

Singh Grewal 2001). Indeed, for Habermas, the positive need for greater policy co-ordination between Member States necessitated by the restriction on domestic decision-making capacity demands a heightened legitimation through the emergence of a European civil society and public sphere, a 'catalytic' European Constitution, a shared 'political culture', and reformed political institutions (Habermas 2001). In this sense, Habermas seems to point us towards the EU and transnational governance as successor to the nation state (the EU as a means of making up for the loss of decision-making capacity domestically), but equally then requiring the same sorts of modalities of legitimation to prevent the reproduction of the pathologies associated with the emergence of the welfare state.

However, the development of OMC points to a different trajectory for the welfare state in Europe. As Scharpf indicates (2000), while EU economic law and policy have important implications for the conduct of national welfare policies, the solution of a uniform EU social welfare policy based on a consensus among Member States (which would have legitimacy in Habermasian terms) is not feasible, while a uniform solution based on majority rule would lack legitimacy. Our problem is how best to manage diversity between different national welfare systems rather than how to build a legitimate uniform European welfare system. The aim of OMC is, therefore, not to seek to impose a uniform and consensus-based model of the welfare state on EU member states, but rather to steer the diverse national systems. It cannot, therefore, be brought within the normative embrace of an EU constitutional architecture that seeks to re-impose a unity of sovereignty and legitimacy

through a European public sphere (see Cohen and Sabel 2003). This multi-level terrain of decentralised decision-making and centralised co-ordination and steering which neither transcends the nation state, nor leaves it to its own devices, is not easily captured within Habermas's critical constitutional project. Indeed it simply highlights the tension that Smith and Fine (2003) read in Habermas's work between cosmopolitanism as the successor to the state and cosmopolitanism as something to be reconciled with the endurance of the state.

The point is this: while new legitimation problems are emerging as the EU seeks to manage diverse welfare states, the Habermasian proceduralist paradigm struggles to deal with the multi-level nature of EU governance. A response premised on the adoption of a European Constitution and enhanced EU-level democracy seems to miss the very different trajectory along which OMC is travelling.

(c) Law and OMC

Law plays a number of key roles in Habermas's normative project. Law institutionalizes and regulates democratic processes of will-formation, while endowing the individual with rights. Law and adjudication thus seek to protect both public and private autonomy. As a communicative medium, law acts as a crucial bridge between the 'lifeworld' and the political and legal 'systems'. At the same time, law is a potential site for the pathologising tendencies of the political system while also at risk of overburdening its own regulatory capacity. The answer for Habermas is not a liberal strategy that reduces the role of law and

minimises the welfare state, nor is it an acceptance of the functional demands of the welfare state, but again a middle course in which the validity of law is grounded in the constitutionally regulated processes of democratic will-formation.

OMC processes, however, indicate a decentering of law. First, in terms of institutionalization, while it is true that the co-ordination processes for economic and employment policies are institutionalized in the Treaties, the same cannot be said of the other post-Lisbon processes including the social inclusion process. The attempt to 'constitutionalize' OMC within the Constitutional Treaty failed in as much as no general provision outlining the features of OMC processes was agreed. The nature and form of OMC instead owes much to how the institutional actors shape and define these processes.

It is perhaps its *potentially* porous quality that allows OMC to open itself up to civil society. To be sure, the lack of legally institutionalized procedures represent a dilemma for transnational civil society and there have been calls for the creation of a legal basis for 'civil dialogue'. On the other hand, legal institutionalization of procedures performs a constraining as well as an enabling function and so is always a dilemma for civil society (an issue we return to below when considering Christodoulidis's critique of the optimism of constitutional pluralists). Even from a pragmatic point of view, transnational NGOs have been reluctant to argue for a greater constitutionalization of OMC until and unless such processes can be demonstrated to produce tangible and favourable results. And at the same time, given the multi-level nature of OMC, these issues are played out not only at transnational level but also, crucially, at

national level in terms of the processes surrounding the NAPinls. The point is this: OMC processes have not only been the subject of limited legal institutionalization and constitutionalization, the very question of the extent to which such processes ought to be constitutionalized and participation processes institutionalized is at stake.

Second, until the European Court of Justice's ruling in respect of the procedures to be used when triggering the 'excessive deficit procedure'¹, coordination processes have been free from judicial scrutiny. But as even that ruling recognises, judicial review is still only possible in respect of acts producing legal effects. Whereas the ECJ has been called upon to adjudicate on issues of the 'representativeness' of social partners in social dialogue², and on issues of access to documents in respect of comitology³, what marks these 'new modes of governance' out from OMC is that they are oriented towards the production of measures producing legal effects whereas the OMC process on inclusion is not. It is difficult to envisage ways in which civil society actors might resort to adjudication before the Union's courts to assert 'rights' of public autonomy in the absence of a process that produces measures having legal effects. Whether or not domestic legal systems provide opportunities for adjudication around NAP processes will, of course, vary from one system to another. But again, this returns us to a multi-level constitutionalism that does not sit easily within the Habermasian perspective.

Thirdly, in a more general sense, the language of law as the communicative medium is absent in OMC processes. To be sure, although not cloaked in legal form, guidelines, objectives and recommendations might well

use prescriptive language. In this way one needs to avoid an overly formalistic approach. In addition, the employment policy co-ordination process may have more direct linkages to formal legal texts (and vice versa). Nonetheless, at its most basic level, OMC does not rely upon the traditional Community Method of law-making in which the institutional triangle of Commission, European Parliament and Council of Ministers negotiate legislative texts. Problem-solving under OMC is premised not upon an ideal of the production of a generalisable legal text as a uniform solution, but instead on the attempt to manage diversity through decentralized decision-making (see Scharpf 2002 and more generally, Cohen and Sabel 1997: 324-325). Insofar as OMC aims towards a vertical convergence of national policies, it tends to cloak its normative steer in 'soft law' guidelines, objectives and recommendations, rather than the 'hard law' of regulations or directives. Moreover, law as a language and law as a discipline – a discipline occupying a central role in EU studies – occupies a less dominant role compared to the techniques of the practitioners of social policy defining, quantifying and measuring labour market participation, child poverty, educational attainment at key stages. Debates revolve not around formally drafted legal texts, but around the choice of indicators, the availability and reliability of data, objectives and targets. There is a greater 'fluidity' of language in institutional documents than would be normal in legal texts.

Finally, and notwithstanding the Charter of Fundamental Rights, the introduction of OMC indicates a certain resistance to the use of law to endow the citizen with social rights. That is not to suggest that rights discourse is wholly absent or indeed that there is a necessary antagonism between OMC

and rights discourse (see Armstrong, 2003a, Bernard, 2003): merely that the OMC process on inclusion has not been clearly enlisted towards the aims of promoting fundamental social rights and that the space OMC occupies is one deliberately not occupied by harmonized legislation in the social sphere (recall the prohibition on harmonization in Article 137(2)(a) EC).

In short, while Habermas prescribes that ‘the more law is enlisted as a means of political steering and social planning, the greater the burden of legitimation that must be borne by the *democratic genesis* of law’ (Habermas 1996: 42), what happens when law is not enlisted towards the ends of political steering or social planning (as in OMC)? The question of democratic legitimation is not resolved and either we conclude that OMC processes ought to be considered as suffering from deep legitimation problems that a greater involvement of civil society cannot cure or we need to rethink how we approach the question of legitimate and effective governance in the EU.

Does the EU Need More Democratic Legitimation?

One response to the question posed at the end of the last section might be to seek to treat much of what the EU does as a form of ‘exception’ to the normal precepts of democratic constitutionalism. There is a now well-known argument, deriving from the work of Giandomenico Majone that suggests we conceive of the EU as the external dimension of ‘the rise of the regulatory state’ (1994, 1996, 2000). Majone suggests that insofar as the EU is engaged in policies of economic and social regulation rather than redistributive policies, what matters

is the credibility and efficiency of the regulatory process. That is not to say that Majone is unconcerned with issues of legitimacy. But using a 'principal-agent' approach there is a separation of democratic concerns (which attach to the delegating role of political 'principals' – the Member State) from legitimacy and accountability concerns that relate to how political 'agents' – the EU's institutions – exercise their delegated responsibilities. Although there is a (national) space for ultimate democratic control over the delegation of powers, the thrust of the argument is in favour of giving independence to expert decision-makers to carry out their delegated tasks (subject to certain due process, transparency, participation and accountability requirements). From this perspective the historical tendency towards technocracy in the EU is not an accident that waits for democratic legitimacy to catch up in time, but is intrinsic to *regulatory* policy-making that demands a certain insulation of expert decision-making from overt political interference. Conversely, *redistributive* policies are less well suited to EU action and ought then to remain within the democratic structures of nation states. So while Habermas seeks a unified approach to European integration based on increasing democratic constitutionalism, Majone separates regulatory and redistributive policies in a way that the former requires little by way of direct democratic legitimation at EU-level, while the latter's democratic legitimation is supplied through national structures.

Majone's thesis has proved a source of influence for Moravcsik's attempt to generalise a view that the EU requires little more by way of democratic legitimation than is already supplied by way of existing constitutional checks and balances, direct EP elections and, more fundamentally, national democratic

systems (Moravcsik 2002). Rather than trying to build democratic legitimacy in the EU having in mind 'a utopian form of deliberative democracy' (*ibid*: 605), Moravcsik demands that we look to 'the real-world practices of existing governments and the multi-level political system in which they act' (*ibid* p. 605). In Moravcsik's 'real world' the practices of governance are those of delegated regulatory policy and, following Majone, are in need of no further democratic legitimation.

Gerstenberg and Sabel analyse Majone's approach as the 'de-politicization of European policy-making', the 'separation of economics and politics' and a form of 'antagonism' between constitutionalism and democracy (2002: 296-300). To this we can add the separation of legitimate social regulation at EU level, from more general social welfare provision which Majone would view as necessarily within the normative embrace of Member States. However, as Wincott argues (2003), the separation of economics from the politics of redistribution and of EU level market integration with national level social welfare provision makes decreasing sense. As he suggests in the post-EMU, post-Lisbon environment, the rhetoric is very much in terms of integrating social policy into the economic policy agenda. What this 'integration' means is ambivalent. In terms of social inclusion it might mean ensuring that, in an act of collective solidarity, the EU commits to improving the social and economic position of Europe's poor. Alternatively, it might mean modernising social welfare protection to prevent Member States breaching EU rules on fiscal restraint. Whatever the interpretation, it is less clear that the sort of separation that Majone has in mind works well in the post-Single Market context embodied

in the Lisbon Strategy. And of course, we still need to keep in mind the point that EU economic law is having a profound impact on domestic social policy choices. In sum, one cannot categorically dismiss social welfare policies as matters merely for domestic democratic legitimation, when the tendency of EU policies from the 1990s onwards has been for EU law and policy to have an increasing influence on those choices and to seek to do so.

Moravcsik opens up a second line of attack on the 'radical democrats' in arguing that increasing participation does not increase legitimacy. He does this by suggesting that insulated institutions are often more popular than democratic institutions. In conflating popularity with democracy no space is left open for making sense of democracy even – or perhaps, especially – where governments or decision-makers are unpopular. Moravcsik expands on his theme, however, in also suggesting that the issues that voters find most salient – healthcare, education, law and order, pensions and social security, and taxation – are not primarily matters of EU competence, whereas those matters that do fall within EU competence – trade policy, removal of non-tariff barriers etc. – are of low political salience. Therefore, so the argument goes, the domestic arena supplies the necessary democratic legitimation for the issues that voters find salient and for which the EU lacks competence.

To be sure, as has already been indicated, there has not been an expansion of EU *legislative* competence in the fields Moravcsik identifies as being of high political salience. Nonetheless, it is in precisely these fields that the EU has sought to develop OMC as a way of enhancing EU influence but without expanding legislative competence. For present purposes the fact that

OMC might attempt to steer policies in exactly the areas of pensions, social protection, healthcare must at least beg the question as to how to ensure legitimation beyond the traditional 'regulatory policy' domains of the EU. However, in a now-familiar move, Moravcsik dismisses these areas as either 'modest' or 'atypical' (2002: 607, fn 1). The application of OMC is, therefore, simply categorised as a field of disproportionate attention by those scholars of European integration interested in democratic constitutionalism. To be sure, if OMC in fact makes little difference to these spheres then we need to take Moravcsik's motivating hunch – that we need to be careful about an abstract over-supply of democratic legitimation – a little more seriously. But conversely, if OMC does impact upon the substantive policy preferences of Member States in these fields then we do need to ask how democratic legitimation is to be ensured and what role civil society might play in this process. Moravcsik is right to ask us to look at 'real-world' practice: the problem for him is that OMC is in the real-world and it has ambitions to make the real-world social inclusion policies and social protection systems of Member States more effective.

Agonistic Constitutionalism

While Moravcsik may be unduly dismissive about the role of deliberative democracy in EU governance, nonetheless, 'radical democrats' ought not to assume the democratic high-ground merely by default. We need to analyse more closely the claims that radical democrats make for more participatory modes of governance inclusive of civil society actors. In this section, we

consider Tully's 'agonistic constitutionalism' and in the following section, we analyse 'directly-deliberative polyarchy'.

For Tully, radical democracy requires a theoretical and critical re-orientation away from the 'abstract and prescriptive' and towards the 'contextual and dialogic'; that is oriented not towards 'agreement on universal principles or procedures' but to renegotiation and revisability; and that is concerned with the contextual practice of democratic governance within and beyond the traditional institutions of constitutional democracy (Tully 2002: 217-221). The methodological orientation, therefore, is towards analysis of the 'practices of democratic freedom' and the 'democratic struggle on the ground' as fought by democratic activists in a form of 'globalisation from below' (*ibid*: 219-20). Although Tully points us in the direction of the practices of governance, he is less specific about actual or possible institutional structures of governance for the realisation of radical democracy. It is this weakness that proponents of 'directly-deliberative polyarchy' highlight and seek to address (see below). Nonetheless, one can see the way in which the broadening out of governance processes like OMC to embrace civil society might (ideally) constitute a form of democratic struggle on the ground and contribute towards the sort of inclusive democratic practices Tully envisages.

A stronger objection to Tully relates to the relationship between democratic freedom and constitutionalism. For Tully, societal pluralism is generative of disagreement and contestation that goes all the way down to the constitutional level. That is to say, not only must constitutionalism frame a negotiated processes of political disagreement, it must also put itself to the test

by being the object of disagreement: democratic freedom must preserve the 'calling into question and presenting reasons for the renegotiation of the prevailing rules of law, principles of justice and practices of deliberation (Tully 2002: 218). In this way Tully seeks an inclusive form of democratic constitutionalism, open not only to political practices of inclusion (including a role for non-governmental organisations and civil society), but also to an inclusive constitutionalism capable of being contested and renegotiated but *within* constitutionalism.

For Christodoulidis (2003), however, the constitutional optimism of Tully fails because constitutionalism cannot at one and the same time maintain its structuring properties (its institutionalization) and render them up for deliberation: a performative contradiction. Drawing on systems theory, he suggests that the need for law to reduce complexity and for constitutional law even more so to structure and guide expectations, defeat practices of democratic freedom that seek to invoke and yet transgress constitutional norms. Civil society's engagement with constitutionalized practices of democratic freedom can never, for Christodoulidis, escape the structuring effects by which constitutionalism defines civil society's presentation and re-presentation. Better then, so the argument goes, for civil society to remain outside of constitutionalism and to maintain its critical potential through its under-determination (and here the anti-globalization movement is suggested as a case in point).

In many ways, Christodoulidis critique of constitutional optimism is more than an attack on the possibilities of constitutional *pluralism* or constitutional

agonistics: for him, constitutionalism of itself is a foreclosing process. Viewed from the interior perspective of systems theory, in which law must achieve normative closure even if it remains cognitively open to its environment, not surprisingly the idea of constitutional openness is a contradiction in terms. But, there is only a performative contradiction in an inclusive constitutionalism if the only constitutionalism worth the name is 'exclusive' by virtue of it having definitively established determinative internal rules (a completed institutionalization) in respect of a pre-constructed or presupposed environment (the demos). One cannot rule this out, of course, but it does require to be demonstrated and it also requires to be defended against the possibility of challenge (consider, for example, the manner in which constitutionalism in the United Kingdom has – on differing grounds – adapted to the renegotiation of the constitutional order upon membership of the EU: see Armstrong 2003b). While we can accept that constitutionalism is a structuring discourse, it is not inevitably a wholly foreclosing discourse (see Gerstenberg, 2002 discussed further below).

Nonetheless, Christodoulidis's depiction of civil society might be seen as a valiant attempt to rescue civil society from the sort of neutering that Ashenden sees in Habermas's work (see above). And yet, in working against constitutionalism, Christodoulidis ends up producing a kind-of mirror-image idealization of civil society. Whereas Habermas offers us a civil society that is all talk and no action within the confines of democratic constitutionalism, Christodoulidis suggests a civil society that can have no voice within democratic constitutionalism for fear that in the act of authorship it betrays its critical

potential. We are left then with the convulsive actions of disorganised civil society as the beacon for radicalism. Ironically, then, both Habermas and Christodoulidis share a tendency to idealize civil society – the former bringing civil society's relationship to the political system within the embrace of democratic constitutionalism, the latter by keeping civil society outside its grasp. Both end up undercutting civil society's political engagement within democratic constitutionalism.

There is a point here, however, that does need to be taken seriously: at what price does civil society enter into governance structures? As commentators have noted (especially in the context of the recent debates around civil society generated by the White Paper on Governance – see Armstrong, 2002; Curtin 2003), the rediscovery of civil society as a source of legitimation for EU policies has been accompanied by a desire to governmentalize and indeed civilize civil society. Constitutionalization and institutionalization may be purchased at too high a cost for civil society: but if instead of seeing this as an inevitability we view it as a danger, and if instead of viewing rules and processes as fixed rather than open to examination and contestation, then what we have is a challenge for inclusive constitutionalism rather than its defeat. And at the more practical and political level at which Christodoulidis rightly asks us to position civil society, it is worth keeping in mind that civil society has a choice whether to seek to act inside or outside the structures of institutionalized governance (including OMC). The fact that OMC opens up a space for civil society does not mean it has to fill it. Indeed, the very

threat of 'exit' or non-participation may enhance the 'voice' of civil society both within existing governance structures and over those structures.

Following Foucault, Tully's inclination is to see claims as to limits of thought and action in genealogical terms and from this to suggest the possibility 'to think and act differently' (Tully 1999). The emergence of new modes of governance at this historical juncture may provide a basis for rethinking the possibility for an inclusive system of democratic governance in which civil society can play a role. What precisely that role should be and what the institutional architecture for its operationalization should look like is perhaps what proponents of directly-deliberative polyarchy seek to contribute to the cause of radical democracy and democratic experimentalism.

'Directly-Deliberative Polyarchy'

For Cohen and Sabel (2003), neither the 'unitary sovereignty' perspective of Habermas nor the 'technocratic' 'principal-agent' world-view of Majone and Moravcsik offer adequate critical and conceptual vantage points from which to make sense of EU governance, and especially its newer modes of governance. While travelling some way with Tully, nonetheless, there is discontent with Tully's lack of practical and institutional specification of the architecture of democratic experimentalism. Instead Cohen and Sabel suggest a model of 'directly-deliberative polyarchy' (DDP). In this final part of the paper the potential of DDP to offer a conceptual basis by which to account for civil society's involvement in new modes of governance is explored. The theory is outlined

and then analysed in respect of (1) its proposal as an ‘alternative’ approach to democratic constitutionalism; (2) the scope and extent of substantive deliberation; and (3) its account of civil society.

(a) Co-ordinating Decentralised Deliberation

DDP offers a model of collective problem-solving and decision-making premised upon decentralized deliberation and reason-giving on substantive matters of policy in areas such as education, health and welfare. The mere fact of decentralization is not enough: rather decentralized decision-making needs to open out to the influence of similar processes taking place in other localities. The mutual exchange of information and the development of techniques of monitoring and evaluation demand the networking of decision-making processes at all levels and the revisability of decisions in light of new information. Deliberation, therefore, requires *co-ordination* oriented towards mutual influence and learning (Cohen and Sabel 1997: 326). Thus, the role of ‘central’ governmental units is to collect and disseminate information; to co-ordinate multiple processes of substantive decision-making; and to ensure that decisions taken in one field have regard to broader contextual factors.

DDP seeks to decentre legislatures and courts as arenas for resolving substantive social conflicts and instead looks towards what Gerstenberg and Sabel term ‘a horizontalised and polyarchical conception of constitutionalism’ in which constitutional practices extend out into society (2002: 327-8). For Gerstenberg – and this point is important keeping in mind the discussion of the

alleged performative contradiction of agonistic constitutionalism – constitutional principles are always legally indeterminate until applied in practice and, therefore:

‘the goal is that interpretative conflict, rather than being absorbed by the courts, is worked out in deliberative political forums where parties to a conflict with diverging normative outlooks and perceptions of social pathology are required to engage one another in a process of mutual learning and of collaboratively figuring out what indeterminate constitutional provisions mean under given circumstances’ (2002: 173).

This is not mere interpretative wiggle-room: it is an assertion of the indeterminacy of law and the attribution of meaning in the concrete circumstances in which interpretative claims are invoked and contested. The obligation on courts is then less to resolve conflicts by reference to agreed constitutional standards and more to promote ‘jurisgenerative’ deliberative processes of conflict resolution in which constitutional norms and values are stakes in the argument or ‘enabling constraints’ (Gerstenberg, 2002: 189; Gerstenberg and Sabel, 2003).

As Cohen and Sabel (2003) admit, deliberation also requires *democratization*. Following Michelman (1999) they propose five preconditions for democratic deliberation: (1) protection of rights of association, free speech and participation; (2) norms of transparency; (3) co-ordination of deliberation across different ‘units’ (territorial, societal and governmental units); (4)

accountability of deliberations in specific areas with wider public debates; (5) individual rights to contest decisions. In the same way that courts are decentred from the task of constitutional dialogue, democratic processes meeting these preconditions extend out beyond the legislature to include new modes of governance.

In terms of civil society, DDP potentially opens up an important space for civil society. DDP is concerned to create inclusive processes by which actors – including civil society actors – identify common problems and seek solutions. Civil society can do more than signal its discontents and desires to the formal state apparatus: it can use its knowledge and skills to highlight problems and suggest solutions. Civil society can also take on shared responsibilities in implementing agreed policies and evaluating their effectiveness, feeding-back perceived strengths and weaknesses into the policy design. In short, we move from a conceptualisation of civil society as normatively ‘privileged locus’ of critique and resistance without power (Ashenden 1999) to one that accounts for civil society as a potential participant in democratic experimentalism. Instead of civil society appearing as the bridge between the public and private spheres, as influencing the political system while remaining outside of governance, as an abstract idealization, DDP brings civil society directly into governance as a concrete political and legal actor.

(b) DDP and European Constitutionalism

It will be apparent from the brief description of OMC given at the start of this chapter that there is a resonance between OMC processes and DDP's prescription of centralized co-ordination of decentralized processes of substantive decision-making. But how should we judge OMC's contribution to European constitutionalism when viewed from the perspective of DDP?

There is a sense that while claiming that DDP offers an 'alternative' perspective on problems of democratic constitutionalism, nonetheless when applied in the EU context it takes for granted or presupposes a fairly substantial pre-existing institutional and constitutional architecture at national and transnational levels. Is this something to be transcended or transgressed as the alternative strategy of DDP takes hold, or is there a co-existence/cohabitation/contestation of 'old' and 'new' constitutionalism mirroring 'old' and 'new' governance? Perhaps the difficulties encountered in the Convention drafting the Constitutional Treaty point to the difficulties in accommodating new governance like OMC within a re-worked, but nonetheless traditional constitutionalism. Proponents of DDP are open to the accusation of simply side-stepping the issue of whether there are or are not accepted constitutional norms and institutional structures that provide a basis for future experimentation, and if so, how should one account for the legitimacy of such 'enabling constraints' in the first place. This weakness has particular relevance for Gerstenberg's desire to spread around constitutionalism and constitutional interpretation: it tells us that we have a stake in constitutional interpretation, but it does not tell us what is the text to be interpreted, how it came in to being, why certain values have been constitutionalized yet others have not, and whether

certain values ought to be constitutionalized. If DDP ends up piggy-backing on certain constitutional givens, it looks more like a 'second front' in radical democracy, rather than an alternative.

A different way in which we might think about this issue is whether the more traditional institutions of polyarchy (that DDP states will be decentered rather than dissolved) supply a default position in the event that deliberation and contestation in the experimental realms of new modes of governance boil over into conflict or continually produce irresolution. The more that experimental designs provide 'exit' options to return conflicts to traditional institutions for 'ultimate' resolution, the less that proponents of radical democracy can justify treating DDP as an 'alternative' to mainstream democratic constitutionalism rather than an 'addition'. Even if it is not assumed that traditional governance institutions supply a default position, there remains an ambiguity about just how much experimentation is to be expected. In the context of the EU, notwithstanding the vogue for OMC, the traditional Community Method has hardly disappeared. In other words, it is unclear how much of the architecture of 'traditional' democratic constitutionalism is presupposed and how much remains once experimental democracy takes hold.

(c) Substantive Deliberation and OMC

At the core of DDP is a demand for deliberation on matters of substance. Yet, there are obviously different degrees of substance from the comparatively minor to more major decisions. While democratic experimentalism may break out with

regard to some substantive issues, there must inevitably be an anxiety about tokenism and direct deliberation on some topics but not on others, or that deliberation takes place within a policy context that has already been set.

Of course, this sort of problem is something that proponents of DDP can use as a critical tool by which to judge new governance. Indeed it has relevance for the OMC processes being undertaken in the context of the Lisbon Strategy. For example, while there is evidence from the OMC process on inclusion that points to a developing institutionalization of 'processes about processes' (for example, in participative processes surrounding the production of NAPincls), it is less obvious that this is provoking deliberation on the substance of national policies. And, while DDP would suggest the need for linkage between social and economic co-ordination processes, the trend towards the streamlining and co-ordination of the different OMC processes (European Commission 2003) raises the fear that the anti-poverty agenda is in fact being sidelined both by economic imperatives and by a focus on the use of OMC to reform social protection systems rather than to make a 'decisive impact on poverty'. It is perhaps one of the greatest concerns surrounding the OMC process on social inclusion that whatever the level of civil society participation in this process, and even if it were ultimately to promote deliberation on the substance of policies, nonetheless, it is a process subsumed within a broader macro-economic framework and value-system that is less open for debate.

All of which raises the question whether certain sorts of constitutionalized value pre-commitments are required to ensure that deliberation remains open to the full-range of substantive concerns. As Wilkinson suggests, constitutional

optimists who embrace visions of agonistic or experimental democracy run the risk of purchasing a cosmopolitan idealism at the cost of 'any specification of the substantive values of post-national community' (2002, p. 472). Again, this returns us to the issue of what sorts of constitutional pre-commitments DDP presupposes or requires.

Finally, there is, of course a crucial connection between the scope and space for deliberation and the use of DDP to account for civil society. It makes little sense to account for civil society in OMC from the perspective of DDP if civil society is excluded from substantive deliberation, or if deliberation takes place on some substantive topics but not others. In short – and to this extent we return to Moravcsik's inclination – unless and until OMC processes generate wide-ranging substantive deliberations, we need to avoid over-stating the constitutional significance or quality of civil society's engagement with the processes surrounding OMC.

(d) DDP and Civil Society

It is perhaps paradoxical that while proponents of DDP clearly have in mind an active role for civil society in governance processes, nonetheless, the dimensions of this role are somewhat under-specified. Proponents of DDP do recognise that 'the extent to which deliberative polyarchy ramifies past the technical elite into civil society is an open question' (Cohen and Sabel 2003). However, the issue is not just whether DDP reaches out to civil society, but to what extent civil society has the capabilities and power to reach into DDP to be

a meaningful participant in governance. There is more than a degree of optimism about the extent to which civil society will engage in open deliberation on matters of substance. While one can find intriguing local experiments of this sort (especially in the realm of social inclusion), our everyday experience tells us that getting individuals to involve themselves in, and remain committed to, decision-making processes is a tall order. Moreover, there are institutional constraints on participation from the venue of meetings and their timing to the very language and discourses used. We also need to recognise the extent to which democratic experimentalism and its engagement with civil society will be resisted by traditional institutions of representative democracy. These are important issues when considering civil society's ability to engage in OMC processes.

If DDP is right to seek to bring civil society within governance processes, it also needs to develop an understanding of civil society as an object of governance. We have already noted this point in discussing Christodoulidis's anxieties about an inclusive constitutionalism that brings civil society within governance. To some extent, new modes of governance like OMC have avoided some of the problems associated with the 'representativeness' of civil society encountered in respect of access to EU consultation processes (on which see Curtin, 2003). On the other hand, and especially in the OMC process on inclusion, there are funding-ties and close relationships between transnational NGOs and the European Commission. If DDP gives us a way of thinking about OMC how should it react to these sorts of concerns? Perhaps because DDP avoids an idealization of civil society (whether inside of

democratic constitutionalism like Habermas or outside of it like Christodoulidis), it can seek a critical perspective on OMC and civil society that is vigilant towards processes of institutionalization and co-option that conflict with the goal of an inclusive and open system of governance. Concerns about who gets to participate in governance and under what conditions can be internalized as part of that which requires to be explained and justified in respect of the substantive deliberations in issue.

It will be obvious from the discussion in this and the previous sections that the issue is not whether OMC is DDP. Rather, the aim has been to suggest that DDP offers us a critical perspective from which to account for OMC and for civil society, and to hold up for judgment the legitimacy of OMC. That judgment depends not merely on civil society's involvement but also on DDP's other dimensions – substantive deliberation, co-ordination, democratization, and horizontalization of constitutionalism. And it is a judgment that is always in the making. There is a need for constant justification of the legitimacy and effectiveness of governance processes along these dimensions. What this means, however, is that at most all we can say is that new governance processes like OMC can at best make provisional claims to legitimacy that are challengeable when analysed in practice. OMC is not DDP, but DDP does give us a way of thinking about the legitimacy of OMC and the role of civil society in OMC processes.

CONCLUSIONS

The ambition of this chapter has been to adopt a reflexivity towards how we think about civil society in the EU. In particular, it has sought to trouble a certain tendency to invoke a form of Habermasian civil society in contexts that are otherwise antagonistic to (or at least in tension with) Habermas's ideal of procedural democracy. Alternative interpretations of democratic constitutionalism have been explored and their insights and limitations discussed. In the end, it is suggested that directly-deliberative polyarchy's critical orientation best equips us to think about, and account for, civil society in new modes of governance in the EU.

When viewed from the perspective of DDP there is much to be pessimistic about the normative quality of OMC processes as they now stand. At the same time, the ambition to mobilise all actors (public and private, national and sub-national); the development of new, even if provisional, working arrangements between NGOs and government officials; the development of multi-level interactions between social and political actors in different aspects of the OMC process are to be welcomed. There *is* something interesting going on here and it is important that we understand it and relate it back to issues of democratic constitutionalism rather than treat it as somehow apart from such concerns or merely overshadowed by the *real* constitutional work of producing a Constitutional Treaty for the EU. To return to Tully, new modes of governance challenge us to reconsider what we accept as the limits of democratic constitutionalism. The OMC processes being developed offer us a new

perspective from which to reflect on civil society's contribution to legitimate European governance.

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¹ Case C-27/04, *Commission v. Council (Excessive Deficit Procedure)* judgment of 13 July 2004.

² Case T-135/96, *UEAPME v. Council of the EU* [1998] ECR II-2335.

³ Case T-188/97, *Rothmans International BV v. European Commission* [1999] ECR II-2463.