

Prahlad Rai

Non-Governmental Organisations and International Law

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Preface

The purpose of this book is to understand non-governmental organisations through the lens of international law. This book primarily addresses NGO community and students of law, political science, sociology, masters of social work and management studies. It is a ready reference for activists, officials and also corporate social responsibility department of various corporations. I have presented the past 200 years of NGOs' story in a very simple and readable manner in diverse issue areas.

The term non-governmental organisation explicitly entered the United Nations Charter and the corpus of international law, in mid-twentieth century. This opened an opportunity for NGOs to work with other international actors like States, inter-governmental organisations (IGOs) and corporations, who enjoy sovereign powers, authorisation and economic clout, respectively. NGOs have none of these powers; they simply have altruism and activism. However, their influence and expertise has grown over the years.

I have highlighted the performance and achievements of NGOs in this book as well as their possibilities and limitations. NGOs have played a very constructive role in the making of international law and global governance. I have referred to some peaceful methods and techniques that have been employed by NGOs over the years, innovating them further as per changing needs and contexts.

NGOs have engaged with some of the most crucial issue areas of our time-human rights, environment and business ethics. I have looked for insights in these issue areas to identify the role of NGOs, besides States, IGOs and corporations. Based on this, I have provided indications towards better use of public space and mutual learning for furthering their NGOs' activities in democratic, authoritarian and mixed governments.

The protection of human rights defenders, environmentalists and activists is vital. NGOs have already received a legal identity, and maintaining their accountability and transparency certainly enhances their global standing.

In this book, I have covered all the core areas and themes involving the functioning, funding and other concerns of NGOs. I wish the best to the readers about

to embark on a journey to make a positive change in the world and to those already working to address global challenges that humanity faces. I hope that this book will be instrumental in developing and evolving newer perspectives for the way forward.

Jaipur, India

Prahlad Rai

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Last but not least, I would like to thank my wife, Manju, for her unwavering support and for bearing with me during the years this has taken to complete and for being my pillar of strength. I'm also thankful to my sons, Mudit and Mohneesh, for their optimism and support.

About The Book

Point 1

Non-Governmental Organisations and International Law

Point 2

In the last few decades, Non-Governmental Organisations worldwide have been working on various critical areas affecting people's lives and expectations to facilitate a more humanising international law. Their sphere of influence is within the State and beyond. They embrace the spirit of *Vasudhaiva Kuthumbhkam*—the whole world is one family.

The Author delves into how NGOs enrich the international community. The book provides ideas, highlights issues, and identifies actors, actions, and the scope of NGOs in international law. It charts the possibilities and limitations of NGOs within the legal framework of a State and its evolution over the years. NGOs have obtained 'consultative status' from the UN Economic and Social Council and extended their access to inter-governmental organisations, international courts and tribunals. The book spotlights NGOs' influence on these international actors.

NGOs have played an important role in the making of human rights, protection of environment and business ethics. The book is an overview of their performance.

Point 3

NGOs are governed by a set of national and international law. This book highlights their accountability under the international legal framework and provides them guidance to influence international actors and engage in protection of human rights, environment and business ethics. The book provides legal insights for NGOs efficacy and how their contribution can strengthen international law. Today the NGO activism in the sinking public sphere is an enthusiasm.

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Part I
Status of NGOs

Chapter 1

Introduction



1 What is an NGO?

The ‘Non-governmental organisations’ (NGOs) term was employed by the Charter of the United Nations in 1945 and has formed an integral part of the international law lexicon. The term ‘NGOs’ has very wide connotations. In order to understand ideas of NGOs in the proper perspective, a precise definition and conceptual framework is needed. Peter Willets in his study: “*What is a Non-Governmental Organisation?*” (2002) has explained that.

an NGO is defined as an independent voluntary association of people acting together on a continuous basis, for some common purpose, other than achieving government office, making money or illegal activities.¹

Kerstin Martens published her popular research paper, “*Mission Impossible? Defining Non-Governmental Organisations*”, in 2002. She observed: NGOs have become recognised actors in international affairs, particularly over the last decade. It has not yet been clearly defined what the term NGO encompasses.²

In the early twentieth century, D.W. Bowett referred to NGOs as private international unions.³ In order to co-ordinate NGOs’ activities and to maintain their records, the Union of International Association (UIA) was founded in 1907. Then the UIA published Yearbook of International Organisations with content information about non-governmental and inter-governmental organisations (IGOs). But the Yearbook did not define NGOs. The Private International Union term was no more used in international law. But legal literature used the term NGO with more frequency in comparison with other terms, starting 1945.

An NGO is said to be a private person’s initiative with public interest; they have a motivation to serve people without the personal gain of any of its members. This

¹ Willets (2002).

² Martens (2002).

³ Bowett (2009).

is a voluntary association for common cause. The NGO is an institution that has permanent structure and durability. They have independent identity from the state, inter-governmental organisations and corporations. These are social organisations that are distinct from social movements, because social movements deal with the specific assertion of people at large for the time being, while NGOs are transboundary activists with a durable set structure and a legal identity.

NGOs have emerged from ideas of charity, philanthropy and not-for-profit but they have their own features and characteristics under the umbrella of non-governmental entity or non-business agency. They are engaged in developing alternatives, law-making and enforcement of rules, but are not involved directly in power politics. Therefore, they steer clear of political parties and aren't engaged with the replacement of government or its takeover.

Pierre-Marie Dupuy observed:

We are led back to the role of legal scholars faced with the paradox of NGOs; de jure, these entities have no existence or a very narrowly defined one, if any; but de facto they do a lot, especially in the functioning of international institutions and the implementation of the law created in their midst.⁴

NGOs do not have a legal definition because there is no specific international agreement unlike inter-governmental organisations. The legal framework of NGOs was first ever provided in Article 71 of the UN Charter and followed by the ECOSOC Resolution 1996/31. The United Nations Economic and Social Council (ECOSOC) Resolution lays down a workable definition of NGO:

Any such organisation that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organisation for the purpose of these arrangements, including organisations that accept members designated by government authorities, provided that such membership does not interfere with the free expression of views of the organisation.⁵

The ECOSOC Resolution emphasised on NGOs not being created either by government or inter-governmental agreements but rather by a private person's collective institution. NGOs enjoy independence in expression and action outside the orbit of government and business. The resolution further laid down certain conditions for granting consultative status to NGOs, inter alia: NGOs' aims and purposes shall be in conformity with the spirit, purposes and principles of the UN Charter; recognised standing within the particular field of its competence; a representative character; headquarters with an executive officer; a democratically adopted constitution; and appropriate mechanism of accountability.⁶ These are some of the essential elements for obtaining consultative status.

The Institute of International Law made attempts to define NGOs in 1910 and consolidate the definition of NGOs on the basis of certain criteria. The institute used

⁴ Dupuy (2008).

⁵ *Consultative relationship between the United Nations and non-governmental organisations*, ECOSOC Resolution E/RES/1996/31 (25 July 1996), para 12.

⁶ *Ibid.*, paras 2, 9–12.

the term private international organisations instead of NGOs. Private international organisations or NGOs are private initiatives, non-profit making and performing activities at the international level. NGOs are further defined by the Council of Europe in 1951 and subsequently 1986, the Organization of American States (OAS) in 1999 and African Union in 1963, in their respective legal documents.

Apart from the UN Charter, the ECOSOC Resolution, specialised agencies, Council of Europe, Organization of American States, African Union and a number of writers such as Boli and Thomas,⁷ Schermers and Blokker,⁸ Willets,⁹ White,¹⁰ Hermann H.K. Rechenberg,¹¹ Lador-Lederer,¹² Anna-Karin Lindblom¹³ and Steve Charnovitz¹⁴ have defined NGOs as well. These writers and institutions identified a set of salient features. By and large, they have argued upon them.

2 Salient Features of an NGO

NGOs, as institutions, possess some salient features that distinguish them from other international actors. NGOs are primarily a private person's initiatives, known as not-for-profit organisations. They are actively engaged in peoples' interests and are generally good at national and international level. Moreover, they are not supposed to earn profit for the distribution among its members or promoters. NGOs are autonomous bodies that can take independent decisions on international affairs unlike the representatives of nations. They express their opinion freely and carry out missions in their chosen issue areas.

NGOs essentially fall outside the orbit of state and market. They seek their permission or registration, income tax exemption, receive funds and undertake compliance of government regulations without losing their functional autonomy and integrity. NGOs encounter market place, interface business and interact with corporations but they remain away from any profit or trading interests. They shall keep away from any kinds of violence. NGOs pursue their objectives and transnational boundary activism by peaceful and democratic means. Their operative methods are globally accepted, like peaceful assembly and protest, campaign and networking, spreading of awareness and educating people on contemporary issues, building public opinion and suggesting alternate policy framework. Generally, NGOs do not indulge in direct politics, either to replace or to take over the government. They are essentially societal organisations and refrain from power politics and business earnings.

⁷ Boli and Thomas (1999).

⁸ Schermers and Blokker (2018).

⁹ Willets (1966).

¹⁰ White (1951).

¹¹ Rechenberg (1997).

¹² Lador-Lederer (1963).

¹³ Lindblom (2005).

¹⁴ Charnovitz (2006).

NGOs' aims and purposes are: public interest and the promotion of peoples' well-being. They have their objectives and means in conformity with the spirit, principles and purposes of the United Nations. Hopefully, they think beyond 'self-interest' and work selflessly, inculcating the altruistic behaviour within themselves. Ever since their inception, NGOs have been inherently operationalised in their envisaged objectives with the spirit of voluntarism.

NGOs are located within any given country and carry out activities inside their national boundary and beyond. They have to think globally, have international orientation and are not confined to nationalistic ideas. NGOs are not essentially state representatives in international conferences and world summits. They participate as autonomous entities and represent voices of the voiceless in national and international conferences.

'Non-governmental entities' is thereby a very broad term. A number of synonymous terms are used in the fraternity¹⁵ like civil society, non-state actors, social movements, not-for-profit organisations, voluntary associations, charity, philanthropy, foundations, public trusts and so on.

Each term has its own meaning, connotation and implications. Indeed, they are interrelated in the broadest sense and sometimes overlap, but they are not interchangeable and synonymous with each other. For instance, the term 'civil society' is broader than the term, NGOs. Apart from NGOs, civil society includes political parties, trade unions, foundations, religious organisations, academia, voluntary associations, clubs, professional organisations and every kind of non-governmental entity. Even in the broadest sense, civil society encompasses freedom of speech, rule of law and independent judiciary and democracy. However, the idea of civil society is closely related to the idea of NGOs. The history and theory of NGOs and civil society intersect through the ages. In short, civil society is an idea, while NGOs is an activism from outside the realm of family, state and the world of business.

The concept of civil society emerged at the time of Aristotle in the third century BC. The ideas of civil society continue to this day. Civil society ideas, civic values, ethos and norms are also inseparably shared by NGOs. These theoretical tools and methods are applied to the NGOs' conceptual discourse.¹⁶

NGOs function as societal actors and have a close connection to social movements. Social movements are a collective endeavour of private individuals who wish to protest, to resist, to demonstrate against powerful regimes and raise a voice for oppressed populations. Social movements are engaged with social change and exist to transform the political system in democracy. For instance, the Civil Rights movement in America of the 1960s, Arab Spring in 2011 and the Me Too movement in 2017 have focussed on the cherished human values of equal treatment, democratic rights and gender justice respectively.

These movements were the collective challenge to powerful individuals and regimes alike; that nobody is above the law and standards of civic behaviour. Therefore, social movement ethos with the NGOs coalition and their network come for

¹⁵ Woodward (2010).

¹⁶ Ehrenberg (2007) and Whaites (1998).

advocacy. The NGOs coalition ban on Anti-personnel Mines, 1997, and the Prohibition of Nuclear Weapons, 2017, appeared like social movements. NGOs are rooted in social movement, ever since the latter's resurgence in the eighteenth century. Since NGOs organised movements against anti-slavery, prostitution, opium and armament, they have been overlapping with civil society and social movements.

However, NGOs are distinct from social movements because they have infrastructure and durability in comparison with the social movements. Social movements are spontaneous, issue-based and time-specific. Their purpose may or may not be achieved. For example, the Arab Spring of 2011 resulted in success for Tunisia, but not elsewhere.¹⁷ Being institutions, NGOs can therefore sustain and remain engaged in transboundary activism.

Of late, the term 'non-state actors' (NSA) is used in academic literature. Likewise, civil society and non-state actors having broader connotations encompass corporations, media, the national liberation movement, NGOs, people's movements, religious groups and even violent groups and business magnates. NGOs are different from NSAs because NGOs' working is based on the principle of non-violence, whereas some NSAs are said to be involved in insurgent and disruptive activities. But those NSA that do not believe in violent means are approximately interlinked to NGOs, civil society and social movements.¹⁸

The Cotonou Agreement between the European Union and African, Caribbean and Pacific countries was concluded in 2000, and the term non-state actors included civil society, trade unions and the private sectors under Article 6 Clause 3 of this agreement.¹⁹

Voluntary associations are also closely related to NGOs because the idea of voluntarism is one of the core values of the NGO community. Volunteer associations are also a private citizen's creation and represent non-profit sectors. The volunteers have a common cause, such as trade unions and professional associations. 'Volunteer association' is a very wide term covering all sort of groups including residential welfare associations and business associations. Volunteer associations differ from NGOs because they do not require to be registered in their country while NGOs are generally registered civic associations.

Every non-profit organisation is not an NGO. For instance, any business entity that does not engage in profit earnings is certainly close to an NGO. In India, a non-profit company registered under section 8 of the Company Act, 2013, is a charitable organisation that receives tax exemptions. This type of company is a business organisation and also carries out commercial activities, but strictly, it cannot distribute its earnings or benefits among its members, shareholders and promoters. A non-profit company has a social cause as per the choice of its shareholders.²⁰

Charities, public trusts, foundations and philanthropic associations/organisations come under the ambit of non-profit activities. They fall broadly within the confines

¹⁷ Diani and McAdam (2003), Tilly (2008), and Staggenborg (2008).

¹⁸ Wagner (2010), Keck and Sikkin (1998), and Arts and Reinalda (2001).

¹⁹ The Cotonou Agreement (2000).

²⁰ Anheier (2006) and Hartigan (2006).

of civil society and NGOs. Charities, foundations, public trusts and philanthropic organisations are primarily donors or funders in the interest of general and common causes.

Historically, charity is rooted in religion and rich persons' generosity. Out of their fortune, they distribute money or kind to the poor, needy and distressed people. In 1601, charity organisations were engaged in health, housing, education and the amelioration of living prisoners.

In the era of enlightenment, charity became a secular and cultural practice and law also promoted it through tax exemptions. Charity provided funds to social movements and campaigns. For instance, the anti-slavery movement in the nineteenth century and the anti-nuclear weapons campaign in the twenty-first century received donation from charities. In the era of a flowing globalised economy and free market, charity became more relevant to the areas of poverty, health, housing, education, environment, human rights, food security and community development.²¹

Public trust was incorporated to institutionalise charitable work and received tax exemptions. These charitable trusts generated goodwill through their work and donations in the alleviation of poverty, promotion of education, health, environment and community life. They played a significant role in Iran, India, the United Kingdom and the United States.²²

The public foundation is a non-profit organisation. They provide funds to NGOs or individuals for charitable purposes.²³ In the same way as a trust, the foundation is also public or private in nature. Private foundations and trusts are endowed by individuals or families. It has very restricted tax exemptions in comparison to public trusts and foundations. Private foundations and trusts are generally controlled by a donor, an individual or a family.

Philanthropy is a private initiative for public interest. It focusses mainly on the improvement of human life. Philanthropy in its broad sense stands for the love for humanity. Individuals engaged in philanthropy are known as philanthropists. Examples of these are Andrew Carnegie, John D Rockefeller, Ford, Tata, Warren Buffet, Bill and Melinda Gates and many more. They have contributed most of their fortunes to charity. Charity and philanthropy both dedicate their funds and resources for public good. Charity is spontaneous and can be undertaken by any individual. It may be a one-time affair. Philanthropy, on the other hand, may be a long-term solution. Philanthropic foundations provide funds to NGOs and civil societies. Generally, they do not engage in field activities.²⁴

²¹ Chisolm (1988–1989).

²² Edwards and Stockwell (2013).

²³ Poelofs (2003).

²⁴ Adam (2004), Ilchman et al. (1998), Kingler (2008).

3 Classification of NGOs

Jurgen Habermas described non-governmental entities as the public sphere. It is a sphere of national and domestic social interaction.²⁵ Associational life of civil society is a basic human instinct. There are two broad areas, governmental and non-governmental institutions. Non-governmental organisations have the basic unity in their essential features: non-governmental, non-profit, non-uni-national and non-violent. These NGOs' criteria differentiate themselves from governmental and inter-governmental organisations (IGOs).

Civil society, in the broader sense, encompasses all social, economic, cultural and political relations, but the emphasis is usually on political aspects of these relations.²⁶ Civil society is outside the governmental apparatus but it is not necessarily against the government. Although they are almost always against authoritarian regimes.²⁷ The United Nations has included business and civil society in its 'back page site' for providing information. For instance, the UN Department of Economic and Social Affairs has integrated all kinds of civil society organisations with a single unified system.²⁸ This was protested against because corporations' economic monopoly had pushed civil society to the fringe of the world affairs.

NGOs practice non-violence, hence criminal mafia, gangsters, terrorists and insurgents are beyond the purview of this inclusive study. However, are trade unions included in the realm of NGOs? Steve Charnovitz proposed to incorporate labour unions and professional associations within the NGO fold.²⁹ Charnovitz's ideas were a reflection of the United Nations' past practice. The UN endowed consultative status to labour unions via ECOSOC accreditation procedure in 1946, in the category of NGOs.

There are no specific provisions to register or to regulate NGOs under international law, except when it comes to consultative status accorded by the UN Economic and Social Council. NGOs are first registered under their own country's legal system. Subsequently, they obtain consultative status in the UN system.

The legal system of NGOs around the world is obviously different. Hence, the creation of NGOs overall differs from one another. In democratic nations, it is very easy for NGOs to obtain registration. While in authoritative nations, NGOs' registration or permission is a hard nut to crack. In case they get permission, they might be pushed back. For instance, in China, NGOs are looked upon as anti-government as opposed to non-governmental entities.³⁰ The core idea of civil society has remained intact despite their origins in diverse legal systems.³¹

²⁵ Habermas (1974).

²⁶ Peter Willetts, *supra* note 9, p. 14.

²⁷ Edward (2009).

²⁸ <http://www.un.org/esa/coordination/ngo>.

²⁹ Steve Charnovitz, *supra* note 14, p. 350.

³⁰ Ashley and He (2008).

³¹ Cohen and Arato (1994).

The journey of modern NGOs began from Western Europe and Northern America, with most NGO headquarters being located in the northern hemisphere. The office bearers and chief executives are from western countries.³² The winds of change began to blow in the last quarter of the twentieth century, when the office bearers' and chief executives' posts were shared between developing and developed nations.

Diversification in the NGO community is inevitable due to their growing number, reach, size, issue areas and activities. NGOs have differences in their cultures, ideologies, legal status, orientation and locations. In spite of their diversity, the community has unique characteristics with regard to its members, objectives, headquarters, constitution or articles of association, governance, registration, tax exemptions and permissions for receiving foreign funding.

The classification of NGOs is based on their legal status, membership, level of operation, issue areas and their accreditation status within the UN system. NGOs' legal status is divided into four categories: (1) un-incorporated voluntary association, for example club or any similar groups; (2) incorporated voluntary association registered under registration and taxation law, for example Amnesty International and other NGOs; (3) charity, foundation and public trust, for example Ford Foundation, Tata Trust and Worldwide Fund for Nature (WWF), etc.; and (4) companies, not-for-profit under Company Act, for example Give Directly—a non-profit company.³³

Peter Willets classified international organisations into three categories, i.e. (1) inter-governmental organisations (IGOs), for example the African Union, the UN, UNESCO, World Bank and others; (2) hybrid international organisations, for example ILO and IUCN and ICRC; and (3) international non-governmental organisations, for example Amnesty International, Transparency International, Doctors Without Borders (MSF), Human Rights Watch and numerous others.

Willets further divided NGOs on the basis of membership and funds. First, NGOs have only government employees as members, for instance International Union of Police Federation. Second, members of NGOs are private persons and welcome government funds, for example International Planned Parenthood Federation. Some NGOs do not prefer government funds, for instance Amnesty International.³⁴

On the operation level, NGOs are classified as local, national, regional and international. They are broadly divided into two categories: national and international. Those NGOs operating in two or more countries are known as international NGOs, for example Doctors Without Borders (MSF). As far as UN consultative status goes, after 1996, no such classification exists, but they are categorised by ECOSOC as general, specialised and roster NGOs.³⁵ The World Bank divided NGOs into the categories of operational and advocacy.³⁶

³² Chandok (2005).

³³ Stillman (2007).

³⁴ Peter Willets, *supra note 9*, p. 8.

³⁵ ECOSOC Resolution 1996/31.

³⁶ Malena (1995).

Kerstin Martens has classified NGOs on the basis of structure and functions.³⁷ The base structure of NGO is either to be federative or centralist. A federative NGO is an umbrella organisation that functions along with or is loosely connected to other NGOs. It is a coalition of NGOs, in a sense. Oxfam International and Friends of the Earth International are cases in point of the above. A centralist NGO, on the other hand, has strong headquarters. They operationalise projects and plans from their central offices' directives. Affiliated NGOs or branches are not allowed to take independent projects, plans or other initiatives from their own end. Amnesty International, Human Rights Watch, Green Peace International, CARE International, Save the Children International, etc. are examples of these.

The functional basis of NGOs is also classified into two categories, i.e. service NGO³⁸ and advocacy NGO. Service NGOs are engaged in relief work and humanitarian actions, for example CARE, Oxfam and Plan International. Advocacy NGOs are actively involved in policy-making, influence government decisions, create public debate and build public opinion; they are more than simply lobbyist and pressure groups. For instance, Green Peace International, Transparency International, the International Campaign to Ban Landmines (ICBL) and the International Campaign to Abolish Nuclear Weapons (ICAN).

4 The Idea of Civil Society

NGOs form one of the components of the dense network that is civil society. The word civil society denotes an aggregate of some of the non-governmental entities. They are located outside the state apparatus and intimate family systems. Therefore, all civic organisations, institutions, movements and processes are an integral part of civil society. In the broadest sense, civil society could be understood in the context of freedom, individual initiatives, group activism and the community's creativity. Civil society is not just an institute but a living idea of human civilisation. The idea of civil society has been the central theme of political thinkers through the ages.³⁹ It refers to a description of a certain type of social structure, behaviour, a set of ideals and movements. It is a possibility to revive social institutions like the trade union, NGOs and the associational life of a community. This idea was rooted in classical civilisation, deeply discussed in the time of enlightenment and again, has been well received in the globalised world.⁴⁰

The idea of civil society can be understood in three ways: firstly, it is opposite to natural society, where there is a lack of organised political community on the basis of reason, civilisation and law. Secondly, it is against the state because civil society is an autonomous body that is rooted in the private sphere. And thirdly, it is against

³⁷ Martens (2005).

³⁸ Coston (1998), Beigbeder (1991), and Weiss (1998).

³⁹ Jen L. Cohen and Andre Arata, *supra note 31*.

⁴⁰ Kaviraj and Khilnani (2001); John Ehrenberg, *supra note 16*.

selfishness and social isolation because it emphasised on associational life.⁴¹ Civil society is essentially an idea, and that idea is very much useful to our time.⁴²

NGOs are inseparable to civil society. Both are intertwined concepts. Therefore, their historical background and theoretical aspect are unified. Alan Whites rightly observed:

NGOs were identified as a possible point of contact with the building blocks of civil society: namely civil associations.⁴³

A. Classical Heritage

The NGO as an institute, a movement and a legal entity has shared the theoretical evolution of civil society down the centuries.

In the classical era, third century BC, people organised themselves into different associations or organisations. The first and foremost organisation was Greek polis or city states. Apart from city states, people also lived in different associations to achieve their own specific and varied objectives.⁴⁴ These diverse organisations were known as civil societies or in Aristotle's words: *Komonía politike* (polis or political community).

According to John Ehrenberg, Roman philosopher Marcus Tullius Cicero, in the first century BC, enriched the classical ideas of civil society. He introduced the term, *Societas Civilis*, and further expanded it from the political community level to the societal level. The term 'civil society' is directly inherited from Cicero's term: *Societas Civilis*.

In classical civilisation, Greek philosophers Plato, Aristotle and others had grounded civil society on moral reasons and justice. These ideas were further enriched by stoic thinkers. They promoted the idea of universal civil society on the basis of virtue and the unity of the material world. With the decline of Greek city states in the second century BC, the idea of civil society was further developed in the ancient Roman civilisation.

Cicero in the first century BC was the most important thinker of the classical era. Greek ideas were inherited by Roman thinkers. They found them useful for Roman society and grounded civil society on the people's common good. Civil society is a social bonding of community. Human beings desire inherently to live and to sustain community life. The laws and institutions were necessitated by the Romans for sustainability of their community life outside of social constraints.⁴⁵

Gradually, Rome became the epicentre in the fourth century and, in collaboration with the church, consolidated state power. The idea of civil societies was spread by the church and theologians across Europe and beyond.

⁴¹ Sudipta Kaviraj and Sunil Khilnani, *Ibid.*, p. 288.

⁴² Kumar (1993).

⁴³ Whites (1996).

⁴⁴ John Ehrenberg *supra note 40*, pp. 20–21.

⁴⁵ *Ibid.*, p. 35.

In the fifth century, Saint Augustine observed that ‘civil society’ was not based only on human reasons and virtues but also on faith, scripture and the church.⁴⁶ Classical Greek and Roman ideas of civil society were based on political theory and rationality, while Augustine overshadowed them with religious faith and the church. Augustine’s religious ideas were modified by Thomas Aquinas in the thirteenth century. He emphasised on Aristotle’s approach to political community and human nature in order to live an associational life. God gifted human beings with rationality and guidance to take righteous decisions. “Civil society is now a necessary condition for freedom.”⁴⁷

B. The Era of Enlightenment

The notions of religiosity in the Middle Ages were replaced by state sovereignty. The paramouncy of modern states was firmly established in society in the seventeenth century. Europe witnessed renaissance, in other words, enlightenment. Civilisation was organised around family, economy, morality and political power. States were responsible to provide security and to promote human creativity.

Thomas Hobbes wrote his famous treaty, *Leviathan*, in 1651. He included civil society in the realm of state sovereignty, emphasising that civil society was only possible within the bounds of state supremacy. However, civil society existed before modern states. In the classical and Middle Ages, they were considered a space for collective community life.

The ideas of modern states and their sovereignty were also subscribed to by John Locke. However, he opposed state interference in the private affairs of individuals as well as the creativity of community. In his famous book, *Two Treatises of Government* (1689), he propounded the concept of individual right to life, liberty and property. Locke’s concept of freedom prescribed that anyone has the power to do what he wants to do or perform any particular action. Hobbes and Locke rooted their ideas of state and civil society in the social contract theory. According to them, civil society was a space of private activities under the purview of state sovereignty.

Adam Ferguson, in his famous book, *An Essay on the History of Civil Society* (1767), gave new horizons to the all-important subject. He rooted civil society in moral sentiments and the love for humanity. He had the highest estimation about human kindness and affection and thus concluded that civil society had progressed in moral values.⁴⁸ These ideas were further developed by Adam Smith in his classic work, *The Wealth of Nations* (1776). Smith propounded the notion of free market in the book. In his view, free market is indispensable to the prosperity of society and people’s happiness. Smith visualised private interest with public welfare through free market and division of labour .

⁴⁶ Ibid., p. 43.

⁴⁷ Ibid., p. 61.

⁴⁸ Hill (1997).

C. Modernity

Aristotle, Cicero and Ferguson had indicated that civil society was the moral progress of humanity. These moral views were further elaborated by Immanuel Kant in the ground breaking work, *Metaphysics of Morals* (1785),⁴⁹ *Critique of Pure Reason* (1781)⁵⁰ and *Critique of Practical Reason* (1788).⁵¹ Kant was influenced by Thomas Hobbes and Jean-Jacques Rousseau.⁵² Kant's views on civil society were an outcome of human nature. According to him, human nature was the reflection of free will. The state ought to make it possible to create free will in civil society.

Freedom plays an important role to transform natural life into civil life. Every man bears virtues of humanity. The state of nature was not a favourable condition for each other.⁵³ The state ought to protect the individual's security, property, freedom and justice. A human is a rational being, can cultivate virtues and has the power of free choice. They conduct themselves in society by reason as opposed to desire. However, the states' authority is imperative to protect individual autonomy and freedom. The state protects individuals' rights by enforcing a legal framework within their jurisdiction.⁵⁴

GWF Hegel's civil society is located between family and the state. Civil society is distinct from the state and family and rested in the realm of economy. Hegel elaborated on civil society in his well-known book, *Philosophy of Rights* (1821).⁵⁵ Hegel is a great admirer of civil society, and he said that civil society is an achievement of the modern world that can be helpful to resolve contemporary social problems like poverty, ignorance and many more.⁵⁶ Moreover, civil society promotes an individual's ethical life and freedom. In the world of Hegel, the main role of civil society is to educate people. It spreads awareness among individuals to hold intellectual ideas, universal approaches and objectivity of actions.

Civil society makes individuals into rational human beings and conscious keeper citizens. It endeavours to transform the individual into an ethical person, effectively upgrading them from nobody to somebody. A person who conducts himself, engages in work and carries out activities in an ethical and universal way. Hegel's main focus lays on an individual's central aspect of life, his recognition by himself and by society. In addition, every human being wants satisfaction from their life. Civil society puts its efforts into a rational order that contains institutions that are responsible for attaining the said satisfaction. For instance, business agency and corporations generate employment and products and remove the fear of unemployment and scarcity of goods.⁵⁷

⁴⁹ Kant (1998).

⁵⁰ Kant (1999).

⁵¹ Kant (2004).

⁵² Suprenant (2010).

⁵³ Ibid., p. 83.

⁵⁴ Ibid., p. 92.

⁵⁵ Hegel (1968).

⁵⁶ Stillman (1980).

⁵⁷ Ibid., p. 635.

Apart from individuals, civil society is also indispensable to the sustainability of the state. According to Hegel, the ancient Greek polis or city state was lacking in civil society institutions. Due to the lack of civil society, the Greek polis was distracted. Indeed, civil society encouraged the people to participate directly in politics and live an ethical life.⁵⁸ State, civil society and family are interconnected and interdependent on each other. The state and society benefitted immensely from a family that cultivated ethical values and virtues in children. But family does not suffice, and that's why the state opened schools and people formed civic society organisations. These engage in educating and awakening people for participation in the workforce, livelihood and happiness.

Hegel's civil society is mediated between family and state. Civil society is the site for the proper understanding of the right to freedom, private property and the discourse surrounding public policy. Civil society stimulated individuals for self-determination, self-consciousness and rational choices. An individual engaging in work is liberated from the status of nature, and it gives him satisfaction and recognition.⁵⁹ Hegel imagined civil society to be a mediating institution to resolve the issues of selfishness and responsibility towards people. Hegel's main contribution was a theoretical analysis of origin, nature and function of this mediating institution, i.e. civil society.⁶⁰

The idea of civil society in the nineteenth century was re-shaped as a distinct sphere that was not synonymous with private property or free market or moral sentiments. The nineteenth-century thinkers conceptualised civil society as an autonomous body located beyond the intimate relations of family and the state apparatus.

Karl Marx revisited Hegelian civil society. Marx described civil society as a social organisation evolving directly around production and commercial activities, and it formed the basis of the state.⁶¹ Marx's civil society was a sphere of the higher economic strata of society. He did not see them apart from the state apparatus.

Civil society has varied origins and diverse theoretical explanations but it remains a group action in the general interest of people. Moreover, civil society educated citizens and stimulated people to participate in the political arena of the state. It cultivated a sense of civic participation, development of individual personality and voluntarily solution of social problems. That is a third path besides the state and market. In its broadest sense, civil society was the sphere of culture 'where values and meaning are established', "where they are debated, contested and changed."⁶²

⁵⁸ Ibid., p. 641.

⁵⁹ Ibid., p. 626.

⁶⁰ Church (2010).

⁶¹ Krishan Kumar, *supra note* 42, p. 377.

⁶² Ibid., p. 383.

5 The Public Sphere and NGOs

In the sphere of culture, civil society represents an uneven field where not everyone stands on equal footing. Antonio Gramsci described it as a site of culture hegemony, where without employee coercing, hegemony was established by the capital class. They received consent from the lower strata or working class through civil society under their subordination. Gramsci called it ‘spontaneously’ or ‘willingly’ receiving consent from the deprived people of society.⁶³

Gramsci’s theory of culture hegemony is a modality of power to continue domination in society over marginalised people. By the culture hegemony theory, Gramsci exposed the capitalistic society’s claims of democracy. In his view, the civil society and the state were integrated with each other. Civil society comprises cultural, social and economic institutions, whereas the state is a political society.⁶⁴ Whenever the state stumbled, a strong structure of civil society immediately swung into action to support the state apparatus. “The communist ideal is destroying itself on the eve of the twentieth century because it could not create the ‘fortress and earth works’ of civil society, nor accommodate them.”⁶⁵

Gramsci did not subscribe to those traditional ideas of socialists who opposed *laissez faire* in the economic sphere. Indeed, they wanted to install an omnipotent state that could suppress the private sphere, civil society and freedom.⁶⁶ Gramsci supported the free market regime and was opposed to the protectionist policy of the state. Moreover, Gramsci also defended privacy and freedom of the individual.

Gramsci views that civil society does not comprise neutral institutions because it protects, primarily, the privileged class. As a consequence, it loses its universal characteristic. The state and dominant class co-opted civil society in order to maintain their hegemony through a non-coercive way. Some NGOs play a more active role in the existing hegemony block.⁶⁷ NGOs like the International Chamber of Commerce (ICC) and the World Business Council for Sustainable Development (WBCSD)⁶⁸ and others in the same bracket are in deep collaboration with state and corporations.

Gramsci’s civil society is not a static institute, rather a creative sphere where marginalised peoples could be mobilised for the creation of counter hegemony. For this purpose, a successful movement is needed that could be backed up by trichology: organisation, ideology and action.⁶⁹ Change takes place only after the re-negotiation of unequal power relations between deprived people and the rich class. The political consciousness of deprived people makes a difference to strengthen their position in society. Deprived people can frame a broader coalition or historical block by

⁶³ Gramsci (2011).

⁶⁴ Buttigieg (1995).

⁶⁵ Lewis (1989), cited by Joseph A. Buttigieg, *Ibid.*, p. 3.

⁶⁶ *Ibid.*, p. 6.

⁶⁷ <https://iccwbo.org> (founded in 1919 in Paris, France).

⁶⁸ www.wbcsd.org (founded in 1995 in Geneva, Switzerland).

⁶⁹ Katz (2006).

including various civil society organs such as the peace movement, women empowerment groups, environmentalists, religious groups, ethical organisations and others in the same vein. Single-minded groups are a broad-based network of civil associations and NGOs. Civil society is a continuously evolving process of social relations.⁷⁰

Civil society is not just an idea but also an action. Hannah Arendt indicated civil society as political action.⁷¹ Arendt gives deep insight into the polis of Greece, the republic of Rome and the declaration of independence and the drafting of the constitution of the United States. There is space for individual freedom, family and economic life. Moreover, there is also space for conduct politics. The public space of action is a place for debating and negotiating people's well-being.⁷² Personal life is at stake in the realm of private space but national and international life is at stake in public place.

In the Middle Ages, public space was occupied by the Church and religion. It was only in the sixteenth century that Machiavelli rediscovered antiquity and the classical ideas of governance. Arendt gives Machiavelli credit for enduring secular body politics.⁷³ Subsequently, secular body politics was adopted on both of sides of the Atlantic Ocean. The United States adopted constitutional democracy that was full of freedom, politics and action.

Thomas Jefferson, the President of the United States (1801–1809), proposed regular Town Meetings at the local level for American citizens. That was a practical workout of the expansion of freedom and action within the realm of constitutional democracy. Citizens assembled to debate, protest and demonstrate peacefully as well. According to Arendt, people are the origin and repository of power in each and every state.⁷⁴ People's actions make history, like India's Freedom Movement, United States' Civil Rights Movement, the Eastern European struggle against totalitarianism, the Arab spring and many others have left indelible footprints on human civilisation.

Spontaneous political action was welcomed by Arendt. She defended the opposition to the Vietnam War in the 1960s because the movement was primarily political and did not affect economic and social aims much. In spite of political action for peoples' well-being, we cannot ignore the state, because it is identical to the common interest. Moreover, collective life is possible, and it succeeded within state power.⁷⁵ Deliberations and diversity are essential to exercise state power judiciously.

Arendt recognised that public policy was a matter capable of being contested. Anyone who wishes can participate or even initiate public debate or discussion.⁷⁶ She emphasised on voluntary participation. In democracy, the election of representatives and the formation of institutes are necessary. Besides, Arendt stresses on political

⁷⁰ *Ibid.*, pp. 336–337.

⁷¹ Arendt (2009) and Arendt (1998, 2006).

⁷² Betz (1992).

⁷³ *Ibid.*, pp. 386, 389.

⁷⁴ Wolin (1983).

⁷⁵ *Ibid.*, p. 17.

⁷⁶ Issac (1994).

space and grassroot-volunteerism in order to manifest the people's participation in the democratic process. Creative minds like novelist Albert Camus and poet Rene Char had participated actively in the resistance movement against abuse and misuse of powers.⁷⁷ Civil societies act as 'Oases in the Desert' or 'Islands in the Ocean' when it comes to civic initiatives and the participation and networking of like-minded persons and groups.

Arendt's civil society is a political notion that makes possible a public sphere for sociability and human interaction. Citizens' common concerns motivated them towards political action. These political actions are contingent, spontaneous and creative, and their beauty and greatness lies in plurality, voluntary participation and does not adhere to its outcome. Arendt talks in the similar vein as *Shrimad Bhagwat Gita's* Second Chapter: Do not let the fruits of your actions be your motive for doing them.⁷⁸ Hannah Arendt's founding moment of public sphere was a political action of civil society. It facilitated the plurality of opinion. Thus, civil society collectively searches the meaning of terms such as common cause, national interest and general good and tries to build consensus in their midst.

The concept of public sphere was expounded greatly by Jurgen Habermas in 1998.⁷⁹ Habermas defined public sphere as "a realm of our social life in which some public opinion can be formed. Access is guaranteed to all citizens."⁸⁰ He further said: it is a guarantee of freedom of assembly; association; and expression to the citizens when they behave as a public body and use these public spaces seamlessly.⁸¹ Newspapers, magazines, TV, radio and the internet are the public sphere in our life. Thus, the public sphere is a space or arena where civil society mediates between community and state.

The concept of public sphere originated in eighteenth-century Europe. The public sphere was located beyond the private sphere of family, church and religious affairs. It was recognised as an independent domain from the state. It originated when the first ever state budget was separated between private and public expenditure. Thus, the idea of public expenditure was borne from the state exchequers.

The concept was further developed in the coffee houses of London and elsewhere in the eighteenth century. Literate individuals and intellectuals gathered in coffee houses and had discussions on important public issues of the day.⁸² Each and every person who wanted to participate in civic life and be involved in ongoing discussions had easy access to coffee houses. They exercised their reasons on any public issues and expressed their views.⁸³ Participants collectively read newspapers and magazines. The coffee houses created the locale of publicness, an ideal public space for the manifestation of political culture. It led to the strengthening of democracy and

⁷⁷ Ibid., p. 162.

⁷⁸ Yildirim (2015).

⁷⁹ Habermas (1998).

⁸⁰ Jürgen Habermas, *supra note* 25, p. 49.

⁸¹ Ibid.

⁸² Cown (2004).

⁸³ Ibid., p. 346.