

THE RISE OF TRANSNATIONAL DEMOCRACY AND ITS EFFECT ON THE INTERNATIONAL LEGAL ORDER*

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Abstract

It has been acknowledged that the international legal order faces the prospect of significant change through developments such as the Internet, the increase in the influence of NGOs, and also – controversially – the waning of Westphalian dominance by states together with the development of transnational democracy. This paper first examines the transformation that the international legal order has experienced, particularly since the end of the Cold War, underlining the rise of NGOs in the international realm. It then discusses the relationship between this development and both the degeneration of the state-centric system and the issue of democracy that is of growing concern in international law. It concludes that the developments the international legal order has been witnessing are interdependent, having led to the rise of NGOs, resulting in the extension of democracy beyond national borders and increasing pressure on state-centric systems.

Keywords: Westphalia/Post-Westphalia, Transnational Democracy, NGOs.

JEL classification: K33, L31, F59

Ulus-Aşırı Demokrasinin Yükselişi ve Uluslararası Hukuk Sistemine Etkileri

Öz

Uluslararası hukuk sisteminin, internet, sivil toplum kuruluşlarının (STK) etkisinin artışı, bununla beraber tartışmalı da olsa Vestfalya devlet merkezli sistemin zayıflaması ve uluslar ötesi demokrasinin gelişmesi ile çok önemli değişimlere maruz kaldığı kabul edilen bir gerçektir. Bu çalışma, öncelikle sivil toplum kuruluşlarının uluslararası alanda artan etkisine vurgu yaparak uluslararası

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hukuk sisteminin tecrübe ettiği bu değişimi inceliyor. Bu gelişme ile zayıflayan devlet merkezli sistem ve uluslararası hukukta gelişen bir olgu olan demokrasi konusu arasındaki ilişkileri değerlendiriyor. Uluslararası hukuk sisteminin şahit olduğu gelişmelerin aslında birbirlerine bağlı oldukları sonucuna varılıyor öyle ki sivil toplum kuruluşlarının artan etkisi demokrasinin ulusal sınırları aşması ve devlet merkezli sistem üzerinde baskı oluşması gibi sonuçlara yol açmıştır.

Anahtar Kelimeler: Vestfalya/Vestfalya Sonrası, Ulus-Aşırı Demokrasi, STK.

JEL sınıflandırması: K33, L31, F59

1. Feeling the Realities of the Post-Westphalia Era¹

It is argued that the state-based system no longer reflects the realities of the current post-Cold War world order (Drake, 1999, p. 243). There have been several remarkable developments such as the intensification of globalization, the Third Wave of global democratization and the rise of transnational social movements (McGrew, 2002). Mattias Kumm (2004, p. 907) maintains that “contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms”. Ferguson and Mansbach (2004, p. 1) maintain that the Westphalian era has passed and that the end of the Cold War has undermined states’ roles as a consequence of this global trend. They believe that “the current erosion of state authority and capacity signals that the interstate epoch is drawing to a close, and invites us to reexamine old ideas and construct new ones that will both provide a better fit with observable reality and a more accurate guide to changing political patterns and attendant norms” (Ferguson & Mansbach, 2004, p. 4). It is thus clear that new international developments have been alerting the international legal system to the necessity of adapting to the realities of new geopolitical conditions.

¹ The concept “Post-Westphalian” was first propounded by Falk (1998). Other scholars have also used this concept, while some prefer to use “Westphalia II” (Valaskakis, 2000).

Globalization has propelled many new issues such as a lack of deliberative democracy, international justice (Archibugi, 2008, pp. 105-106), a universal constitution², a world parliament (Archibugi, 2008, p. 172) and the principles of *erga omnes*, *jus cogens* and subsidiarity onto the international agenda.³ The development of NGO activity in the international field accordingly demonstrates the emergence of international civil society. Cullen and Morrow (2001, p. 7) state that “such activity has accelerated in several areas, notably environment and human rights, and the integration of NGOs into the implementation of international law, particularly of multilateral treaties, indicates a socialization of international law, and more importantly, the beginnings of pluralism in international law, where states are not the only actors which can influence the progressive development of international law”.⁴

Johan Galtung pertinently cautions: “states beware: as other key actors (NGOs, TNCs, and LAs)⁵ catch the linkage between globalization and democracy while states fail to do so, and the state system overdoes Westphalian sovereignty (350 years are enough!), these other systems may overtake and pass the state system as carries of the popular will” (Galtung, 2000, p. 159). The world has become a much more polycentric place than it was in 1945 (Alston, 2005, p. 4).

Jost Delbruck states that “the monopoly of the state as a political actor in the international system has been entirely broken” (Delbruck, 2002, p. 410). In the post-Westphalian era the gradual diminution of nation states’ powers has led to the emergence of supranational actors such as the EU, NAFTA and the WTO, sub-national actors including Puerto Rico, Greenland, Quebec and Hong Kong, non-state actors such as the Tibetan government in exile and

² “...constitutional trends that are beginning to emerge outside of the nation state ...” (Helfer, 2003, p. 237)

³ “...The principle of subsidiarity ought to be an integral feature of international law...” (Kumm, 2004, p. 921)

⁴ The authority of the state in the international system has been broken (Delbruck, 2002, p. 410).

⁵ NGOs: Non-Governmental Organizations, TNCs: Transnational Corporations, LAs: Local Authorities

private military companies, NGOs like Greenpeace and Amnesty International (Delbruck, 2002, p. 410) and transnational actors such as Interpol, Médecins Sans Frontières (Lissitzyn, 1968), the Inter-Parliamentary Union (IPU), the International Organization for Standardization (ISO) and the International Olympic Committee (IOC). The horizontal structure of international law is changing with the introduction of new actors.⁶ The emergence of non-, sub- and suprastate actors has seen international relations develop vertically, which is to say in a multilayered and pluralist fashion, heedless of sovereignty and territorial factors. Various networks formed by sovereign-free actors for effective global governance should be brought together in the 21st century as the monolithic model crumbles with the appearance of new actors. Thus, as Carol Gould rightly suggests, “no forward-looking democracy theory can claim to be complete without considering these important new domains” (Gould, 2012, p. 116).

Moreover, the concept of governance according to which states and non-state actors hand-in-hand shape the process by which international law is formulated has replaced the state-centric conception of “government” which has hitherto formed the cornerstone of the old horizontal system. Another novelty of the post-Westphalian order is the introduction of the democratic concept to the international level. The idea of “transnational democracy” is often referred to by academics and politicians. The large number of innovations, both inside and outside the UN, concerning the democratization of the process by which international law is formulated emanates from the participation of non-state actors in international law and politics.

As the effects of globalization and global democracy have significantly increased in the post-Westphalia era, so have NGOs been in the ascendancy in the formulation of international law. Drake (1999, p. 243) argues that, even though “nationalistic feelings are becoming much stronger, and tensions among peoples,

⁶ Falk (1969) sees the international system after the Peace of Westphalia as the “transition to [a] horizontal inter-State model’.

ethnic groups, tribes, and even clans are boiling over into open conflict”, yet, “national boundaries have become more permeable, and national sovereignty less sacrosanct”. She aptly adds that the concept of the nation-state has begun to be considered as an obstacle to the maintenance of international peace and security”, so that, even though it strives to restrain the development of new trends in the international legal order, it cannot escape debilitation.

Charnovitz (1997) argues that “although the State-centric view continues to pervade international law, this dogma is losing coherence”. He attributes this to a significant rise in the number of states, their increasing heterogeneity⁷ and the increasing compatibility between the natures of states and NGOs.⁸ In a similar vein, Nicolas Politis (1928) postulates that “international law is in a transition period – no longer exclusively the law of States, but not yet completely the law of individuals”. While NGOs may not yet have gained formal recognition in international law, they have already brought about a practical change in the structure of traditional international law.

The horizontal structure of international law has been degraded by the entrance of new actors in the international legal order. As mentioned, the Westphalian World Order (WWO) is single-layered, monolithic and territorial. A state’s ability to control a geographical area automatically entails its control of the political power within that territory’s boundaries (Schreuer, 1993, p. 447). International law is seen as rules governing states in a world where each state has a border and equal rights (Willets, 2010). Yet the existence of NGOs has engendered the development of vertical relationships, as a result of which international law has evolved a significant vertical dimension. Schreuer (1993, p. 453) maintains that “there is mounting evidence that the process of redistributing

⁷ “After all, how much commonality really exists between China and the Marshall Islands? Are they both “powers,” to use the old term for participants in international conferences?” (Charnovitz, 1997, p. 277)

⁸ NGOs have also acquired some of the characteristics of states, such as permanent populations of dedicated members and the capacity to conduct international relations (Charnovitz, 1997).

authoritative functions will continue and that the vertical element in a preponderantly horizontal order will continue to grow". International law, in other words, could develop both horizontally and vertically. There has been a significant increase in transnational relationships that have led to the emergence of many actors (Delbruck, 2004, p. 46). International law has thus shifted its emphasis to the vertical.

To illustrate this point, entities such as non-state, supranational and subnational ones can act independently of states in decision-making and in practice. Examples include Belgium's Flemish and Walloon regions, the Canadian province of Quebec, Chechnya in Russia, Scotland and Wales in the UK and Spain's Basque and Catalan regions. Such subnational geographical regions as these last four could have direct and official relations with the central organs of the EU (Spiro, 1997, pp. 31-32). Therefore, "the horizontal multiplicity of actors and their vertical interconnectedness has made classical concepts of the structure of the international system obsolete"; international relations as the exclusive domain of states is no longer a valid concept (Delbruck, 2002).

Moreover, the advisory opinion of the ICJ in the case of *Reparation for Injuries Suffered in the Service of the United Nations* on 11 April 1949 provides that "...the Organization is an international person. It is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims". This decision amounts to an acknowledgement that an international organization can have a legal personality in international law. In that respect, it is a recognition of new actors alongside states in international law.

In contrast to current conditions, the Treaty of Westphalia prohibited the monitoring and preservation of individual rights within a state's borders on the grounds that it guaranteed not to interfere in the domestic affairs of sovereign states. The Treaty provided that states bore no responsibility for their internal actions

(Schneebaum, 2004). This is not valid for the current world order, however, since the majority of states do not have unlimited authority over their citizens. In addition, the notion that state governments are no longer their citizens' sole representatives has become increasingly popular (Schneebaum, 2004). Global civil societies therefore endeavor to establish independent non-state entities to maintain their interests, as they increasingly no longer believe that states are the proper agents working for their benefit (Willetts, 2010). Schneebaum (2004, p. 13) argues that "none of this is conceivable in a world governed by the Treaty of Westphalia, all of it presupposes the demise of that regime". These trends highlight the unfitness of the WWO to the current demands of the international legal order.

The most significant feature of the post-Westphalian era is that states have been losing their control of international relations and of innovations and developments (Willetts, 2010). Multinational enterprises and transnational corporations have begun to be influential in international legal decision-making processes (Kurtz, 2002, p. 243; Schachter, 1997, pp. 7-24). In fact, states' determinations of their national economic policies have been giving way to the preferences of multinational corporations (Cox, 1996, pp. 154-155). For this reason, states have considered the interests and wishes of profit-oriented corporations as far outweighing their own citizens' demands (Willetts, 2010), so that their dependence on multinational corporations forces them to shape their policies in accordance with those wishes and interests rather than those of their own people. The international system has eventually developed a new mechanism to fight the corporations' dominance: non-profit NGOs and civil social actors have begun to play an important role in reducing the impact of multinational corporations on national policies (Willetts, 2010).

For example, protests that occurred after NGOs waged an intense global campaign against the Multilateral Agreement on Investment (MAI) prevented its adoption. The same has occurred regarding the NGOs' campaign against the planned EU agreements with Canada (the Comprehensive Economic and Trade Agreement

(CETA)) and the US (the Transatlantic Trade and Investment Partnership (TTIP)). NGOs are concerned that these agreements pose a threat to democracy, as they would involve a further transfer of power from nation states to corporations. They believe that such agreements would influence governments to take decisions that are not in the public interest. Such example demonstrates that nation states are no longer the sole representatives of the public good in the post-Westphalian era, and that individuals have been motivated to collect under the umbrella of NGOs to make their wishes for their futures heard.

In short, there are four key aspects of the new world order: the introduction of innovations such as the Internet, the increased influence of new non-state actors, the rise of new problems and the loss of states' traditional dominance. The Internet has enabled NGOs to communicate internationally by efficiently sharing their experience, knowledge, campaigns and activities, and their influence has consequently increased. The rise of NGOs has eroded the monopoly of the state-centric international system in two ways. The emergence of new international problems with which traditional state responses are inadequate to deal has induced states to share their responsibilities with NGOs, and the development of instant communication and rapid travel has provided NGOs with the means to exert pressure on states.

2. Overview of Democracy in the Context of International Law

“Suppose you were living in a village of thirteen people. You and your neighbours elected one person to be the mayor of your village, and made virtually all public decisions by referendums allowing your mayor to put your decisions into action. You would invariably manage few resources, and exert little power on the communities around you; however, you would have a substantial degree of control in your affairs. Now suppose you moved to a village of approximately 7 billion. You now have a village council, a mayor, a local representative, a governor, a national representative, a president or prime minister, and an international representative. There are thousands of issues decided each day, some of these are legislative

issues bound to become laws, some judicial decisions that will have legal bearing - all will affect you and your life. Consequently, the degree of control you can exert over your own affairs has virtually evaporated. What happened to the spread of liberal democracy? In a world where the theory of a "global village" is increasingly and increasingly convincingly being advanced, international law theoretically also becomes increasingly necessary - this global village is interdependent, and thus there must be universality to the laws." Gautner (Fox & Roth, 2000)

The Westphalian system of international law has never heeded the democratic legitimacy of states.⁹ That order has therefore never had a democratic purpose. States had suppressed democracy within their borders, so that concept had been an unfamiliar one in international law for a long time.¹⁰ The most important subjects were states, and international law was regarded as concerning only affairs between states, not within them. The result was that a state was unlikely to be judged for any aspect of its behaviour under international law. Because international law was based on the classical concept of sovereignty, "states were given *carte blanche* to choose their own polity" (Fung & Wright, 2009, p. 14). Of course, they used this opportunity to disregard democracy in order to forestall what they regarded as its pernicious effects on their behaviour for which they would not be held to account. Consequently, the ruling elites who regulated international law had enjoyed the benefits of neglecting democracy.

In fact, traditional international law did not concern itself with the democratic character of sovereign states, as democratic governance was not a principle of statehood.¹¹ In this regard,

⁹ "...a government in effective control of a territory is generally accepted as the representative of the population within that territory, even if it has assumed power through violent or otherwise undemocratic methods." (Lindblom, 2005, p. 6)

¹⁰ "Traditionally, international law has barely paid attention to the democratic legitimacy of its most important subjects – states –, having been concerned only with relations between states and not within them." (Wouters; Meester; Ryngaert, 2003)

¹¹ Article 1 of the Montevideo Convention on the Rights and Duties of States sets out the criteria for statehood: a) a permanent population; b) a defined territory; c) a

Roland Rich (2001, p. 20) points out that “the word ‘democracy’ does not appear in the Charter of the United Nations, nor was it mentioned in the Covenant of the League of Nations”. By requiring all states to approve its obligations, the UN Charter did not require its members to adopt a model of democratic governance.¹² No standard textbooks on international law include chapters on democracy (Varayudej, 2010, p. 4). Neither has the International Court of Justice regarded the legal application of democratic principles in its decisions. There have, however, been some attempts to make democracy a norm of international law (Varayudej, 2010). US President Woodrow Wilson (1917) said that “the world must be made safe for democracy” when clarifying his aims upon the USA’s entry into World War I, even though the credibility of this statement is arguable.

Despite previous attempts to enhance the transparency and accountability of, as well as participation in, world politics, and to increase respect for the rule of law, from Immanuel Kant to Richard Falk (Archibugi & Held, 2011, p. 433), the idea of applying democracy conceptually and practically beyond nation states has hitherto been considered to be an innovative development (Archibugi & Held, 2011). In this context, most international relations textbooks prior to 1989 do not so much as contain the word ‘democracy’, and even those that did might still not refer to world politics (Archibugi & Held, 2011). According to Archibugi and Held (2011, p. 434), most of these textbooks did not evaluate the concept of democracy beyond national borders, but rather addressed purely domestic issues. These authors believe that this

government; and d) the capacity to enter into relations with other states (Varayudej, 2010).

¹² In contrast to the UN, the EU requires many standards for states to become members. It also monitors its members for compliance with the organisation’s obligations. Yet these obligations are quite different from those implied by the UN’s Article 4(1): “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” (Varayudej, 2010, p. 4)

was because the Cold War hindered the democratization of the international system (Archibugi & Held, 2011).

2. 1. The enrichment of democracy beyond national borders

The defeat of fascism after World War II presented the international community with the opportunity to make democracy a norm of international law. With this in mind, some tentative steps were taken in describing “certain civil and political rights” and also in drafting the “consultative instruments of several international organizations” (Archibugi & Held, 1995, p. 21). It might well be concluded that “this formative period of modern international law did indeed plant the idea that democracy is an essential element of human rights, but the Cold War intruded far too quickly for the notion to take root in international law” (Archibugi & Held, 1995). Democracy had thus arrived as an idea whose realisation should at least be attempted, even though the circumstances did not allow its full development.

After the fall of the Berlin Wall, scholars and policymakers have indeed begun to reconsider democracy in the face of global changes and, as a result, to discuss the application of democracy beyond borders.¹³ As mentioned earlier, McGrew contends that a transformation has occurred from interstate relations to global politics in the post-Westphalian world order (McGrew, 2011, p. 32). Holden (2000, p. 1) also points out that the collapse of communism has contributed to the development of international democracy. In this regard, most recent international relations textbooks devote at

¹³ More accurately, the rise of the Arab spring in theory but the Arab winter in practice was triggered by civilians demanding more democratic rights. What is more, it is quite plausible to suggest that most countries are more democratic than they were before 1990. Even autocratic regimes have begun to be concerned about how long their power can endure, as their legitimacy is increasingly called into question. For instance, the Saudi government has had to consider measures to placate popular opinion, and the Princely family has begun to come in for criticism. Eventually, as unrest was spreading across the Middle East, the Saudi government spent billions of dollars helping Saudis buy houses and start businesses in an obvious attempt to stave off protests (Decent, 2015).

least one chapter to the question of democracy by evaluating the impact of globalization (Holden, 2000).

By contrast with the UN Charter, some post-war international treaties directly espouse democracy. UNESCO was established for the purpose of contributing to peace and security by promoting collaboration among nations in the spheres of education, science and culture (UNESCO, Article 1(1)). The preamble to its constitution refers to democracy by stating that “the great and terrible war which has now ended was a war made possible by the denial of the democratic principles” (UNESCO, Preamble). Democracy also appeared in Article 29(2) of the 1948 Universal Declaration of Human Rights (UDHR). The Article refers to “...recognition and respect for meeting the just requirements of morality, public order and the general welfare in a democratic society” (UDHR, Article 29). At the same time the preamble to the constitution of the Organization of American States (OAS) also expresses itself “...convinced that representative democracy is an indispensable condition for the stability, peace and development of the region”. The preamble of the 1949 Statute of the Council of Europe sees its members as “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”. Rich (2001) believes that “the use of the qualifier *genuine* is an early indication of the contestation over ownership of the term democracy”. However, there does not seem to have been a general endorsement of the democratic principle under international law outside treaties (Crawford, 1993, p. 116).

The general character of traditional international law did not take the “will of the people” into account, being instead based undemocratically on “sovereignty”. James Crawford (1993) maintains that general classical international law’s features were deeply undemocratic, describing its six aspects as follows.

Firstly, the executive has comprehensive power to agree and apply rules of international law which may affect the rights of

individuals without their consent and even without their knowledge.¹⁴ For example, the heads of states and foreign secretaries or their equivalents generally have plenary powers to make international commitments on behalf of the state. Even if the government were to come to power with 75 per cent of the popular vote, one quarter of the population would be unrepresented by that government's foreign policy. In fact, the 75 per cent might very well also disagree with foreign policy decisions.¹⁵ Once individuals express their concern that their consent is not taken into account, they might seek alternative ways of expressing their opinions. One reason for the existence of NGOs and their increasing role in international affairs is that they have been regarded as a significant alternative forum in which individuals can voice their views.

Secondly, it does not matter how democratically a national law is established. A state cannot make its national law an excuse for refusing or failing to comply with international obligations.¹⁶ In the current global order, a state's national behaviour can have a significant impact on the rest of the world. For example, the Ukraine crisis has negatively affected international politics, particularly in Europe. Broadly speaking, the Russian government has apparently put its national concerns before those of international law, causing an ongoing crisis that has adversely affected other regions. The impact of the crisis has been felt by people across the globe via Internet news and other networks. A UN resolution of the ongoing Syrian crisis is impossible because of conflicts between those permanent members of its Security Council with interests in the crisis. If all interested states would first

¹⁴ Vienna Convention on the Law Treaties, 23 May 1969: UN Treaty Series, vol.1155, p131, Article 7(2)

¹⁵ See for example American citizens' views about America foreign policy: "As for Mr. Bush, 23 percent approve of his handling of the situation in Iraq, 72 percent disapprove; 25 percent approve of his handling of foreign policy, 65 percent disapprove; and 27 percent approve of his handling of immigration issues, while 60 percent disapprove." (Sussman, 2007)

¹⁶ Article 27 of the Vienna Convention on the Law of Treaties explicitly indicates that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

consider international rules rather than their perceived national interests, an effective resolution would be eminently possible.

Thirdly, while the executive government has virtually exclusive control over the availability of international remedies, individuals have no legal standing and autonomous procedural rights in international law. This is an essential point, but it has weakness as well as strengths. First, it is necessary to provide some privileges to executive government regarding its security and official work. Otherwise, the execution of their policies might become impossible if they proved unwelcome to extremist or other antagonistic groups. Secondly, the absence of legal sanction for its work would make it very hard for it to fulfil that work efficiently. On the other hand, individuals should also be able to benefit from similar international remedies as far as possible.

Fourthly, the principle of non-intervention protects even non-democratic regimes. However, attempts to solve a mistake with another mistake are obviously flawed. Non-democratic regimes might pose a significant issue that must be dealt with. On the other hand, intervention is quite problematic: most such actions have failed to improve the situation; on the contrary, they have generally made it worse. In fact, there have been several examples of intervention in the affairs of non-democratic governments, implying that the principle of traditional international law was violated on those occasions. The well-known Iraqi invasion of 2003 concerned an anti-democratic government, but the international community has borne sad witness to how this intervention made the situation worse.

Fifthly, the principle of self-determination is not able to modify established territorial boundaries *uti possidetis juris*.¹⁷

Sixthly, a successor government is responsible for those responsibilities of its predecessor that emanate from its acts. For example, a military regime in Costa Rica seized power but was

¹⁷ For example, the principle of self-determination was ignored in Africa and Central America under the name of stability.

eventually overthrown and replaced by an elected government that refused to pay the debts incurred by its predecessor. After the case went to arbitration, it was held that the successor government was bound by all the acts of its predecessor, on the basis that the previous regime was firmly established, and that its legitimacy or constitutionality were irrelevant.

Nevertheless, this trend has begun to change after the Cold War: the world has begun a remarkable shift towards democracy after the collapse of Soviet Union. Consequently, now that democracy has become a significant consideration, international organizations and instruments have also been challenged on their democratic credentials (Fox & Roth, 2000, p. 1). Gregory Fox and Brad Roth (2000) state that “prior to the events of 1989-1991, 'democracy' was a word rarely found in the writings of international lawyers” and that there were few international organisations that supported democratic governance. The traditional attitude was that international law said little about the way in which governments were selected. The post-Cold War democratic revolution has profoundly shaken old assumptions of international law, which has consequently been deployed to foster transitions to democracy and “to justify the armed expulsion of military juntas that overthrow elected regimes” in the 1990s (Fox & Roth, 2000).

Given this reality, it can be observed that international law has entered a new era of globalization, and that the path to a more democratic global world is an ongoing process, not a straightforward leap. Significant changes in the international realm have been followed by questioning the “democratic deficits” of international organizations and instruments. In this regard, some commentators raise questions regarding whether “global governance and the structure of international institutions [are] democratically legitimate, or [whether they] suffer from a democratic deficit” (Moravcsik, 2004, p. 336). This is emerging as perhaps one of the central questions in contemporary world politics. The legitimacy of international law has therefore become a central concern (Kumm, 2004, p. 907). Contemporary critiques of

international law may have taken a variety forms (Kumm, 2004), but leading students of international law have begun to suggest that it is suffering from a crisis of legitimacy (Weiler, 2004), the conclusion of international organizations being that “they suffer from a severe democratic deficit” (Moravcsik, 2004).

The issue of democracy has been of growing concern in international law. While Thomas Franck could say before the fall of the Berlin Wall: “yet, oddly, almost no one, nowadays, seems to ask this type of fundamental teleological question¹⁸ of the international system” (Franck, 1987-88, p. 535), this observation has been nullified by questions about the democratic deficit in international law. There was a clear victory for “liberal democracy” after the end of the Cold War in the early 1990s (Fukuyama, 1992). This was considered as the triumph of democracy that implied the demise of communism, fascism and other ideological anti-democratic forces (Varayudej, 2010, p. 6). After the victory of liberal democracy, international scholars began to believe in a right to democracy as a new human right to be considered among international human rights law and as an influential principle in most fields of public international law (Varayudej, 2010). Thomas Franck maintains that “democracy is beginning to be seen as the *sine qua non* for validating governance” (Franck, 1992). A major debate has consequently arisen among international lawyers and political scientists regarding the relationship of democracy and international law (Crawford, 1998; Crawford, 2000; Franck, 1998; Khan, 2003; Marks, 2000; Rich, 2001; Wouters, 2003).

2. 2. The impact of NGOs in the development of democracy

Globalization’s impact on international relations has resulted in democracy beginning to become a principle of international law. In this regard the recognition of new states has also increasingly depended on their commitment to the construction of a democratic polity (Wouters et al, 2003, p. 19). The provision of democracy by globalization refers to the relationship between democracy and

¹⁸ This type of fundamental teleological question refers to the “legitimacy of international law” (Kumm, 2004).

globalization (Wouters et al, 2003). The main actors in this relationship are NGOs, which have come into being because of the widely held view that states and international organizations have failed to adequately represent their constituencies (Willetts, 2010). Globalization has paved the way for NGOs to be more effective in the international realm by enabling them to recruit and communicate with members internationally.

Held (1995) and Clark (1999) declare that “for the most part, it is only in the post-Cold War era that the historically estranged literatures of international relations theory and democratic theory have begun to exhibit a shared fascination with the idea of democracy beyond borders, that is transnational (or global) democracy” (McGrew, 2002). These two authors could be right in highlighting the significant impact of the end of the Cold War. However, claiming that international relations theory has become out of date would be an exaggeration. Of course, a “transnational turn” in the post-Westphalia era could be discerned, and thus a significant shift in the concept of democracy as it has crossed national boundaries (McGrew, 2002). However, this process is still evolving, and international relations theory must thus be updated to some extent, while still acknowledging vestiges of the dominance of nation states.

Delbruck aptly declares that “the allocation of public authority to entities beyond the state” has been put firmly on the agenda for discussion, and that the legitimacy of public authority has thus begun to be questioned.¹⁹ This is in fact an essential point in the new international legal order. It is argued that the last few centuries could be divided into the three eras of the *aristocratic*, *oligarchic* and *democratic* (Willetts, 2010). By this account the *aristocratic* period, in which states were the predominant actors, occurred during the 17th and 18th centuries. The *oligarchic* period lasted until middle of the 20th century and involved not more than 50 states, while international organizations were considered as

¹⁹ Delbruck (2004, pp. 36-47) divides the allocation of public authority into three categories: “1. to international governmental organizations; 2. to supranational organizations; and 3. to nongovernmental organizations”.

legal persons in international law. During this period the legislative process was under the control of intergovernmental actors (Willetts, 2010).

While it was not possible to question the legitimacy of the process by which law was adjudicated because of the predominance of a strongly positivist approach in the *aristocratic* period, a limited and non-functional opinion on legitimacy was dominant in the *oligarchic* period. However, a *democratic* period has emerged in the last 20 (now 30) years in which non-state, sub-state and supra-state actors have increasingly been participating in the formulation of international law, thereby increasing the importance of democratic legitimacy (Willetts, 2010).

It can be concluded that the participation of non-state entities has both instigated and accelerated the democratic process in the international legal order. NGOs as significant non-state actors have made remarkable contributions to this process. Representative democracy has consequently been supplanted by participatory democracy, since NGOs have been considered as more representative of people's interests (Fung & Wright, 2001, p. 5). This is indeed an inevitable outcome when globalization coincides with the lack of accurate representation in the international sphere. The UN has also explicitly accepted with favour the fact that "citizens everywhere have found new channels of political expression and activity through NGOs and transnational movements" (Therien & Belanger-Dumontier, 2009, p. 359). Representative democracy is not adequate and it has been abused; people are therefore seeking alternative means of representation in the international legal order's agenda. Globalization has tolerated innovations and the activities of NGOs (Therien & Belanger-Dumontier, 2009). Worldwide, people have begun to coalesce under the umbrellas of NGOs, and in so doing have increased their participation in the international organizational decision-making process. NGOs have thereby striven to insinuate themselves directly or indirectly into that process (Therien & Belanger-Dumontier, 2009). As a result, the development of

representative democracy has occurred within the context of international law.

3. Critics of transnational democracy

There are some objections to the development of democracy beyond borders. The current study covers some of these criticisms. Critics generally doubt that transnational democracy is developing beyond a very rudimentary stage. Some agree that the phenomenon does indeed exist, if only in a highly attenuated form; others dispute even that basic assertion (Martell, 2011, p. 618). They concede the existence of common global problems, but question whether global politics is the best way of tackling them. Some assert that any development of transnational democracy requires individuals and states to abdicate their own interests, but they are concerned that this is not happening (Martell, 2011, p. 618). Further, some do accept that some developments could be seen as a basis for a transformation of the international legal order, but they do not see these developments being widely accepted. A global consciousness regarding ecological problems that would produce cosmopolitan sensibilities might, for example, be dawning, but it is believed that “this is speculative [;] there is no good evidence for it” (Martell, 2011, p. 620).

Moreover, realists also see the academic advocates of transnational democracy as dreamers (Wolf, 1999; Zolo, 1997; Hawthorn, 2000, p. 101; Chandler, 2003, p. 332). They believe that the world is very different from the one imagined by these theorists. They maintain that international relations should be regulated according to the traditional principles of force and interest. They therefore hold that any effort to tame the international legal order by institutions and public participation must be considered as no more than pure utopianism (Zolo, 1997; Hawthorn, 2000, p. 101; Chandler, 2003, p. 332). On this view, some realists reject the feasibility and the desirability of the development of transnational democracy in the current world order. They therefore maintain that the lack of a sociological and empirical basis in society renders the world unready to embrace

transnational democracy (Wendt, 1992, p. 391). Furthermore, as the EU is supposedly among the most democratic of international organizations,²⁰ this criticism supports the contention that extending democracy beyond the nation-state is difficult if not impossible (Archibugi, 2004, p. 458). Dahl (1989) has drawn up a list of minimum criteria²¹ for assessing intrastate democracy, concluding that the possibility of applying these criteria to international organizations is unrealistic. He therefore argues that global democracy is not possible, and asserts that international organizations cannot ever be as democratic as many states have become. He believes that “the idea of post-national democracy is misleading” (Dahl, 1989).

The force of these criticisms can certainly be appreciated when they are applied to the global sphere. It might be difficult to expect national standards of democracy when applied beyond borders to become integral to international organizations in the short term. However, these objections do not comprise the core of democracy, but only constitute some of the means of achieving non-violence, popular control and political equality. Besides, although international organisations are less democratic than many of their member states, they should not be evaluated according to the same criteria (Archibugi, 2004, p. 458). In fact, such evaluation is more about determining the capacity of various systems to increase the level of democratic participation in response to complaints regarding the lack of control over executive decisions. Besides, the notion that the EU is not a democratic entity arises from high expectations. While the institution’s level of democracy is very high compared to those countries with a large democratic deficit, that same level might not satisfy other states with higher standards of democracy. Of course, it cannot be argued that the EU represents the perfect democratic model, but neither can the positive influence

²⁰ ‘[The] EU represents a remarkably distinctive form of democracy beyond borders’ (Woods, 1999, p. 39)

²¹ Such as effective participation, voting equality at the decisive stage, enlightened understanding, control of the agenda and inclusiveness

of its activities on the developing democracy and accountability of states be ignored.

4. Conclusion

To sum up, it is evident that there has been a remarkable development in the international legal order. This development is due to the increasingly widespread availability of rapid travel and communications technology, the rise of NGOs, the fact that states are no longer monopoly actors, and to transnational democracy. These are interdependent realities of the newly emerging international legal order. The transformation of that order through innovations in travel and communications has led to the rise of NGOs as their capabilities have increased. The rise of NGOs has eroded the state-centric international system both by exerting pressure on states and by helping them deal with new international problems. States have begun to share their authority with NGOs; indeed, the state-centric system's decision-making process has been directly affected by their activities. Their increasing influence in the international realm has resulted in democracy transcending national boundaries. On the other hand, states are still important actors. The rise of NGOs might be caused by a desire for improved representation being expressed in the search for alternatives to states. Even though there has been some indication that a more democratic international system is emerging, there is no doubt that the development of a strong transnational democracy still has a long way to go, as states who still hold the major share of power in the international legal order are not likely to easily allow that power to be shared. The rise of NGOs' influence is evident, yet some cases they still require the permission of states to act. NGOs still lack a recognized international legal personality, as they are still not eligible to appear as actors in their own right before courts. Alongside their *de facto* recognition, therefore, they must also be approved as *de jure* actors. When this has been achieved, the international legal order is very likely to see greater democratic development.

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