Civic, Civil or Servile?*

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In Prague last November, at the Conference of the European Foundation Centre, I noticed, among my English friends at least, a tendency to use the phrase "civil society" almost interchangeably with "civic society". I have heard the same in the House of Lords, and in Strasbourg. Is there a difference? Does it matter? Which is right?

"Civic" refers in both English and French to matters which concern citizens as inhabitants of a place along with others: their rights, their duties, and those attributes which pertain particularly to the city to which they belong. Thus a place of meeting is a civic centre; a mark of honour is a civic crown; and the defenders of the city are the civic guard. "Civic", in other words, has a strict and close connection with the city of ancient times and with its modern successors. A civic society is more likely to be concerned with the parks and gardens near the town centre than with the role of the citizen in society.

"Civil" has a broader meaning in both languages. There is a usage in English by which it simply means "polite" which is in French less common: *poli, gentil, correct* are all nearer the mark. But on the broader meaning of the term the two languages unite: "Ce qui concerne les citoyens" as the French dictionary has it, echoing the English "pertaining to the community", as opposed to the more limited meaning of civil, "pertaining to the citizen". Both languages use the word to distinguish civil affairs from military or religious affairs. Both languages also have a longer list for civil than for civic of couplings in which the word is applied to a particular aspect of life: *droit civil*, as opposed to *droit pénal*; *droits civils*, as opposed to *droits politiques*; *ingénieur civil, emploi civil, mariage civil,* and *guerre civile*. English too has civil law, civil marriage and civil war; like the French it has *civil* engineer (as opposed to *military*), but also

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civil servant, and presumably for the same reason, civil liberty, civil disobedience, and civil defence.

It becomes clear, then, even from this brief excursion into linguistics, that "civil" carries the broader sense, and can even be assumed to incorporate the narrower meaning of "civic". Let us be in no doubt; it is the civil society which this paper will explore.

That term "civil society" is valuable for a number of reasons. First, it is positive. All other possibilities are negative or inadequate: *non*-governmental organizations, the *not*-for-profit sector, the third sector (where does that put the Fourth Estate?); even the English "voluntary sector" or the French *vie associative* are limited in their implications, if only to the culture from which they spring. Terms such as "charity" in the Anglo-Saxon world, or "foundation" on the continent of Europe, are vital to the precise concepts to which they refer, but narrower still in relation to the phenomena we are seeking to encompass.

For "civil society" encompasses all those concepts, and more. It is what citizens together do in their own right at the bidding of no higher authority, for the common good, and apart, generally speaking, from direct party political affiliation or alignment. The civil society is not concerned primarily with power, although it may be ranged against the excessive concentration or abuse of power in any quarter. In Communist states the slow, hidden but determined resurgence of the civil society was a major factor in the astonishing revolutions of 1989. When the moment came, the networks of mutual support and communication were there to mobilize the people and overthrow the governments that had tried, and failed, to outlaw independent action on the part of their citizens.

The resurgence of the civil society in central and eastern Europe had a particular historical significance and remains of crucial importance. The democracies newly established there will not survive without a flourishing, independent, civil society. But what is also clear is that in every part of the world, whatever the political circumstances, the civil society has experienced a surge of energy and increased activity in recent decades. I shall draw here on the first fruits of a major long-term international study: the Johns Hopkins Comparative Nonprofit Sector Project, a brainchild of its Director, Lester Salamon, at The Johns Hopkins University in Baltimore. This project has teams of social scientists working on each continent to analyze the nature and growth of the civil society, or the not-for-profit sector as they less elegantly call it. The early work concentrated on the development of *definitions* that would be valid across the world, on the identification of *categories* for the subsequent analysis of organizations and activity in the civil society, and of *criteria* critical to its survival and success. Work then proceeded simultaneously on each continent.

In the United States, Dr. Salamon found in 1982 that 65 per cent of voluntary organizations had been created since 1960. In France, home of the *association* and bastion of the concept of *solidarité*, in 1960 associations were being formed at a rate of 10-12,000 a year whereas in 1987 alone more than 54,000 were formed. In Britain some 4,000 new charities are established each year; between 1980 and 1986 their income—although in gross total it may have declined slightly since—increased by 220 per cent. Similar increases were detectable in other western European countries. In central and eastern Europe since 1989 the sector has multiplied despite huge practical problems. In Hungary alone some 6,000 foundations and 11,000 associations had been registered by mid-1992 and similar developments have occurred in all former Communist countries. In the former Soviet Union Dr. Salamon notes that "a Foundation for Social Innovations was formed in 1986...as a way to translate citizen initiatives into effective action". Charity law is, in fact, centuries old in Russia, albeit with close control by the tsar or the State. Much has been done to build on it since the demise of the Soviet Union. A law concerning voluntary associations was passed in 1991 and work is continuing on developing a legal framework for the civil society where, for example, awareness of the importance of human rights is particularly strong.

In Asia, Africa and Latin America Dr. Salamon reports "even more dramatic developments". I have had personal experience of the importance of the civil society in Africa, particularly in one-party states. In Zimbabwe, seeking out voluntary organizations which we could help in the heady days after independence, I went first to the Minister of Labour and Social Affairs. "Why don't you give *us* the money?" he said. "We're the government here; we do everything." Apart from the fact that he was later jailed for corruption, I had to explain our motives in terms that would fit with his view of the world. "Our concern," I said, "is to promote the people's response to government initiatives." Out in the villages I urged people to take charge of their own destiny. It was the same message, the other way round.

Lester Salamon draws particular attention to the burgeoning Village Awakening Movement, derived from the Gandhian tradition in India and Sri Lanka and the Harambee (Together) movement in Kenya. In India a Council of Foundations was established in 1987. In Bangladesh some 10,000 nongovernmental agencies are registered. In the Philippines 21,000 nonprofit organizations were formed in the 1970s and 1980s. Brazil, Chile and Argentina have seen similar explosions of activity—conscious, organized and recognized, strengthening the power and capacities of citizens and enhancing the quality of the society to which they belong. Within the framework set by law, we as citizens must have the freedom, the capacity and the right to act in concert in what we see to be our interests and the interests of our fellow citizens.

This evidence from across the world, admittedly patchy so far, is enough to convince us that the civil society everywhere is increasing in energy, volume and significance, even at a time, as Dr. Salamon also points out, that there is "a decline...in many of the more traditional forms of participation such as voting, political party identification and labour union membership".

This enormous worldwide increase conceals nevertheless, a variety of different traditions and different forms and of different relationships with other institutions—above all, with government. The two main traditions are those of Roman or civil law, which obtain principally in continental Europe, and that of common law, which has spread throughout those parts of the world which follow Anglo-Saxon traditions. (In Scotland these two traditions are somewhat intermingled, since Scottish law still derives from Roman law but British administrative practice, prevalent in the kingdom since the Union of 1707, derives from the Anglo-Saxon tradition.) Within the British Isles, the Anglo-Saxon tradition extends to England, Wales and Ireland, but it has travelled to the United States and the whole of the British Commonwealth to encompass the North American continent, Australasia, India and some other parts of Asia.

Both these important traditions stand for, and indeed serve to identify, the civil society. Sometimes they may be seen even as rivals, but it is better to assume that each is of irreplaceable value in its own context and that only when we take them together—even including their points of incompatibility—can we fully understand what the civil society is all about.

To identify the differences and complementarities between the two traditions I turn first to the Anglo-Saxon concept of trust. One account has it that this concept originated at the time of the Crusades. A man bent on joining a Crusade on which he might be absent for several years would entrust his property and his responsibilities to a neighbour or a relative who was staying at home. In order to fulfil these responsibilities, the one who stayed at home would be granted full ownership of the property and would exercise the same powers over the property and the dependants as the absentee himself would have exercised had he been there. But this ownership and these powers would have been exercised wholly on behalf of the absentee owner, his dependants and his domestic responsibilities, without any gain to the one who held the property on trust. Whether or not this is the actual origin of the concept, it provides a perfect model for an understanding of it. It was extended to those who took responsibility for fulfilling the wishes of the dead and to certain commercial situations. That is a factor which still contributes to London's attraction as a commercial and financial centre and attempts are being made to introduce a similar concept into French financial markets.

It was from this concept of trust that the English idea of charity gained its breadth and significance. In Tudor times, many who had made their wealth in

the great commercial enterprises of the late 16th century wanted to contribute some of that wealth to the public good. Queen Elizabeth I was keen to encourage them. At the same time there was widespread abuse of the ecclesiastical trusts and trusts for the poor. If poverty was not alleviated by the trusts originally established for that purpose, the poor might rise in revolt. A series of bad harvests in the 1590s exacerbated the risk. It was a time, too, of secularization. In the period following the Reformation the authority and powers of the Church had been curtailed and it was no longer assumed that it would provide education and social services. The first Poor Law of 1545 established the responsibility of the state to relieve poverty and implied a partnership between the state and the wealthy citizen, between statutory and voluntary resources, to meet social needs.

It was in this context that the famous *Statute of Charitable Uses* was passed in its final form in 1601. Its twofold purpose was to root out abuse and to enumerate charitable uses—to set out, in other words, what was charitable and what was not. It is in this enumeration of charitable uses that we find the broad and generous notion of public good: not just the relief of poverty, the care of the sick, the marriage of poor maidens and other things you would expect to find, but also the training of apprentices, the building of bridges, the maintenance of roads, and other purposes, as Lord Macnaghten later described them, "beneficial to the community". Property assigned to such purposes would be deemed to be held on charitable trusts, protected by law from failure on the part of trustees, from abuse, and from interference—even on the part of the Queen. To this day, those who put their money in trust for a particular purpose can be confident that their money will be protected and their purpose maintained. That goes not just for rich Tudor businessmen but for any ordinary citizen who donates funds to charity or who joins with others for a purpose of public benefit.

This is a tradition, and a law, of profound importance in Anglo-Saxon societies. Sometimes it has been neglected, sometimes abused, sometimes diluted by too much emphasis on fiscal benefits and too little on legal status, but it remains a legal and social concept of profound and practical significance.

Traditions and laws, equally profound and equally important in legal concept, exist elsewhere in Europe and the world, but how fascinatingly different they can be! One of the most important concepts in France and on the Continent generally is that of *association. La vie associative* is one of the most positive and attractive features of French life. The Revolution of 1789 removed the king and secularized the state but it maintained the direct relationship between the state and the individual which had obtained under the monarchy and which survives to this day. That relationship precluded the formation of intermediary bodies. It was not until 1901 that the state in France formally conceded citizens'

right to associate in their own interest and that of others, and to form groups which might have legal status, act independently on behalf of their members, and relate corporately to the state.

This is a very different pattern from that which obtains in Anglo-Saxon countries. There it is the *purpose* of an organization rather than its *form* that determines its legal status. If its objects are exclusively charitable, it is a charity, whether it is formed as a trust, an association, a legal company or by royal warrant. But for its purposes to be charitable they must be essentially disinterested. The Association of Long-Distance Haulage Contractors, formed legitimately to promote the interests of its members, could not be so construed. In the continental tradition, such a distinction is unthinkable. *Associations* are formed precisely to "defend specific interests", whether those of their members or of others, and the Fédération Routière Internationale is indeed registered with the Council of Europe as an international nongovernmental organization with consultative status alongside such organizations as the Conference of European Churches, Caritas, Amnesty International and INTERPHIL. Thus it is that *associations* can be grouped with co-operatives and mutual financial organizations in the broad concept of *l'économie sociale*, which unites all those organizations that act neither at the behest of the state nor in pursuit of personal profit but for mutual support, shared endeavour and common gain. Thus it is, too, that *associations* constitute, in the civil law tradition, a part of the fabric of *political* life, whereas a political purpose is specifically denied to charities. Anglo-Saxons mistrust ideology and do not want their political organizations to masquerade under the cloak of charity. Their continental counterparts cannot understand the distinction. Within the Council of Europe it is specifically with the political organ, the Parliamentary Assembly, and through the Directorate of Political Affairs, that the international nongovernmental organizations are linked, with their own assembly in pursuit of both general and specific political objectives.

In the common law tradition a political purpose is specifically ruled out—but I hasten to correct a common misapprehension: charities in English law are most certainly not precluded from political activity as such. Political activity must, however, be demonstrably in support of their charitable purposes, it must not be party politics, and it must not be on such a scale as to dominate the organization. I recall a demonstration outside 10 Downing Street by Shelter, the national organization for the homeless, when Mrs. Thatcher lived there. She was not pleased, and the message came to me as Chief Charity Commissioner through the Home Secretary that such unwelcome and improper activity must be stopped. My fellow commissioners and I made the legal judgment that the charity had been acting with complete propriety and within the law. Its members had drawn attention to the plight of their beneficiaries in the best way they knew, they had not chanted "Maggie out, Kinnock in", and they had persisted

that day, next day and every day with their main task of helping the homeless directly. Meanwhile they were, of course, advising the government continuously on measures that would help to resolve the acute housing problems of the deprived. So it was that we—a government department—protected the charity from undue interference by a government which had hoped that we could protect it from what it viewed as undue interference by a charity in government affairs. The Prime Minister's only recourse would have been to the courts, which would undoubtedly have supported our view. Indeed, although we had from time to time to curb the excessive political activities of certain charities my public contention was that there was not, in general, too much political activity by charities, but too little. Public life in Britain can hardly be imagined without the contribution of charities, from their wealth of experience and expertise, to lawmaking and government policies, and trustees should miss no opportunity within the law to stand up for their beneficiaries in the public arena.

In the Anglo-Saxon tradition the same principle applies to foundations, since there is no difference in law between a foundation and a charitable association. On the continent, that difference is marked. The notion of a foundation is even more difficult to accept in France than was that of an *association*. In the first place it offends against the principle that the heirs to an estate should not be deprived of their inheritance by an act that can only become effective when the one who performed it is dead. But secondly it was felt that to establish a foundation for a public purpose was to usurp the function of the state. Before the revolution, successive kings maintained strict control over the establishment of foundations which, after the Revolution, were simply deemed not to exist. Only recently has France been moving towards a comprehensive legal regime for foundations, but the criteria for their establishment are set by government and include a high financial threshold which successfully limits their number. Queen Elizabeth I would have thought such a policy counter-productive, and indeed it is by no means universal in civil law countries. Holland has an immense wealth of foundations with strong government support and in Germany there is a particularly close relationship between the responsibilities performed by the state or the *Land*, the contributions of the voluntary sector to the performance of those responsibilities, and the independent status of the private foundations. It is fascinating to see how the new democracies of central and eastern Europe are drawing on these different principles in building on their own historic traditions to recreate the civil society in their own domains.

How, meanwhile, are we dealing with these precious differences and commonalities at the European level? What we do in Europe is bound to have influence across the world. Three challenges face us: first, to understand each other; second, to state the principles on which the civil society must be based; third, to join in the revival of the civil society in the new democracies of central and

eastern Europe. I cannot deal with all those challenges in this paper but I can at least offer some comment on our progress. A number of discussions have taken place; programs have been undertaken; much good has been done. But I am aware of only two initiatives designed to establish a legal framework: the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, which originates from the Council of Europe, and the proposed *statut*, or legal instrument, for a European Association, which is emerging from the European Commission in Brussels alongside the *statuts* for co-operatives and for mutual financial organizations. The two are not related and indeed are hardly compatible.

First, the Convention. Its purpose is simply to enable international nongovernmental organizations to operate in countries other than their own. It was opened for signature in 1986 and came into force in 1991. It is dependent, to be effective, entirely on the ratifications voluntarily executed by individual member states. So far seven have signed: Austria, Belgium, Greece, Portugal, Switzerland, the United Kingdom and Slovenia. Subject to that, it is freely available not only throughout the membership of the Council, now genuinely pan-European, and without any further action by the organizations who might benefit from it. Their status, in the other countries party to the Convention, is immediately assured. There is a presumption of legitimacy and a reliance on national law in the construction of this instrument, with no change required either in national law or practice or the constitution and management of the organizations themselves.

The *statut* of Brussels is somewhat differently conceived. Its purpose is more specific: to enable international nongovernmental agencies within the European Union to operate throughout the Union—to enjoy the benefits, in other words, of the single market open to their commercial counterparts. There are no obstacles, it should be said, to the operation of such organizations in Union legislation, only in some, but not all, national legislation. The proposed *statut* would override such obstacles. Once adopted by the Council of Ministers it would become immediately operative but it would remain entirely optional for the organizations concerned to apply for status as a European Association. If they do they must conform to the national laws obtaining in the country in which they are based; beyond that there are certain regulations about which the early drafts at least were ambiguous—it was not clear whether they were to be obligatory or optional. These regulations affect the constitution and management of the associations in such matters as the conduct of meetings and the participation of staff (a matter which could impinge adversely on the manner in which a trust must operate its business). The *statut* also requires the governments to open a register of European associations, to verify that their constitutions and practices conform with the *statut* and that they provide an adequate

account of their activities. These guarantees will have to be published in an official bulletin and kept up to date.

There is much to be commended in this initiative. Clearly it is right that the organs of *l'économie sociale*, particularly the co-operatives and mutual societies, should have free access to the single market. Indeed it is somewhat disturbing that elements of some national legislation should prevent such free access. It is also greatly to the good that the Commission and the governments should recognize their responsibility to guarantee public confidence in the organizations of the civil society. That is vital; nothing undermines the strength of the voluntary sector so much as a scandal about the misapplication of funds, their diversion for private gain, or the faulty direction of a hitherto respected organization.

But some doubts, indeed some profound concerns, must be expressed. In the first place, the manner in which the proposed *statut* was first developed reveals a confusion of means and ends. When the problem of access to the single market was first raised, a formal interpretation or reinterpretation of the Treaty of Rome was proposed to make it say what it clearly did not say. The phrase *"organisations sans but lucratif"* in Article 58 of the Treaty refers manifestly to the criterion of purpose, and the intention of that clause was to exempt such organizations from the full requirements of company law. In doing so it exempted them also from the privileges of companies, including access to the single market. The proposed interpretation would have determined that *"organisations sans but lucratif"* did not mean what it says but meant in fact organizations not engaged in economic activity, thus transferring the criterion from purpose to activity and incorporating at a stroke large numbers of *associations*, charities and voluntary organizations in the ambit of company law and all its complications, when they had previously regarded themselves, and been regarded as, belonging to a wholly different category. When it was realized that such an interpretation would have unintended consequences, a single *statut* was proposed for co-operatives, mutuals and associations. When it was then realized that no single *statut* could cover such diverse bodies, three separate *statuts* were proposed, with the promise that all three would be enacted at once or not at all. Even now there are several provisions in the draft *statut* for associations that are more appropriate to organizations operating commercially than to organizations operating voluntarily and for the public good.

For all the good intentions that lay behind this procedure, I do not think that it is a good way to approach legislation in an area so sensitive, so important, and where the traditions lie so deep in different societies. A more profound concern emerges if we examine some of the assumptions that lie behind these proposals and more recent discussions in the European Parliament. It is all to the good that public confidence should be maintained in the sector and that some degree

of supervision should be exercised to ensure that certain basic criteria and standards are being met. I do not know if the governments have fully realized the implications of that part of the *statut*. I do know from my experience in the United Kingdom how difficult it is to establish, but above all to maintain, a register of organizations in an area so volatile and varied as the civil society. What concerns me here, however, is who will establish and interpret the criteria.

In England and Wales, the criteria are established by ancient laws defending citizens and protecting their trusts and they are interpreted, not by governments, but by the courts. It was not the prime minister who determined whether or not Shelter was an organization of national utility; nor could she decide, or even influence the decision, about whether or not they acted with propriety in demonstrating outside her house. Behind the proposed *statut* for a European association however lies the assumption that it is the governments, and the Commission of the European Communities, that will decide whether what we do as private citizens in the public arena is for the public good or not. Government decisions on such matters are bound to be affected by short-term political considerations, and it is in that sense that I fear for the independence of the voluntary sector and of the civil society as a whole. This anxiety was borne out when I read the recommendation in a motion for a resolution on Foundations and Europe which is now before the Parliament that "certain foundations...could, on the basis of projects carried out and results obtained and after consulting Parliament, be granted the title of 'European utility', which would not be a permanent one but which would be renewed periodically". That proposal was developed in the draft of December 8, 1993 to read that "il conviendrait d'élaborer un code de conduite à l'usage des fondations 'd'utilité européenne' qui permette d'éviter les inconvénients bien connus des biens de main-morte et des corps intermédiaires, l'accumulation des richesses, et de ce fait de pouvoir, de la part d'institutions susceptibles d'échapper au contrôle des pouvoirs publics et au judgment d'opinion".

Nothing could more powerfully express the cultural clash and the multi-cultural richness that we experience at this point of history. It is clear enough that there are various 'inconvénients', but it is not so clear who is so inconvenienced, until one reaches the phrase "institutions susceptibles d'échapper au contrôle des pouvoirs publics". Citizens should always be able to escape from *les pouvoirs publics*: that is what the *société civile* is all about. However benevolent the master, we need our own powers of self-determination.

Such propositions are nevertheless put forward in an impeccably European spirit of solidarity and common endeavour and with a view to enhancing the status and effectiveness of foundations in particular and of the civil society in

general—we need not doubt the motives and the credentials of those concerned, nor the hopes that their objectives will indeed be achieved. None of that should conceal from us all the realization that the authorities are taking upon themselves decisions and judgments that are the prerogative of the citizen. It is for you and me to decide what is in our interest as citizens, not the politicians and bureaucrats of the moment, in accordance with our own judgment and understanding and with reference to criteria more profoundly established and of far longer standing than the fashions and exigencies of the day, however idealistically they may be expressed.

In the short term it is unfortunate, as Professor Merle has commented, "que l'Europe, terre d'élection du mouvement associatif, ne puisse fournir au reste du monde l'exemple d'une démarche unie et cohérente pour l'amélioration du statut des organisations internationales non-gouvernementales". We in the Council of Europe must take up that challenge too. In the longer term, more fundamental issues are at stake. Ralf Dahrendorf wrote in 1990 that "the civil society is about substantial sources of power outside the state". He speaks of the creation of "a network of autonomous institutions and organizations which has not one but a thousand centres and can therefore not easily be destroyed by a monopolist in the guise of a government or a party". "Civil society", he goes on to say, "in a certain sense sustains itself. It does not seem to need the state." These thoughts are different from the notion of the state, and of the individual in relation to the state, that prevails in France, but they must be expressed if we are to approach my first objective: that we should understand each other.

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