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Doing Democracy "Differently": The Transformative Potential of Human Rights NGOs in Transnational Civil Society

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DOING DEMOCRACY 'DIFFERENTLY': THE TRANSFORMATIVE POTENTIAL OF HUMAN RIGHTS NGOs IN TRANSNATIONAL CIVIL SOCIETY

Julie Mertus[*]

It is time to give a different content to 'democracy', to retool it so that it can work for and not against the progressive transformation of communities. Breaking out of the present limited vision of representative democracy in the international community of states entails both an expansion of its terrain and an improvement of its techniques.[1] Doing democracy differently does not mean duplicating state structures at the peripheries – that is, simply shifting them above and below the state. Rather, to do democracy differently entails widening its terrain to include the space known as transnational civil society and improving the techniques of the democratic enterprise to promote enriched norms of participation, transparency and accountability.[2]

The emphasis of any democratic enterprise is necessarily shaped by circumstances of time and place. My focus is on the transnational civil society[3] created in the wake of post-Cold War globalization and on its interaction with those who are marginalized and relatively powerless in the global order. Paul Hirst reminds us that all of the major political doctrines that have claimed to be democratic – classic liberalism, democratic socialism and corporatism – have shared a conception of the state as the central and compulsory organization that

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[1] Tony Wright, *Reinventing Democracy?*, in REINVENTING DEMOCRACY 13 (Paul Hirst & Sunil Khilnani eds., 1996).

[2] These norms have become recognized as essential elements of several areas of international law and practice. *See* Gregory Fox, *Remarks*, in Karen Ann Widess, *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L. L. PROC. 356, 360 (1997).

[3] *See, e.g.*, Jean Cohen & Andrew Arato, *The Contemporary Revival of Civil Society*, in CIVIL SOCIETY & POLITICAL THEORY (1992); Victor Pérez-Diaz, *The Possibility of Civil Society: Traditions, Character & Challenges*, in CIVIL SOCIETY: THEORY, HISTORY, COMPARISON (1995); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 378 (1998); Benedict Kingsbury, *Indigenous Peoples, in International Law: A Constructivist Approach To the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998) [hereafter Kingsbury, *Indigenous Peoples*].

alone determines the forms of governance within a definite territory.[4]
And yet the recent rush/push towards economic globalization has
altered both the state and its relationship to wider society and
transformed the nature and character of nonstate actors. The ferment
of democracy from the extremities – democracy from below -- is the
focus of this analysis.

This essay is divided into three parts. First, I outline the main
elements of the post-Cold War developments relating to transnational
civil society and their relationship to globalization, with particular
emphasis on the opening of participation for those who are otherwise
marginalized by the state-based system. Transnational civil society
has the potential to create a 'setting of settings'[5] in which agendas for
progressive change can be worked out, tested and applied. However,
as the second section of my work explains, a counter-democratic
tension limits the role that human rights NGOs currently play in
transnational civil society. Transnational human rights NGOs mainly
do democracy from the top-down, failing to operate according to
norms of participation, transparency and accountability. The final
section of my work suggests an alternative, bottom-up approach. I
argue that we need to do democracy differently if human rights NGOs
in transnational civil society are to fulfill their promise of representing
unheard voices and promoting progressive values across borders.[6]

I. NEW OPENINGS FOR DEMOCRATIC PARTICIPATION IN TRANSNATIONAL CIVIL SOCIETY

Transnational 'civil society' refers to the space of uncoerced
human association and also the set of relational networks that fill this
space.[7] These voluntary associations are constituted by and interact
through transboundary networks[8] created for particular political, social

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[4] Paul Q. Hirst, *Democracy and Civil Society,* in REINVENTING DEMOCRACY, *supra* note 1, at 13
[hereafter Paul Hirst, *Democracy and Civil Society*].
[5] Michael Walzer, *The Civil Society Argument,* in Dimensions Of Radical Democracy 89, 98 (C.
Mouffe, ed., 1992) [hereafter Walzer, *The Civil Society Argument*].
[6] *See* Richard Falk, *The Global Promise of Social Movements: Explorations on the Edge of Time,*
12 ALTERNATIVES 173 (1987).
[7] Walzer, *The Civil Society Argument, supra* note 5, at 89. *See also* Cohen and Arato, *supra* note 3,
at 38.
[8] *See* Ronald Inglehardt, *Modernization And Postmoderization: Culture, Economic And Political
Change,* 43 SOCIETIES 188 (1997) (importance of organizational networks); Perez-Diaz, *supra* note 3, at

and cultural purposes.[9]   Transnational civil society includes such entities as nongovernmental advocacy organizations (including human rights 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.[10]   Ideally, the associational life of transnational civil society is open and encouraging of diverse participation.[11]

The recent rise of transnational civil society and the increasing importance of nonstate actors[12] is a product of the complex

90 (noting emerging economic, social and informational networks); Timothy W. Luke, *New World Order or Neo-World Orders: Power, Politics and Ideology in Informationalizing Glocalities in* GLOBAL MODERNITIES 91-107 (Mike Featherstone et. al. eds., 1995) (discussing emerging local/global "webs"); Patricia Chilton, *Mechanics of Change: Social Movements, Transnational Coalitions, and the Transformation Profess in Eastern Europe in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 225 (Thomas Risse-Kappen ed., 1995) (explaining how "transnationalism takes account of coalitions of non-state actors across national borders"); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism,* 17 NW. J. INT'L L. & BUS. 1014 (1996-97) (networks in international economic systems contributing to fragmentation).   For an excellent case study of the impact of international networks on global politics, consider the nuclear freeze campaign. *See* COALITIONS & POLITICAL MOVEMENTS: THE LESSONS OF THE NUCLEAR FREEZE (Thomas R. Rochon & David S. Meyer eds., 1997).
    [9] Ronnie D. Lipschutz, *Reconstructing World Politics: the Emergence of Global Civil Society,* 21 MILLENNIUM: J. OF INT'L STUDIES 389, 393 (1992) (emphasizing that this concept of civil society refers to something broader than social networks).
    [10] For an overview with respect to the human rights movement, *see* HENRY J. STEINER, DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT (1991). One debate that will not be resolved here is whether business nongovernmental organizations should be considered part of civil society. Hegel and his followers define civil society as that which is apart from the state. Many theorists writing today see civil society as the space "mediating between private markets and 'government'. BENJAMIN R. BARBER, JIHAD VS. MCWORLD 285 (1995). A more nuanced view is 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* Michael Walzer, *A Better Vision: The Idea of Civil Society: A Path to Social Reconstruction,* DISSENT 293, 300 (Spring 1996). *See also* ROBERT HEILBRONER, BEYOND THE VEIL OF ECONOMICS: ESSAYS IN WORLDLY PHILOSOPHY 13-34 (1988) (proposing economic sphere as civil society); DAVID HELD, MODELS OF DEMOCRACY 300 (1987) (arguing that democratic civil society is incompatible with unrestricted private ownership).
    [11] A primary work supporting this thesis is ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY (1993). Joshua Cohen and Joel Rogers have also suggested that straightening voluntary associations could rejuvenate the democratic state. *See* Joshua Cohen and Joel Rogers, *Associations and Democracy, in* I ASSOCIATIONS AND DEMOCRACY: THE REAL UTOPIAS PROJECT 1-110 (Erik Olin Wright ed., 1995). *But see* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1982) (underscoring the difficulties and contradictions with collective action).
    [12] *See* John Spanier, *Who are the 'Non-State Actors'? in* THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS 43 (William C. Olson ed., 1991); Benedict Kingsbury, *Whose International Law? Sovereignty and Non-State Groups,* 88 AM. SOC'Y INTL'L. L. PROC. 1 (1994). Note that this essay uses the term nonstate actor to refer to an actor that is not answerable to a state and Rosalyn Higgins' term

phenomenon known as globalization.   Richard Falk's distinction
between 'globalization from above' and 'globalization from below'
identifies two interrelated tendencies: the restructuring of the world
economy on a regional and global scale through the agency of
transnational corporations 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.[13]
Both globalization from above and globalization from below are not
'natural', 'private' or 'apolitical' phenomena, but rather are political,
public and contestable processes that are constituted through the
actions of people.[14]   The impact of globalization from above and
below is the creation of a transnational civil society, a space beyond
the boundaries of states where individuals and groups interact and
shape collective life.[15]

Globalization opens spaces for transnational civil society. *First*,
globalization refers to increasing interdependence at the world level,
wherein the activities of people in specific areas have repercussions
that move beyond local, regional or national borders. Human rights
problems in an interdependent world increasingly cross state borders.[16]
Thus, for example, products that present environmental hazards
endanger the health of people in numerous states.[17]   The
interdependence of markets can result in reverberating cross-border
explosions when one or a few markets falter, resulting in mass
migration and widespread threats to economic and social rights. In
order to find solutions to such issues, human rights NGOs working at

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'participants' to refer to all to whom international law is applicable. *See* ROSALYN HIGGINS, PROBLEMS
AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 94 (1994).
    [13] Richard Falk, *The Right to Self-Determination Under International Law: The Coherence of
Doctrine Versus the Incoherence of Experience*, in SELF-DETERMINATION AND SELF-ADMINISTRATION:
A SOURCEBOOK 335 (W. Danspeckgruber ed., 1997).
    [14] *See* Anne Orford & Jennifer Beard, *Making the State Safe for the Market: The World Bank's
World Development Report 1997*, 22 MELBOURNE U. L. REV. 195, 216 (1998).
    [15] Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52
INT'L ORG. 613, 627 (1998).
    [16] For early articulations of the interdependence theory, *see* TRANSNATIONAL RELATIONS AND
WORLD POLITICS (Robert O. Keohane & Joseph S. Nye, Jr. ed., 1972).
    [17] Alexandre Kiss, *The International Protection of the Environment*, in INTERNATIONAL LAW:
CLASSIC & CONTEMPORARY READINGS (Charlotte Ku & Paul Diehl eds., 1998); Edith Brown Weiss,
Planetary Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES & ACTION (Richard Claude &
Burns Weston eds., 1992); Pérez-Diaz, *supra* note 3, at 90; *see* generally, Hugh J. Marbury, *Hazardous
Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L.
251 (1995).

all levels of communities must find new ways to gather information and conduct transborder advocacy.

Second, globalization results in the fragmentation of states and peoples into autonomous groups and areas. In a globalized world, homogeneity is no longer a feasible expectation. The club of globalization encourages and in some cases even demands that minority cultures form their own economic, social and cultural networks to preserve and promote their own collective interests.[18] Associations also form around identity markers such as language, culture and kinship.[19] Identity groups place increased demands for their own rights to culture, language, and association.[20] While the ability of minority cultures to assert their interests is a positive development, the formation of identity groups may, by design or as an unintentional by-product, threaten the human rights of other identity groups. The markers chosen by identity groups cross state boundaries, but within a demarcated territory or population.[21] The rise of identity groups is experienced as fragmentary because it emphasizes the division of an imagined larger identity into smaller pieces. Fragmentation may serve to secure identity in a way that promotes the ability of minority cultures to work for justice. Yet when tensions between identity groups are manipulated by local power brokers,[22] a combative, pluralistic civil society may drain itself of life. Transnational civil society needs to recognize both the positive and negative potential of fragmentation.

Third, globalization also results in some degree of homogenization[23] and uniformity.[24] Two branches to this process of

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[18] *See, e.g.*, Sol Picciotto, *supra* note 8, at 1014; DAVID KNOKE, POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE 76-81 (1990).

[19] *See* generally examples in HUGH POULTON & SUHA TAJI-TAROUKI, MUSLIM IDENTITY AND THE BALKAN STATE (1997); Benedict Kingsbury, *Indigenous Peoples, supra* note 3, at 414.

[20] *See* David S. Meyer & Sidney Tarrow, *A Movement Society: Contentious Politics for a New Century, in* THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 1, 18 (David S. Meyer and Sidney Tarrow ed., 1998).

[21] Muslim identity in Bosnia provides a good illustration of these phenomena. *See* TONE BRIGA, BEING MUSLIM THE BOSNIAN WAY: IDENTITY AND COMMUNITY IN A CENTRAL BOSNIAN VILLAGE (1995).

[22] *See* JULIE MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999).

[23] *See* Benedict Kingsbury , *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 421 (1994) [hereafter Kingsbury, *The Concept of Compliance*]; *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).

unification can be identified.   The first, with its tremendous implications for participation in civil society, has been described as "a growing element of global consciousness in the way the members of global civil society act".[25]   Participants in transnational civil society are progressively agreeing on norms for their own participation[26], making possible emerging social constructions based on a more cooperative, problem-solving civil society.[27]   For example, general agreement on norms for participation in human rights discourse have led to increased participation in international problem-solving of nongovernmental organizations with similar human rights concerns, as in the example of women's human rights groups operating in several states.[28]   At the same time, however, this unification ignores differences in participation resources and threatens to silence alternative methods of working toward progressive social transformations. Transnational civil society can help to guard against the negative aspects of unification of participatory norms by permitting alternative avenues for participation by those with outside methodologies.

The second branch of unification is the so-called McDonaldization of the world.[29]   The forced imposition of outside ideas on local circumstances may result in the loss of culture, languages and ideas. Local nationalisms may be an important source of resistance to McDonaldization. Reflecting the broader trend toward trans-border connections, these new reactive nationalisms may become 'transnationalisms' as they connect politicized national entities located in more than one territory.[30] These connections may represent positive developments as they provide increased opportunities for traditionally marginalized actors to participate locally and in transnational civil

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[24] Zdravko Mlinar, *Individuation and Globalization: The Transformation of Territorial Social Organization, in* GLOBALIZATION AND TERRITORIAL IDENTITIES 15, 20-22 (Zdravko Mlinar ed., 1992).

[25] Lipschutz, *supra* note 9, at 399.

[26] *See* Albert Bergesen, *Turning World System Theory on Its Head, in* GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY 76 (Mike Featherstone ed., 1990).

[27] *See* Lipschutz, *supra* note 9, at 407.

[28] *See generally* MARGARET KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL RELATIONS (1998); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America,* 47 INT'L ORG. 411 (1993).

[29] *See* Barber, *supra* note 10.

[30] *See* Luis Eduardo Guarnizo & Michael Peter Smith, *The Location of Transnationalism, in* TRANSNATIONALISM FROM BELOW 3, 11 (Luis Eduardo Guarnizo & Michael Peter Smith eds., 1998).

society. In some cases, however, local resistance may take the form of retrenchment of progressive social norms and reactive nationalism, which can spell disaster for minority groups.[31] Transnational civil society must remember that local resistance may have an underside.

A *fourth* phenomenon of globalization undercuts homogeneity: globalization also produces 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 modernity, a unity of disunity: it pours us into a maelstrom of perpetual disintegration and renewal, of struggle and contradiction, of ambiguity and anguish.[32]

The easing of border controls in previously restrictive states bowing to the pressures of globalization results in an inward flow of goods, information, ideas and people – including people with new and challenging ideas on human rights. Exposure to alternative ideas 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".[33] In transnational civil society, learning through increased interaction goes both ways. Those living in previously closed states may benefit from the new ideas being brought in and from the process of interaction; the travelers arriving in previously closed states may benefit from the new ideas they find there and discover through the process of interaction. At the same time, if the ideas on either side are regressive, or the experience of exchange regressive, a negative transformation could occur as a result.

In sum then, those who are otherwise marginalized by the state-based system have an interest in the spaces created by globalization in their local and trans-boundary context. Where a strong and functioning civil society exists, diverse voices are included and civil

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[31] *See* Mertus, *supra* note 22.
[32] MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR 15 (1982).
[33] Lipschutz, *supra* note 9, at 413.

society actors, taken together, demand and oversee legal constraints on state and corporate power and the accountability of state and corporate actors.[34]   As Stephen Gill has suggested, globalization and the development of a transnational civil society

> [O]pen[s] up new potential for counterhegemonic and progressive forces to begin to make transnational links, and thereby to insert themselves in a more differentiated, multilateral world order. This would be a way to advance the process of democratization of an emerging global civil society.   This might then provide the political space and social possibility to begin to mobilize for the solution to deep-seated problems . . . .[35]

In this sense, transnational civil society has the potential to create a space in which agendas for progressive change can be worked out, tested and applied.   In the next section, I explore how a counter-democratic tension limits the role human rights NGOs currently play in transnational civil society.

II. THE ROLE OF HUMAN RIGHTS NONGOVERNMENTAL ORGANIZATIONS

Transnational NGOs mainly do democracy from the top-down, failing to operate according to norms of participation, transparency and accountability.   This section explores this phenomenon with specific attention to transnational human rights NGOs, but the observations made can be applied generally to other nonstate actors in transnational civil society. The rise of transnational civil society and nonstate actors presents a paradox for social change advocates.   On the one hand, transnational civil society can potentially raise and address the concerns of unheard voices.   Indeed, the very existence of a robust civil society may be seen as a precondition to the realization of decidedly progressive democratic norms: transparency, accountability and participation.[36]   On the other hand, NGOs in transnational civil society often act in a manner that silences marginalized voices and

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[34] *See generally*, DAVID HELD, MODELS OF DEMOCRACY (1987).
[35] Stephen Gill, *Reflections on Global Order and Sociohistorical Time*, 16 ALTERNATIVES 311, 311 (1991).
[36] *See* Cohen & Arato, *supra* note 3, at 80 (civil society as "locus of democratization").

undermines democratic principles of transparency, accountability and participation.

Transnational NGOs have enormous political significance at all levels. On the one hand, NGO 'success' can be measured at the governmental level by examining NGOs' imprint on governmental policies. For example, NGOs may set the agenda for legislative debate, propose legislative language and suggest state actions. More ephemeral is NGO success beyond state behavior that is at the level of civil society. But through their actions many NGOs attempt to do much more than write laws; they seek to transform society at all levels to be more in tune with the values of justice. Peace activists "aim not only to convince governments to stop making war but also to create more peaceful societies".[37] Women's groups seek more than state laws prohibiting gender discrimination. They aim to chip away at patriarchal attitudes and imbedded structures that serve to perpetuate the subordination of women.[38] Similarly, international environmental NGOs attempt to influence more than the operations of specific international organizations and the creation of international conventions. They seek to inculcate an 'environmental sensibility' in deliberations at the individual, organizational, corporate, governmental, and interstate levels to shape world collective life.[39] By affecting the 'societal mood,' 'cultural drift' or public orientation, the impact of transnational human rights NGOs can influence both top-down and bottom-up approaches to social change.[40] It is for this reason that nonparticipatory, unaccountable and nontransparent NGOs are particularly detrimental to the potential for bottom-up movements: The multi-directional ways in which agendas at all levels of society are influenced by NGOs goes unchecked.

The processes by which many transnational human rights NGOs operate threaten local autonomy. There is the potential for the interplay between transnational and local to improve associational life

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[37] Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics,* 47 WORLD POLITICS 311, 321 (1995). *See also* PAUL JOSEPH, PEACE POLITICS 147-51 (1993).

[38] *See* Joseph Gusfield, *Social Movements and Social Change: Perspectives on Linearity and Fluidity, in* RESEARCH IN SOCIAL MOVEMENTS: CONFLICTS AND CHANGE 326 (Louis Kriesberg ed., 1981).

[39] Wapner, *supra* note 37, at 121.

[40] *See* Herbert Blumer, *Social Movements, in* STUDIES IN SOCIAL MOVEMENTS: A SOCIAL PSYCHOLOGICAL PERSPECTIVE (Barry McLaughlin ed., 1969).

at both the local and transnational levels by bringing together actors that do not ordinarily meet.[41] In a two-directional process, local NGOs learn strategies and substantive information from their participation that can be used locally, in efforts to shape the form and operation of domestic law and practice, and international NGOs learn strategies and information from local NGOs.[42] But often transnational human rights NGOs' interaction with local communities amounts to little more than using them for information gathering assistance (i.e., the foreign NGO gathers information for later distribution in Geneva and New York that is not even shared with local counterparts). Heavy-handed transnational human rights NGOs foist their agenda on their local counterparts, irrespective of its relevance for locals.[43] While locals are often able to adapt NGO assistance in a manner that suits their needs, an enormous power imbalance renders independent decision-making impossible.[44]

A transnational human rights NGO concerned with democracy from the bottom up would focus on the empowerment of local communities. For many transnational human rights NGOs, however, local empowerment is a mere by-product of the work, not an intended goal. The prime tactic of many human rights NGOs is directed to the mobilization of shame of governments[45], instead of empowerment of people. The techniques of transnational 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 their violations to the general public; the exchange of such information with other nonstate participants in transnational civil society; the reporting of human rights problems to state and international bodies; and ongoing or *ad hoc* consultation with

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[41] Wapner, *supra* note 37, at 127.

[42] *See* Nira Broner Worcman, *Local Groups Think Globally*, 95 TECHNOLOGY REV., Oct. 1992, at 36.

[43] For example, traditionally marginalized women's groups have been known to organize conferences on domestic violence in countries where the top concern of women is not violence but privatization. *See* Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER & L. 369 (1998).

[44] *See* Julie Mertus, *The Liberal State vs. The National Soul*, 8 SOC. & LEGAL STUD. 121 (1999).

[45] *See*, e.g., *Mobilization of Shame*, in JAMES AVERY JOYCE, THE NEW POLITICS OF HUMAN RIGHTS 79 (1978).

governments or international human rights bodies.[46]   Through the investigation and publicizing of human rights norms, transnational human rights NGOs have been extremely influential in shaping domestic and international agendas on such matters as the protection of the environment[47], the banning of landmines[48], the promotion of women's human rights[49] and human rights in general.[50]   Yet such influence often has been achieved with little attention to local empowerment and, in some cases, despite the alternative goals of local actors.[51]

Marginalized voices have difficulty penetrating the agenda of transnational human rights NGOs when their operations are not transparent and participatory. The many ways in which NGOs, acting individually and in networks, wield influence on decision-making often occurs 'behind closed doors' and without pluralistic participation. The agenda of women's human rights groups for the World Conference on Human Rights in Vienna in 1993, for example, was developed largely by women from influential Western institutions. These leaders sought to promote inclusion and transparency by operating on a 'caucus basis' through which they did their agenda-setting work while simultaneously trying to co-opt individuals from

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[46] *See* Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45 (1995). *See generally* Laurie S. Wiseberg, *Human Rights Nongovernmental Organizations, in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 372-84 (Richard Pierre Clause & Burns Weston eds., 2ᵈ ed. 1992); PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS (Peter Willetts ed., 1982); A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI-KENT L. REV. 61 (1992).

[47] *See* Kal Raustiala, *States NGOs, and International Environmental Institutions*, 41 INT'L STUD. Q. 710 (1997); THOMAS PRINCEN AND MATTHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS (1994).

[48] *See* Richard Price, *supra* note 15, at 613.

[49] *See* Martha Alter Chen, *Engendering World Conferences: The International Women's Movement and the UN, in* NGOS, THE UN & GLOBAL GOVERNANCE 139 (Thomas G. Weiss & Leon Gordenker eds., 1996).

[50] Felice D. Gaer, *Reality Check: Human Rights NGOs Confront Governments at the UN, in* NGOS, THE UN & GLOBAL GOVERNANCE *supra* note 49, at 51.

[51] For example, some well-intentioned but misguided women's organizations have pushed women's rights issues in new governments in Central and Eastern Europe, funding such things as the drafting of 'Western-model' legislation and the insertion of Eastern Europe into international instruments and meetings pertaining to women such as the Declaration and Platform for Action of the Fourth United Nations World Conference for Women in Beijing in 1995. These actions had little impact on the empowerment of grassroots groups in Eastern Europe and indeed ran contrary to many grassroots group's goals, which tended to focus on local economic and social issues instead of formal legislation and international meetings.

other NGOs to participate in the process in order to make it more representative.[52] 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'.[53]   Moreover, the deals eventually struck between individual representatives of NGOs and state leaders were the result of quiet lobbying, not the product of a visible and accessible process. To some extent, this is the way the UN 'works' and the issue is not just about how NGOs are internally organized, but also about the way that NGOs are expected to operate or fit into existing UN practices. Nonetheless, it must be remembered that powerful NGOs designed the 'backdoor process' as the means of participation and they therefore have little incentive to change it.

Most transnational human rights NGOs have failed to adopt bottom-up styles of democracy. International NGOs that have worked over the past ten to twenty years in consultative status with the United Nations, for example, are among the NGOs least likely to base their policies on the concerns of a highly participatory constituency.[54] Studies have found that the closer an NGO is to the grass-roots level, the greater its chances at promoting positive social change because it is more likely to represent a highly motivated and engaged constituency.[55] The direction of change in such a situation is bottom up because locals with ties to the grassroots drive the NGO. On the other hand, the direction of change promoted by a NGO with no tie to the grassroots is top-down and, consequently, ineffective at promoting long-lasting transformative change. The experience of NGO work in Bosnia, for example, reveals organizations driven more by opportunism than the goal of working toward some ethical vision and representing the concerns of a constituency. Such organizations have only a temporary and superficial impact on social structures.[56]

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[52] Donna Sullivan, *Remarks*, in *The Growing Role of Nongovernmental Organizations*, 89 AM. SOC'Y INT'L L. PROC. 413 (1995).

[53] Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y. U. J. INT'L & POL. 201 (1994).

[54] Sullivan, *supra* note 52.

[55] *See* M. CASTELLS, THE CITY AND THE GRASSROOTS (1983); Philip Oxhorn, *Controlled Inclusion to Coerced Marginalization*, in CIVIL SOCIETY: THEORY, HISTORY AND COMPARISON 250, 267-69 (John Hall ed., 1995).

[56] *See* Ian Smillie, Service Delivery or Civil Society: Nongovernmental Organizations in Bosnia-Herzegovina (December 1996) (manuscript of memorandum sent to nongovernmental organizations and

The institutionalized public sphere of transnational civil society is not truly open to all voices and some interlocutors remain muted in their attempt to be heard. In such cases, subordinated groups may create their own fora for expression – in Nancy Fraser's terms, - "subaltern counterpublics", or "parallel discursive areas where members of the subordinated social groups invent and circulate counter discourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs".[57] Where traditionally marginalized actors may fear retribution for exercising their voice, they may create coded means of expression, often as a form of resistance.[58] Groups with little contact with marginalized actors, even if well intentioned, are not equipped to read the hidden transcripts of their sometimes-coded expression.[59] Thus, even the best attempts of human rights NGOs to be inclusive may remain long on aspiration, yet fall short in application. For example, large outside NGOs could not understand why a grassroots woman's literacy group in Has, a very traditional, rural part of Kosovo, continually refused to accept funding for an automobile and to otherwise operate like a Western woman's group. The activists from Has preferred to hitch rides with men as a way of providing them with the feeling that they played an active role in literacy projects. Acceptance of large amounts of money from any organization would have engendered jealously and suspicion among male family members who had the effective power to prevent women and girls from attending literacy workshops.[60]

Human rights NGOs run afoul of democratic norms in another manner: they may violate with impunity specific human rights closely

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donors in Bosnia-Herzegovina) [hereafter, Smillie memorandum]. The verdict still is out on social change experiments in Bosnia, but early work of the author regarding women's rights organizations in Bosnia tends to support this thesis. *See* JULIE MERTUS WITH JUDY BENJAMIN, HUMANITARIAN ASSISTANCE AND PROTECTION: THE GENDER CONNECTION (1999).

[57] Nancy Fraser, *Rethinking the Public Sphere: a Contribution to the Critique of Actually Existing Democracy, in* POSTMODERNISM AND THE RE-READING OF MODERNITY 210 (Francis Barker et. al. eds., 1992).

[58] *Cf.* JAMES C. SCOTT, DOMINATION AND THE ART OF RESISTANCE: HIDDEN TRANSCRIPTS (1990).

[59] Julie Mertus, *The Liberal State and the National Soul, supra* note 44.

[60] *See* Julie Mertus, *Women in Kosovo: Contested Terrains – The Role of National Identity in Shaping and Challenging Gender Identity, in* GENDER POLITICS IN THE WESTERN BALKANS: WOMEN AND SOCIETY IN YUGOSLAVIA AND THE YUGOSLAV SUCCESSOR STATES 173-77 (Sabrina P. Ramet ed., 1999).

connected with democracy promotion.[61] One of the most popular roles for nongovernmental actors in democracy promotion in the 1990s has been the monitoring of elections.[62] "The results of such elections," Michael Reisman has observed, "serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government".[63] However, few checks exist on the conduct of election monitors and, in many cases, monitors may be untrained volunteers who are not equipped to certify elections as fair and free.[64] In addition, the results of election monitoring may be clouded by partisan judgments (often passed off as sanctioned by some international standard).[65] A separate problem is that despite their best attempts at operating in a fair manner, some local NGOs may be denied funding while others may be funded in excess of what they can manage.[66] NGOs should be permitted time to develop their own accountability mechanisms and develop gradually, not artificially fast, according to some outside timetable.[67]

At the same time, NGOs are called nongovernmental because they are not supposed to be mere agents of government. A fundamental tenant of civil society is that it is independent of (if not oppositional to) the state.[68] A primary measure of the strength of civil society then is its capacity simultaneously to *resist* subordination to state authority and, when desirable, to *demand inclusion* into state political structures

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[61] *Cf.* Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L. J. 443, 469 (1997) (international institutions, arguably one component of civil society, have advocated undemocratic means of achieving liberalization).

[62] Donna Arzt has called election-monitoring missions the "dance craze of the decade". Donna E. Arzt, *Bridge Over Troubled Water: Law and the Emergence of New Democracies*, 22 SYRACUSE J. INT'L L. & COM. 81, 98 n.83 (1996). *See* David Stoelting, *The Challenge of UN-Monitored Elections In Independent Nations*, 28 STAN. J. INT'L L. 371 (1992).

[63] Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 868-69 (1990).

[64] *See* Christopher A. Riley, *Neither Free Nor Fair: The 1996 Bosnian Elections And The Failure of The UN Election-Monitoring Mission*, 30 VAND. J. TRANSNAT'L L. 1173 (1997).

[65] Brad Roth, *Remarks, in* Karen Ann Widess, *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L. PROC. 356, 367 (1997).

[66] Smillie memorandum, *supra* note 56, at iii.

[67] Leon Gordenker & Thomas G. Weiss, *Devolving Responsibilities: A Framework for Analyzing NGOs and Services*, 18 THIRD WORLD Q. 443, 451 (1997) ("nobody knows to whom NGOs are answerable").

[68] Paul Hirst, *Democracy and Civil Society*, *supra* note 4, at 97-116.

on specific issues.[69] Some NGOs have their foundations in 'new social movements', that is they represent values and aspirations associated with peoples.[70] The problem is that too few NGOs maintain their allegiance to social movements and, instead, over time they may gain inclusion in state political structures to the extent that they are reluctant to express alternatives to the state values and programs.[71]

Over time, all NGOs may not be strong enough to resist subordination by the state, because of the benefit of funding and status.[72] This problem becomes acute when NGOs assume functions that were once the province of states; for example, social service delivery and humanitarian relief.[73] "Ultimately", Ian Smillie writes, "there is 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".[74] Once they become a sort of 'public service sub-contractor'[75], NGOs are in continual danger of having their local accountabilities and ethical principles compromised by the financial and discursive capacity of

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[69] Oxhorn, *supra* note 35, at 252. Some scholars in Eastern Europe have advanced a different view of civil society. *See* ZBIGNIEW RAU, THE REEMERGENCE OF CIVIL SOCIETY IN EASTERN EUROPE AND THE SOVIET UNION (1991) (describing civil society as arenas of resistance to a totalitarian state).

[70] Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 112 (1996)[hereafter Dianne Otto, *Nongovernmental Organizations*]. Within any community at any point in time, the subaltern may or may not play an active role in human rights NGOs. Some human rights NGOs cannot by any stretch of the imagination be termed 'subaltern' with respect to their composition, activities and goals. However, this is not the case in all places and all periods of time. With respect to the NGOs in the former Yugoslavia, for example, some kitchen-table organizations were decidedly subaltern while others were composed of some of the most powerful and privileged members of society who advanced their own narrow agenda with little regard to the oppressed in their society. Some women's groups in the former Yugoslavia, for example, changed over time from representing subaltern concerns to promotion of the dominant agenda of local or foreign elites. (Observation drawn from authors' first-hand work in the former Yugoslavia). The same phenomenon can be seen with respect to international women's groups. *See* Julie Mertus & Pamela Goldberg, *supra* note 53.

[71] *See, e.g.* STUART WEIR & WENDY HALL, EGO TRIP: EXTRA-GOVERNMENTAL ORGANIZATIONS IN THE UK AND THEIR ACCOUNTABILITY (1994).

[72] *See* Oxhorn, *supra* note 35, at 252-53.

[73] One recent study of this problem is in Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation In the Relationship Between the UN and NGOs*, in NGOs, THE UN AND GLOBAL GOVERNANCE, *supra* note 49, at 67.

[74] IAN SMILLIE, THE ALMS BAZAAR 237 (1995).

[75] *See* BEYOND UN SUBCONTRACTING: TASK SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOS (Thomas G. Weiss ed., 1998).

states to shape their agendas.[76] When NGOs are dependent on states or other powerful donors such as the UN, they no longer fulfill their role as nonstate counterparts in transnational civil society. Instead, they form patron-client relationships to improve their positions, thus repeating the old tradition of strong-state/weak-state clientelism.[77]

The local NGO sector in Bosnia, for example, 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.[78] 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. 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 psychosocial projects to income generating projects in mid-90s left many Bosnian NGOs in despair, as they were unable to continue their programs.[79] This focus on inexpensive service delivery via local NGOs was at odds with the creation of a strong, pluralistic civil society.[80] The donor process in Bosnia can be said to advance the goals of foreigners; it stretches the imagination, however, to claim that it advances Bosnian civil society in a meaningful way when very little will be left behind when donors pull out.

The convergence of NGO and government interests can at times be traced to the pragmatic intertwining of resources and the reality of staffing international projects. NGOs receive funding, direction, and supplies from governments and at times work jointly in the field on large common endeavors. At the same time, many governments are dependent upon NGOs for information and expertise. Above all, there

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[76] Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 COLUM. H.R. REV. 1, 41 (1997). [Hereafter Otto, *Rethinking the Universality*].

[77] *See generally*, DAVID HULME AND MICHAEL EDWARDS, NGOS, STATES AND DONORS: TOO CLOSE FOR COMFORT? (1997).

[78] Memo from CARE/CRS/DELPHI to Brenda Cupper, dated 19 March 1997 (attaching Smillie memorandum, *supra* note 56).

[79] Smillie memorandum, *supra* note 56, at iv. This observation is supported by the author's interviews with local NGOs in Bosnia in July 1998.

[80] *See* Smillie memorandum, *supra* note 56, at iv.

are people 'behind' the projects.[81]   NGO staff increasingly move between government jobs and NGO work and as they do so their visions and the interests of their various employers converge. These shifts make the agenda of democracy from below complex and, in some cases, impossible. The connections are not transparent to those outside the specific projects in question and the loyalty of the NGO has shifted from 'the bottom,' as it were, to the 'top'.

Blinded by a romantic attachment to the notion that NGOs are a spontaneous order independent of and separate from the state, we have been slow to identify and address transparency and accountability problems within NGOs. These days few NGOs can be said to be the kind of spontaneous, private entity envisioned by classic liberal theory.[82] The problem with the "classical liberal legacy of conceiving civil society as a spontaneous order separate from government", as Paul Hirst emphasizes, is that it "actually undermines the devising of effective remedies to the growth of unaccountable hierarchical power in both the public and private spheres".[83]   Within organizations, romanticism prevents NGO staff from seeing their organization as it is; an entity that should be held accountable.   The failure to require accountability leaves the power of these organizations unchecked. Therefore, instead of enhancing citizen participation, many NGOs have the reverse effect.   While some NGOs remain open to public input, the relatively empowered citizen often has little control over NGO operations, let alone those who are marginalized. More often, NGOs set the public agenda on an issue before offering it to the public for comment. Thus, instead of enhancing the choices of marginalized citizens, some NGOs serve to restrict it. In short, NGOs "need to be made accountable in some direct way to the constituencies involved in or affected by them".[84]

Accountability questions increase in magnitude and complexity when nonstate actors perform government functions.   Increasingly governments delegate public functions to specialized bodies, charged

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[81] David Kennedy has made this characterization (made with respect to international projects generally).

[82] For a critique, see Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUS. Y. B. INT'L L. 190 (1992).

[83] Paul Hirst, "Democracy and Civil Society", *supra* note 4, at 98.

[84] *Id.* at 101.

with designing, reviewing or implementing what would have previously been public functions. These bodies may operate with the stated goals of greater transparency, accountability and more inclusive participation and, in some cases, these goals may be realized. 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.[85]   A danger, however, is posed where nonstate actors take on public functions without mechanisms of accountability.   Reconceptualizing aspects of the public sphere as private means that decisions concerning such newly privatized issues are kept from public scrutiny or control.[86]

The World Bank has played a leading role in encouraging states to limit public sector activities by privatizing these activities and cutting state expenditures.[87]   Potentially profitable public agencies are privatized and left in the hands of foreign and local investors. A role is played by NGOs as well. They provide the services that the state has abandoned and private investors have scorned as unprofitable, such as health, education, microcredit, vocational training, professional services, research and civic education.[88] While the World Bank expects these NGOs to be accountable to citizens, no such expectations are brought to bear on for-profit privatized services. Privatized public services need only demonstrate greater managerial accountability for outputs or outcomes.[89]   As Anne Orford and Jennifer Beard explain:

> There is little consideration of the possible need to constrain the
> power of the new market-oriented state, nor is there any reference
> to the need to ensure that private actors be subjected to the ongoing
> requirements to account to the people of a particular state once

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[85] See generally, Ken Conca, Greening the UN: Environmental Organizations and the UN System, in NGOs, THE UN & GLOBAL GOVERNANCE, supra note 49, at 105; THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS (Ronnie D. Lipschutz & Ken Cocca eds., 1993); Harold K. Jacobson and Edith Brown-Weiss, Strengthening Compliance with International Environmental Accords: Preliminary Observations From a Collaborative Project, 1 GLOBAL GOVERNANCE 119 (1995); Wapner, supra note 37.

[86] Anne Orford & Jennifer Beard, supra note 14, at 207.

[87] See THE WORLD BANK, WORLD BANK DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD (1997).

[88] Orford & Beard, supra note 14, at 208.

[89] Id. at 207 (citing 1997 World Bank Report at 9-10).

> public sector activities have been privatized. We are simply to
> assume that all those who act in the private sector automatically
> make decisions for the greater good of the general public. Such an
> assumption is premised upon faith in the efficient and benign
> operation of the market.[90]

The NGOs that take over public sector services become complicit in this process. Not only are they not constrained by any minimum standards of accountability, they collaborate in the process through which citizens are denied the ability to choose their own form of economic or social arrangements.[91]

With all of these limitations, how can NGOs possibly fulfill their potential role of adding a 'third voice' in international relations, one autonomous both from government and markets?[92] One way, I suggest, is to do democracy differently – to take seriously the notion of democracy from below. This would mean ensuring that NGOs adhere to the norms of transparency, accountability and participation that NGOs increasingly demanded of state actors. These norms should be embraced throughout transnational civil society. In the next section, I explain how this vision of democracy from below differs from the prevailing notion of democracy from above and how it is transformative for societies.

III. FROM 'DEMOCRACY FROM ABOVE' TO 'DEMOCRACY FROM BELOW'

A. The Present Agenda

Traditional international relations scholarship discusses how the rise of nonstate actors and the changed role of the state is intertwined and marked with a shift from 'government' to 'governance'. This means that fewer commentators are dreaming of the building of international organizations that generate and administer rules (a

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[90] *Id.* at 211.
[91] *Id.* at 209.
[92] Otto, *Nongovernmental Organizations, supra* note 71, at 128.

'world' government)[93], and are instead considering non-governmental means of governing, without centralized sovereign authority, including relationships that transcend national frontiers. 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, nongovernmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.[94]

Achieving governance thus necessitates more complex and far reaching methods across a broader terrain.

International financial institutions contend that they can distinguish between 'good' and 'bad' governance. According to the World Bank, governance that may be deemed 'good' 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".[95] 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".[96] The World Bank itself fails to meet the standards of accountability and transparency, and, as

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[93] For a reformist call for global governance that still embodies an institutional focus, *see* COMMON RESPONSIBILITY IN THE 1990S: THE STOCKHOLM INITIATIVE ON GLOBAL SECURITY AND GOVERNANCE 35-42 (1991).

[94] James N. Rosenau, *Governance, Order and Change in World Politics, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 3 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

[95] Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. SOC'Y INTL'L. L. PROC. 271, 280 (1994) (citing *World Bank, Governance: The World Bank's Experience (Operations Policy Department, Final Draft*, Nov. 23, 1993, at 1). *See*, William Chia, *Quality of Government Outweighs Political System: Prof. Koh*, BUS. TIMES, Apr. 29, 1993, at 2; *See* also, Bill Maurer, *Cyberspatial Sovereignties: Offshore Finance, Digital Cash, and the Limits of Liberalism*, 5 IND. J. GLOBAL LEGAL STUD. 493, 497 (1998).

[96] Patricia Armstrong, *supra* note 95, at 79.

noted above, does not apply these standards evenly to all international actors.[97]

A key idea associated with the connection between legitimacy and governance is the 'right to democratic governance', an arguably emerging human 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".[98] Thomas Franck, a leading proponent of this right, argues that "the radical vision [that governments should rule with the consent of the governed and that governments that acted in such a manner would be perceived as legitimate] is rapidly becoming, in our time, a normative rule of the international system".[99] A word of caution is in order, however, as there is no one accepted model of democracy and it is debatable whether any norm of democracy has emerged as customary international law.[100]

Although the elements of the right to democratic governance have not been clearly defined, it appears to encompass both procedural and participation-oriented theories about the operation of the rule of law in a democracy.[101] The 1990 Copenhagen Document of the Organization for Security and Cooperation in Europe (OSCE, then CSCE)[102] 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".[103]   Absent from any OSCE discussion[104] is any discussion of vertical responsibilities, or the responsibilities of citizens toward each other and the responsibilities of collections of citizens

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[97] On a selective basis, some NGOs are required to comply, while corporate and other newly privatized activities need not. *See* Anne Orford & Jennifer Beard, *supra* note 14, at 211.

[98] Universal Declaration of Human Rights, art. 21.

[99] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

[100] *See* Mertus, *The Liberal State and the National Soul*, *supra* note 44.

[101] Cohen and Arato, *supra* note 3, at 4-8; *see* also, John Norton Moore, *The Rule of Law and Foreign Policy*, 2 HARV. J. WORLD AFF. 92 (1993).

[102] The name of the organization changed from the Conference on Security and Cooperation in Europe to the Organization on Security and Cooperation in Europe in 1974, reflecting its move from a series of periodic meetings with a loose institutional structure to a more permanent organization with a more defined structure.

[103] Conference on Security and Cooperation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, *reprinted in* 29 I.L.M. 1305, 1306 (1990).

[104] *Id.*

such as NGOs to citizens. These matters are simply not matters of high priority.

The formula of the OSCE, U.S. Agency for International Development (USAID) and other large Western entities for democratization is said to include: "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".[105]   In practice, World Bank and Western government-funded (largely through USAID) efforts to promote democratization have focused the monitoring of political elections, virtually to the exclusion of the fostering of other participatory mechanisms and the nurturing of civil society.[106]   The justification commonly given for an 'elections first' approach is that they are democracy's first step.   More accurate, however, is an understanding that there is no single natural order of events for democracy and that the fostering of participation from below may in fact be a more important first step than elections.[107]

A 'one size fits all' and 'instant' vision of democracy creates new opportunities for Western imperialism.[108]   In the name of democracy, foreign governments interfere with the internal processes of local communities. Invocations of democratic principles in specific political controversies, either at the state or sub-state level, are by nature ideologically skewed and manipulative.[109]   Foreign government funding to local "pro-democracy" groups is particularly suspect. Foreign governments fund political organizations that share their values and goals, favoring foreign transplants over indigenously created groups with different agendas.[110]   When foreign funding is necessary for survival, indigenous groups transform themselves (at least publicly) to be acceptable enough to the foreigners to obtain their money. This may mean neglecting the interests of grassroots actors

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[105] Susan Marks, *Remarks, in* Karen Ann Widess, *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L. PROC. 356, 371 (1997).

[106] Donna E. Arzt, *supra* note 62, at 98; *see also* Dianne Otto, *Challenging the 'New World Order': International Law, Global Democracy and Possibilities for Women,* 3 TRANSNAT'L L. & CONTEM. PROBS. 371, 378 (1993) [hereafter Otto, *New World*].

[107] Susan Marks, *supra* note 105, at 373.

[108] Otto, "New World", *supra* note 106, at 383.

[109] Brad Roth, *supra* note 67, at 367.

[110] Holly Burkhalter, *Remarks,* in Farhana Y. Khera, *Democratization and International Law: Building the Institutions of Civil Society,* 88 AM. SOC'Y INT'L. PROC. 197, 210 (1994).

and adapting the foreign obsession with top-down, electoral focused democracy. Consequently, foreign funding of top-down democracy projects serves to subvert and squelch bottom-up democracy.

The transplant of Western style, market-oriented democracy not only fails to address the needs of participatory democracy from below, but it also cannot be transplanted to other countries and to international institutions without violating international human rights norms.[111] The idea of democracy in international human rights law, as articulated in the Declaration from the 1993 World Conference on Human Rights and many international human rights instruments and proceedings, is said to be "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems".[112] Interpretation of this is controversial, but whenever state or nonstate participants coerce weak governments to accept a narrow vision of representative democracy, core principles of democracy are trampled.[113] Whenever state or nonstate participants use elections to accord legitimacy to an authoritarian regime that it formerly lacked, the resulting 'cosmetic' democracy thwarts fundamental ideals of self-government and equality.[114] Invocation of the term 'democracy' by foreign donors makes human rights advocates wary, "not only because of the very colorful and checkered past of the United States in manipulating that concept, but also because of the eagerness of cynical governments that have abusive records to manipulate it".[115] The result is control from above and suppression of voices from below.

In conclusion, the agenda of democratization from above has at best been extremely limited and ineffective at promoting the norms of participation, transparency and accountability.[116] This is no surprise. A top-down agenda for democracy was never designed to promote these norms fully or equitably. Instead the top-down approach was

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[111] See Richard Falk, *The Right to Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in SELF-DETERMINATION AND SELF-ADMINISTRATION: A SOURCEBOOK 47 (W. Danspeckgruber ed., 1997).

[112] Vienna Declaration and Programme for Action, 25 June 1993, para. 5.

[113] A case study of this phenomenon is provided in THOMAS CAROUTHERS, IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS (1993).

[114] Susan Marks, *supra* note 105, at 376.

[115] Holly Burkhalter, *supra* note 110, at 203.

[116] Many commentators critique in greater detail the ways in which the right to democracy has been implemented on the state level. See, e.g., the contributors to D.L. SHETH & ASHIS NANDY, THE MULTIVERSE OF DEMOCRACY: ESSAYS IN HOUR OF RAJNI KOTHARI (1996).

created to locate and preserve power at the top and to control any alternative agenda from rising from the bottom. It is a very different understanding of democracy that empowers people from below.

B. Doing Democracy Differently

The first step towards doing democracy differently is opening up the concept of democracy so that it is no longer identified solely with representative democracy from above and market-oriented systems. For this to happen, the concept of a 'right to democracy' needs re-imagining if it is to be seen as relevant to all societies and not merely the transplant of Western values.[117] Dianne Otto suggests a useful way to think about universality and rights that could steer us in the right direction. Human rights, she argues, should be framed as "a dialogue, in the sense of struggle, rather than a civilizing mission".[118] 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"[119] with neither universalism nor democracy being rejected but particularized.[120] This entails learning about the values of democracy and its meaning for structuring relationships by paying attention "to the ongoing evolution of democratic discourses"[121] in civil society.

Otto's approach to human rights emphasizes both the relational as well as constitutive aspects of human rights. Rights matter because they define relationships; relationships give meaning to rights. The processes of defining and enforcing rights takes place in the context of relationships. The process of rights definition and enforcement demonstrates who we are as a society, what we value, how power is distributed and how relationships are regulated. This focus on relationships makes particular sense in our globalized world marked by an emerging transnational civil society where, as described above, the varieties of relationships, the kinds of actors and the direction of

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[117] *Cf.* Martti Koskenniemi, *The Police in the Temple, Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 343 (1995).

[118] Dianne Otto, *Rethinking the Universality, supra* note 76, at 3.

[119] *Id.* at 35.

[120] Chantal Mouffe, *Radical Democracy: Modern or Postmodern?, in* UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 36 (Andrew Ross ed., 1988).

[121] Otto, *New World Order, supra* note 106, at 400.

dialogue are complex and changing. It also makes sense in a world transformed by the ideas of democratic governance, for these concepts have key relational and constitutive components.

A relational standpoint helps to reconceive democracy in more open terms. In this way, democracy is understood "as an ideal of self-government and equality, as a catalyst, orientation and framework for criticism and transformation of the conditions of collective life".[122] This reconceptualization would de-domesticate the notion of democracy; in other words it would move it from a hegemonic domestic construct to a more particularized and local domestic construct. Susan Marks laments that "[i]t would seem to me to be unfortunate indeed if democracy, an idea that has so often served to inspire and justify 'revolutionary politics aiming at the roots of existing distributional systems,' were allowed to become the monopoly of those who would have it do the reverse".[123] Instead of being associated with any cultural or political specificity (i.e. market capitalism), a more open idea of democracy could be used by groups at the margins to present their own view of the good life.

Another step toward doing democracy differently has already been suggested, namely the expansion of the terrain of democracy to include transnational civil society. Democracy needs to flow downwards and sideways as well as upwards, enriching associational life. In this vision, what happens at the margins matters -- "power is conceptualized as dispersed throughout the global polity rather than . . . centralized in the state and the economy".[124] The array of participatory democratic opportunities involves all aspects of community life, beyond the traditional focus on elections and political rights, and beyond the building of democratic institutions.[125] A diverse array of NGOs thus should be involved both in the creation, monitoring and workings of transnational democratic institutions as well as the reformation of democratic norms.

A related element of doing democracy differently involves recognition of a 'right to democracy' that flows horizontally, up and

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[122] Susan Marks, *supra* note 105, at 375.

[123] *Id.* at 376 (citing Martti Koskenniemi, *"Intolerant Democracies": A Reaction*, 37 HARV. INT'L L. J. 231, 234 (1996)(waning that a universal norm of democracy can be used against revolutionary politics).

[124] Otto, *Nongovernmental Organizations, supra* note 71, at 134.

[125] Otto, *New World Order, supra* note 106, at 399.

down between state and citizens, with no limitations as to any private or public powers. This orientation can be seen as extending and critiquing the vertical/horizontal divide in international human rights theory. A vertical view of human rights focuses on the relationship between the state and the individual: rights flow in one direction, down from the state to the individual and rights claims flow in one direction as well, up from the individual to the state. A horizontal view of human rights focuses on the relationships 'at the same level', that is of individuals to one another and, to some extent, of state actors to one another: rights *and responsibilities* flow in both directions between these actors. As discussed previously, this view of thinking is more in line with how transnational human rights NGOs aim to work. Although many NGOs work top-down and thus appear to be acting solely in a vertical manner, their goal is to influence horizontal relationships as well. They attempt to influence not only governments but also citizens as well, and impetus and impacts of NGO action are felt both top-down and bottom-up.[126]

This approach would recognizes a range of legitimate stakeholders in decision-making and seek ways in which these stakeholders can have an effective voice. An approach of this kind would not construct iron walls between 'public' and 'private' centers of power, but instead would apply norms of rights and responsibilities to both.[127] The main vehicle for promoting these norms targets the enhancement of those principles of accountability, participation and openness. Human rights advocates should take steps to ensure more accountability and transparency for nonstate participants, in everything they do and especially when they take on state functions.

NGOs should not be held hostage to government donors under some theory of accountability. In demanding greater transparency and accountability for NGOs, care should be taken to ensure that the

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[126] For example, environmental and human rights NGOs have sought to hold nonstate corporate entities accountable for their behavior. NGOs take direct action against corporations that violate basic norms for behavior, organizing boycotts of companies that trap endangered animals, exploit child labor, and produce non-biodegradable paper wrappings for food products. In addition, NGOs have drafted corporate codes of conduct, urging corporations to pledge to adhere to minimum standards of social behavior. These and other measures help to define the boundaries of good conduct and thus animate how a host of actors -- from governments to voluntary associations and ordinary citizens – think and respond. Wapner, *supra* note 37, and accompanying text.

[127] Tony Wright, *supra* note 1, at 13.

demands for accountability are not simply an effort by fading government bureaucracies to retain control through proxies.[128] Accountability to governments is not the main concern here. NGOs should engage in self-regulation in order to be accountable and transparent to people and, thus, more likely to promote bottom-up participation.[129] Thus, as Eric Dannemaier asserts:

> the responsibility of these nongovernmental actors with respect to this type of ideological accountability should be limited to rules that promote transparency of mission. This will aid in financial accountability and in a broader understanding of an organization's place within society and the political arena, without limiting a group's mission or attempting to influence its ideology.[130]

This kind of limited accountability to people will make it easier for them to know what NGOs are doing and, with this information, participate in transnational civil society through these NGOs or through other connections. At the same time, the accountability should not act as a control on the mission of any NGO, thus remaining consistent with the tenant of pluralism in bottom-up democracy.

Enhanced openness and pluralism would bring more issues to the table. To promote transformative social change from the bottom-up, actors in transnational civil society must be committed also to addressing 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.[131] Globalization has encouraged, and in some cases demanded, privatization of social services. Researchers have demonstrated, for example, how privatization of key social services in Latin America, such as social security, health care and housing, has exacerbated

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[128] Ian Smillie, *NGOs and Development Assistance: a Change in Mindset?*, 18 THIRD WORLD Q. 563, 575 (1997).

[129] Eric Dannemaier, *Democracy in Development: Toward a Legal Framework for the Americas*, 11 TUL. ENVTL. L. J. 1, 26 (1997). Accountability and transparency should be a two-way street. Just as NGOs adopt codes and other self-governing measures to regulate themselves, governments should take steps to be more transparent and accountable with respect to their behavior in transnational civil society.

[130] *Id.*

[131] *See*, e.g., Dianne Otto, *Rethinking the Universality*, *supra* note 76, 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.")

exclusion of citizens from community life.[132]   For the most part,
critiques of such changes in the space of transnational civil society
have been left to organizations identified as 'development' or
'economic' groups, and most human rights NGOs have had little say in
the matter.[133]   Full and complete realization of the goals of the
Universal Declaration, however, requires change. Not only does the
failure of human rights NGOs to engage in global economic justice
issues marginalize such matters, but also it exacerbates the conditions
under which individuals and NGOs can 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 by
human rights NGOs contributes to the democratic deficit in
transnational civil society.

     To ensure that democracy from below reaches marginalized actors,
the value of participation needs to be better articulated. We know that
civil society is underdeveloped where small, participatory and
democratically structured organizations independent of the state are
uncommon.[134]   We also know that human rights dialogue in
transnational civil society remains underdeveloped when it is
dominated by large, exclusive, undemocratic organizations.[135]   But
how do we refine our understanding of participation to realize
transformative democratic goals? One of the main roadblocks to doing
democracy differently lies in the reality that transnational civil society
reflects disparities in power that are not recognized or acknowledged.
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 the misbalance. Less powerful groups can be
marginalized and their protests remain unheard. Abdullahi An-Na'im
recognizes that "ideally participants should feel on equal footing but,
given existing power relations, those in a position to do so might seek

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[132] Oxhorn, *supra* note 35, at 253.
[133] Michael Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS.
L. REV. 269, 272-76 (1994).
[134] *See* Price, *supra* note 15.
[135] *Id.*

ways of redressing the imbalance".[136]   Otto goes farther in insisting that "transparency of the operations of global networks of power, of exploitation and domination, is a vitally important component of transformative dialogue".[137]

The application of democratic principles to transnational civil society entails more than the mere addition of a dose of pluralism. In addition to opening civil society to more diverse forms of participation, doing democracy differently insists that all actors act ethically by interrogating 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 would be for powerful agents of transnational civil society to listen to and value the experiences and wisdom of their less powerful counterparts. While this may be the goal of many human rights advocates, rarely is it carried out in practice. We could draw from our understanding of a participatory norm of democracy 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".[138] Flexible rules and transparent processes should be developed for the inclusion of NGOs in international decision-making fora to expand and formalize their participation. Here the example of NGO participation in some international law contexts sets the foundation for further development.[139] These and related measures would add meaningful context to the norm of participation in transnational civil society[140] and lead towards transformative, bottom up participatory democracy.

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[136] Abdullahi An-Na'im, *What Do We Mean By Universal?*, 23 INDEX ON CENSORSHIP, No. 4/5, 1994, at 120,122.

[137] Otto, *Rethinking Universality, supra* note 76, at 33.

[138] *Id.* at 38.

[139] *See*, e.g., Ellen Hay, *Increasing Accountability for the Conservation and Sustainable Use of Biodiversity: An Issue of Transnational Global Character*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1995).

[140] Moreover, greater access to international procedures would lay the foundation for improved accountability of international organizations generally. *See* David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L. J. 2645 (1991).

IV. CONCLUSION

Instead of rejecting the notion of democracy, advocates for social justice should embrace it and give it content so that it can become a mechanism for positive social transformation. This means moving democracy beyond the state and to the levels of civil society. It also entails going beyond representative democracy to a form of participatory democracy from below which emphasizes the norms of participation, transparency and accountability. The framing rules in such an enterprise would shape and reflect changes in power structures and, accordingly, influence the new actors occupying spaces opened by the change. Nongovernmental organizations could play a key role in doing democracy differently, but so far their potential remains unfulfilled.

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