



25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 089 / 2012

Series B

Human Rights, Democracy; Internet / intellectual property, Globalization

Tatsuji Ohno

**Roles of Citizens or “Civil Society”
and Responsibility of State**

URN: urn:nbn:de:hebis:30:3-249477

This paper series has been produced using texts submitted by authors until April 2012.
No responsibility is assumed for the content of abstracts.

Conference Organizers:

Professor Dr. Dr. h.c. Ulfrid Neumann,
Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe
University, Frankfurt/Main; Speaker of
the Cluster of Excellence “The Formation
of Normative Orders”
Professor Dr. Lorenz Schulz M.A., Goethe
University, Frankfurt/Main

Edited by:

Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Tatsuji Ohno, Tokyo / Japan*

Roles of Citizens or “Civil Society” and Responsibility of State

Abstract: Civil Society became an important theme in the recent discussion of political or social theory. Civil Society is playing a substantial role for the legislation process. We can find it especially in the activities of international NGO. It gives a new aspect of the relationship between state and society, and legal philosophically speaking, of validity of law. Activities of Civil Society are socially recognized and their support systems are gradually institutionalized also domestic in Japan. But Japanese NPO has its own weak point, which arises from the political structure of our society.

Keywords: Civil Society, Validity of Law, Democracy, State

I. Conceptual Problem and Civil Society Today

“Civil Society” has many meanings – they have changed historically, from classics (civil society = political society: *res publica* or *polis*) over modern legal or political philosophies (civil society *contra* state) up to today. Recently this concept takes another meaning, which is different from these classical definitions, or can intermediate these meanings in a sense. According to its most famous definition by Michael Walzer, “civil society” is

“the space of uncoerced human association and also the set of relational networks—formed for the sake of family, faith, interest, and ideology—that fill this space”¹.

The concept “Civil Society” has played a central role to encourage and orient movements of world-wide democratization, with the changes of political and social situation after the end of cold war. As frequently pointed, transnational moves of people and information gave its background. Besides, globalization gave another impact on the development of new “Civil

* Hosei University

¹ Walzer, *The Concept of Civil Society*, in: Walzer, ed., *Toward a Global Civil Society*, 1994, 7.

Society”. Economical globalization can affect anti-democratization. International bureaucracy, multinational corporations etc. are not often under the control of states -- in this sense they are a type of “civil society”. They are against at least national autonomy.

But it leads to activities by another type of transnational civil societies (international NGO). They try to control global governances, which are often under the strong influence of economical globalization, on issues as human rights protect, prohibit or restriction of use of normal weapons, ecology etc. One can describe this type of globalization as “political”.

So the development of “Civil Societies“ has given influences on the relations among states, between state(s) and societies or citizen. Also in Japan, Civil Society debates have already some history. We can find civic movements, almost after 1970, for example movement against pollution, consumer movement, and so on. “Citizen” was understood here simply as “non-politician”. But citizens belong to certain classes or region in reality. They are the middle classes, live in big cities and so on. Citizen in civic movement don’t always represent real “public opinion”. They insist on only “something to have (property)”, not “how to be (being, identity)”. Of course these critics are one sided. But this clarifies that concept “citizen” or “civil society” can have different meanings and political positions in concrete contexts. But with enactment of NPO-law NPO and its activity is generally recognized also in Japan.

Civil Societies have so different issues as their own. From greater “political” issue as above noted, to conflicts in smaller human relations, as neighborhoods, families. There can be interconnection among these issues, and according to this, civil societies mediate people, groups, information.

II. Structural Characters of “Civil Society”: Between “public” and “private”

Thus these new “Civil Societies” do not necessarily oppose to states, but mediate between citizens and states informally. The function or role to mediate of society to the state belongs to parliament or political parties, in traditional democratic understanding. But in their “informality” and single issue character, they are fundamentally different from these political organizations or institutions. This informality means also a lack of democratic legitimacy in a sense that they are not recognized authentically by people.

Under citizens there can be conflicts in their opinions or interests. Therefore they can oppose to “citizens,” if they are real majority in their society or state. Rather they don’t simply speak for interests of citizens themselves, but act on (national/ international) public opinions or their own ideas (of course parliament or political parties act not always in according to real vox populi too). This means independence of civil societies from up and down. When they try to make up new “public opinion”, they act as, so called, “moral entrepreneur”

In this context, I refer to Kai Nielson’s “Reconceptualization” of civil society. He defines it from the Gramscian standpoint of view, as following:

“We need an adequate conception of civil society. In addition, we need to understand the politics of civil society in order to provide a corrective for a characteristic failure of liberalism, namely, that of operating with a simplistic conception of the distinction between public/ private, state/ society, and social/ individual. Liberalism lacks, or at least seems to lack, the conceptual resources to make clear how there is a nongovernmental public sphere, a civil society, which, though closely related to the state, is still not a part of the state apparatus. But this nongovernmental public sphere is nonetheless a vital force in forming public opinion, constructing consent and generating a de facto legitimation.”²

² Kai Nielson, Reconceptualizing Civil Society for Now, in: Toward a Global Civil Society, 44-45.

Nielson illustrates this type of Civil Society with “schools, churches, labor unions, businessmen’s club, ethnic associations, the media, various professions like medicine with its institutional setting, the legal professions with its institutional setting”³.

Nielson cited Robert Paul Wolff for the explanation of “de facto legitimation”. “(De) facto authority is a form of power, for it is a means by which its possessor can enforce his decisions.”⁴. In this sense, Nielson uses this concept in another meaning. We can understand this difference from the perspective of Legal Validity (Radbruch). Wolff’s de facto authority means power-theory of sociological theory. But Nielson’s de facto legitimation is on the recognition theory or philosophical theory. Respond to the position of Civil Society in the whole law-making system.

De facto legitimation, from my point of view, relates to the content of law. It is not validity grounded on real consensus (in this sense, not voluntaryistic-sociological consent theory, but “philosophical” theory with Radbruch’s classification). But it functions in dynamics of consent making process and maintain opinion diversity.

III. Japanese NPO-law: Its Background and Reality

We focus on this institutional dimension around civil society, as Nielson pointed. Nielson describes “civil society” with so many types of middle groups, from traditional to modern. Of course it is important, to find out civil society activities in different types of middle groups, in their realities.

But as I mentioned at beginnings of this report, NGO or NPO has in these 10 years, after the Books of Walzer and Nielson, acted in so many realms. The word “civil society” is used often as synonym with NPO or NGO. And to support and check these activities becomes important as roles of citizen and responsibility of state. In Japan the NPO-Law (Law

³ Ibid. 45.

⁴ Robert Wolff, ed., *The Rule of Law*, 1971, 57.

Concerning the Promotion Specific Non-Profit Organization Activities) is enacted 1998 (amended 2003). Article 1 proclaims its purpose as following:

*“The purpose of this law is to promote the sound development of specified nonprofit activities in the form of volunteer and other activities freely performed by citizens to benefit society, through such measures as the provision of corporate status to organizations that undertake specified nonprofit activities, (and establishing the system of authorizing specified nonprofit juridical persons that have proper operating organization and business activities and promote public welfare: added in 2011), and thereby to contribute to advancement of the public welfare.”*⁵

We can find in the purpose of this law, that Japanese society has been interested in Civil Society activities these years, and that it is recognized also publicly. It is the fact, that Situations after each two big earthquakes prompted the voluntary support action and for this institutionalization Hanshin-Awaji earthquake made a starting point. But it is also the fact, that there were basic stream continuously, which has made Japanese Society gradually “Civil”⁶.

Civil Society activities mainly aim at enhancement of each individual. We can find this trend also in purpose of some another Japanese new legal institutions, as the consumer basic act, the adult guardianship system. Here we can find the fundamental change of standpoint, “from protection to empowering”. From protection against civil or economic society, which consists of idealized “strong” individual citizen, to empower disadvantaged people to act autonomic and independent in society as well as they can. The role of Civil Society is empowering and advocating individuals. From this view point, the state is responsible not

⁵ This English translation is unofficial by “Civil Society Monitor” (http://www.jcie.or.jp/civilnet/monitor/npo_law.html). In its Homepage one can get information about activities of Japanese NPOs and situations around them. NPO- Law was amended recently 2008 and 2011. By the amend 2011, authorizing system is simplified and localized (authorized not by cabinet office, but by local government).

⁶ There were another context, which prompted NPO activities: the influence of deregulation-policy.

only to provide fundamental condition of citizens, but also to support these activities. State and Civil Society are not in the strict dualism, but should co-operate, with taking some distance from each other.

But there is some “gap” between institution and reality. In according to an analysis⁷, Japanese Civil Society suffers from:

- *Lack of financial independence*
- *Dependence on “subcontractor” job of administrative functions*
- *Insufficient participation of citizens and insufficient support (donation or voluntary activities) from them.*

This critical analysis is based on their perspective about the conditions for civil society: independence and accountability. This is, generally speaking, also the condition of democratic organization. Thinking with civil society is meaningful for democracy theory, not only because of its function for the whole democratic organization, but also as its good example. It takes a role as an inter-mediator between state (public) and society (private). Then what kind of meaning does it have for legal philosophy?

IV. Meaning for Legal Philosophy

Because the activities of civil society relate to influent on law-making or legal/ moral consciousness, they make a sense to problematic of legal philosophy, as the discussion about validity of law. Civil societies have no formal competence to law-making, but can make “contents” of law “better”, through their influence, help, or pressure to competent law-maker. This is the function of “de facto legitimation”, which Nielson pointed. They can provide a good example to think about relationship in validity of law in cooperation or tension between competence and content of law, authority and idea, etc.

⁷ Prof. Yayoi TANAKA, National Institution for Academic Degrees and University Evaluation.

From Radbruch's classification of theories on the validity of law, we can see rather the reality of the problem around the validity of law. It can lead better understanding of problem, if we grasp it, not absolutely, but in with regard to antagonistic relations between society and state in the law-making.

In order to keep this antagonistic relationship, it is important, that civil society is independent from state not only politically but also financially, and accountable both to citizens (clients) and to state, in order to legitimate its own status. Purpose of these activities is empowerment of disable or weak citizens to stand and act by themselves. On the other side, state is responsible to support this support of civil societies (NGO etc.) to citizens. These activities themselves are principally not "formal". But legal and political institutionalization of this role-division and its precondition in society is necessary to establish the adequate relation among citizen, civil society and state. To analyze many phases of this relationship, from private life to international relationship, is aim of this workshop.

V. From our Workshop⁸

Aim of our workshop is, to discuss importance of activities of „civil society“, not only in their political, social aspects, but also from legal point of view. In conclusion, I refer to reports in this workshop total shortly in association with the main theme, which I explained.

In order to make law-contents better, these influences should be settled institutionally in law-making-system, "Better" means here that law responds adequately to more opinions in society. Civil Societies can function as a bridge between legislator and (silent) citizens. This can apply to policy-making of administrative system (Mori).

⁸ List of Reporters: Kosuke NASU (Setsunan University, Osaka), Masako INOUE (Kanagawa University, Yokohama), Yasutaka MACHIMURA (Hokkaido University, Sapporo), Toru Mori (Kyoto University, Kyoto), Shun KAKU (Hokkaido University, Sapporo), Koichi TANIGUCHI (Metropolitan University of Tokyo, Tokyo), Yasunori SUGAWARA (Hokkaigakuen University, Sapporo).

On the other side, institutions for Civil Societies provide preconditions for better one: their accountability to their clients etc. Under the conditions of good Civil Society, there are not-legal ones. Communications among citizens, families, Civil Societies and state is one thing (Inoue). This is important for collective decision. In addition to this, independency of Civil Society from state or „public sphere” is important to keep diversity of opinions (Nasu). So Civil Society has a role as a mediator in the process of public will making in its widest sense. Philosophical approach to communication in society gives a skill to analyze these aspects of Civil Society (Sugawara).

As a background of this problematic one can't forget the great impact of globalization upon states, societies, and also local communities. Internet communications opened new networks of peoples. One can say, it makes a new type of Civil Society. But in this “world” there are many problems, which destruct rights, freedom of people. Therefore legal approach to this is also necessary (Machimura). We need the coercion of the state power to retain such communities. This paradox will be explained through the cases of regulation/deregulation, comparing Japan-U.S. (and Korea) case studies concerning land-use regulation (Taniguchi). As more general problem, the relationship between global world and nation states, international law and national law is understood from the perspective of conflict between universalism and national interests. This doesn't mean, universalism must be good thing. Nation states have their own contexts and legal cultures. Universalism can be oppressive to them. (Kaku).

The theme “Civil Society” has many aspects and is in development. We would like to grasp it totally through comparison with it in another culture, society. We are still on the starting point to think Civil Society philosophically.

Address: Tatsuji Ohno, Tokyo / Japan. E-Mail: tohno@hosei.ac.jp