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# WAIT! THAT'S NOT WHAT WE MEANT BY CIVIL SOCIETY!: QUESTIONING THE NGO ORTHODOXY IN WEST AFRICA

Thomas Kelley\*

## INTRODUCTION

Among those whose vocations or avocations involve spreading democracy and market driven prosperity<sup>1</sup> to the developing world, it has long been an article of faith that creating a vibrant, highly ing civil society is a necessary (some would say *the* necessary) precursor. This Article focuses on the complicated and messy business of promoting civil society in Africa, Muslim West Africa in particular.

I assume, and this Article argues, that when we—people and institutions from the Global North<sup>2</sup>—envisage civil society in Africa, we picture citizens forming voluntary non-governmental organizations (“NGOs”) and then sitting around conference tables (perhaps the most culturally attuned among us include visions of people sitting in circles under village trees) debating and passing resolutions that will advance women’s rights, the rights of minority groups, protections for children and other vulnerable members of society, environmental justice, freedom of expression, due process, and the rule of law.<sup>3</sup>

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1. Alison Van Rooy & Mark Robinson, *Out of the Ivory Tower: Civil Society and the Aid System*, in CIVIL SOCIETY AND THE AID INDUSTRY 31, 36–37 (Alison Van Rooy ed., 1998) [hereinafter CIVIL SOCIETY AND THE AID INDUSTRY] (stating that promotion of democracy and promotion of economic development are the two major aims of the civil society movement, and that improved economic performance is assumed to be a byproduct of strong civil society).

2. Throughout this Article I employ the terms “Global North” and “West” interchangeably and somewhat loosely to refer to the wealthy countries of the world—and the institutions that they control—that dominate international development. I realize fully that the salience of these terms is fading as China and other non-western countries exert ever greater influence in Africa and other parts of the developing world.

3. Indeed, the United States Secretary of State, Hillary Rodham Clinton, has traveled the world recently delivering the good word that civil society “undergirds both democratic governance and broad-based prosperity.” See Hillary Rodham Clinton, U.S. Sec’y of State, *Civil Society: Supporting Democracy in the 21st Century*, Community of Democracies, Krakow Poland (July 3, 2010), *available at* <http://www.state.gov/secretary/rm/2010/07/143952.htm>. When she specifies the civil society actors she has in mind, she tends to refer to “organizations . . . fighting for justice and law, or clean and open government, or public health, or a safe environment, or honest elections . . .” *Id.*; see also Wachira Maina, *Kenya: The State, Donors and the Politics of*

What we of the Global North do not picture in our collective conception of civil society, and what we are not prepared to deal with, is groups of Islamic *imams* crowding into the public square agitating for norms and laws that would, among other things, deny women equal inheritance rights or the right to marry without elder males' permission. Yet, this is precisely what has happened across Islamic West Africa, partly as a result of Western-inspired reforms that were intended to bolster civil society. The civil society sector that we envisioned and helped engineer in poor countries across Africa has been occupied by nongovernmental actors whose visions of a just society diverge radically from our own. The question that this Article begins to answer is what if anything we in the Global North ought to do about it.

Because this Article is linked to a symposium, I feel obligated to draw an explicit connection to the theme of Governing Civil Society: Linking NGO Legitimacy to Nonprofit Accountability. If civil society is to have any meaning and any efficacy in non-Western societies and states, it will have to develop its own peculiarities in its own social and political context. Ultimately, civil society in far away countries will probably look very little like civil society in the United States or Western Europe. Efforts to transplant U.S.-generated norms and "best practices" on nonprofit governance and accountability to civil society actors in Africa and other parts of the developing world are probably a waste of time. Just as Africans will have to develop their own civil society, they will have to develop their own norms concerning the proper governance of its constituent members. And that may take a long time.

In pursuit of that argument, Part I of this paper examines what we mean by civil society and concludes that, though it means many things to many people, a core conception shared by most donor countries and Northern multilateral organizations and NGOs is that it is, or at least should be, comprised of high functioning voluntary associations dedicated to protecting universal human rights and upholding democracy. Stated more precisely, civil society in poor countries should look a lot like the nonprofit sector in the United States and the voluntary sector in Europe. Part II offers examples of how our plans for civil society in Africa, particularly in Islamic West Africa, have gone awry. A brief preview of that story is that the US and its Global North allies encouraged law reform that would create a social space for the growth of a civil society sector, but Muslim social reformers rushed into that social space and successful-

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*Democratization*, in CIVIL SOCIETY AND THE AID INDUSTRY, *supra* note 1, at 134, 137–38 (arguing that Western promoters of civil society in Africa have a narrow, culturally determined view of what constitutes legitimate civil society).

ly launched popular efforts to institute Islamic norms and practices. Part III grapples briefly with the question of what we should do about it, and concludes that our best course is to permit divergent visions of civil society to take root in countries that are historically and culturally different from our own.

#### I. CIVIL SOCIETY: A PROTEAN CONCEPT BECOMES A KEYSTONE OF INTERNATIONAL LAW AND DEVELOPMENT PROGRAMS

Civil society means many things to many people. Accounts of its origins and evolution have become numerous in recent years, typically beginning with Ancient Rome (where the term civil society described civilized people organizing their public affairs through a *polis*), continuing to a revival of the concept during the eighteenth century Scottish Enlightenment (where it was conceptualized as a check on the power of the state), nodding to the Italian Marxist theorist Antonio Gramsci (who saw it as the sphere in which battles for and against capitalism were fought), and ending with the fall of the Berlin Wall, the break-up of the Eastern Bloc, and the international flowering of democracy propelled by citizens' voluntary associations.<sup>4</sup>

For purposes of this brief Article, we pick up the story of civil society at its last chapter as the Cold War was coming to an end. At that time—in the late 1980s through the 1990s—civil society became “one of the big ideas of the millennial moment,”<sup>5</sup> a “key element in the post-Cold War zeitgeist.”<sup>6</sup> The Berlin Wall fell, the Cold War ended, and the development of civil society was declared essential to the Western project of creating democracy and prosperity across the world, including Africa.<sup>7</sup>

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4. For a comprehensive and nicely written account of the history of the term “civil society,” see Alison Van Rooy, *Civil Society as Idea: An Analytical Hatstand?*, in *CIVIL SOCIETY AND THE AID INDUSTRY*, *supra* note 1, at 6–24 [hereinafter Van Rooy, *Civil Society as Idea*]. For an entertainingly sardonic version of the same story, see John L. Comaroff & Jean Comaroff, *Introduction*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA* 1–22 (John L. Comaroff & Jean Comaroff eds., 1999) [hereinafter *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*].

5. Comaroff & Comaroff, *Preface*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*, *supra* note 4, at vii [hereinafter Comaroff & Comaroff, *Preface*].

6. Thomas Carothers, *Civil Society: Think Again*, *FOREIGN POL'Y* 19 (1999).

7. See Naomi Chazan, *Africa's Democratic Challenge*, 9 *WORLD POL'Y J.* 279, 280 (1992). The civil society notion received a boost from the work of Robert Putnam, who studied democracy in small towns in northern Italy and concluded that it functioned well there because the inhabitants of the small towns had built up a store of what he called “social capital.” Robert Putnam, *Bowling Alone, America's Declining Social Capital*, *J. DEMOCRACY* 61, 67 (1995). He warned that associational life in the U.S. was losing its

At an operational level, building civil society became the marching orders for a vast array of institutional actors engaged in international development work.<sup>8</sup> American development institutions such as USAID began churning out reports and making grants to engender civil society.<sup>9</sup> Even international finance institutions such as the World Bank, whose core missions were not supposed to involve democracy building and social engineering,<sup>10</sup> began including civil society in their programs and reports.<sup>11</sup>

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vibrancy, and that a decline in associational life would reduce our social capital and undermine our democracy. *See id.* at 67–70.

8. Nelson Kasfir, *The Conventional Notion of Civil Society: A Critique*, in CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES 2 (Nelson Kasfir ed., 1998); Stephen N. Ndegwa, THE TWO FACES OF CIVIL SOCIETY: NGOS AND POLITICS IN AFRICA 2, 15 (1996); *see also* Alan Whaites, *Let's Get Civil Society Straight: NGOs, the State, and Political Theory*, in DEVELOPMENT, NGOS AND CIVIL SOCIETY 124, 126 (Deborah Eade ed., 2000) [hereinafter DEVELOPMENT, NGOS AND CIVIL SOCIETY] (arguing that it has become a development industry orthodoxy that development, particularly efforts to create good governance in the developing world, should be undertaken through civil society).

9. *See* GARY HANSEN, CONSTITUENCIES FOR REFORM: STRATEGIC APPROACHES FOR DONOR-SUPPORTED CIVIC ADVOCACY GROUPS (USAID Program and Operations Assessment Report No. 12) (1996), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/constituenices.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/constituenices.pdf) (stating “a core component of USAID’s democracy and governance agenda is support for strengthening civil society”).

10. *See generally* NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS (2006) (examining the role of the IMF and the World Bank in international relations). A slightly more cynical version of this explanation points out that the international financial organizations such as the World Bank and the IMF that have taken the lead in implementing the law-as-technology approach are forbidden by their charters from straying into the realm of politics, whereas nothing prevents them from being involved in technology transfer. *See* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEM AND ECONOMIC DEVELOPMENT AROUND THE WORLD 20–21, 209 (2008). They therefore adopt, consciously or unconsciously, strained definitions of law that permit them to take what they view as appropriate action. *Id.*

11. *See, e.g.*, THE WORLD BANK, FRAGILE STATES—GOOD PRACTICE IN COUNTRY ASSISTANCE STRATEGIES 5–6 (2005), available at [http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/12/22/000090341\\_20051222094709/Rendered/PDF/34790.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/12/22/000090341_20051222094709/Rendered/PDF/34790.pdf); THE CIVIL SOCIETY FUND OF THE WORLD BANK GROUP, SMALL GRANTS BIG RESULTS: SMALL GRANTS PROGRAM ANNUAL REPORT FISCAL YEAR 2008 7–8 (2008), available at <http://siteresources.worldbank.org/INTSMALLGRANTS/Resources/CSFAnnualReport2008.pdf> (describing small grants intended to spur civic engagement and listing various targeted civil society groups).

The aid industry presumed a causal connection between a thriving civil society, democratization, and economic prosperity.<sup>12</sup> When talking about Africa, some Western experts explain the causation as economic liberalization leading to a powerful middle class, which protects its interests by forming robust civil society, giving rise in turn, to stable democracy.<sup>13</sup> Others place civil society first in this causation cascade; a thriving civil society gives rise to healthy democracy, which creates the conditions for long-term economic development.<sup>14</sup> No matter the details of the causal explanation, it has become accepted wisdom that civil society plays a vital role in creating democracy and long-term prosperity.<sup>15</sup>

Given policy makers' and aid experts' unbounded enthusiasm for civil society, its definition is surprisingly hazy and malleable.<sup>16</sup> A USAID study on civil society defines it somewhat tautologically as "nonstate organizations that can act as a catalyst for democratic reform[,]"<sup>17</sup> implying that democratic reform is the sole or primary reason for civil society's existence. A more flexible (and typical) definition of civil society, attributed to the noted civil society theorist Larry Diamond, is "the voluntary and self-supporting legally ordered social space between government and market where citizens act collectively to express opinions, concerns, and demands, especially pertaining to the state."<sup>18</sup> The noted anthropologists, Jean and John Comaroff, apply their disciplinary perspective to civil society and define it as "a public sphere, separated from

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12. See generally Van Rooy & Robinson, *supra* note 1, at 36–37 (stating that the two primary goals of civil society projects are promotion of democracy and promotion of economic development, and that improved economic performance is generally assumed in the civil society literature to be a byproduct of strong civil society).

13. Maina, *supra* note 3, at 154.

14. Van Rooy & Robinson, *supra* note 1, at 36.

15. *Id.* at 44–50 (reviewing various popular theories explaining why civil society bolsters democracy).

16. Comaroff & Comaroff, *Preface*, *supra* note 5, at viii, 6 (arguing that the concept of civil society was revived after the Cold War and that it has come to mean all things to all people); see also MICHAELLE L. BROWERS, *DEMOCRACY AND CIVIL SOCIETY IN ARAB POLITICAL THOUGHT: TRANSCULTURAL POSSIBILITIES* 6 (2006) (arguing that those who invoke civil society often attempt "to insinuate theoretical and ideological assumptions into their analysis, stressing particular aspects of the notion as well as different historical sources and traditions, as suit the writer's purposes").

17. See HANSEN, *supra* note 9.

18. Simon Stacey & Sada Aksartova, *The Foundations of Democracy: U.S. Foundation Support for Civil Society in South Africa, 1988–96*, 12 *VOLUNTAS* 373, 383 (2002) (citing Larry J. Diamond, *Rethinking Civil Society: Towards Democratic Consolidation*, 5 *J. DEMOCRACY*, no. 3, 1994 at 4–17).

church or government, perceived as an impersonal, self-regulating site for the pursuit of voluntaristic civic action . . . ."<sup>19</sup>

It is noteworthy that civil society practitioners and theorists disagree on whether religion falls within its ambit.<sup>20</sup> Some exclude religious organizations,<sup>21</sup> viewing them as a type of primordial attachment, akin to clan and tribal affiliation, that can have no place in a highly functioning civil society in the context of a modern democracy.<sup>22</sup> Others include religious organizations in their civil society definitions,<sup>23</sup> but almost always limit their discussion to Christian organizations<sup>24</sup> and, even then, generally mention them only as an afterthought.

Non-Christian religions, particularly Islam, are portrayed implicitly, and sometimes explicitly, as antithetical to civil society.<sup>25</sup> Although some commentators argue forcefully that Islam is compatible with democratic governance and civil society,<sup>26</sup> many hold the opposite view.<sup>27</sup> Addition-

19. Comaroff & Comaroff, *Preface*, *supra* note 5, at viii.

20. See Comaroff & Comaroff, *Introduction*, in CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA, *supra* note 5, at 6–7 [hereinafter Comaroff & Comaroff, *Introduction*]; see also Van Rooy & Robinson, *supra* note 2, at 57–58 (arguing that there is no shared understanding among donors about the specific types of organizations that constitute civil society, and noting that different divisions of USAID emphasize different sorts of organizations); Amy S. Patterson, *A Reappraisal of Democracy in Civil Society: Evidence From Rural Senegal*, 36 J. MOD. AFR. STUD. 423 (1998) (citing Michael Walzer, *The Idea of Civil Society*, in 38 DISSENT 293 (1991)).

21. See Whaites, *supra* note 9, at 127–29 (arguing that associations based on “primordial attachments” such as tribal affiliation and religion ought not be considered part of civil society); see also Dorothea E. Schulz, *Political Factions, Ideological Fictions: The Controversy Over Family Law Reform in Democratic Mali*, 10 ISLAMIC L. & SOC’Y 132, 160 (2003) (arguing that many Western oriented civil society organizations involved in democratization debates in Mali did not consider Islamic actors as legitimate participants).

22. Whaites, *supra* note 8, at 129.

23. See Carothers, *supra* note 6, at 19–20; see also Patterson, *supra* note 21, at 423.

24. Maina, *supra* note 3, at 146–49.

25. See Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19; see also Naomi Chazan, *Africa’s Democratic Challenge*, 9 WORLD POL’Y J. 279, 287 (1992) (claiming that Islamic religious organizations fall outside of civil society, partly because they “seek to take over the state”); Dale F. Eickelman, *Islam and the Languages of Modernity*, 129 DEADALUS 119, 120 (2000) (summarizing various arguments about why Islamic organizations should not be included in the concept of civil society).

26. See Eickelman, *supra* note 25, at 132 (arguing that Islam, in its multiple and contested forms, can and should act as a vibrant part of civil society). See generally Robert W. Hefner, *Public Islam and the Problem of Democratization*, 62 SOC. RELIGION 491, 498 (2001) (arguing that modern interpretations of Islamic scriptures have increasingly accepted freedom and democracy as Islamic endowments).

27. See, e.g., Charles K. Rowley & Nathanael Smith, *Islam’s Democracy Paradox: Muslims Claim to Like Democracy, so Why Do They Have so Little?*, 139 PUB. CHOICE

ally, many majority Muslim countries undergoing democratic transformations continue to debate whether or not Islamic leaders are legitimate members of civil society entitled to a seat at the table when deciding the rules that will govern their societies.<sup>28</sup>

If there is disagreement over whether religious organizations have a role to play in civil society, there is virtual unanimity, at least among Global North actors, that NGOs are vital. In fact, although definitions of civil society rarely say so explicitly, those who implement and comment on civil society initiatives often conflate the two and simply assume that when we talk about spurring the growth of civil society in developing countries, we in fact are talking about developing those countries' NGO sectors.<sup>29</sup>

There are at least two reasons that Global North actors consider NGOs as either essential to or the alter ego of civil society.<sup>30</sup> The first is cultural and historical. Stated bluntly, wealthy actors from the Global North often are convinced, based on their own historical experience and political philosophy, that a rich associational life, by which they generally mean a thriving NGO sector, is the key to healthy democracy.<sup>31</sup> Americans and Europeans who consider their societies as the apogee of democratic evolution, and who observe the central role that the NGO sectors played in the development of their own democracies, naturally assume that poor countries will follow them down the same democratic path if they can construct a civil society sector "akin to what we have in Western Europe and North America."<sup>32</sup>

A second reason that NGOs migrated to the center of civil society and democracy and governance strategies is that actors in the Global North began to view them as vehicles for addressing the problem of failed states in the developing world, particularly in Africa. Soon after independence in the early 1960s, Africa succumbed to strongman leadership, and by the late 1980s and early 90s, many African states were in full

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273 (2009) (arguing that democratic deficits in Muslim-majority countries have to do with Islam itself).

28. Schulz, *supra* note 21, at 160.

29. Van Rooy, *Civil Society as Idea*, *supra* note 4, at 6, 15–16 (arguing that among development practitioners civil society is synonymous with NGOs).

30. See Kasfir, *supra* note 8, at 2, 5 (arguing that commentators and development professionals generally assume that NGOs are the constituent members of civil society).

31. See Mikael Karlström, *Civil Society and Its Presuppositions: Lessons from Uganda*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*, *supra* note 4, at 104, 115; see also Maina, *supra* note 3, at 139 (arguing the prevailing conceptions of civil society reveal a strong Western bias).

32. Stacey & Aksartova, *supra* note 18, at 382 (quoting the Soros Foundation's description of an "open society").



blown crisis.<sup>33</sup> At the same time, the Northern development community was looking for new partners to carry out its post-Cold War development agenda of democracy and economic liberalization.<sup>34</sup> Donors came to view NGOs, whether preexisting or created by the donor organizations, as magic bullets that could solve many of the problems and address many of the deficiencies of African states.<sup>35</sup> The NGOs could act as institutional substitutes for weak African states in the grand project of democratization and economic development<sup>36</sup> and, simultaneously, could act as bulwarks against backsliding states and venal state actors straining to hold on to power.<sup>37</sup>

When Western development experts described the ameliorative benefits of NGOs, they had a particular sort of NGO in mind, even if they did not say so. What they meant was advocacy organizations, led by Western-oriented intellectuals, lawyers, entrepreneurs, academics, and teachers,<sup>38</sup> all devoted to public interest causes such as the environment, hu-

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33. Maina, *supra* note 3, at 153.

34. See Ndegwa, *supra* note 8, at 17 (arguing that development organizations viewed states as stumbling blocks to development and tried to avoid them by channeling aid through NGOs).

35. William Cunningham Bissell, *Colonial Constructions: Historicizing Debates on Civil Society in Africa*, in CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA, *supra* note 4, at 124, 124; see also Maina, *supra* note 3, at 134 (referring to the aid industry's assumption that civil society would be the "midwife of democracy" in Africa); Stacey & Aksartova, *supra* note 18, at 373, 375 (claiming that U.S. private foundations came to believe that civil society was essential to democracy in the post Cold War developing world).

36. Johanna Kalb, *The Institutional Ecology of NGOs: Applying Hansmann to International Development*, TEX. INT'L L.J. 295, 297 (2006); see also Chazan, *supra* note 25, at 286 (linking the West's imposition of structural adjustment programs, with their emphasis on shrinking states, with the rise of the NGO sector in Africa); Maina, *supra* note 3, at 134 (arguing that building civil society emerged in the 1990s as a corrective to derelict African states and a general air of Afropessimism); Mick Moore & Sheelagh Stewart, *Corporate Governance for NGOs?*, in DEVELOPMENT, NGOS AND CIVIL SOCIETY, *supra* note 8, at 80 (noting that bilateral and multilateral donors avoided states and switched their development budgets to NGOs).

37. See generally Patterson, *supra* note 20, at 423 (describing the West's focus on civil society in Africa as the key to democratization and stability); see also Comaroff & Comaroff, *Introduction*, *supra* note 20, at 18–24 (arguing that because the organizations of civil society promote democratic values among their members, they are able to challenge repressive state actions and facilitate democratic development); Van Rooy & Robinson, *supra* note 1, at 49–50 (arguing that many proponents of civil society in developing countries view it as the sector where citizens learn the habits and skills of democratic participation).

38. Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19.

man rights,<sup>39</sup> women's issues, election monitoring, anti-corruption, and other things that we in the Global North tend to applaud.<sup>40</sup>

Though this implicit vision was perfectly in harmony with the West's historical experience, or at least its own narrative describing its historical experience, it generated problems when implemented in Africa. One stemmed from the elitism inherent in the NGOs favored by Western aid agencies. Such organizations typically were and are dominated by educated, western oriented citizens who have only tenuous ties to those citizens whose interests they claim to represent.<sup>41</sup> Little of the language<sup>42</sup> and few of the techniques employed by such organizations arise from the grassroots of the subject countries.<sup>43</sup>

Another problem resulting from Western donors' narrow (and self-referential) focus on NGOs as the key to prosperity and democracy in Africa is that many important and potentially efficacious forms of public associational life are excluded.<sup>44</sup> Western commentators on NGOs and civil society tend to ignore organizations and institutions that do not focus on the defense of individual rights<sup>45</sup> or that do not directly engage the

39. Van Rooy & Robinson, *supra* note 1, at 40 (stating that in international aid circles, civil society is often conflated with human rights).

40. *Id.* at 16; Carothers, *supra* note 6, at 19; *see also* Maina, *supra* note 3, at 159–60 (arguing that theorizing on civil society in Africa views “good” civil society as professional groups, human rights lobbying organizations, law reform organizations, and the church, and that in Kenya, those groups receive the lion's share of Western civil society funding); Ndegwa, *supra* note 8, at 3 (describing the typical work of NGOs in Africa as civic education and election and human rights monitoring).

41. Carothers, *supra* note 6, at 20; *see also* Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19. *See generally*, Kalb, *supra* note 36, at 303 (arguing that educated elites seek jobs in the NGO sector of developing countries because the pay and stability are better than the civil service or private sector); Ndegwa, *supra* note 8, at 3–5 (arguing that African NGOs typically are run by elites who are out of touch with grassroots concerns and that they depend almost entirely on external funding from donor countries); Maina, *supra* note 3, at 158 (arguing that Western aid money goes to the usual NGO suspects, many of which are run by Western oriented lawyers).

42. Maina, *supra* note 3, at 162 (arguing that most of the language employed by host country NGOs is fed to it by the donor countries and their development agencies, including the concepts of “empowerment” and “aid re-engineering”).

43. *Id.*

44. Kasfir, *supra* note 8, at 5; *see also* Maina, *supra* note 3, at 137–38 (arguing that much associational life in Africa occurs outside of formal organizational life in ethnic and religious organizations).

45. *See generally* Elizabeth Garland, *Developing Bushmen: Building Civil(ized) Society in the Kalahari and Beyond*, in CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA, *supra* note 4, at 72, 72–77 (discussing whether civil society is a Western construct inapplicable to non-Western societies that do not conceive of society as composed of individuals versus a powerful state).

state in ways that enhance its democratic character.<sup>46</sup> They tend not to realize or acknowledge that much associational life in African societies and much of African's social organization happens in places that are geographically and culturally distant from the state.<sup>47</sup> Thus, donor countries' and development agencies' narrow focus on Western-oriented NGOs ruled out a significant role for traditional African social institutions such as clans,<sup>48</sup> tribal associations,<sup>49</sup> the *chefferrie*,<sup>50</sup> and, as discussed later, Islamic religious organizations.<sup>51</sup>

To summarize, the quest to engender civil society in the developing world has migrated to the center of the Global North's development agenda. But even as enthusiasm for civil society has become ubiquitous, no common working definition has emerged. At an operational level, however, where development agencies go about the business of stimulating the growth of civil society, a tacit set of definitional concepts has evolved. When development actors say civil society, they generally mean NGOs organized and run by western-oriented elites, if not westerners themselves, working to implement democracy and universal human rights. In Africa, this narrow working definition has limited the effectiveness of civil society development programs and, as discussed in the next Section, has given rise to unintended consequences.

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46. Karlström, *supra* note 31, at 105.

47. Admittedly, there are a few prominent counter examples where Western states and their proxies have celebrated and supported traditional, non-state institutions. Perhaps the most celebrated example was the West's support for Rwanda's use of traditional *gacaca* courts in adjudicating suspected participants in that country's 1992 genocide. See Marc Lacey, *After the Horror, Truth and Some Healing, Maybe*, N.Y. TIMES, June 20, 2002, at A4 (reporting favorably on the institution of *gacaca* courts in Rwanda).

48. Karlström, *supra* note 31, at 107.

49. Maina, *supra* note 3, at 159.

50. This is a French term that refers to the traditional chieftaincy. See Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U. J. INT'L L. & POL. 635, 653–55.

51. See Comaroff & Comaroff, *Introduction*, *supra* note 20, at 20–22 (arguing that policy makers have ignored the potential for Africanized modes of civil society that might incorporate and build off of kin based and ethnic organizations); see also Van Rooy, *Civil Society as Idea*, *supra* note 4, at 22 (arguing that many associations in Africa are excluded from working definitions of civil society because they are “ascriptive” rather than truly voluntary).

## II. CIVIL SOCIETY EVOLVES IN UNEXPECTED DIRECTIONS IN WEST AFRICA

### *A. Western-Oriented Elites Start Down the Path of Civil Society and Democracy*

The 1990s was a time of political ferment across West Africa. As the shockwaves from the fall of the Berlin Wall spread across the region, countries attempted with varying success to shed their authoritarian pasts and institute democratic reforms with civil society at the core.<sup>52</sup> The illustrative example that follows focuses primarily on the West African Republic of Niger, partly because its experience with civil society and democratization is typical among Islamic African countries, and partly because it is the West African country with which I am most familiar. Western Africa is rife with numerous similar examples, though, including Senegal, Mali, and somewhat to the north, Morocco.

In the early 1990s, Nigerien democracy activists composed largely of Western-oriented intellectuals, students, and labor activists<sup>53</sup> compelled the military regime then in power to convene a national conference that would, in theory, negotiate and agree upon scaffolding for the country's democratic future.<sup>54</sup> The conference quickly declared itself sovereign and assumed the task of drafting a new democratic constitution and adopting a series of legal codes that it considered fundamental to any democratic society.<sup>55</sup> At a minimum, the conference intended to adopt laws governing the operation of the electoral system, private ownership of land, freedom of expression and the press, and family life.<sup>56</sup> However, it quickly

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52. See Leonardo A. Villalón, *From Argument to Negotiation: Constructing Democracy in African Muslim Contexts* 6–7 (Feb. 4, 2010) [hereinafter Villalón, *Argument to Negotiation*] (unpublished discussion paper) (on file with author) (describing the interaction of democracy and Islam in Niger, Senegal, and Mali). See generally MINISTÈRE DE L'ECONOMIE ET DES FINANCES, *IMPLICATION DE LA SOCIÉTÉ CIVILE DANS LA GESTION DES AFFAIRES PUBLIQUES POUR UNE BONNE GOUVERNANCE AU NIGER* 32–34 (2003) [hereinafter NIGER MINISTER OF FINANCE REPORT ON CIVIL SOCIETY] (a report funded by the United Nations Development Fund) (on file with author) (describing how civil society organizations in Niger inserted themselves into the center of democracy struggles in the early 1990s).

53. Leonardo Villalón, *The Moral and the Political in African Democratization: The Code de la Famille in Niger's Troubled Transition*, 3 DEMOCRATIZATION 41, 54 (1996) [hereinafter Villalón, *Moral and the Political*]; see also Chazan, *supra* note 25, at 279–80 (noting that political liberalization across Africa in the early 1990s was often led by civil servants, students, professional organizations, trade unions, and churches).

54. Villalón, *Moral and the Political*, *supra* note 53, at 41.

55. *Id.* at 48.

56. *Id.*

became bogged down in practical and political disagreements, and much of its ambitious legal agenda was left to be worked out by the post-conference, democratically elected government.<sup>57</sup>

The fundamental meaning of democracy and the details of democratic governance were hotly contested in Niger, but from the start there was broad consensus, at least among Western-oriented leaders, about the fact that democracy necessarily includes the liberalization of the public sphere.<sup>58</sup> This meant freedom of speech, freedom of the press, and freedom of association, and the new constitution and statutes established those rights as part of the DNA of the emerging democratic state.<sup>59</sup>

For philosophical and practical reasons described in the previous Section, democracy proponents and their Western sponsors did not stop at enshrining general rights of expression. They also passed laws explicitly intended to facilitate and spur the development of civil society in Niger.<sup>60</sup> Most fundamentally, Niger's new constitution explicitly provided its citizens the right to form political parties and other voluntary associations.<sup>61</sup> Further, statutes that had originally been enacted by a military regime in the 1980s were updated to provide a solid legal existence to voluntary associations, a comparatively streamlined process for registering them, and a dedicated government office to oversee them.<sup>62</sup> Unofficial lists of

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57. *Id.*

58. Villalón, Argument to Negotiation, *supra* note 52, at 10.

59. See Villalón, *Moral and the Political*, *supra* note 53, at 48; see also CONSTITUTION OF NIGER (1999), tit. II (enumerating various individual rights including the right to free expression).

60. Villalón, Argument to Negotiation, *supra* note 52, at 11 (referring to the "official recognition of voluntary social life" in Niger); see also *Gestion Participative et Démocratie Associative* (Feb. 2001) (a pamphlet, funded by the United States Government, explaining good governance principles for civil society actors) (copy on file with the author); *Renforcement de la Capacité de la Société Civile* (Feb. 2001) (a pamphlet, funded by the United States government, explaining among other things the vital role of civil society in a democracy) (copy on file with the author).

61. CONSTITUTION OF NIGER (1999), tit. II, art. 9.

62. See generally Ordonnance no. 84-06 du 1<sup>er</sup> mars 1984 portant régime des Associations (modifiée par l'ordonnance n°84-50 du 5 décembre 1984 et la loi n°91-006 du 20 mai 1991) [Ordonnance no. 84-06 of March 1, 1984 Ordinance Governing Associations, Amended by Ordinance No. 84-50 of December 5, 1984 and Law No. 91-006 of May 20, 1991] (République du Niger) (laying out a restrictive scheme to create a narrow, controlled existence for voluntary associations); CONSTITUTION OF NIGER (1999), tit. II, art. 15 (further restricting the activities of student associations); *Id.* tit. II, arts. 17-18 (explicitly permitting foreigners to form voluntary associations in Niger); *Id.* tit. II, art. 21 (recognizing *organisations non gouvernementales*, or NGOs, as a subset of voluntary associations that are "animated by a spirit of voluntarism that they carry out in the service of others and where its aims are the support of development through social and/or economic activities"); Decret no 92-292/PM/MF/P du 25 septembre 1992, portant modalités

new voluntary associations indicate that while a handful of new NGOs completed the registration process each year in the early and mid-1990s, in 1998 fifty-two new organizations registered, and between 2000 and 2003, 237 new organizations were officially formed.<sup>63</sup> Many of these organizations were formed with the hope of influencing the ongoing debate about what Nigerien democracy should look like.<sup>64</sup>

### *B. Islamic Organizations Learn to Love Civil Society*

In accordance with the plans laid in the Global North, the flood of new voluntary associations and NGOs included many Western-oriented human rights organizations. For example, the *Association nigerienne pour la defense des droits d l'homme* ("ANDDH"), is a well established NGO populated by lawyers and intellectuals that agitates for universal human rights and the rule of law, and Timidria, is funded by Western aid organizations to advocate for human rights protections for the country's customary slaves.<sup>65</sup> What Nigerien democracy activists and their Western sponsors did not anticipate was that Islamic religious organizations, which had only been peripherally involved in the earliest struggles for democracy,<sup>66</sup> would see a valuable opportunity in this new civil society space, and would aggressively seize it.<sup>67</sup>

The proliferation of publicly assertive Islamic religious organizations was a novel phenomenon in Niger and many other countries in West Africa. In Niger, the repressive military regimes that had dominated post-independence governance generally permitted the existence of only one

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d'application de l'article 20.1 d l'Ordonnance no 84-06 du 1er mars 1984, portant regime des Associations [Decree no. 92-292/PM/MF/P of September 25, 1992] (Republique du Niger) (laying out a streamlined process for the recognition and monitoring of domestic and foreign NGOs and describing their rights and responsibilities).

63. Interview with Madam Sayo Aysatu, Directrice de Direction des Liberte Publique, Direction Generale des Affaires Politiques et Juridiques, Ministere de l'Interieur et de La Decentralization, in Niamey, Niger (Feb. 4, 2004) (interview notes on file with author). Copies of the unofficial annual list of NGO registrations are on file with the author.

64. Villalón, Argument to Negotiation, *supra* note 52, at 7.

65. See *Working in Partnership*, ANTI-SLAVERY ORG., [http://www.antislavery.org/english/what\\_we\\_do/working\\_in\\_partnership.aspx](http://www.antislavery.org/english/what_we_do/working_in_partnership.aspx) (last visited May 16, 2011).

66. Villalón, Argument to Negotiation, *supra* note 52, at 34 (indicating that the early pro-democracy movement in Niger was propelled by French educated elites, but that religious organizations gradually gained influence).

67. *Id.* at 8; see also Mustapha K. Al-Sayyid, *A Civil Society in Egypt?*, 47 MIDDLE E. J. 228, 228-229, 239 (1993) (describing how the opening of civil society in Egypt and several other North African countries led to increasingly voluble participation by "intolerant" Islamic organizations).

Islamic religious organization in the public sphere—the *Association Islamique du Niger* (“AIN”)—and carefully controlled its activities and pronouncements.<sup>68</sup> The creation of a freewheeling civil society sector, however, gave rise to a democratization of religion and a new profusion of religious organizations. Under the new rules of the game, not only was the AIN able to express its views without government approval or censure, but a welter of religious actors began to vie to put forward popular visions of what a just, democratic, *Islamic* society would look like.<sup>69</sup> While the new multitude of Islamic associations represented a multiplicity of competing views on the true meaning of Islam, they quickly realized that any position labeled “Muslim” would strike a responsive chord in a country where the overwhelming majority of the population professes that religion.<sup>70</sup> To the extent they could coalesce around certain public policy or legal principles and speak with one voice, they could impose their will in open civil society debates.<sup>71</sup>

### C. Civil Society Showdown(s) Over Family Law

In Niger and nearby African countries,<sup>72</sup> the fiercest debates between secular, Western-oriented, human rights-based civil society groups on one hand, and Islamic religious organizations on the other, concerned the proposed reform of family laws.<sup>73</sup> For Western-oriented democracy activists, the development of a modern “family code” was a fundamental ingredient in the development of a democracy. By “modern,” the democracy activists generally meant “French” family laws based upon universal human rights principles such as equal inheritance for women, a wom-

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68. Villalón, *Moral and the Political*, *supra* note 53; *see also* Chazan, *supra* note 25, at 285 (describing a post-Independence phenomenon common in Africa whereby states permitted some voluntary associations to form but limited them in number and carefully controlled their activities).

69. Villalón, *Argument to Negotiation*, *supra* note 52, at 10–11.

70. Villalón, *Moral and the Political*, *supra* note 53, at 56. *See generally* Léon Buskens, *Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere*, 10 ISLAMIC L. & SOC'Y 70 (2003) (describing attempts in Morocco to modernize family law and institute civil society where multitudinous, competing Islamic organizations entered the sector and tested “the limits of freedom of speech”).

71. *See* Schulz, *supra* note 21, at 145 (noting that in Mali, Muslim groups that normally competed with one another came together to effectively block Western women's rights and family law reforms).

72. *See* Buskens, *supra* note 70, at 71 (describing political and religious struggles over family law in Morocco); Schulz, *supra* note 21, at 132–33.

73. *See id.* at 122 (stating that in Morocco, the reform of family law became a symbol of the place of Islam in society).

an's right to consent to marriage (and to decline to engage in polygamous marriage), and the equal right to seek divorce and to retain custody of minor children.<sup>74</sup>

But these Western conceived rights (and the Western-funded efforts to implement them)<sup>75</sup> were and are in tension with Islamic and customary<sup>76</sup> Nigerien social and legal traditions that grant husbands superior rights in the context of marriage relations. For example, Muslim law stipulates that a son's inheritance should be twice that of a daughter's.<sup>77</sup> In addition, the Koran explicitly permits men to engage in polygamous marriage and makes it much harder for a woman to obtain a divorce than a man.<sup>78</sup> In Niger and other Islamic African countries, these gender-imbalanced legal traditions generally have been upheld by state legal authorities, who are permitted by statute to diverge from formal state codes and instead rule on family law matters according to custom.<sup>79</sup> Quite clearly, including "universally accepted" notions of gender equality in the fundamental laws that would give shape to Niger's new democracy was going to require deft cultural, religious, and political maneuvering by the country's secular, Western-oriented civil society actors.

Ultimately, they failed. The French-style family code was placed on the agenda by Niger's transitional government as one of the fundamental texts that had to be elaborated in building the legal infrastructure for the new democracy, but it was blocked by Islamic actors' effective political

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74. Villalón, *Argument to Negotiation*, *supra* note 52, at 24.

75. See Schulz, *supra* note 21, at 142 (noting that in Mali, efforts to reform family law were pushed by women activist groups that were heavily subsidized by Western donor organizations).

76. It is far beyond the scope of this Article to attempt to disentangle Islamic law on one hand and non-Islamic African customary law on the other. It must suffice to say that in Niger and other West African countries, both exist but they overlap significantly. In many instances, Islamic law is more protective (at least from a Western perspective) of women's rights than customary law. To take an example from southwestern Niger, Islamic law permits a female descendant to inherit a half share of her father's real and personal property, while customary law forbids her to inherit any rights in real property. In Niger and elsewhere in West Africa, state courts are often empowered to take customary law into account, particularly in matters of family law, and those courts typically apply an unpredictable blend of Islamic and customary law. See generally Kelley, *supra* note 50, at 645–51.

77. Villalón, *Moral and the Political*, *supra* note 52.

78. *Id.* at 52; see also, Patterson, *supra* note 20, at 427 (noting that social norms in patrilineal Africa generally limit women's access to property, education and credit, and prevent them from participating fully in public life); Schulz, *supra* note 21, at 140 (noting that in Mali, women owe a legal right of obedience to their husbands).

79. See Schulz, *supra* note 21, at 140–41 (describing courts' enforcement of customary laws in Mali that generally favor the rights of men over women).



organization and agitation in the civil society sector.<sup>80</sup> To oversimplify a protracted political and cultural battle that unfolded over a period of several years, Islamic organizations took advantage of the new civil society infrastructure to organize themselves and to loudly proclaim, and mobilize public support for, the notion that the supposedly universal rights enshrined in the proposed family code were un-Islamic and/or part of a Western neo-imperialist project.<sup>81</sup> The Islamic actors won popular support,<sup>82</sup> overwhelmed the Western-educated, secular-leaning organizations such as ANDDH, and blocked the reform legislation.<sup>83</sup>

In the end, a legislative reform effort aimed primarily at increasing women's standing in society opened up a field for conservative religious forces to mobilize popular discontent by entering the civil society sector—with its freedom of expression and of association—and offering a vision of Islamic cultural autonomy as an alternative to political dependence on the West. The internationally sponsored promotion of women's rights not only offered a new rallying ground for conservative oppositional forces, but ended by endowing them with greater moral authority and greater standing in the emerging African democracies.<sup>84</sup>

### III. CONCLUSION

Western countries' plans to engender civil society in West African nations as an essential component of democratization and liberalization contained an inescapable conundrum: the only way we could create a civil society in Islamic West Africa—at least a civil society in our own secular, human rights-based image—was to do it over the objections of the Islamic majority; in a word, to do it undemocratically.

We in the Global North assumed that if we coached emerging African democracies through the process of establishing truly democratic politi-

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80. *See id.* at 137 (noting that Muslim activists in Mali were able to blunt political westernization by “successfully appeal[ing] to an alternative normative order,” particularly among the lower classes).

81. *See id.* at 133 (noting that Islamic actors defeated family law reform in Mali partly by portraying it as an example of Western imperialism); *see also* Buskens, *supra* note 70, at 95, 100, 102 (describing the same dynamic in the context of family law reform efforts in Morocco).

82. *See* Schulz, *supra* note 21, at 159 (noting that in Mali many Islamic women lined up publicly against the legal reforms that would have put them on equal legal footing with men).

83. Villalón, *Argument to Negotiation*, *supra* note 52, at 24–25; *see also* Schulz, *supra* note 21, at 133 (stating that Islam took over the “center-stage” in Mali's moves toward political modernity).

84. *See* Schulz, *supra* note 21, at 163.

cal institutions, including free and fair elections and broad freedoms of expression and assembly, the people, often organized and represented by their NGOs, inevitably would choose legal and social structures much like our own. Not only would contract rights and property rights be protected, but individual rights, most notably women's rights to equal treatment under law, would become sacrosanct. This is not what happened. The people, who assembled in the physical and metaphorical space of the civil society sector, vigorously debated whether to institute Western-style laws to govern family life and other sectors of their societies, and decided—democratically—that they preferred their own, non-Western, largely Islamic laws and traditions.

This leads to the ultimate question posed by this paper. What if anything should western proponents of civil society do about it? When we promote civil society and democracy in Africa and other parts of the developing world, are we satisfied by democratic procedures; that is, by open debate and free and fair elections followed by the implementation of laws that a majority of the population has endorsed?<sup>85</sup> More to the point, is it acceptable if the democratically determined social order and legal system adopted by those countries lacks the recognition and protection of the universal human rights that we hold dear?<sup>86</sup>

Or did we mean something different, something more normatively substantive, when we said we wanted to guide developing countries toward civil society and democracy? Are western-oriented NGOs inescapably necessary to the development of civil society and democracy, and are there certain unequivocal, universal, inalienable rights that all democracies must recognize and protect, including women's right to equality under law?<sup>87</sup>

The answer to these fundamental questions is the topic for a book, or a series of books, not a brief symposium article. However, my initial response is that there is little that western governments and aid organizations can do to prevent the civil society sphere in West Africa from evolving in its own direction. Having supported the implementation of structures that permit, even encourage, open, society-wide debate about the nature of justice and governance, it is impractical, and frankly, unseemly for westerners to attempt to intervene when we disapprove of the principles and structures that our ostensible tutees have devised.

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85. See Patterson, *supra* note 20, at 424 (defining democracy as a procedure in which individuals are free to participate and have the means to hold their leaders accountable).

86. See Villalón, *Moral and the Political*, *supra* note 86.

87. See *id.* at 42 (arguing that democratization has come to imply a package of universalist human rights concerns).

Besides, the ultimate result may not be bad, even from a western perspective. Although Islamic actors have had an outsized influence on the shape of civil society and other democratic institutions in West Africa, there is no reason to believe that the end result of the democratic contestation in the civil society sector will be a conservative, closed Islamic republic along the lines of Iran or Saudi Arabia or Taliban-controlled Afghanistan.

This is because in Niger and elsewhere in Islamic West Africa, the metes and bounds of the religious subsector within civil society are open to vigorous, democratic debate and contestation. While it is true that the story of Niger's family code showed what can happen when Islamic forces coalesce around a particular issue, there is in Niger and elsewhere in West Africa roiling debate and contestation surrounding the interpretation of the Koran and other holy texts and how they should (or should not) be applied in the public sphere.<sup>88</sup> This "constructive fragmentation"<sup>89</sup> of Islamic religious debate is likely to increase as literacy rates rise<sup>90</sup> and as freedom of expression continues to permit broad participation in political discourses.

In sum, there is an emerging Muslim public sphere in West Africa and a general, society-wide reconsideration of the role of Islam in these emerging democratic societies.<sup>91</sup> The end result of the open debates will very likely not result in a civil society dominated by NGOs dedicated to protecting universal human rights. Nor, however, is it likely to result in closed, repressive Islamic societies. Having jumpstart a dynamic process of democratic change, civil society proponents from the West are probably going to have to allow it to play out. They can attempt to influence the debates. They can even insist that the NGOs that they fund adhere to western values and to western conceived "best practices" for civil society actors. But, as recent struggles in West Africa have shown, they are very unlikely to succeed in determining the outcomes of the processes that they set in motion, and they probably should not try. We can hope that the promotion of civil society will lead toward just and stable societies, but we should accept that this may look little like our own.

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88. See Eickelman, *supra* note 25, at 124–25, 130.

89. *Id.* at 129.

90. *Id.* at 124–25.

91. *Id.* at 130.