From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society

Julie Mertus

Follow this and additional works at: http://digitalcommons.wcl.american.edu/auilr

Part of the International Law Commons

Recommended Citation
FROM LEGAL TRANSPLANTS TO TRANSFORMATIVE JUSTICE: HUMAN RIGHTS AND THE PROMISE OF TRANSNATIONAL CIVIL SOCIETY

JULIE MERTUS *

INTRODUCTION .......................................................... 1336
I. TRANSFORMED SPACE: GLOBALIZATION AND THE ROLES OF STATE AND NON-STATE PARTICIPANTS . 1341
II. TRANSFORMED METHODOLOGIES AND IDEAS: GOVERNANCE AND THE EMERGING RIGHT TO DEMOCRACY................................................................. 1351
A. NATURE AND SCOPE OF GOVERNANCE AND THE RIGHT TO DEMOCRACY .......................................... 1351
B. LIMITATIONS AND REDIRECTIONS .................................. 1361
III. TRANSFORMED PARTICIPATION IN HUMAN RIGHTS DISCOURSE .................................................. 1365
A. THE POSITIVE ROLE OF HUMAN RIGHTS NGOs ................. 1366
B. DANGERS OF NGOs THAT VIOLATE DEMOCRATIC NORMS... 1372
C. LEGAL TRANSPLANT PROJECTS ........................................ 1377
D. CHALLENGES AHEAD ....................................................... 1384
CONCLUSION ................................................................. 1387

* J.D., Yale Law School; Assistant Professor of Law, Ohio Northern University, Pettit College of Law. This article benefited greatly from conversations with Richard Falk, Jack Donnelly, Ilene Grabel, and Dan Wessner, at a SSRC/MacArthur sponsored workshop in Hanoi, Vietnam in April 1998. I am also appreciative of the comments and suggestions of Karen Elliot, Keith Krause, Janet Lord, and Steve Veltri, and the participants in the 1997 Halle Faculty Seminar series at Emory University. This article would not have been possible without the research support of the Halle Institute. A shorter version of this article can be found in The Future of Human Rights, edited by Steven Marks and Burns Weston. The ideas are also developed further in an article entitled “Doing Democracy Differently,” forthcoming 1999, in Third World Studies, with Diane Otto, guest editor.
INTRODUCTION

Today's political and legal geography presents opportunities and challenges not faced by the drafters of the Universal Declaration of Human Rights ("Universal Declaration") \(^1\) some fifty years ago. The shape, direction, and nature of State responses to human rights problems have dramatically altered. Non-State actors \(^2\) and transnational networks \(^3\) now play a greater role in the promotion and protection of human rights in local, regional, and international arenas. Concurrently, the challenges faced by the international community have shifted from localized national security concerns to matters of a more global nature, such as the environment, mass migration, and the human rights of women. The increase in non-State participants \(^4\) and the

---


4. See HIGGINS, supra note 2, at 94 (noting that the use of the term 'participant' avoids the subject-object distinction in international law).
emergence of transnational civil society have opened a new domain within which the rights enumerated in the Universal Declaration and other international human rights documents may be realized.

Variously termed "world," "global," "international," or "transnational" civil society, this domain is the social, cultural, and ethnic arrangements of modern industrial society considered apart from State control. Transnational civil society refers to "a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of States."


9. See Timothy P. Terrell & Bernard L. McNamee, Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice, 17 FORDHAM INT'L L.J. 459, 460 (1994) (naming as examples of transovereigns "the Catholic Church, the environmental 'Green' movement, fundamentalist Islam, international communism, and in many ways the United Nations.").

This article uses the term "transnational" throughout instead of "world" or "global" because civil society is much more uneven and issue-specific than those terms imply. The term "international" is avoided because it could too easily be conflated with international regimes or States. "Transovereign" emphasizes a lack of obedience to any particular sovereign and not merely the crossing of national borders. Some commentators, however, have narrowed "transnational" to include only structures that embody a moral commitment that requires "a more fundamental commitment to an organization's values and agenda than the ordinary NGO would involve." Id. at 460 n.3.


This is an appropriate description as no single map exists of transnational civil society, but rather a "network of strategizing and powers and their articulation." The voluntary associations of transnational civil society include such entities as non-governmental advocacy organizations, humanitarian service organizations, unions, religious groups, civic and neighborhood associations, political and social movements, information and news media, educational associations, and certain forms of economic organization. These entities link themselves together in networks for particular political, social, and cultural purposes. The State boundary-crossing aspect of such associations makes them transnational; their voluntary, non-State aspects make them part of "civil society." Law plays a central role in civil society. Civil society cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government. Legal associations play a central role in the development of civil society by supporting rule of law mechanisms that permit the independent existence of non-


13. See BENJAMIN R. BARBER, JIHAD VS. MCWORLD 285 (1995) (noting that while Hegel and his followers define civil society as that which is apart from the State, many modern theorists see civil society as the space "mediating between private markets and . . . government."); Michael Walzer, A Better Vision: The Idea of Civil Society: A Path to Social Reconstruction, DISSERT 293, 300 (1996) (presenting the more nuanced view that civil society may encompass certain economic institutions, such as worker organizations and consumer cooperatives, that function in private markets but have their origins outside the market). See also ROBERT L. HEILBRONER, BEYOND THE VEIL OF ECONOMICS: ESSAYS IN WORLDLY PHILOSOPHY 32 (1988) (proposing that economic processes are a prerequisite for civil society); DAVID HELD, MODELS OF DEMOCRACY 341 (2d ed. 1996) (arguing that democratic civil society is incompatible with unrestricted private ownership).

14. See Lipschutz, supra note 10, at 393 (emphasizing that the concept of civil society refers to something broader than social networks).


17. See infra notes 80-81 and accompanying text (defining "rule of law"). See generally Richard H. Fallon, Jr., The "Rule of Law" as a Concept in Constitutional
governmental entities and by encouraging the development of institutions that foster their growth. A strong civil society also demands and oversees legal constraints on State power and the accountability of State actors. Associational life provides an important medium for the development of ideas about the role of law in society, such as the parameters of civil freedoms and entitlements, the shape of legal constraints on the exercise of public authority, and the definition of public commitments.

It is possible to view the idea of civil society through various political and philosophical lenses. For the purpose of examining the promise of transnational civil society for human rights, a definitional focus on relational networks helps to sharpen the inquiry. One proponent of this focus, Michael Walzer, writes that “[t]he words ‘civil society’ name the space of uncoerced human association and also the set of relational networks—formed for the sake of family, faith, interest and ideology—that fill this space.” Ideally, the associational life of civil society is pluralistic and encouraging of diverse participation. A primary measure of the strength of civil society is its ca-

---


19. See generally HELD, supra note 13 (discussing the accountability of State actors in civil society).


23. See, e.g., ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIL
pacity simultaneously to resist subordination to State authority and to demand inclusion into State political structures. Human rights advocates argue that civil society creates a "setting of settings" in which the human rights norms embodied in the Universal Declaration and its progeny are worked out, tested, and applied. Hence, the importance of relational networks.

The rise of civil society presents a paradox to human rights advocates. On the one hand, civil society can promote human rights norms and raise the concerns of unheard voices, including those of people oppressed through violations of core principles of international human rights. The inclusive and pluralistic nature of associational groups promotes what is seen as the "emerging right to democratic governance." Some view the very existence of a robust civil society as a precondition to democratic governance and to the realization of human rights. On the other hand, transnational civil society may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign and, thus, may act in a manner contrary to democratic principles. This article examines this paradox by analyzing the ways in which non-State participants may work in conjunction with States to promote these norms.


25. See RAU, supra note 24, at 98.

26. See, e.g., Pérez-Díaz, supra note 3.


28. See GELLNER, supra note 16, at 188. See also COHEN & ARATO, supra note 5, at 80 (identifying civil society as a "locus of democratization").
First, this article outlines the transformations pertaining to space, namely, globalization and the roles of State and non-State participants. A discussion of these changes reveals the increasing importance of transnational civil societies. Second, this article analyzes transformations pertaining to methodology and idea, analyzing the concepts of “governance” and the right to “democratic governance.” This article also examines the change in focus from government to governance and explains the connection of these concepts to the promotion of human rights. Finally, this article details the role of non-governmental organizations (“NGOs”) in transnational civil societies, and explains how their actions may run contrary to democratic norms, and how their participation in transnational civil societies can improve. A discussion of the effects of NGOs on “legal transplants” in Central and Eastern Europe illustrates the problems of NGOs attempting to foster positive social change. Ultimately, this discussion provides insight into the evolution of the system of international human rights law and practice and the challenges that lie ahead.

I. TRANSFORMED SPACE: GLOBALIZATION AND THE ROLES OF STATE AND NON-STATE PARTICIPANTS

The rise of non-State participants and networks is a product of the complex phenomenon known as globalization. Richard Falk has drawn a distinction between globalization from above and globalization from below to identify “two interrelated tendencies: the restructuring of the world economy on a regional and global scale through the agency of the transnational corporation and financial markets from above, and the rise of transnational social forces concerned with environmental protection, human rights, and peace and human security from below.” The impact of globalization from below is

29. See infra notes 225-235 and accompanying text.

created by transnational civil societies, "the thin and uneven public sphere that can coalesce at the global level where individuals interact for common purposes and shape collective life." Additionally, globalization represents four interrelated and seemingly contradictory dimensions.

First, globalization recognizes an increasing interdependence at the world level, where the activities of people in a specific area have repercussions that go beyond local, regional, or national borders. For instance, human rights problems in an interdependent world increasingly cross State borders. Similarly, products that present environmental hazards endanger the health of people in numerous States. This interdependence of markets causes reverberating cross-border explosions when markets go bad, subsequently resulting in mass migration and widespread threats to economic and social rights. Therefore, in order to remedy these situations, human rights advocates must find new ways to gather information and conduct trans-border advocacy.

31. Price, supra note 11, at 627.
33. See TRANSNATIONAL RELATIONS AND WORLD POLITICS 42 (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972) (noting the growing interdependence among industrialized nations and subsequent changes in decision making).
34. See id. (discussing early articulations of the interdependence theory).
Second, globalization results in the fragmentation of States and peoples into autonomous groups and areas. Consequently, as a survival tactic in the increasingly interconnected world, economic, social, and cultural networks form to promote their own collective interests. These associations usually form around common identity markers, such as language, culture, and kinship. Identity groups also make new demands for their own rights to culture, language, and association. Unfortunately, the formation of identity groups may, by design or as an unintentional byproduct, threaten the human rights of other identity groups. For example, the formation of ethnic Hungarian groups in Romania may be perceived as threatening by ethnic Romanians. While the markers chosen by identity groups cross State boundaries, they nonetheless remain within a demarcated territory or population—e.g., Romania or the community of Romanians. The rise of the identity groups is considered as fragmentary because it emphasizes the division of an imagined larger identity—e.g., the people of Romania—into smaller pieces—e.g., ethnic Romanian versus all other minority ethnicity. As a result, human rights advocates become concerned with protecting and promoting the human rights of ethno-national minorities. When tensions between identity

36. See, e.g., Sol Picciotto, Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism, 17 NW. J. INT'L L. & BUS. 1014, 1045 (1996-7) (emphasizing need for greater international coordinating); DAVID KNOKE, POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE 76-81 (1990) (exemplifying black civil rights movement to illustrate organizations that attempt to achieve their own goals).


40. See generally TONE BRIGA, BEING MUSLIM THE BOSNIAN WAY: IDENTITY AND COMMUNITY IN A CENTRAL BOSNIAN VILLAGE (1995) (describing Muslim identity in Bosnia and providing another good illustration of this phenomenon).

41. See, e.g., HELSINKI WATCH, SINCE THE REVOLUTION: HUMAN RIGHTS IN
groups are further manipulated by local power brokers, the situation may erupt into an intrastate conflict, raising a whole host of human rights concerns. In the words of John Keane, a combative, pluralistic civil society may "hemorrhage to death."

Third, globalization somewhat results in the homogenization of the world wherein "instead of differences among territorial units which were mutually exclusive, there is now a uniformity." This process of unification has two branches. The first, which has tremendous implications for human rights advocates, was described as "a growing element of global consciousness in the way the members of global civil society act." Participants in civil societies are progressively agreeing on such norms as diplomatic languages and systems of representation and democratic governance. The domination of liberal norms in international politics dislocates the anarchical social construction of the world and enables emerging social construction based on a more cooperative, problem-solving civil society.


42. See generally Julie Mertus, Kosovo: How Myths and Truths Started a War (1999).


44. See Roninger, supra note 20, at 7.

45. See Kingsbury, supra note 37, at 421 (commenting on some common elements shared by indigenous people). See also Ileana M. Porras, A Latcrit Sensibility Approaches the International: Reflections on Environmental Rights as Third Generation Solidarity Rights, 28 U. Miami Inter-Am. L. Rev. 413, 424 (1997) (arguing for a reassessment of the implications of globalism).

46. Mlinar, supra note 32, at 21 (emphasis added).

47. Lipschutz, supra note 10, at 399.


49. See infra notes 97-100 and accompanying text.

50. See Lipshutz, supra note 10, at 407.
The second branch of unification, which has limited utility for human rights advocates, is the so-called "McDonaldization" of the world. This form of outside, consumer-oriented homogenization does not necessarily minimize the competing cultural perspectives that threaten "to diminish the prospects for developing truly universal standards of human rights and more effective mechanisms for achieving them." On the contrary, forced impositions of outside ideas on local matters may result in retrenchment and reactive nationalism that can lead to human rights disaster for minority groups. Applying the broader trend toward trans-border connections, new reactive nationalism may become "transnationalism" if connected to politicized national entities located in more than one territory. Furthermore, the view of globalization as homogenization minimizes the complex way in which the local interacts with the international. Much of what is described as "local culture" as opposed to "outside ideas" is in fact already a reflection of the global. Conversely, the "local" influences, and is reflected in, the global. Aggressive forms of contemporary nationalism are made within global terms of identity and shaped by local particularities. It is essential that human rights advocates are sensitive to the local conditions that give rise to human

51. See generally BARBER, supra note 13.


56. See generally Janice Gross Stein, Image, Identity, and Conflict Resolution, in MANAGING GLOBAL CHAOS: SOURCES AND RESPONSES TO INTERNATIONAL CONFLICT 93, 95 (Chester A. Crocker et. al. eds., 1996) (discussing creation of enemy identities).
rights abuses and the ways in which local societies adapt and apply human rights norms.\(^{57}\)

A fourth phenomenon of globalization also undercuts homogeneity by producing diversification within territorial communities. As Marshall Berman explains:

Modern environments and experiences cut across all boundaries of geography and ethnicity, of class and nationality, of religion and ideology: in this sense, modernity can be said to unite all mankind. But it is a paradoxical unity, a unity of disunity: it pours us all into a maelstrom of perpetual disintegration and renewal, of struggle and contradiction, of ambiguity and anguish.\(^{58}\)

The easing of border controls in previously restrictive States results in an inward flow of goods, information, ideas, and people—including people with new and challenging ideas on human rights. Exposure to outside beliefs increases the variety of ideas in local spaces. With restrictions on travel relaxed, “[p]eople travel to teach, to learn, to buy, to sell, to kill and to heal. In doing so, they learn new ways of doing things, including new forms of social organization, and they come to see the costs of old ways of doing things.”\(^{59}\) This can have a positive impact for human rights as it may result in increased willingness to accept human rights norms within a local context. At the same time, new human rights concerns may arise where local power structures perceive a threat and fortify themselves against outside influences. In short, a politics of collective identity and participation is emerging amidst diversification and “[in] some places such politics are expressed via nationalism; in others through identities based on civil society.”\(^{60}\)


\(^{58}\) MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY 15 (1982).

\(^{59}\) Lipschutz, supra note 10, at 413.

\(^{60}\) Id. at 398.
Where is the State in this new global geography? Some commentators would like to dispense with the State as the principle unit of analysis in international relations and international law. Ken Booth exemplifies this thinking when he warns:

Sovereignty is disintegrating. States are less able to perform their traditional functions. Global factors increasingly impinge on all decisions made by governments. Identity patterns are becoming more complex, as people assert their local loyalties but want to share in global values and lifestyles... The [metaphor for the] international system which is now developing... is of an egg-box containing the shells of sovereignty; but alongside it a global community omelet is cooking.

Although the global omelet exists, the move away from the State should not be overstated. The State still is active in human rights norm formation and enforcement and interstate activities pertaining to human rights issues still hold great importance. Only the shape, direction, nature and scope of interstate politics have changed. All of these changes have an impact on the ways in which human rights problems are handled and how the progressive realization of international human rights is approached.

The global omelet includes numerous non-State actors, some of which are partially the creation of States, some of which are wholly independent. As Benedict Kingsbury has noted, the State is now operating within an increasingly dense matrix of transnational interactions involving other States, inter-governmental institutions, corporations, and a whole range of cross-border groups and networks that


are slowly evolving into a transnational civil society. Participants in the human rights decision-making process include not only individual States but also individual participants, NGOs, intergovernmental organizations ("IGOs"), and other voluntary associational groups. This means that the formulation and implementation of human rights standards now involves more than the State; they involve many non-State interests as well.

The direction of interstate interaction was altered by an increased emphasis on cross-boundary linkages. For example, non-State actors in State A may interact directly with State and non-State actors in States B and C regardless of the attitude of State A, or whether or not State A actually has relationships with States B and C. In the past, the most important decisions were made with States directly connecting with other States on a one-to-one basis. Today, non-State participants interact directly with each other and with States. In this sense, it is possible to characterize them as "sovereignty free" actors. Their lines of communication may "cross" in unusual and unexpected ways.

The direction of interstate interaction was further altered by an increasing growth of international and regional networks operating at the sub-State level. Importantly, there was a rise in direct contacts


67. See Spanier, supra note 2, at 43-46 (stating that international organizations may be comprised of representatives of States and, thus, their "non-State" nature may be of a different quality than that of non-governmental organizations).

68. See JAMES N. ROSENAU, TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY 36 (1990) (providing examples of "sovereign free" actors as "multinational corporations, ethnic groups, bureaucratic agencies, political parties, subnational governments, transnational societies [and] international organizations").

69. See Julie Mertus, The Liberal State and the National Soul, SOC. & LEGAL THEORY (forthcoming 1999).

between national regulators with similar functional responsibilities, such as between environmental regulatory groups in States A, B, and C. Similarly, there was a rise in direct contacts between non-governmental organizations with similar human rights concerns, such as between women’s human rights groups in States A, B, and C.\(^7\)

Technological changes were instrumental in promoting the kinds of cross-boundary linkages that foster burgeoning transnational social movements. Today, many participants in transnational civil society depend on public communication and discourse. In addition, the realms of public communication and discourse are also a site of transnational civil society.\(^7\) Internet user groups, bulletin boards, and websites have constructed a new arena wherein political and social norms are proposed, debated, and determined.\(^7\) Communication on the Internet creates a community of informed activists who are unbounded by hierarchy or territory—anyone, anywhere can be an activist on the Internet. As Leon Gordenker and Thomas Weiss note, "[e]lectronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogative of nationalism."\(^7\)

---

71. See generally MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (describing emergence of transnational advocacy networks in international politics); Kathryn Sikkink, Human Rights, Principled Issue-Networks, and Sovereignty in Latin America, 47 INT’L ORG. 411 (1993) (describing these organizations as being linked by shared values or principled ideas).


The reaction of transnational participants to the war in Bosnia-Herzegovina illustrates the mobilization of transnational civil society in response to human rights and humanitarian crises. A global network of State and non-State participants watched the crises develop; slowly, they decided whether to take action. The network included transnational professionalized bodies designed to manage, control and respond to such crises, such as the Organization for Security and Cooperation in Europe ("OSCE") and the North Atlantic Treaty Organization ("NATO"). Media and information sources, including the Internet, publicized information about human rights abuses and humanitarian conditions, drawing attention to the widespread use of rape as a strategic weapon of war and to the deliberate targeting of civilian groups based on their ethno-national background. NGOs monitored abuses and suggested action to professionalized international bodies, including the State-based Helsinki Committees and Amnesty International, as well as trans-State and sub-State service organizations such as the United Nations High Commissioner for Refugees ("UNHCR"), the Croatian Red Cross, or Save the Children. Also, NGOs successfully pushed for the issuance of various United Nations Security Council resolutions authorizing various forms of humanitarian and/or military intervention and for the establishment of international war crimes tribunals. States were involved in this response, both as members or supporters of the various types of bodies named above, and as actors responding in their own names. The States that were most effective in addressing human rights questions were the ones that adjusted to the shifting global landscape and, in particular, worked constructively with a range of non-State participants.\(^{75}\)

This simplified rendition of the actors responding to the crisis in the former Yugoslavia serves to illustrate the changing role of the State and the importance of non-State actors. A primary lesson of the new global geography is that transnational civil society has become an increasingly important space in which human rights norms may be given the force of law. Another key lesson, well illustrated by the former Yugoslavia, is that State and non-State participants must work together to promote and protect human rights. In doing so, the

\(^{75}\) In making this observation, the author draws from her two years in Yugoslavia during the war.
methodologies and ideas they have at their disposal were transformed as well. This Article will now address this aspect of the new global geography.

II. TRANSFORMED METHODOLOGIES AND IDEAS: GOVERNANCE AND THE EMERGING RIGHT TO DEMOCRACY

Within the new global geography, State and non-State participants have at their disposal methodologies and ideas for addressing human rights issues that were not at the forefront fifty years ago. This section examines the possibilities and limitations for one central set of ideas and methodologies, namely, those related to governance and the right to democracy. It begins by examining the scope and nature of these concepts, examining both possibilities and limitations, and then redirections for the application of the concepts in line with human rights norms.

A. NATURE AND SCOPE OF GOVERNANCE AND THE RIGHT TO DEMOCRACY

The rise of non-State actors and the changed role of the State are intertwined with a move from “government” to “governance.” There is now a shift from the building of international organizations that generate and administer rules—e.g., a “world” government—to governing relationships that transcend national frontiers without sovereign authority. James Rosenau distinguishes governance from government as follows:

[G]overnment suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. . . . [Governance] embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby

those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.  

Achieving governance thus necessitates more complex and far reaching methods than the mere establishment of government.

Establishing a distinction between “good” and “bad” governance can extend this vision. According to the World Bank:

Good governance is epitomized by predictable, open and enlightened policy making, a bureaucracy imbued with a professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs. Poor governance is characterized by arbitrary policy making, unaccountable bureaucracies, unenforced or unjust legal systems, the abuse of executive power, a civil society unengaged in public life, and widespread corruption.

Another descriptive term for “good governance” is “democratic governance.” More often, however, the term “democratic governance” is used to invoke an electoral focus. In other words, the “legitimization of government authority” using a “mechanism of periodic competitive elections,” supported by “civil rights and liberties”


as well as a "constitutional order dedicated to the rule of law." The "rule of law" in this context differs substantially from "rule by law." Neil Kritz draws out the distinction as follows:

[T]he rule of law does not simply provide yet one more vehicle by which government can wield and abuse its awesome power; to the contrary, it establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules. . . . Adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it involves an evolutionary search for those institutions and processes that will best facilitate authentic stability through justice.

Institution building in the name of fostering the rule of law includes such tactics as programs for improving the competency and independence of the judiciary, designing curricula for the building of a professional and human-rights respecting police force, improving legal education for the preparation of new legal practitioners in a democratic system, and the creation of mechanisms to secure the independence of the bar.

NGOs have actively promoted the establishment of institutions that foster good governance. For instance, some environmental activists have argued in favor of good environmental governance, while at the same time not pushing for the creation of a uniform gov-


82. See id. at 590-92 (discussing the emerging international standards that define the "rule of law").

ernment on the environment.\textsuperscript{84} Good environmental governance would reflect such values as transparency, accountability, and accessibility in a "more or less formalized bundle of rules, roles, and relationships that define the social practice of states and non-state actors interacting in various issue areas [such as the environment], rather than formal interstate organizations with budgets and buildings and authority to apply rules and impose sanctions."\textsuperscript{85} Good governance in the environmental arena need not promote uniformity. On the contrary, it may leave room for the existence of diverse networks addressing specific issues organized around concepts of geography, nationality, and culture.\textsuperscript{86}

As it has evolved from idea into practice, governance has come to embrace two distinct components. The first component is characterized by an increase in the delegation of public functions to particularized bodies operating on the basis of professional technique and with stated goals of greater transparency, accountability, and more inclusive participation.\textsuperscript{87} Environmental regulatory bodies, formed on either an interstate or sub-State level, provide one illustration of groups composed of professionals who open their day-to-day policy deliberations and operations to public comment and scrutiny.\textsuperscript{88} The

\textsuperscript{84} See, e.g., Daniel C. Esty, \textit{Stepping up to the Global Environment Challenge}, 8 FORDHAM ENVTL. L.J. 103 (1996) (stating that without an overarching sovereign to respond to cross-jurisdictional pollution, optimal solutions to environmental concerns are unlikely to be met).


\textsuperscript{86} See \textit{GARETH PORTER & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS} 15-33 (1991) (exploring the diversity of issues and tactics in the environmental arena).

\textsuperscript{87} Ronnie Lipschutz has used the term "heteronomous" to describe these actors: "[they] are differentiated from each other in terms of specialisations: there is not a single network, but many, each fulfilling a different function." Lipschutz, \textit{supra} note 10, at 391 n.9.

\textsuperscript{88} See generally Ken Conca, \textit{Greening the UN: Environmental Organizations and the UN System}, in \textit{NGOS, THE UN & GLOBAL GOVERNANCE} 105 (Thomas G. Weiss & Leon Gordenker eds., 1996); \textit{THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS} (Ronnie D. Lipschutz & Ken Cocca eds., 1993) (as-
second component is characterized by an increasing growth of non-
governmental norm-promoting and norm-monitoring organizations,
and reflects a reaction to the danger posed by the delegation of public
functions to particularized bodies that may not easily be held ac-
countable.\textsuperscript{99} Operating on both transnational and sub-State levels,
these NGOs act as "watch" organizations and push for the realization
of human rights norms.\textsuperscript{90}

In addition to regulating who gets what, when, and how, govern-
ance has a constitutive function.\textsuperscript{91} In this sense, global governance is
conceptualized as multiple and overlapping processes of decision for
defining and distributing authority and power worldwide.\textsuperscript{92} Global
governance structures our world by determining what constitutes
relevant political behavior and which dimensions of collective life
are most significant. By creating the very terrain in which authority
and power are exercised, the constitutive function of governance has
great importance for States and non-State participants who try to ex-

\begin{itemize}
  \item \textsuperscript{89} See generally THOMAS PRINCEN & MATTHIAS FINGER, ENVIRONMENTAL
    NGO\textsc{s} IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 218 (1994)
    (discussing the role of international environmental NGOs); JULIE FISHER, THE
    ROAD FROM RIO: SUSTAINABLE DEVELOPMENT AND THE NON-GOVERNMENTAL
    MOVEMENT IN THE THIRD WORLD (1993) (discussing emergence of non-
governmental organizations as factors in the implementation of sustainable
development).
  \item \textsuperscript{90} See generally Felice D. Gaer, Reality Check: Human Rights NGO\textsc{\texttimes}s Con-
    front Governments at the UN, in NGOS, THE UN & GLOBAL GOVERNANCE 51
    (Thomas G. Weiss & Leon Gordenker eds., 1996) (discussing the most visible
groups, which are Amnesty International, Human Rights Watch, and the Interna-
tional League for Human Rights). There has been, however, a proliferation of hu-
mans rights NGOs since the 1970s. \textit{See generally id.}
  \item \textsuperscript{91} See Keith Krause, Address at the 1997 ACUNS/ASIL Meeting on Global
    Governance at Brown University (July 29, 1997).
  \item \textsuperscript{92} See PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 210
    (1990) (explaining the constitutive nature of this kind of power as "a power over
consciousness itself, through its control of society's reality-forming, as well as the
power to embody the values derived from such reality-forming in legal relations
and to interpret and apply those legal relationships authoritatively.\textsuperscript{93}
\end{itemize}
ert some influence or control over human rights issues. It is the consti-
tutive function of "governance" that provides a source and marker
for the legitimacy of State governments and international organiza-
tions. Legitimacy is central to the enforcement of human rights. Only
human rights processes and bodies perceived as legitimate are
taken seriously; only States perceived as legitimate can enforce hu-
man rights norms successfully.

A key idea arising out of the connection between legitimacy and
governance is the right to democratic governance, an emerging right
that finds its grounding in the words of Article 21 of the Universal
Declaration: "the will of the people shall be the basis of the authority
of government." As Thomas Franck argues, "the radical vision [that
governments should rule with the consent of the governed and that
those governments that act in such a manner will be perceived as le-
gitimate] is rapidly becoming, in our time, a normative rule of the
international system." Franck terms this right as one of "democratic
governance" or a "democratic entitlement," and its supporters vari-
ously argue that this vision of democracy is essential for the legiti-
macy of States, for peace, and for the enforcement of human rights.

93. See Franck, supra note 27, at 50-52.
94. See id. at 50 (discussing the constitutive function of governance and noting
"[l]egitimacy . . . is the quality of the rule, or a system of rules, or a process for
making or interpreting rules that pulls both the rule makers and those addressed by
the rules towards voluntary compliance"). See also David Caron, Governance and
Collective Legitimization in the New World Order, 6 HAGUE Y.B. INT'L L. 29
(1993) (considering fundamental principles of governance). See generally THOMAS
M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) [herein-
after FRANCK, FAIRNESS IN INTERNATIONAL LAW]; THOMAS M. FRANCK, THE

95. See Fernando R. Tesón, The Kantian Theory of International Law, 92
COLUM. L. REV. 53, 81-84 (1992) (asserting the notion that human rights protec-
tions are elementary to the legitimacy of States).
96. W. Michael Reisman, Sovereignty and Human Rights in Contemporary Inter-
97. Universal Declaration of Human Rights, supra note 1, art. 21.
98. Franck, supra note 27, at 46.
99. See generally DEBATING THE DEMOCRATIC PEACE (Michael E. Brown et.
al. eds., 1996) (presenting both sides of the "democratic peace" argument); IMMANUEL
KANT, PERPETUAL PEACE 107-39 (Ted Humphrey trans., 1983) (predicting that democracies are not prone to aggression). But see generally Edward D.
Although the elements of the right to democratic governance are not clearly defined, they appear to encompass both procedural and participation-oriented theories about what constitutes the rule of law in a democracy.\textsuperscript{100} The 1990 Copenhagen Document of the OSCE—then “CSCE”\textsuperscript{101}—underscores the importance of the rule of law for the operation of just societies, declaring that “societies based . . . on the rule of law are prerequisites for . . . the lasting order of peace, security, justice, and cooperation.”\textsuperscript{102} The OSCE also recognizes the underlying substantive nature of rule of law institutions:

\[\text{T}he\ \text{rule\ of\ law\ does\ not\ mean\ merely\ a\ formal\ legality\ which\ assures\ regularity\ and\ consistency\ in\ the\ achievement\ and\ enforcement\ of\ democratic\ order,\ but\ justice\ based\ on\ the\ recognition\ and\ full\ acceptance\ of\ the\ supreme\ value\ of\ the\ human\ personality\ and\ guaranteed\ by\ institutions\ providing\ a\ framework\ for\ its\ fullest\ expression.}\textsuperscript{103}\]

The OSCE includes in its requirements for the rule of law the following: the duty of government to act in compliance with the constitution and the law, accountability of the military and the police to civilian authorities, consideration and adoption of legislation by public procedure, publication of administrative regulations as the condition for their validity, effective means of redress against administrative decisions and the provision of information to the person affected on the remedies available, an independent judiciary, protec-
tion of the independence of legal practitioners, and detailed guarantees in the area of criminal procedure.  

A related component of the right to democratic governance, which is specifically more process-oriented, concerns the electoral process. One wave of collective democratic institution-building focusing on elections began with United Nations supervision of elections in Namibia upon its independence in 1989. The 1990 Paris Charter of the OSCE illustrates this focus, recognizing the right of every individual, without discrimination, "to participate in free and fair elections." The Copenhagen Document of the OSCE spells out the substantive elements of the "right to elections," stating "free elections . . . will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives."  

Another process-based component of the right to democratic governance is the bundle of rights that help to ensure free and open elections, such as association and speech rights. Participation-oriented theorists value these rights as they enable more individuals and groups to take part in political life. Democratic civil society  

104. See id. paras. 5.3, 5.6, 5.8, 5.10-5.12, 5.14-5.19, at 1308-09; see also Kritz, supra note 81, at 590.  
107. Copenhagen Document, supra note 102, para. 5.1, at 1308.  
109. See Kimberle Crenshaw & Gary Peller, The Contradictions of Mainstream Constitutional Theory, 45 UCLA L. REV. 1683, 1700 (1998) (determining whether free speech exists as a democratic non controversial precondition to democratic governance in terms of whether people actually have the ability to meaningfully express themselves on political issues affecting the polity).  
"fosters the citizenship skills and opportunities required for the explicit assertion of popular sovereignty over the apparatus of the representative democratic state." It is through participation in voluntary associations that individuals can gain the political competency and skills needed to influence political agendas.

Process-oriented theorists argue for recognition and enforcement of an independent norm of participation. As Eric Dannenmaier observes:

A true democracy... must... feature transparent and participatory decision-making and a government that is in constant dialogue with its citizens to shape and direct fundamental policies. It is pluralistic decision-making that is at the heart of democracy. . . .

The provisions of the Universal Declaration and its progeny can be read as "embody[ing] rights of free and equal participation in governance." In conjunction with recognizing the importance of fair and open elections, the OSCE has recognized "the importance of pluralism with regard to political organizations."

In any event, whether conceived as a right unto itself or as a bundle of rights, the notion of democratic entitlement has at its core one coherent purpose: to create the opportunity for all persons to assume responsibility for shaping the kind of world in which they live and work. In practice, governance norms reflect values such as change and progress over tradition, growth over distribution, and so forth. These values establish the parameters of our choices as individuals and as members of communities.
All participants in international human rights discourse—weak States, strong States, and non-State participants—have had to answer to these ideas of governance and democratic entitlement. Small and weak States in particular are said to have much to gain from the right to democratic governance. Ideally, norms of democratic participation provide an important role for small and weak States so that they can participate in international society on their own terms, cooperate with each other, and in doing so, modify the conflictual role of socially constructed anarchy. Democratic rights are also said to facilitate order in “anarchical societies” by providing legal norms and mechanisms that prevent powerful States from forcing less powerful States to acquiesce with their interests and values. Rules about democratic participation in transnational civil society, however, are intended to apply to strong as well as weak States. For strong States there exist at least four types of incentives to adhere to norms of democratic governance. First and foremost, the substance of such norms may benefit both strong and weak States, and thus adherence to such norms may serve all States self-interest. Second, following norms of participation may cause a State to avoid transaction costs, reducing the costs of doing business. Third, acquiescing to participatory rules, even if the State does not benefit from those rules, can facilitate international agreements concerning other issues, such as trade, security, and the environment. Finally, assuming that democratic norms have the force of law, the States that comply can avoid

121. See Interview with Jack Donnelly in Hanoi, Vietnam (Apr. 9, 1998).
122. See id.
123. See, e.g., Thomas Buergenthal, CSCE Human Dimension: The Birth of System, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 1990, No. 2, at 163 (Andrew Clapham & Frank Emmert eds., 1992) (noting benefits derived from adhering to or participating in various norms of democratic governance). Buergenthal concludes that those States that participate in norms of democratic governance are thereby able to “to condition their bilateral and multilateral relations in general upon progress in the human dimension sphere.” Id. at 207.
developing reputations as lawbreakers. For all of these reasons, "democratic governance" has become a force that State and non-State actors must reckon with as they participate in the global community.

B. LIMITATIONS AND REDIRECTIONS

Despite the purported advantages for all participants adhering to norms of democratic governance, the idea of global democratic governance is not yet fully defined and realized. Many commentators critique the ways in which the right to democracy is implemented on the State as well as the transnational level. Somewhat paradoxically Janet Lord notes, "it is by now characteristic for discussions concerning the democratic entitlement to refer also to the democratic deficit evident in some international institutions, the very ones which are responsible for advancing democratic principles and for promoting the establishment of democracy within States." As the former Secretary-General of the United Nations has argued, "norms of democratic participation should be extended to the international arena." He added: "If the international community encourages democratic movements within States, it must also attempt to practice democracy itself. Within the international system, all nations—large and small, powerful and weak—should be able to make their voices heard and to participate in decision-making."


125. For a critique of inequities in the application of this norm of "democratic governance, see Mertus, supra note 78.

126. See generally Franck, supra note 27, at 46 (recognizing that democracy is on the way to becoming a global entitlement).


130. Id.
Problems are presented, however, as to how to accomplish international democratization. Exports of democratic governance could backfire. Some observer's fear that the notion of democratic entitlement could "create new opportunities for Western imperialism" and "a continuation of humiliating intervention by States bent on 'civilizing' missions." Richard Falk has long seen great promise in a new jurisprudence of transnational civil society, yet worries that "liberal North American scholars have been, in effect, proclaiming the universal applicability of the U.S. political and legal system, its commitment to constitutionalism, electoral politics, and civil and political rights." Falk suggests that serious questions arise as to whether it is possible to transplant western-style, market-oriented democracy to other countries and international institutions without violating international human rights norms. The idea of democracy in international human rights law, as stated in the Declaration from the 1993 World Conference on Human Rights, is "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems." Whenever States or non-State participants coerce weak governments to accept democratic norms, such actions could run contrary to this notion of democracy.

Both the process of legal transplants by which politically strong States such as the United States persuade weaker States to adopt United States-style laws and institutions and the processes of international law-making, through which transnational bodies determine


132. Franck, supra note 27, at 80 (remarking that States with a long history of "civilizing missions" may not take too kindly to pro-democracy imports).

133. See Falk, New Jurisprudence of Global Civil Society, supra note 30, at 334 (describing ethnocentrism and lack of normative authority in the trend toward democratization).

134. See generally Falk, The Right to Self-Determination Under International Law, supra note 30 (examining the right to self-determination under international law: the coherence of doctrine versus the incoherence of experience).

the content and impact of international law, run the danger of violating democratic norms. Weaker States may feel forced to adopt United States-style laws. The process, however, by which those laws are adopted may not be open to public scrutiny. For example, in Bosnia-Herzegovina, American advisors have played an incredibly forceful "behind the scenes" role in the formulation and adoption by Bosnian entities of United States-style criminal and civil laws. The democratic norms of participation, accountability, and transparency may be violated when smaller and politically marginalized voices are kept out of the decision making process.

Imposing democracy on States through outside force may unsuccessfully affect positive social change. Human rights norms generally only work when they are internalized and not forced on a local body politic by some outside power. One of the most basic lessons


138. See, e.g., FRANCK, FAIRNESS IN INTERNATIONAL LAW, supra note 94, at 480-82. To use one illustration with respect to Bosnia, despite the good intentions of foreign law experts, local women's groups are rarely consulted with respect to changes in criminal law. When they are approached for comments on criminal law, local women's groups often find the tactics of the foreign experts to be inappropriate and alienating. Misreading of cultural cues compounds these difficulties. For example, an American lawyer faxed women's groups draft provisions of the proposed criminal law pertaining to domestic violence. When no one responded from the women's groups, the American lawyer assumed a lack of interest. In reality, however, the women's groups were highly interested and extremely well informed on the subject of domestic violence. They did not respond because they were offended by the American lawyer's failure to approach them in person. "He sent a fax and expected us to respond immediately! Can you believe it!" one women exclaimed, "And we don't even know him!" In the United States, the faxing of messages to strangers and the expectation of immediate responses is the norm, but in Bosnia a face-to-face meeting is required and, ideally, the stranger would make an effort to visit the local office. See Interviews with NGOs, in Bosnia (June-July 1998) [hereinafter Bosnian NGOs Interviews].


of the foreign development world that is applicable to human rights is that any transplants “must support domestically rooted processes of change, not attempt to artificially reproduce pre-selected results.” This corresponds with Franck’s argument that States and processes are unlikely to gain respect and affect compliance if they are not viewed as legitimate. The same reasoning is applicable to non-State entities; in particular, NGOs promoting democratic norms are unlikely to gain local respect unless viewed as legitimate.

Does the above reasoning support abandoning the norms of democracy altogether? No, as long as the norm of democratic entitlement is refined to make it relevant to all societies and not merely as a transplant of outside—e.g., western—values. Dianne Otto suggests a useful way to conceptualize the universality of human rights that could avoid relativist paralysis. Human rights, she argues, should be framed as “a dialogue, in the sense of struggle, rather than a civilizing mission.” In other words, the intersections between global ideas of democracy and local practices and adaptations could be viewed as a process of constant “transformative dialogue,” with neither universalism nor democracy being rejected but particularized. The values of democracy and its meaning for structuring relationships are learned by paying attention “to the ongoing evolution of democratic discourses” in civil society.

Otto’s approach to human rights emphasizes both the relational as well as constitutive aspects of human rights. Rights matter because

---


142. See generally Franck, supra note 27, at 46 (examining notion of democracy as validating governance).


145. Id. at 35.


147. Otto, supra note 131, at 400.
they define relationships. Also, the process of defining and enforcing rights is done in the context of relationships. The process of rights definition and enforcement demonstrates how power is distributed and how relationships are regulated. Focusing on relationships makes particular sense in a globalized world marked by an emerging transnational civil society where the varieties of relationships, the kinds of actors, and the direction of dialogue are complex and changing. It also makes sense in a world transformed by the idea of democratic governance because these concepts have key relational and constitutive components. As explained below, a redirected application of these concepts holds promise for transformed participation in human rights processes.

III. TRANSFORMED PARTICIPATION IN HUMAN RIGHTS DISCOURSE

The net result of the transformed political geography and the transformed ideas and methodology described above is the creation of new opportunities and challenges for realizing human rights. The shift from government to governance, and from a local to transnational civil society is well underway, driven and influenced by non-State actors, non-territorial social and economic forces, and the information technology revolution. The transformations do indeed have the potential to be transformative for human rights advocates. Full application of democratic norms in transnational civil society could result in two sets of structural changes. First, it could open a space for restructuring the international human rights system so that the identity of the system itself is altered by democratic norms in a manner receptive to human rights. Second, through ethical engagement in this process, human rights advocates themselves may change as if forced to question "what kind of individuals [they] would have to become in order to open ourselves to new worlds."

In explaining the potential for positive social transformation, this section uses as an illustration the work of human rights NGOs, even


149. DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE 1 (1993); see also Otto, supra note 144, at 3-4 (employing this same definition of transformation in her examination of human rights universals).
though the lessons are also applicable to other actors participating in transnational civil society. Some of the roles played and activities undertaken by human rights NGOs in transnational civil society are outlined, with an emphasis on NGOs engaged in "legal transplant" projects. The section explains how NGOs may threaten democratic norms even while their existence may promote democratic governance. Finally, the section suggests how NGOs could apply a refined version of Franck's "democratic entitlement," which will improve the ability of NGOs to realize the norms of the Universal Declaration.

A. THE POSITIVE ROLE OF HUMAN RIGHTS NGOs

Transnational civil society is a highly political space for all participants, and human rights NGOs are no exception.150 As Burns Weston noted, "[t]he debate about the nature and content of human rights reflects, after all, a struggle for power and for favored conceptions of the 'good society.'"151 Human rights NGOs act within the space of transnational civil society to push for their visions of a good society. In doing so, they "constitute themselves in an assemble of arrangements so that they can express themselves and their interests."152 NGOs disagree about the nature and scope of human rights and advance contending approaches to public order and scarcity among resources. Nonetheless, "an increasingly interdependent and interpenetrating global community, any human rights orientation that is not genuinely in support of the widest possible shaping and sharing of all values among all human beings is likely to provoke widespread skepticism."153 Thus, the trends toward globalization have pushed legitimacy-seeking human rights NGOs to agreement on central issues.

153. Weston, supra note 151, pg. unavail. online.
To illustrate, the 1993 World Conference on Human Rights brought an array of human rights NGOs to Vienna where many advanced their own specific human rights claims based on their own particularistic visions of a good society. Despite divergence among the tactics and substantive arguments of NGO leadership, the Vienna participants managed to work together to push State leaders to adopt a strong statement reaffirming their commitment to universal human rights. These efforts culminated in the Declaration and Platform for Action, which was signed by the representatives of 171 States. The Vienna Declaration proclaimed:

All human rights are universal, indivisible, interdependent and interrelated ... [and that] ... [w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.  

154

The Vienna Declaration illustrates agreement on central conceptual issues, however NGOs, like States, continue to disagree with each other, and with many States, about how these concepts should be realized.

NGOs participate in debates about the nature of human rights through a variety of tactics that allow them to play vital roles in international human rights lawmaking and law implementing at both the domestic and international levels.  

155

Local NGOs learn strategies and gain substantive information through their participation in international networks and the teachings of international law, which is then employed in efforts to shape the form and operation of domestic
law. At times, key individuals act as transnational entrepreneurs by playing a key and persistent role in pushing for normative change on human rights issues. In other cases, domestic and international groups mobilize around key concerns to put pressure on State and international bodies to adopt and enforce a norm. Increasingly, it is "from the NGOs that new ideas, approaches, and solutions are springing forth" at the local, national, regional, and international levels.

The techniques of human rights NGOs include: the monitoring and surveillance of human rights problems, notification of emergency situations, the dissemination of information about human rights norms and violations to the general public, the exchange of such information with other non-State participants in transnational civil society, the reporting of human rights problems to State and international bodies, and ongoing or ad hoc consultation with governments or international human rights bodies. The prime weapon of human


158. See generally LAURA MACDONALD, SUPPORTING CIVIL SOCIETY: THE POLITICAL ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN CENTRAL AMERICA (1997) (providing examples of this process in Latin America).


The mobilization of shame, that is, the shaming of governments to abide by human rights norms. By investigating and publicizing human rights norms, NGOs are extremely influential in shaping domestic and international agendas on such matters as the environment, landmines, women's human rights, and human rights in general.

NGOs also contribute to the development of international law through the submission of complaints and through international litigation, instituting or intervening in cases as parties, serving as court—or party—appointed experts, testifying as witnesses, or participating in proceedings as amici. The United Nations human rights system offers three treaty-based procedures that provide possibilities for individuals and NGOs to submit petitions directly to the respective committees. International organizations contemplated

161. See James Avery Joyce, Mobilization of Shame, in THE NEW POLITICS OF HUMAN RIGHTS 79 (1978). See, e.g., Phillippe J. Sands, The Environment, Community and International Law, 30 Harv. Int'l L.J. 393, 394 (1989) ("[NGOs] have been active for many years in identifying threats to the environment, in attempting to force governments to take measures to protect the environment, and in signaling breaches of existing international environmental regulations.").

162. See Kal Raustiala, States NGOs, and International Environmental Institutions, 41 Int'l Studies Q. 710 (1997) (explaining that NGOs have become influential in the international realm because of their ability to investigate and publicize human rights violations throughout the world); see also PRINCEN & FINGER, supra note 89.

163. See, e.g., Price, supra note 11, at 615 (discussing role of NGOs in the transnational dispute over landmines).


166. See, e.g., Diane Shelton, The Participation of Non-governmental Organizations in International Judicial Proceedings, 88 Am. J. Int'l L. 611 (1994) (providing study of the increasingly important role played by NGOs in international litigation).

the participation of non-State entities in human rights issues. 

Examples of these include the constitutional mandates of UNESCO, the measures developed by the International Labor Organisation to protect freedom of association, and the International Tribunal for the former Yugoslavia's rules of procedure and evidence. The regional systems for the protection of human rights also provide mechanisms for non-State participation, recognizing in limited cases the ability of non-State participants to raise claims against States.

168. See Lord, supra note 128, at 23-24 (describing the role of non-governmental organizations as constitutionally mandated in the charters and constitutions of certain international organizations).


A separate development within the human rights system concerns extending access to human rights treaty-monitoring bodies for individual non-State participants. Article 71 of the United Nations Charter grants NGOs consultative status with the Economic and Social Council. In recent years, NGOs have read this provision broadly and an increasing number of NGOs are involved in the work of the United Nations. The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the Committee Against Torture all permit NGOs to make formal interventions on human rights matters. Women's human rights groups also earned a role for themselves in the monitoring procedure before the Committee on the Elimination of All Forms of Discrimination Against Women, irrespective of any formal grant of permission.

NGOs have made a substantial impact on the development of international human rights laws and policies. This is achieved by channeling proposals to States through the consultative and observer status of NGOs in treaty bodies and international organizations, multilateral conferences, and international meetings such as preparatory conferences for international conferences. One sign of the impact of human rights NGOs is the reaction of States and international


177. See Christopher Tracy, The Growing Role of Non-governmental Organizations, 89 Am. Soc'y Int'l L. Proc. 413 (1995) (remarks of Donna Sullivan) (distinguishing different types of NGOs working on human rights that fall into the following overlapping categories: the "old timers" who have long enjoyed consultative status with the United Nations, NGOs that participate largely through regional networks, NGOs that act as coordinators for international conferences, and NGOs that view themselves as playing the role of technical advisors to other NGOs and movements). See also Theo van Boven, The Role of Non-Governmental Organizations in International Human Rights Standard Setting: A prerequisite of Democracy, 20 Cal. W. Int'l L. J. 207 (1990) (describing general role of NGOs in the international setting).
bodies to their work. As Donna Sullivan has observed, "[a]s more NGOs have come into the decision-making settings, we have seen greater resort to less formal decision-making processes, in other words, we now see that negotiating [on human rights issues] is occurring in informal sessions to which NGOs have no access. . . ."

To overcome these problems, human rights NGOs actively monitor the workings of State, regional, and international bodies established to address human rights abuses. With respect to the World Conference on Women in Beijing in 1995, NGOs were instrumental in exposing the lack of transparency and accountability in the accreditation process. By checking the norms of democratic participation and ensuring some representation by non-State actors, these transnational NGOs "make democracy safe for the world."

Who, however, will make the work safe for transnational NGOs? Without democratic safeguards, there is no guarantee that any participants in transnational civil society will be democratic. In fact, NGOs often violate democratic norms and these transgressions become particularly troublesome when undemocratic NGOs participate in transnational civil society to affect the enforcement of laws and policies. The undemocratic behavior of NGOs result in many dangers to the conduct of transnational civil law and society.

B. DANGERS OF NGOs THAT VIOLATE DEMOCRATIC NORMS

The operations of NGOs are at times decidedly opaque. NGOs, acting individually and in networks, often wield influence on decision-making "behind closed doors" and without pluralistic participa-

178. See Tracy, supra note 177, at 422-23 (providing description of State reaction to NGOs in various settings).

179. See id. at 423.


181. See id. at 276 (explaining that a faith-based NGO is run by an authoritarian figure in a non-transparent and non-participatory manner becomes troubling when that NGO becomes a force in transnational civil society where it continues to act in an undemocratic manner and, through such transnational work, begins to bring about changes in human rights law and policy).
tion.\textsuperscript{182} For example, an insider group of women developed the agenda of women’s human rights groups for the World Conference on Human Rights in Vienna in 1993.\textsuperscript{183} These leaders sought to promote inclusion and transparency by operating on a “caucus basis” through which they performed their agenda-setting work while simultaneously trying to educate individuals from other NGOs to participate in that process.\textsuperscript{184} Nonetheless, the agenda emerging from this process did not include many minority voices on rights issues, and the selection procedure of both participants and agenda items was not transparent to outsiders.\textsuperscript{185} Moreover, the deals struck between individual representatives of NGOs and State leaders were neither the result of quiet lobbying, nor the product of a visible and accessible process.\textsuperscript{186}

Considerable power is exercised by institutions of and participants in civil society, but there is neither a parliament of civil society, nor a cross-border multiparty electoral process. Accordingly, the institutions of civil society may run against the most basic rule of democracy, namely, to govern with the consent of the governed. For example, international NGOs that have worked over the past ten to twenty years in consultative status with the United Nations are among the NGOs least likely to base their policies on the concerns of a well-defined constituency.\textsuperscript{187} Studies have found that the closer a NGO is to the grassroots, the greater its chances at promoting positive social change because it is more likely to represent a highly motivated and engaged constituency.\textsuperscript{188} Some NGOs in Bosnia, for example, are

\begin{flushleft}
\textsuperscript{182} See Tracy, \textit{supra} note 177, at 421 (discussing the extent of NGOs influence on world conferences).

\textsuperscript{183} See id. at 422-23 (explaining that in the World Conference on Human Rights in Vienna in 1993, NGOs greatly influenced and affected the agenda of the Conference and the focus on particular issues).

\textsuperscript{184} See id.


\textsuperscript{186} See id. at 203-04 (continuing the discussion of the effect of NGO participation and the hidden process that resulted in the ensuing agreement).

\textsuperscript{187} See Tracy, \textit{supra} note 177, at 422-23 (discussing agenda and policies of NGOs that continually participate on a consultative basis with the United Nations).

\textsuperscript{188} See, \textit{e.g.}, M. Castells, \textit{The City and the Grassroots} (1983); Oxhorn,
driven more by opportunism than the goal of working toward an ethnic vision and serving a constituency. Such organizations have only a temporary and superficial impact on social structures.  

In another manner, civil society groups may run afoul of democracy by violating with impunity specific human rights closely connected with democracy promotion. One of the most popular roles for non-governmental actors in democracy promotion in the 1990s is the monitoring of elections. Michael Reisman has observed that the "results of such elections serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government." Few checks exist, however, on the conduct of election monitors. In many cases, untrained volunteers monitor elections and are not equipped to certify elections as fair and free. Despite their best attempts at operating in a fair manner, local NGOs may be funded beyond their capacity for good management. Common

supra note 24, at 267-269 (arguing NGOs that are closely related to its constituency is more likely to have a constructive role in affecting social and political change). See generally Conference: International Human Rights at the Grassroots: Putting International Standards to Work for Our Children, University of Iowa School of Law, Iowa City, IA (Mar. 14-15, 1997) (on file with author).

189. See Ian Smillie, *Service Delivery or Civil Society: Non-governmental Organizations in Bosnia-Herzegovina* (Dec. 1996) [hereinafter Smillie Memorandum] (copy of the manuscript of memorandum sent to non-governmental organizations and donors in Bosnia-Herzegovina, on file with author).


192. See Reisman, supra note 96, at 868-69 (stating that there are very few checks available for election monitoring process).


194. See id. at 1211 (discussing the ability of NGOs to properly monitor and
problems include NGOs censuring their own members, attacking other NGOs viewed as competitors, and blocking all but a few privileged elites from participating in their operations.

Applying Franck's theory of legitimacy, the actions of civil society groups in such cases are likely to be perceived as undemocratic and illegitimate. As explained above, specific provisions of the United Nations Charter, the Universal Declaration, and other human rights instruments can create a normative cannon that embodies "the rights of free and equal participation in governance." Such rights as freedom of opinion and expression and peaceful assembly and association create, in Franck's words, a "net of participatory entitlements." Nonetheless, the specific entitlements enumerated in the Universal Declaration and its progeny pertain generally to the rights of persons vis-à-vis their governments, not to the rights of persons vis-à-vis non-State or transnational participants. As long as international law fails to articulate a clear and consistent position as to the responsibility of non-State actors, such actors will continue to neglect these rights. Although there is growing international jurisprudence to certify the validity of elections).

195. See Franck, supra note 27, at 77 (stating that legitimating power of the community of nations has as its source governments that derive "their just powers from the consent of the governed" and by demonstrating "a decent respect to the opinions of mankind").

196. See id. at 79 (positing that each of these instruments recognizes related specific entitlements as accruing to individual citizens that constitute internationally mandated restraints on governments).

197. See Universal Declaration, supra note 1, art. 19.

198. See id. art. 21.

199. Franck, supra note 27, at 79.

200. See Claudio Grossman & Daniel D. Bradlow, Are We Being Propelled Towards a People-Centered Transnational Legal Order?, 9 AM. U. J. INT'L L. & POL'Y 1, 22 (1993) (arguing that an international legal process that does not allow full participation of non-State actors cannot develop norms that are fully responsive to the needs of the international community); Benedict Kingsbury, Claims By Nonstate Groups in International Law, 25 CORNELL INT'L L.J. 481, 484 (1992) (examining the norms developed in the international legal system to address issues arising in relations between States and non-State groups); P.K. Menon, Individuals as Subjects of International Law, 70 INT'L L. REV. 295, 297 (1992) (discussing broadening of traditional international law doctrine to include individuals as subjects of international law and to confer on them legal personality even if limited to certain purposes).
dence and commentary on non-State actors as subjects of international law, the message to non-State actors in transnational civil society is far from clear. The potential for mischief thus is great.

Another problem with transnational civil society as represented by NGOs is that it is often not strong enough to resist subordination by the State. This problem becomes acute when NGOs assume functions that were once the province of States. Social service delivery and humanitarian relief are examples. "Ultimately," Ian Smillie writes, "there is a question as to how much the 'civil society' discourse and donor infatuation has to do with democracy and human rights, and how much it has to do with finding cheaper and more efficient alternatives to faltering government delivery systems." Once they become a sort of "public service sub-contractor," NGOs "are in continual danger of having their local accountabilities and ethical principles compromised by the financial and discursive capacity of states to shape their agendas." When NGOs are dependent on States, they no longer fulfill their role as non-State counterparts in

201. See, e.g., CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 2-3 (1993) (undertaking an analysis of the position of third parties in international law through an examination of third party claims); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 76 (1986); Janet E. Lord, Taiwan's Right to be Heard by the Security Council, in THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS 133 (Jean-Marie Henckaerts ed., 1996) (arguing that the exclusion of entities other than States from procedural standing before international bodies is an outdated vestige of the traditional doctrine of international law that only States are subjects of international law).

202. See Oxhorn, supra note 24, at 251-52 (contrasting domestic and transnational civil society and stating that the strength of the former lies in its collective capacity to resist subordination to the State).


205. See generally BEYOND UN SUBCONTRACTING: TASK SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOs (Thomas G. Weiss ed., 1998)

206. See Otto, supra note 144, at 41.
transnational civil society. Instead, they form patron-client relationships to improve their positions, thus repeating the old tradition of strong-State/weak-State clientelism.\textsuperscript{207}

For example, the local NGO sector in Bosnia developed “in a distorted way with great attention [by the international community] to service delivery and with very little attention [by the international community] to sustainability beyond the promise of completion dates.”\textsuperscript{208} International donors created a dependency situation through which local NGOs in Bosnia relied upon them for their very existence. These NGOs must actively promote, or at least not contravene, the agendas of their donors: individual States or international bodies composed of States—particularly the United Nations. In the early stages of the donor process in Bosnia, local NGOs were a cheap source of service delivery for foreign donors desiring to provide emergency assistance and psychosocial services. The shift away from emergency and psycho-social projects to income generating projects in the mid-1990s left many Bosnian NGOs in despair as they simply could not continue their programs.\textsuperscript{209} This focus on inexpensive service delivery via local NGOs was at odds with the creation of a strong, pluralistic civil society.\textsuperscript{210} Although the donor process in Bosnia advances the goals of foreigners, it stretches the imagination to claim that it meaningfully advances Bosnian civil society as very little is left behind when donors pull out. Time will tell whether and which foreign promoters of civil society achieved their intended goals in Bosnia. Those likely to be most successful are those that worked with grassroots groups on cultivation of their own agenda.

C. LEGAL TRANSPLANT PROJECTS

Problems with transnational civil society are further illustrated by NGOs at work on “legal transplant” projects. These projects, com-

\begin{itemize}
  \item \textsuperscript{207} See generally NGOs, STATES AND DONORS: TOO CLOSE FOR COMFORT? (David Hulme & Michael Edwards eds., 1997); Roniger, \textit{supra} note 20, at 11-14.
  \item \textsuperscript{208} Memorandum from CARE/CRS/DELPHI to Brenda Cupper (March 19, 1997) (on file with author).
  \item \textsuperscript{209} See Smillie Memorandum, \textit{supra} note 189, at iv; Bosnian NGO Interviews, \textit{supra} note 138.
  \item \textsuperscript{210} See Smillie Memorandum, \textit{supra} note 189, at iv.
\end{itemize}
monly termed "rule of law" endeavors, attempt to transplant laws and, in some cases, entire legal systems from one place to another, usually from a country perceived as "working properly" to one deemed in great need. The first wave of such projects occurred after World War II when the victorious allies rewrote the constitutions of the vanquished to conform to their own ideology. The second wave occurred in the 1960s, a time optimistically labeled the Decade for Development by the United Nations. During this period of decolonialism, "departing colonial powers hastily imposed carbon copies of their own documents [and laws], which evolved from different cultural and historical backgrounds." At the same time, the "law and development" movement, crafted by American academics and private foundations, sent throes of American lawyers abroad, mainly to Latin America and Africa, to train problem-solving legal engineers and promote a modern vision of law as an instrument of

211. See John Reitz, Constitutionalism and the Rule of Law: Theoretical Approaches, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 111, 113 (Robert D. Grey eds., 1997). The "hallmark of the rule of law is the claim most commonly made for it, namely that under the rule of law, the exercise of all power, both public and private, is limited by law." Id. The independence of the judiciary is an important aspect of the rule of law. See, e.g., Ralf Dahrendorf, A Confusion of Powers: Politics and the Rule of Law, 40 MOD. L. REV. 1 (1977) (arguing that the independence of the judiciary may be regarded as the very definition of the rule of law).

212. See, e.g., ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974) (providing the classic examination of legal transplants).


214. See SMILLIE, supra note 204, at 7.

215. See Lis Wiehl, Constitution, Anyone? A New Cottage Industry, N.Y. TIMES, Feb. 2, 1990, at B3 (reporting how countries are turning to United States scholars in part to win foreign aid, but also for their experience in democracy).

216. See JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 14 (1980) (characterizing the American lawyers sent abroad as micro-level problem solvers to macro-level social engineers). Gardner further states that:

Law professor Karl Llewellyn's immodest description was most frequently cited by the law and development movement: "The essence of our craftsmanship lies in skills and wisdom's; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field..."
development policy along capitalist and democratic lines.\textsuperscript{217} The primary goals of these programs were to attempt "to promote U.S.-style legal education and the use of law as a positive instrument of sociopolitical change. . . ."\textsuperscript{218} Within this context, American legal assistance also involved the transfer of American models of the lawyer and the law. The various models for transfer included:

(1) direct transfer of legal institutions and instruments, (2) indirect transfer of legal concepts and models, (3) invited legal transfer, where the initiative and encouragement for the legal transfer process comes from the recipient legal culture, and (4) imposed or uninvited legal transfer at the initiative of the "exporting" legal culture . . . (5) infused—"premeditated" or "planned"—processes of legal transfer, direct or indirect, wherein the initiative comes from the exporting legal culture, [and] (6) more occasional ad hoc borrowing. . . . \textsuperscript{219}

A proliferation of expert-laden think tanks debated, deployed, and dissected these models. Ultimately, it was not an orchestrated political campaign to export any particular western model that influenced local and world politics, but individual experts ability "to employ, articulate, direct and interpret [the models], whatever their [political] attitudes might be."\textsuperscript{220} None of these models worked well at fostering positive social change in Latin America, and, in short, James Gardner concludes, "the history of the law and development movement is rather sad."\textsuperscript{221} It is a history of an attempt to transfer the American legal models that were themselves flawed.

The professional model of the lawyer as pragmatic problem-solver and legal engineer is flawed by its technocratic character and its lack of any coherent ethical or conceptual content. Underlying models of legal thought are in crisis: the prevalent legal instrumentalism is particularly

\textsuperscript{217} We are the trouble shooters."

\textit{Id.}

217. \textit{See generally id.}


219. \textit{See GARDNER, supra note 216, at 21-22.}

220. ROSENAU, \textit{supra} note 68, at 334 (describing these traveling experts as "powerful people," thus emphasizing their inordinate ability to use their own talents of persuasion to change local and global politics).

221. GARDNER, \textit{supra} note 216, at 22.
narrow in its perceptions of law and change interactions, and is vulnerable to authoritarian abuse.\footnote{222. ROSENAU, supra note 68, at 280.}

One of the major shortcomings of the law and development movement was its failure to understand that multiple kinds of law can exist in society and locals act according to their own self-interest. Local people are actors and not mere subjects and they generally turn "American legal assistance to their own ends."\footnote{223. Id. at 287.} Moreover, the law and development movement in Latin America ultimately served to strengthen the hold of anti-democratic elites.\footnote{224. See generally Jose E. Alverez, Promoting the 'Rule of Law' in Latin America: Problems and Prospects, 25 GEO. WASH. J. INT'L L. & ECON. 281 (1991); David M. Trubeck & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. REV. 1062 (1975).}

Whether the lessons of the law and development movement were heard is questionable. The fall of Soviet-dominated States in the late 1980s and early 1990s has ushered in a new wave of legal transplants\footnote{225. See Gianmaria Ajani, By Chance and By Prestige: Legal Transplants in Russia and Eastern Europe, 43 AM. J. COMP. L. 93 (1995) (providing discussion of the history of borrowing of Western legal models in Central and Eastern Europe).} that duplicates wholesale the techniques of earlier times: sending in American lawyers in an attempt to reconstruct the local legal system in a manner more compatible with United States interests.\footnote{226. See generally Sherri Kimmel, For Export Abroad: American Legal Know-How, 20 PA. LAW. 10 (1998); James Podgers, Helping to Keep a Peace: CEELI Volunteers Have Quite Impact on Truce in Former Yugoslavia, A.B.A. J., Sept. 1997, at 94; Molly Stephenson, Real Property Lawyers Promote Reform in Central Europe, 11 PROB. & PROP. 12 (1997); Joan Davidson, America's Impact on Constitutional Change in Eastern Europe, 55 ALB. L. REV. 793 (1992); Charles E. Anderson, Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions, A.B.A. J., June 1990, at 18.} The earlier focus on transporting United States methods of legal education was retained, and a new and bolder emphasis on the wholesale rewriting of local law was added.
The Central and East European Law Initiative ("CEELI") plays a central role in such efforts.\textsuperscript{227} Funded by the United States Agency for International Development ("USAID"), the American Bar Association ("ABA") and other public and private organizations, CEELI supports law reform by sending volunteer lawyers to work with local parliamentarians, judges, law schools, and law offices on-site; organizing workshops, trainings, and exchanges of judges\textsuperscript{225} and lawyers in-country and in the United States; providing legal assessments of draft legislation and of proposed structural changes in the legal system, with a focus on privatization and commercial law. In Bosnia-Herzegovina, a coalition of foreign lawyers, from CEELI, the European Union, OSCE, the United Nations, and the United States Information Agency ("USIA"), have focused on plans for structural changes in the criminal legal field.\textsuperscript{229}

Some commentators contend that these new efforts differ considerably from those employed in the law and development days because the recipient legal culture invites them to enter.\textsuperscript{220} This claim cannot apply to Bosnia-Herzegovina, which is presently run like an undeclared protectorate under the mandate of the Dayton Peace Accord, and volition is negligible in this context. Other Eastern European States also have little choice but to accept an army of foreign legal experts, because international financial institutions and security groups de facto condition preferential treatment based on their presence.\textsuperscript{231} Regardless of inducements by international financiers, local

\begin{flushleft}\textsuperscript{227} See CAROTHERS, supra note 218, at 52-57 (outlining a case study of CEELI efforts in Romania). Other players include the United States funded National Endowment for Democracy ("NDI"), visiting legal experts sent by the United States Information Agency ("USIA"), and the Soros sponsored Open Society Institute ("OSI").

\textsuperscript{228} See id. at 53 (pointing out that programs directed at judges are designed to foster greater judicial independence).

\textsuperscript{229} See, e.g., AMERICAN BAR ASSOCIATION'S CENTRAL AND EAST EUROPEAN LAW INITIATIVE (CEELI), ANNUAL REPORT 1996 (1997); see also Interviews with CEELI representatives in Bosnia-Herzegovina, Romania, Poland, Russia, and Washington D.C. (1996-1998) [hereinafter Interviews with CEELI Representatives].

\textsuperscript{230} See Interviews with CEELI Representatives, supra note 229 (finding CEELI has a policy of not commenting on draft legislation unless it is at the request of the local government and/or other local organizations).

\textsuperscript{231} See id.
actors often believe that they must at least listen to the local American legal experts and adapt what they can to suit local needs. Such needs include: better resources for the legal system, better training for lawyers, a move from out-of-date legal doctrines, and a springboard into the international economy.\footnote{232}

Many legal transplant efforts do not take root in Eastern Europe because “[v]ariations in the political, social and economic values which exist between the two societies make it hard to believe that many legal problems are the same for both except for on a technical level.”\footnote{233} The targets of legal training programs, in particular local judges, are often “either unable or uninterested in making use of external technical assistance.”\footnote{234} Problems faced by judges and lawyers in Eastern Europe are rooted in structural flaws that outside legal experts cannot or do not address: low salaries, especially for judges; inadequate classrooms, courtrooms, and record keeping equipment; “dead wood,” that is, legal officers that simply refuse to change their ways; a lack of tenure for judges, and the inability to get rid of judges that are not able or willing to perform their jobs according to professional standards; a culture of high-level political interference in judicial matters, widespread corruption, and distrust of law; and weak political will regarding implementation of legal reforms.\footnote{235}

While some of today’s sojourners are better trained in the local languages and culture than their counterparts in the 1960s and 1970s, many are not, and their efforts are at best “a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and a simple lack of understanding.”\footnote{236} Energetic traveling American law-

\footnote{232. See Interview with Minister of Justice, Judges, and Lawyers in Bosnia-Herzegovina (July 2, 1998).
234. \textit{See Carothers}, supra note 218, at 54 (describing legal training programs in Romania); Interviews with Lawyers and Judges in Bosnia-Herzegovina, Poland, Romania and Russia (1996-1998) (confirming the general applicability of this remark to other parts of Eastern Europe) [\textit{hereinafter Interviews with Lawyers \\& Judges}].
236. See \textit{Gardner}, supra note 216, at 4 (describing the law and development movement in Latin America).}
yers today, just as in the days of the law and development movement, often fail to see how their good faith efforts can easily serve to legitimate the interests of a regressive status quo. According to Thomas Carothers, "[e]xternal assistance cannot create a will to reform on the part of the relevant authorities; nor can it substitute for a lack of will to reform."237 Even the more self-aware traveling legal experts—and there are many—are likely to find themselves in the position of providing assistance for legal reform in a State where responsible legal authorities are not genuinely committed to reform.238

Another problem with today's legal transplant projects is unrealistic desires to accomplish too much. Many of today's projects foster the development of civil society. While commercial legal transplants may find fertile ground for local adaptation, the civil society rule of law projects are likely to miss their mark. Laws that create the structural underpinnings for civil society—for example, by providing access to the legal process and mechanisms for voting—are necessary for the development of civil society, but they alone do not guarantee the existence of a functioning civil society. Rather, for civil society to work, the community in question must value and view it as legitimate. Rob Atkinson underscores this problem by stating that "[c]reating a civil society by legal fiat is an impossible bootstrap operation, both practically and conceptually. In both liberal political theory and the history of liberal politics, the rule of law is the product of a prior, prelegal commitment to civil society."239 The transplant of legal institutions designed to promote such values as participation and voluntary association will not work in the absence of a prior commitment to such values.240 On the contrary, the local power

237. Carothers, supra note 218, at 56.


240. See Roniger, supra note 20, at 8.

Historically, both the idea and the reality of civil society have preceded the development of democracy. There are points of convergence around pluralism and dispersion of interests and social forces, yet the pluralistic character of civil society neither ensures democracy nor implies a strengthening of the open domain of public life.

Id. Roniger points out that there are societies "that defy the logic of constitutional
structure will reject such a forced imposition as illegitimate and/or misused to serve its own needs. This problem is endemic to the nature of social change and legal transplantation, and the most knowledgeable legal experts will be unable to solve it on their own.

D. CHALLENGES AHEAD

The implications of an undemocratic transnational civil society are far reaching. Undemocratic civil society not only undermines the legitimacy of non-State participants, but also threatens the legitimacy of States and all transnational relationships. Democracy is a “double-sided process” in which the State and civil society “become the condition for each other’s democratic development.” Democracy on the transnational level is good for democracy on the State level and vice versa. Undemocratic civil society at any level of relationship can act as a contagion-squelching participation and legitimacy and thus undermine the potential for positive social change.

The challenge for human rights advocates lies in making transnational civil society democratic in a manner that could lead to positive social change. The answer lies in giving content to Franck’s “democratic entitlement,” shaping it so that it can become transformative democracy. Human rights advocates should take steps to ensure more accountability and transparency for non-State participants, especially when they take on State functions. As a first step, the value of participation requires better articulation. Civil society is underdeveloped democratic legality and exhibit a gap between the formal aspects of public life and the ‘real’ workings of the socio-political arena. . . .” Roniger contends Mediterranean cultures and societies provide good illustrations. See id.


242. HELD, supra note 13, at 286.
where small, participatory, and democratically structured organizations independent of the State are uncommon.243 Further, human rights dialogue in transnational civil society provides a good illustration of underdevelopment when it is dominated by large, exclusive, undemocratic organizations.244

Is it possible to refine the understanding of participation to realize transformative democratic goals? One of the main roadblocks to transformative democracy lies in the reality that transnational civil society reflects disparities in power that are not recognized. Quite simply, well-financed western NGOs are likely to have more power than their poorer and non-western counterparts, and the lack of transparency and accountability in transnational civil society is likely to keep this power unchecked. There is little incentive for powerful NGOs to recognize this misbalance, and less powerful groups can be so marginalized that their protests are not heard. Abdullahi An-Na’im recognizes that “[i]deally participants should feel on an equal footing but, given existing power relations, those in a position to do so might seek ways of redressing the imbalance.”245 Diane Otto goes further in insisting that “transparency of the operations of global networks of power, of exploitation and domination, is a vitally important component of transformative dialogue.”246 Application of democratic principles to transnational civil society would do more than add a dose of pluralism. In addition to opening civil society to more diverse participation, transformative democracy would insist that all actors behave ethically by questioning any privileges they enjoy as a result of structural power imbalances. The most powerful participants of civil society themselves would accept responsibility for developing mechanisms that can enable them to address inequalities in power.

A related element of a transformative strategy is for the more powerful agents of transnational civil society to listen to, value, and incorporate the experiences and wisdom of their less powerful coun-

243. See Price, supra note 11, at 614-16.
244. See id.
246. Otto, supra note 144, at 33.
terparts. Although this is the goal of many human rights advocates, it is rarely carried out in practice. An understanding of a participatory norm of democracy would provide guidance in shaping procedures that would bring non-elites into the debate on human rights on their own terms. As a practical matter, at international meetings discussing human rights norms, non-elite groups "might be empowered to have control of agenda-setting, determine the questions of importance, and run meetings according to procedures they understand." These and similar measures would add meaningful context to the norm of participation.

To be transformative, actors in transnational civil society must commit to exposing the global economic issues that undermine the ability of some voluntary associations to participate in civil society. Many studies indicate that globalization exacerbates economic disparities. For example, globalization has encouraged, and in some cases demanded, privatization of social services. Researchers have demonstrated, for instance, how privatization of key social services in Latin America, such as social security, health care, and housing, has exacerbated exclusion of citizens from community life. For the most part, critiques of such changes in the space of transnational civil society are left to organizations identified as "development" or "economic" groups, and most human rights NGOs have little say in the matter. To fully realize all the goals of the Universal Declaration, however, this circumstance needs to change. Not only does the failure of human rights NGOs to engage in global economic justice issues result in less attention to such matters, but it also exacerbates

247. Id. at 38.
248. For further exposition on these ideas, see Mertus, supra note 78.
249. See id. at 34.
250. See, e.g., id. at 44 ("[T]he egalitarianism of modernity has supported the globalization of capital, which has sponsored reduced state obligations with respect to economic and social rights and deepened the economic disparities between North and South.").
251. See Oxhorn, supra note 24, at 253 (asserting that the concentration of power resources in Latin America has stifled the emergence of healthy civil societies).
the conditions that weaken the ability of individuals and NGOs to participate in any human rights dialogue at all. Without access to health care, housing, or a living wage, individuals and groups are hampered in their ability to associate and voice their concerns. As such, neglect of global justice issues contributes to the democratic deficit in transnational civil society.

A transnational human rights movement is better poised to demand that States behave democratically in promoting and protecting human rights if it strives to act in line with transformative democratic norms. NGOs that are democratic in the sense described in this Article will be perceived as more legitimate when they call for full realization of the goals of international human rights documents and when they act in accordance with such norms. This will provide NGOs with more credible ground on which to demand that international bodies grant them consultative status on all treaty monitoring bodies and that States provide them with a consultative, or at least information-sharing role, on domestic human rights bodies. NGOs need not and cannot take on the role of States in promoting human rights worldwide. Nonetheless, NGOs could do much more in the future if they are perceived as legitimate and, indeed, if they are legitimate. Defining and realizing the elements of a transformative democracy would go a long way toward addressing these concerns.

CONCLUSION

The human rights concerns that motivated the creation of the Universal Declaration are still present. The good news is that the world has changed in ways that can help to give content and effect to the Universal Declaration's principles. As Stephen Gill has suggested, globalization and the development of a transnational civil society:

open[s] up new potential for counter hegemonic and progressive forces to begin to make transnational links, and thereby to insert themselves in a

253. See generally Mertus, supra note 110 (expanding on thesis).

more differentiated, multilateral world order. This would be a way to ad-

vance the process of democratization of an emerging global civil soci-

ety. This might then provide the political space and social possibility to

begin to mobilize for the solution to deep-seated problems of social ine-

quality, intolerance, environmental degradation and the militarization of

the planet.

The new space created by globalization, the rise of transnational
civil society, and the ideas and methodologies represented by gov-

erance and the right to democratic entitlement, provide new oppor-
tunities for non-State participation in human rights standard setting
and enforcement. Non-State actors, in particular human rights NGOs,
have made tremendous advances in their ability to influence the
building of a human rights culture. If they take advantage of the
transformations of space and ideas described above, they can help re-
structure the international human rights system. By doing so, the
identity of the system itself is altered by democratic governance
norms in a manner receptive to human rights.

Saul Mendlovitz and Merav Datan have noted that whether the
emerging transnational norms of governance will be “human rights-
oriented or capital-oriented depends greatly on the nature of partici-
pation of transnational civil society and on our ability to discern
emergent structures and to reinforce those we view as humane.”

Humane governance, in Richard Falk’s terms, “emphasizes the
achievement of comprehensive rights for all peoples on earth.”

Shaping the structures and practices of humane governance “involves
not only the deepening of democracy in State/society settings, but the
outward extensions of democracy to transnational arenas fashioned
by States, corporations, and banks, and the inward extensions of hu-
man rights to villages, rural areas, as well as to schools, homes, the
workplace.” The exact texture of democratic governance has yet to
be defined, but non-State actors are at work on definitions and prac-
tices that could be applied to themselves and to States as well.

255. Gill, supra note 7, at 311.
256. Saul Mendlovitz & Merav Datan, Judge Weeramantry’s Grotian Quest, 7
257. FALK, supra note 7, at 9.
258. Id. at 17.
Therein lies the promise of transnational civil society for the future of human rights.