

NGOs AS A SPECIFIC MODEL OF PARTICIPATION- HOW CAN ONE JUSTIFY THAT MODEL WITH REGARD TO THEORY OF DEMOCRACY?

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Abstract

This paper aims to discuss the roles and participation channels of non-governmental organizations (NGOs) on international plane in the light of the theory of democracy. Firstly NGO participation to international legal system will be examined very briefly by looking at three periods of international law. Although NGOs have been effective in international sphere, they still not been considered a subject of international law that possess legal personality. However the emergence of new concepts such as “global governance”, explains NGOs’ new roles in the theory of democracy.

Democracy without participation of civil society, has been seen as a deficient concept. That is because it does not only mean voting in elections. With globalization process the importance of the

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participation of civil society has been increased gradually. After mentioning democratic deficit of international law with regard to non-state actors in the second part; the current legal status of NGOs under international law, their roles and participation channels will be examined. Furthermore the question of whether there is a generally accepted definition of NGOs according to the relevant international legal documents will be discussed.

One of the most important areas in which NGOs perform significant functions is the environmental law. The term “global environmental governance” has been used to explain the legitimacy of NGO participation to the field. Finally, a brief overview of how NGOs function in this specific field (the means of participation) and some problems that stem from the lack of legal personality of NGOs will be discussed.

Keywords:

Non-governmental organizations, environmental law, participation, global governance, civil society

Öz

Bu makale demokrasi teorisinin ışığında, hükümetler dışı örgütlerin uluslararası alandaki rolü ve katılım yollarını tartışmayı amaçlamaktadır. Öncelikle uluslararası hukukun üç dönemine göre hükümetler dışı örgütlerin uluslararası hukuk sistemine katılımı

kısaca deęerlendirilecektir. Hükümetler dıřı örgütler uluslararası arenada giderek etkili olmakla birlikte; hala uluslararası hukuk kiřilięine sahip bir suje olarak kabul edilmemiřtir. Ancak “küresel yönetiřim” gibi yeni kavramların ortaya çıkıřı, demokrasi teorisinde hükümetler dıřı örgütlerin yeni rollerini açıklamaktadır.

Demokrasi seçimlerde oy vermenin ötesinde bir anlama sahip olduęu için; sivil toplumun katılımı olmaksızın kendi başına eksik bir kavram olarak görölmektedir. Küreselleřme süreci ile birlikte sivil toplum katılımının önemi giderek artmaktadır. İkinci bölümde hükümet-dıřı aktörlere iliřkin olarak uluslararası hukukun demokrasi eksiklięinden söz edildikten sonra; hükümetler dıřı örgütlerin uluslararası hukuk alanındaki güncel hukuki statüsü, rolleri ve katılım yolları ele alınacaktır. Ayrıca ilgili hukuki belgelere göre hükümetler dıřı örgütlerin genellikle kabul edilen bir tanımı olup olmadıęı tartıřılacaktır.

Hükümetler dıřı örgütlerin önemli iřlevler gördükleri başlıca alanlardan biri çevre hukukudur. “Küresel çevresel yönetiřim” terimi bu katılımın meřruiyetini açıklamak için kullanılmaktadır. Son olarak hükümetler dıřı örgütlerin bu özel alanda nasıl hareket ettikleri (katılım yöntemleri) ve hukuk kiřilięinden yoksun olmalarının yol açtıęı bazı problemlere dair genel bir deęerlendirmeye yer verilecektir.

Anahtar kelimeler: *Hükümetler dışı örgütler, çevre hukuku, katılım, küresel yönetim, sivil toplum*

I. Historical Background

In order to understand how international legal system evolved, one should look at the subjects that act in international sphere, throughout history. One of the most important characteristics of today's modern international law has been the inclusion of various actors: These include states, international organisations, regional organisations, non-governmental organisations, public companies, private companies and individuals.²

From one point of view, international law may be divided historically into three periods that are categorized as follows: “The Voluntarist Period” (begins with 1648 the Peace of Westphalia), “Institutionalist Period” (begins in 1899 and lasts till 1990s) and “The Civil Society Period” (begins in 1975 and includes the age we live in today)³.

After the Peace of Westphalia the notion of nation-state emerged and a new legal system was established between those

² Malcolm N. Shaw, **International Law**, 196 (6th ed. 2008)

³ Charlotte Ku, 2001 John W. Holmes Memorial Lecture: **Global Governance and Changing Face of International Law**, 2, ACUNS Reports & Papers No.2 (2001).

nation-states. Many scholars today, consider the Peace of Westphalia as the beginning of modern international law. The main actors of Westphalian system were sovereign states that possess a unique power which let them determine the international law rules by themselves. There was no room for other actors such as non-governmental organizations (NGOs) to take part in the decision-making processes. States were able to decide to limit or not limit their own powers by accepting new rules and had just to do what they specifically accepted. That's why the period is called "voluntarist". It was based on voluntariness⁴.

Institutionalist period: In this period international organizations were established and they became actors nearby the States. However the characteristics of the first period remained unchanged. Since governmental organizations were designed to manage relations between states which were seeking their own interests.

"The civil society period" is characterized by the existence of NGOs. Therefore one should focus on the role of NGOs when talking about this period. Today, political power is not only owned by the states and international organizations that states created, but also by multinational corporations, networks of individuals and

⁴ Professor Ku points out that "during this period, states were obligated to do very little beyond what they specifically accepted". *Id.*, at 8.

nongovernmental organizations. Globalization has reduced the power of governments. Consequently non-state actors became effective in the decision-making processes.

With globalization process, problems became global as well and new concepts such as “global governance”, “deliberative democracy” and “the legitimacy of international law” emerged. These concepts are used to explain participation of non-state actors to the international plane and to justify it. Before focusing on these concepts, democracy and representation issues in international law will be examined.

II. How can we justify NGOs in theory of democracy?

According to the traditional international law, a government in effective control of a territory is generally accepted as the representative of the population⁵. While recognizing a government as the people’s legitimate representative, international law does not deal with whether the government has come to power through democratic methods. As the representative of the population a government can decide to be a party to an international agreement or to become a member of an international organization and to represent the state in such organizations. It means that since many states are built on undemocratic legal

⁵ Anna-Karin Lindblom, **Non-Governmental Organizations in International Law**, 6 (1st ed. 2005).

systems, large sections of the world's population are not represented on the international plane⁶. It is called “democratic deficit” of international law and it leads to controversies about legitimacy of international law.

Democracy at national level is also seen as a deficient concept by the contemporary political theorists. Participation is recognized as an indispensable element of democracy today and it is more than voting in elections. Representative democracy is itself a modification of the purest form of democracy⁷, so there can be another model such as participatory democracy. Participatory democracy calls for broad participation in the decision making process and it requires creating opportunities for all members of a group to participate⁸.

As a result of the need for democratization at the global level, the concept of global governance emerged which has been linked to the notion of participation. Global governance is based on participation, consultation, transparency and accountability. Non-state actors contribute to democratic processes for the benefit of increased legitimacy. At the same time they improve efficiency

⁶ *Id.*, at 6.

⁷ Kenneth Anderson & David Rieff, *Global Civil Society: A Sceptical View* in **Global Civil Society**, 2004/5 26, 33 (Helmut Anheier ed. 2005).

⁸ Sabine Saurugger, *Interest Groups and Democracy in the European Union*, in **Interest Group Politics in Europe** 172, 173-174 (Jan Beyers ed. 2010)

of the policy making and ensure the participation of various societies from different states, to the global decision making processes.

In order to participate, there must be a space allowing these actors to participate at first place. Therefore an analyze regarding the abilities of non-state actors, especially NGOs under the international law will be given below. The legal framework that provide NGOS various opportunities to access decision making processes will also be mentioned.

III. Legal Framework Under International Law

The term non-state actors includes subjects other than states such as academic institutions, business forums, clan and kinship circles, environmental movements, ethnic lobbies, human rights promoters, labour unions, relief organizations, think tanks and more⁹. All these actors are sometimes called “civil society”. The term civil society is generally used to classify persons, institutions and organizations that have the goal of advancing or expressing a common purpose through ideas, actions and demands on governments¹⁰. NGOs also constitute a part of civil society. NGOs focus on a variety of fields, eg religion, culture, human rights,

⁹ Jan Aarte Scholte, *Civil Society and Democracy in Global Governance*, 8 **Global Governance** 281, 283-284

¹⁰ Jean L. Cohen & Andrew Arato, **Civil Society and Political Theory** (1st ed. 1992)

development, sports, and the environment.¹¹ Sometimes these two terms (civil society and NGOs) are used interchangeably, however their meanings are not identical. Civil society is a broader term that covers numerous individuals and institutions as well as NGOs.

There is no generally accepted definition of the term NGO in international law. Each international document that refers to NGOs establishes its own definition. For instance, an ECOSOC Resolution on *Consultative Relationship between the United Nations and NGOs*¹², *European Convention on the Recognition of the Legal Personality of International NGOs*¹³ or a declaration on *fundamental principles on the status of non governmental organizations in Europe*¹⁴ apply a range of criteria in order to determine which entities will be recognized as NGOs according to their provisions.

¹¹ Stephan Hobe, *Non-Governmental Organizations*, in **Max Planck Encyclopedia of Public International Law**, para.1

¹² ECOSOC Res. E/1996/31, Consultative relationship between the United Nations and non-governmental organizations, July 25, 1996, <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> (Last visited February 26, 2017)

¹³ European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, June 25, 1986, E. T. S. No.124.

¹⁴ Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum, November 13, 2002, <https://www.coe.int/t/dghl/standardsetting/cdcj/ONG/Fundamental%20Principles%20E.pdf> (Last visited February 26, 2017)

However there are generally accepted requirements provided by international legal instruments that helps define the term. A report¹⁵ issued by Ecologic - Institute for International and European Environmental Law Policy on behalf of *Umweltbundesamt* determines certain points which may be taken into account to recognize an organization as an NGO: having non-governmental founding act, having headquarters and executive officer, having aims and activities in support of international co-operation, providing expertise and representation, being non-profit making, no governmental control over activities, having certain characteristics in NGO governance¹⁶.

Firstly, certain legal characteristics might be required concerning founding acts of these organizations. International organizations are established by intergovernmental agreements which are governed by public international law. Opposedly, NGOs are generally established by individuals or associations under the domestic law of a state. This difference is commonly recognized by international documents. For instance; United Nations Economic and Social Council (UN ECOSOC) and United Nations Conference on Trade and Development (UNCTAD) refer to NGOs

¹⁵ Sebastian Oberthür et. al Participation of Non-Governmental Organizations in International Environmental Governance, http://ecologic.eu/sites/files/publication/2013/report_ngos_en.pdf (Last visited February 26, 2017)

¹⁶ *Id.*, at 22,23,24,25

as organizations “not established by inter-governmental agreement.”¹⁷

Some institutions such as ECOSOC, Council of Europe and UNCTAD require that NGOs have headquarters and executive officer¹⁸. Therefore NGOs need a basic organizational structure¹⁹.

Besides, certain features about aims and activities of NGOs may be required in legal documents. ECOSOC and UNCTAD require NGOs to be supportive of the UN Charter and the specific objectives of the respective international institutions²⁰. This requirement aims eliminate the opponents of an institution and prevent them from using institution’s structure in order to reach their objectives²¹.

Some institutions (ECOSOC and UNCTAD) require NGOs to be a representative of important elements of public opinion or to

¹⁷ UN ECOSOC Res 1296 (XLIV), May 23, 1968, para. 7; UNCTAD, Trade and Development Board Decision 43(VII), September 20, 1968, para I/8.

¹⁸ For ECOSOC see: supra note 8, at I/10; for the Council of Europe see: Supra note 9, art.1; for UNCTAD see: Id, para I/6.

¹⁹ Oberthür, Supra note 11, at 22

²⁰ For ECOSOC see: supra note 8, at I/2-3; for UNCTAD see: Supra note 13, para I/3.

²¹ Oberthür, Supra note 11, at 23

provide special expertise and competence on topics relevant to the institution²².

Some institutions require NGOs to be non profit making. For instance The Council of Europe Convention determines that accredited NGOs pursue a non profit making aim²³.

NGOs generally defend opinions that are independent from governmental interests. In order to preserve these characteristics, there must be no control of governments over the NGOs. The Council of Europe refers to “private” nature of NGOs, while ECOSOC refers to the free expression of views²⁴.

ECOSOC and UNCTAD provide requirements about the internal structure of the NGOs: For instance, democratic structure, accountability of NGO representatives and transparency of decision making procedures²⁵.

At the end of the day, it is obvious that the definition of an NGO will depend on the provisions of the legal instrument in

²² For ECOSOC see: supra note 8, at I/1-4-9; for UNCTAD see: Supra note 13, para I/2.

²³ Supra note 10, art.1.

²⁴ For the Council of Europe see: Supra note 9, art.1; for ECOSOC see: Supra note 13, para. 7.

²⁵ For ECOSOC see: supra note 8, para I/10-12; for UNCTAD see: supra note 13, para I/2-7.

question; therefore it's not possible to constitute an NGO definition that fits in all cases.

The term has been provided by Article 71 of the UN Charter for the first time; however no definition has been given. The first time that non-governmental organizations (NGOs) took a role in formal UN deliberations was through the UN Charter:

*“ The Economic and Social Council may make suitable arrangements for consultation with **non-governmental organizations** which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”*

Although Article 71 recognizes consultative opportunities to the NGOs, a specific NGO does not have a treaty based right to be consulted.²⁶ This relationship with ECOSOC is governed today by ECOSOC resolution 1996/31.

In the realm of environmental governance, NGOs are the most prominent actors. The first intergovernmental environmental summit is the 1972 UN Conference on Human Environment

²⁶Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 **American Journal of International Law** 357 (2006)

(Stockholm Conference). That was an important step for NGOs to take a part in the global governance processes. Likewise, the UN Conference on Environment and Development (1992 Rio Earth Summit) was of particular significance to NGOs. It demonstrates an important feature of environmental law which is the increased participation of the NGOs.²⁷

1992 Rio Earth Summit produced a non-binding legal instrument, an action plan for sustainable development, namely Agenda 21²⁸.

Agenda 21 declared the need for new forms of participation:

*“The United Nations system, including international finance and development agencies, and all intergovernmental organizations and forums should, in consultation with non-governmental organizations, take measures to ... enhance existing or, where they do not exist, establish mechanisms and procedures within each agency to draw on the expertise and views of non governmental organizations in policy and program design, implementation and evaluation.”*²⁹

²⁷Catherine Redgwell, *International Environmental Law* in **International Law**, 662 (Malcolm D. Evans ed. 2003)

²⁸ U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992)

²⁹ *Id.*, para. 27.9

As it is seen, Agenda 21 affirms the importance of NGOs and seeks integration of NGOs to intergovernmental system in order to reach sustainable development goals. In particular, it aims establishing formal participatory procedures “for the involvement of NGOs at all levels from policy-making and decision-making to implementation.”³⁰

Article 3 para. 7 of 1998 Aarhus Convention³¹, requires each of the parties “to promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”

IV. NGOs’ Roles and Participation Channels

Functions that NGOs perform in global environmental governance are worth mentioning. Problems have become global and more complex since the beginning of the 20th century. Nation states have difficulties in overcoming such major problems today when compared to the past. Therefore the nature of environmental policymaking has changed and non-state actors have begun to cooperate with the states in certain cases.

³⁰ *Id.*, para. 27.6

³¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 28, 1998, 2161 UNTS 447

Together with international human rights law, international environmental law is the field of law with the most significant NGO impact.³² NGOs have great success in shaping the environmental agenda of individual states, convention and treaty processes, and the work of the United Nations³³. Their participation in environmental governance can take a variety of forms. NGOs deliver technical expertise on particular topics as well as participate directly in operational activities. Especially in the field of environmental law, knowledge and expertise gain special importance. In order to evaluate negative impacts of certain activities on environment, technical knowledge and expertise are needed. By collecting, disseminating and analyzing information, NGOs provide such expertise and have influence on policy making procedures. For example Greenpeace International has become one of the major sources of information on the illegal trade in hazardous wastes³⁴. Furthermore, by sharing the information with public, NGOs function as opinion leaders. They do not accept international law and international community as they find it³⁵.

³² Christine Fuchs, *Environment, Role of Non-Governmental Organizations* in **Max Planck Encyclopedia of Public International Law**, para.2

³³ A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 **CHI.-KENT L. REV.** 61, 65 (1992).

³⁴ Jennifer Clapp, *Africa, NGOs and the International Toxic Waste Trade*, 3 **J. ENV. DEV.** 17, 36 (1994) See also Oberthür, *Supra* note 11, at 41.

³⁵ Tarlock, *Supra* note 26, at 66.

Knowledge and skills are also core resources for these organizations. By means of specific information, NGOs design their policies and strengthen their arguments in related area.

NGOs also influence public opinion and decision making processes through lobbying. Lobbying may be understood as influencing decision makers informally in the corridors of meetings³⁶. NGOs can give expert advice to politicians that include ideas from outside the normal bureaucratic channels³⁷. (For instance, Greenpeace advice to African delegations during Basel Convention negotiations was decisive on the ban of exports of hazardous wastes from OECD to developing countries³⁸)

NGO representatives have also become members of national delegations, even sometimes they become negotiators. This type of participation is a close cooperation between governments and the NGOs. In the field of environmental governance, assistance provided by lawyers from FIELD to the Alliance of Small Island States (AOSIS) is a good example of this kind of cooperation. FIELD staff not only provides advice to

³⁶ Oberthür, *Supra* note 11, at 42.

³⁷ Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, <http://environment.yale.edu/publication-series/documents/downloads/a-g/gemmill.pdf> (Last visited February 2, 2017).

³⁸ Clapp, *supra* note 27, at 25-26. See also Oberthür, *Supra* 11, at 44.

government representatives from AOSIS countries but also negotiates on their behalf³⁹.

NGOs also operate after decision making processes by monitoring implementation of agreements and governmental compliance to such legal commitments. As such, NGOs can cause pressure on governments and help strengthen international agreements.

One of the functions of NGOs regarding environmental governance is ensuring transparency. Since inter-governmental negotiations generally take place behind closed doors; NGOs play a critical role in transparency of political processes. Reports of NGO representatives from inside international negotiations and reports on effectiveness of implementation make the process more transparent.

Consequently, NGOs shape public opinion by means of abovementioned tools. Especially media campaigns have a huge impact on environmental policy. They can at any time launch a campaign focusing on human rights, the environment or development etc. These tools help influence individuals and groups; as a consequence shape public opinion.

³⁹ Oberthür, *supra* note 11, at 44.

V. Conclusion

Despite NGOs play a significant role in global environmental governance; this role is limited. The emerging presence of global civil society conflicts with the traditional state-centric approach to international law.⁴⁰ Many institutions provide NGOs opportunities to observe and contribute to debates; however NGOs are generally not allowed to vote on decisions. Since classical international law still does not grant international legal personality to NGOs, they have to stay within the borders drawn by international agreements. On the other hand, this limited role is still very powerful. It has been seen as a paradox of NGOs: power without legal status⁴¹. From one point of view, this lack of legal status has been an advantage: Since the criteria are not strictly determined for the NGOs, various societal actors have opportunity to contribute to the political process.⁴²

At present time, we see that certain agreements and conventions set out the details of legal status of NGOs. As mentioned above, typically such documents grant a consulting status to NGO and obligate international organizations to make arrangements for consultation. Because of the complexity of

⁴⁰ Zoe Pearson, *Non-Governmental Organisations and International Law*, 23 **Australian Year Book of International Law** 73 (2004)

⁴¹ Tarlock, *Supra* note 26, at 64.

⁴² Kerstin Martens, *Examining the Non-Status of NGOs in International Law*, 10 **Indiana Journal of Global Legal Studies** 2 (2003)

environmental problems, international community needs the support and knowledge of NGOs. Besides, NGOs provide more legitimacy to decision making processes by means of representing large number of individuals. In other words, providing more space to NGOs is an efficient way of eliminating democratic deficit of international law. Under the concepts of global governance and participatory democracy, NGOs seem going to be more effective in future decisions. If participation, consultation and transparency are considered building blocks of global governance, NGOs may be the most important actors to achieve and progress these goals.

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