NGO participation in international lawmaking and democratic legitimacy

*The debate and its future*

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Summary – NGO participation in international lawmaking and democratic legitimacy: The debate and its future

This study revisited the debate about whether the participation of NGOs in international lawmaking contributes to the democratic legitimacy of international law. We called this the NGO democratic legitimacy thesis. The starting point of the NGO democratic legitimacy thesis was the assumption that authority exerted by international lawmakers requires democratic legitimacy to ensure broad acceptance of international law. Part I defined democratic legitimacy and defined what criteria should be met within the legal system to facilitate democratic legitimacy. Part II shed light in the first place on the context in which the thesis arose. Certain recent developments in international lawmaking, such as the increasing regulatory autonomy of international organizations and more informal lawmaking processes, have fuelled democratic legitimacy concerns in which primarily the waning autonomy of states, the weak representation of individuals by states and the existing democratic deficits among states have led to the conclusion that state’s consent to international law represents a discredited conception of the democratic legitimacy of international law. As demonstrated, the NGO democratic legitimacy thesis is often presented as a response to the democratic deficits. This led to review of existing legal frameworks that are the basis for NGOs’ participation in international lawmaking. Besides, the literature on the NGO democratic legitimacy thesis was studied and discussed by focusing on the argumentative structure of both the proponents of the NGO democratic legitimacy thesis and its opponents. Part III demonstrated that the persuasiveness of the NGO democratic legitimacy thesis is rather weak. The reason for this conclusion is not due to the role NGOs do or do not play in international lawmaking, but due to the problematic application of the standard of democratic legitimacy to international law. Our critique focused primarily on the insufficient attention paid in current academic discussion on the NGO democratic legitimacy thesis to the institutional preconditions necessary to enable the democratic legitimation of any law. However, when imagining international institutional preconditions, it follows that we are continuously confronted with conceptual and practical dilemmas. We therefore concluded at the end of this study, a choice of better fitting terms to enable us to reassess the contribution of NGO participation in international lawmaking to international law. The study suggested that NGOs participation in international lawmaking could be better understood in terms of a quality justification of international law.

Part I - Democratic legitimacy

In part I, the concept of democratic legitimacy that guided the analysis of the NGO democratic legitimacy thesis was defined. Legitimacy was understood to refer to people’s trust in, and acceptance of the exercise of public authority. The reasons why laws are accepted are likely to differ per individual. They range from motivations based on the content of the law, its legality, and validity, or law’s efficiency in bringing about the promised changes in society. The normative approach to democratic legitimacy central to our study, contrary to a sociological approach to legitimacy, was based not on proved acceptance of law by legal subjects, but on a hypothetical acceptance of the authority of the rule, or the rule-making institution: the normative acceptability of the authority of law. The ground for our normative approach to legitimacy was a given: the NGO democratic legitimacy thesis is built on the assumption that the democratic characteristics of a lawmaking process leads to the acceptability of law. As discussed, the normative force of democratic legitimacy is that
although laws rule legal subjects, they consider themselves the ultimate author of these laws.

In Part I, democratic legitimacy was defined as follows. To conclude that the exercise of authority is democratically legitimate, one should assess whether public authority respects the basic principles of democracy: equality and freedom. These principles protect the potential for every individual’s capacity to act and speak in concert for public political purposes and to translate their power into political impact in lawmaking equally. Freedom is understood as freedom from domination. It was argued that to respect the principles of equality and freedom, a public authority has to offer and guarantee every legal subject an actual, equal, and continuous opportunity to participate in, and to have a decisive impact on the making of law. Participation was understood in three different ways: participation by consent to, by deliberation over, or by control over the exercise of lawmaking authority. The assessment of a law’s democratic legitimacy was presented as a dual evaluation. The first evaluation refers to the assessment whether a political constellation meets democratic legitimacy’s necessary preconditions. These preconditions refer to institutional preconditions, consisting of rights and judicial safeguards, and social preconditions, consisting of a democratic culture entailing a functioning public sphere and civil society. A public authority should preserve these preconditions in order to enable the democratic legitimacy of law. Once has been determined that these preconditions are met, the second evaluation can take place, that refers to the operational aspects. Democratic legitimacy’s operational aspects are assessed by looking into the operationalization of the democratic principles in actual lawmaking practices: whether or not that specific lawmaking procedure offers actual and equal means of participation, and whether the lawmakers live up to democratic procedural norms, such as transparency, accountability, and inclusiveness.

Part II - The NGO democratic legitimacy thesis

After defining democratic legitimacy in Part I, Part II assessed the literature on the NGO democratic legitimacy debate. It first recalled the context in which the NGO democratic legitimacy thesis arose. The NGO democratic legitimacy thesis can be considered a response to growing concerns regarding the democratic deficits of international law. The justification for the acceptability of the binding force of international law, based on the traditional doctrine of state consent, was presented to have lost part of its normative power. Scholars who looked to NGO participation within international lawmaking often justified this by highlighting the empirical fact that the processes by which international rules are established are in constant, rapid development. International lawmaking was considered to evolve, with a consequential increase of the regulatory power of international organizations, and of regulations of a more informal character. Due to these recent developments in international lawmaking, states were assumed to have lost their autonomy in deciding the content and shape of international law. The concerns with regard to the democratic legitimacy of international law suggested an imbalance between the ideal of democratic legitimacy and the legislative processes that constitute international law. Besides these empirical concerns, the normative concerns of scholars regarding state consent were presented. These scholars discredited state consent as a base for democratic legitimacy due to difficulties tracing international law back to the individual as the author of these laws, which, although most of the time not the subject of international law, was considered affected by international law nonetheless. It was argued that both the lack of parliamentary scrutiny and the existing imbalance in power between the states have weakened the indirect representation by state
consent of individuals. In this alleged clash between the ideal of democratic legitimacy law and the reality of current international lawmaking practices, scholars emphasized the possible contributions of NGOs to international lawmaking, and considered these contributions to compensate, in different ways, for the democratic deficits of international law.

The NGOs’ growing participation in international lawmaking and their efforts to influence these processes and shape the outcome of international lawmaking processes explained the emergence of the NGO democratic legitimacy thesis. After outlining the democratic deficits of international law, we looked into the legal frameworks of NGO participation in international lawmaking. NGOs do not operate in accordance with mandates given to them by states under international law, in contrast to the specifically mandated organizations like the ICRC and UN agencies. However, as international organizations defer to NGOs admission, of which the consultative relationship between UN and NGOs, regulated by ECOSOC, often functions as an example, an increasing number of NGOs participate in the formulation of international norms. As discussed, although they differ considerably in degree, more and more international organizations were opting for formalizing or at least intensifying the relationships with NGOs.

Due to NGOs’ impressive track record of contributing to the body of international law, strong claims have been made in the past decades that this role of NGOs, often encapsulated in the more broad term ‘civil society’, is indispensable to the democratic legitimacy of international law. As discussed, scholars presented NGOs as contributors to the democratic legitimacy of international law by voicing the concerns of the ‘otherwise unheard’, by offering their knowledge in deliberative preparatory lawmaking practices, and by stimulating and facilitating social engagement. Additionally, NGOs’ participation was presented as a contribution to deliberative lawmaking, to its transparency, and to the accountability of lawmakers. These benefits of NGO participation in international lawmaking were accompanied by a call for creative institutional innovations to connect governments, international organizations, and civil society.

The study on the NGO democratic legitimacy thesis revealed that qualifying NGOs’ involvement in international lawmaking as a contribution to the democratic legitimacy of international law is a contentious matter. The NGO democratic legitimacy thesis drew criticism from some legal scholars and political scientists for idealizing NGOs and civil society actors as democratic forces. The inquiry carried out in this study uncovered a multitude of resources available for consideration, but equally highlighted how varied discussion around this topic can be, particularly in the absence of some standardized and broadly accepted concepts and processes. Critics challenged the perception of global civil society. They pointed out the dependence of NGOs on states, the questionable representation by NGOs of those marginalized ‘voices’, the lacking accountability mechanisms to hold the NGOs themselves to account. In addition, the current practice of ‘overcrowding’ which allegedly significantly reduces the chances of NGOs to have impact on international lawmaking was criticized, including the strategic incentives for states and international organizations to include NGOs in their work.

The most striking example of the diversity of the debate was the differences in underlying conceptions of democratic legitimacy of international law that informed the academics. What could be deduced from the debate, is that, notwithstanding the fact that the focuses of academics are most of the time on the performances of NGOs, states and international organizations, the transition from a domestic qualification of civil society actors as valuable
contribution to democratic legitimacy to an understanding of NGOs participation in international lawmaking as a contribution to the democratic legitimacy of international law, has led to vigorous debate with the focus around how to conceptualize democratic legitimacy in an international setting, in which complexity, globalization, and plurality dominate. Academic disagreement and debate with regards to NGOs’ participation revolved around, although implicitly, defining democratic legitimacy of international law.

Scholars varied on whether to take a monist approach or a dualistic approach towards the desirability to achieve democratic legitimate international law, or scholars varied on whether to take an institutional or a non-institutional approach towards the conditions and manifestations of democratic legitimacy. Additionally, some scholars perceived democratic legitimacy as a multiform evaluation tool that could change in manifestations and preconditions according to the type and level of exercise of authority whilst others viewed democratic legitimacy as a uniform concept, that kept the same characteristics no matter to what type of authority is was applied. As was demonstrated, the differences in opinions concerning the validity of the NGO democratic legitimacy thesis hinged, among others, upon questions of whether or not there is an international demos, whether or not we can speak of an international public sphere, whether or not global deliberative practices could democratically legitimize international law, how inclusive international lawmaking processes should be, and how we should conceptualize representation without a global parliament to give content to the democratic legitimacy of international law. The clash between the institutionalists and the non-institutionalists, and between the monists and dualists, resulted in a widening gap in interpretation of the key concepts related to the concept of democratic legitimacy. This is what led part II to conclude that a uniform approach to democratic legitimacy, which is necessary to assess the validity of the NGO democratic legitimacy thesis was non-existent.

Part III - The impasse of institutional preconditions and moving beyond

The study on the NGO democratic legitimacy thesis revealed a tendency of scholars to take a fragmented approach towards democratic legitimacy. Two symptoms were detected that demonstrated this observation. First, both supporters and opponents selectively focused on NGOs. They emphasized primarily the organization of NGOs and their functioning, which was considered decisive in determining whether or not NGOs democratically legitimize international law. Second, predominantly the proponents of the thesis approach democratic legitimacy in a non-institutional manner. When attention was paid to the political opportunity structure of NGOs, we observed a selective focus on democratic practices and values without reference to an institutional embedding of these values and practices.

As discussed, this emphasis on the internal democratic organization of NGOs is unconvincing for two reasons. Firstly the chance of succeeding in theorizing a general role of such an unstructured body of different actors should be critically reviewed. Any theory around NGOs’ contribution falls short of reliable predictability. It was argued the fulfillment of a pre-determined responsibility, which is assumed with the NGO democratic legitimacy thesis, can only be empirically tested during NGO participation in international lawmaking (ad hoc) or after NGOs have participated in international lawmaking (ex post). Secondly, the prioritization of NGOs’ internal democratic legitimacy is unconvincing given the lack of institutional preconditions to translate NGOs’ input into political impact in decisionmaking on law. This point brought us to our central criticism of the NGO democratic legitimacy
thesis: a general lack of attention to the necessary institutional preconditions of democratic legitimacy.

Subsequently we observed that the NGO democratic legitimacy thesis was inspired by non-institutionalist understandings of democratic legitimacy that selectively focused on deliberation and civil society. As argued, a non-institutional fragmented approach to democratic legitimacy of international law could not provide a convincing answer to the political fact that NGOs opportunities to democratically legitimize international law are conditional upon the discretion of power holders. As discussed in Part II, the political opportunity structure of even the most receptive international legal regimes offers a more or less random correlation between NGOs input and the effects of its input in terms of impact at the decisional stage of lawmaking processes. A selective focus on democratic norms and practices without taking into account the need for institutional preconditions, leads to an underestimation of the importance of democratic agency for any democratic legitimation of law. In addition, a non-institutional reading of democratic legitimacy offers a marginalized reading of contestation, and a neglect of the need for an all-encompassing political structure consisting of rights and judicial safeguards. Contrary to the current tendency to take a multiform approach to democratic legitimacy, it was contented that a concept of democratic legitimacy should not be too easily influenced by the characteristics of certain political contexts. If this were to be the case, democratic legitimacy would lose its distinctive capacity to critically assess the acceptability of the exercise of authority with the ultimate risk of being captured by the dynamics of current power plays.

As a potential remedy for the general lack of attention to institutional preconditions in the NGO democratic legitimacy debate, two approaches of institutional preconditions were discussed: a cosmopolitan and a two-track approach. The cosmopolitan approach theorized institutional preconditions directly at the international level, taking a uniform-institutionalist approach to democratic legitimation. The two-track approach relied on the already anchored institutional preconditions back at democratic state level, taking a multiform-institutionalist approach. Initially, the two-track approach to institutional preconditions, as presented by, among others, Habermas, Besson, and Erman, seemed convincing. When states provide institutional guarantees, their delegates approve certain international laws, and when civil society participants, including NGOs, further enrich the process of coming into being of those international laws the democratic legitimacy of international law seemed guaranteed. However, conceptual and practical complications arose at different levels. The two-track approach did not fix the earlier discussed flaws in state consent as a legitimizing instrument, related to flaws in the delegation chain and to the unequal decision-making structure of international lawmaking. Furthermore, one encountered the objection that the proper application of the two-track model requires a top-down democratization of current non-democratic states, which in itself is hard to reconcile with the principle of freedom from domination. Additionally, we argued that this approach to democratic legitimacy seems to legitimize only the positions and thus the behavior of states to their own citizens, and not international law. The democratic legitimacy of an international rule of law requires that ‘second order rules’ that prescribe the procedure of legislation can be changed, according to democratic procedures, too. If one wants to meet the ideal of democratic legitimacy one should, in the light of the principles of freedom and equality, establish institutional safeguards at the level where the authoritative decisions are made. Therefore, a cosmopolitan, uniform, institutional approach to democratic legitimacy was considered the most reasonable way to meet the ideal of democratic legitimacy of international law,
because it proposed means to give all individuals the actual, equal, and continuous instruments to make, contest, and change international law at the same level. However, it was argued that it was highly unrealistic to think that current international lawmaking processes will adapt to conform to democratic institutional standards.

After a discussion on the considerable conceptual and practical hurdles for creating institutional preconditions at the international level, we concluded that the appropriateness of the use of the term ‘democratic legitimacy’ in the context of international law should be strongly questioned. Instead, academics in favor of the thesis might have been better understood in terms of a reflection on possible means, participants and processes of democratization of the international order. As was argued, reflecting on democratization is a completely different exercise than reflecting on democratic legitimacy. Whereas the first is an ongoing effort, a process-based interpretation of a development, the second describes an ad hoc effort, a static evaluation of normative acceptability of the exercise of public authority.

As a provisional response to the impasse of institutional preconditions, a reinterpretation of NGOs’ role in international lawmaking processes was suggested. As was argued, NGOs’ participation in international lawmaking could be considered as a contribution to the quality justification of international law. NGOs’ knowledge, consisting of values, testimonials, and expertise, allegedly contributes to both the substance of, and the process of making international law. A quality justification does not preclude a conditional participation of NGOs in international lawmaking processes defined by the discretion of power holders. A quality justification is in principle bound to ad hoc and ex post empirical studies of justificatory acts of lawmakers. Equally, a quality justification offered a better fit with the previously described dynamic manifestations of NGOs. Although there is a considerable overlap with some notions with democratic legitimacy theory, such as transparency, openness, and responsiveness, and the importance of information, quality justification was distinguished by the fact that such a justification of both the rationality of the process and the substance of the norm is an independent defensive act of lawmakers, which does not rely for its status on its legal subjects, in contrast to democratic legitimacy.

As discussed, the evaluation test of international law seemed to have shifted from lawmaking by the people to lawmaking for the people. Two issues emphasized the weaker normative force of a quality justification of law, compared to the democratic legitimacy of law. First, a reading of NGO participation in terms of quality justification obfuscated the actual politics that takes place in lawmaking processes. Notwithstanding its seemingly ‘neutral’ connotation and references to well informed lawmakers, the necessity of multiple sources of information and expertise, in order to establish a procedural-rational deliberations, power play in lawmaking cannot be excluded. NGOs might be used to provide window dressing for what is actually at stake: the possible pursuit of the self-interests of states, international organizations, and arguably also of NGOs. Second, an understanding of NGO participation in international lawmaking in terms of quality justification was confronted with the lack of a normative standard of quality.

Our suggestion to change the terms on which the debate on NGOs’ participation was built, was accompanied by the recommendation to further study the participation of NGOs in international lawmaking. Suggestions for further research included: empirical studies on their contribution in terms of input into the processes of lawmaking, studies on the impact of NGOs on the final international law, and studies on the justificatory acts of international lawmakers. We argued that gaining insight into the politics of both lawmaking and of
justifying international law is necessary. We suggested that future research on a quality justification could also have normative components focusing on what a theory of balance of interests might look like and what virtues for international lawmakers could be defined.