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Rule of Law from the Bottom-up and the Inside-out

Evaluating the legitimacy of a “hybrid approach” NGO

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Abstract

Within the broader literature on civil society organisations (CSOs) there are a number of discussions and debates concerning how to disentangle, dimensionalise, and evaluate the complex concept of legitimacy. Scholars have presented different “dimensions”, “components”, and “types” of legitimacy, as well as suggestions for how to evaluate legitimacy based on the “roles” a CSO should play within a given context. This thesis seeks to analyse and corral these different theoretical and heuristic takes on CSO legitimacy into a theoretical framework, and then apply them to one specific case in order to explore how legitimacy can be evaluated empirically within this framework. The chosen case is International Bridges to Justice (IBJ), an international non-governmental organisation (INGO) that uses a “hybrid approach” to both provide legal assistance directly to indigent accused individuals, and to help strengthen and enforce already-passed legal reforms in the countries where it operates. Using this method, this thesis identifies some ambiguities which may arise when applying discrete theoretical categories to complex empirical case studies. It also notes the significance of “trade-offs” to the legitimacy of CSO approaches, and recognises that an array of CSO approaches is important to the legitimate strengthening of various rights.

Key words: civil society; democracy; legitimacy; global governance; NGOs; rule of law; international policymaking

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1 Introduction: the legitimacy of civil society organisations

In Green's (1997) discussion of rule of law institutions, and particularly the community-driven bureaucratic mechanisms that enforce them throughout Africa, he writes that

[t]he difficulties of transplantation are probably greater for western-style non-governmental organizations (NGOs) than for bureaucracy, excepting perhaps some religious related organizations and, oddly, the Red Cross.... They are unlikely to be optimal local level community programme operational bodies. Detached elite membership groups of well-wishers (usually professionals) working for, but not accountable to and often not in close day-to-day human contact with, those they serve are not notably 'traditional' Africa (or perhaps anywhere else). They may have a future but are not a very speedy or sure route to local level participation and to raising the capacity of ordinary people. [*ibid*: 59]

Included in Green's broad dismissal of "western-style" NGOs are several elements that can all be considered issues of legitimacy. Despite their good intentions, these organisations are "detached", "elite" and too distant from their prospective beneficiaries to be truly representative. Therefore, they do not possess "input legitimacy."¹ They do not promote "local level participation" and they cannot be held "accountable" to those whom they affect. Therefore, they also do not possess "throughput legitimacy." And finally, Green calls their effectiveness into dispute when he states that NGO intervention is not a "speedy or sure route" to improved capacity. This means they have little to no "output legitimacy" either.

Although one could argue that Green's argument suffers considerably from over-generalisation, his is by no means the only voice that has accused NGOs, international NGOs (INGOs), or other transnational civil society organisations (TCSOs) of lacking legitimacy in some facet of their work. Yet, despite these criticisms, the proliferation of these organisations has not ceased and neither has their real and potential ability to influence national and international policy. Scholar Jan Aart Scholte, who has been publishing on this and related subjects for two decades, asserts in a recent article that "civil society organisations", along with "national governments... supranational institutions," and

¹ Input, throughput, and output legitimacy are defined and discussed in sub-chapter 3.2.2.

“substate agencies” are essential players in the “multiple multilateralisms” that comprise contemporary global governance (Scholte 2011: 112).

The significant role of NGOs and other TCSOs in national and global governance means that it is important to be able to accurately evaluate their legitimacy. The difficulty of doing so will be discussed in depth in the proceeding chapters. Evaluating legitimacy in this context requires a disassembling of the concept in order to determine the various ways in which it can be gained, maintained, or lost. This thesis’s focus is one specific type of CSO: those that work with state bodies (particularly in democratically weak states) and grassroots stakeholders to promote and strengthen national rule of law institutions from, as Taylor puts it, the “bottom up, and from the inside out” (Taylor 2004: see abstract). This is a subject for which there is a burgeoning, but still relatively small crop of scholarly literature (Golub 2007; Pouligny 2003; van Rooij 2012; Taylor 2004; Taylor 2006). The primary case study of this thesis is one such TCSO, the Geneva-based International Bridges to Justice (IBJ). IBJ is unusual in that it engages stakeholders from a cross section of society – state representatives, legal professionals, media, police, and grassroots civil society representatives – to provide legal representation to indigent people accused of crimes in the short term, and to instill a state-wide system of *pro bono* legal aid in the long term. So far, the organisation only maintains permanent field programmes in countries that have already passed the relevant rights-protection legislation into law, and therefore is often welcomed by states as a provider of legal technical assistance.

The working research question is: *how can we evaluate the legitimacy of International Bridges to Justice?* The methodology is to apply a theoretical framework on legitimacy to the case of IBJ; and with the goal of identifying broader implications within the research area, to refer to other empirical case studies about similar CSOs. The primary objective is to discuss how the legitimacy of IBJ can be evaluated using the theoretical literature. The tangential research objectives, methodology, and limitations of this thesis are discussed in the next chapter.

2 Methodology & Limitations

This thesis makes use of a qualitative case study methodology. According to Yin (2003), this method is suited to the study of complex, “real-world situations” where there are many uncontrollable variables (referenced in Lieberherr 2011: 77). The “case-study approach” also “enables analytic generalization rather than statistical generalization”, which “involves comparing empirical analysis to a previously developed theory, or proposition” (Yin 1994 paraphrased in Lieberherr 2011: 77-78). The method of sampling is theoretical; the case and theoretical framework were chosen specifically because “they can illuminate a specific phenomenon” (Lieberherr 2011: 78, paraphrasing Eisenhardt & Graebner 2007). In congruence with Flyvbjerg (2006), the scientific philosophy of this thesis is that case studies, much more than just “a method of producing anecdotes”, exemplify “the force of example”, and are a crucial source from which to learn about social phenomena.

As alluded to in the introduction, IBJ was chosen as an “*extreme or unique case*” (see Bryman 2008: 55). Although not the only one of its kind, IBJ’s “bottom up, inside out” strategy “to strengthen rule of law and ultimately democracy” presents us with a relatively unusual approach to legal and political development (Taylor 2004: abstract). Therefore, this case has the potential to deviate from existing theoretical models of legitimacy. IBJ operates both as an INGO/TCSO and as a national-level NGO in Burundi, Cambodia, China, India, Rwanda, Singapore, and Zimbabwe. It is headquartered in Geneva and works towards global objectives, most notably, a 12-year plan to end investigative torture in the world (IBJ.org 2013a). At the national level, it maintains local offices run by local staffs and is subject to state laws and authority. Therefore, my theoretical framework pertains to CSOs in relation to both national and global governance.

In line with Van Rooy’s (2004) definition, I use the terms CSO, TCSO, NGO, or INGO to refer to organisations that are separate from the state and the market, are recognisable as organisations rather than “loose constellations within society”, and are engaged in ensuring “moral” or “just” sociopolitical performance (see Van Rooy 2004: 6-10).

This thesis concerns the evaluation of IBJ’s democratic legitimacy, but also other kinds of legitimacy, such as moral and technocratic. Specifically it discusses how these different kinds of legitimacy can be interrelated, or traded off for one another. It should also be stated that this thesis is not concerned with the *internal* democratic legitimacy of CSOs, but rather legitimacy understood as the impact of a CSO on a country (see Pallas 2010a). The working theoretical framework presented in Chapter 3 is a combination, and in some of its elements, a synthesis, of the broad definitions of legitimacy provided by Scholte (2011), Dingwerth (2004), and Van Rooy (2004), the specific definition of democratic

legitimacy provided by Uhlin (2010), the “components” of legitimacy (input, throughput, output) provided by, *inter alia*, Zürn, Scharpf, and Dingwerth (referenced in Pallas 2010a and Uhlin 2010), the other “types” of legitimacy (democratic, moral, legal, and technocratic) provided by Scholte (2011), the “dimensions” of legitimacy (participation, control, argumentative practice, and good results) put forward by Dingwerth (*op. cit.*), and the heuristic “roles” of TCSOs (revolutionary, advocate, agent, or authority) devised by Pallas.

Chapter 3’s theoretical framework is then used as a “yardstick”, a means to explore how we can evaluate the legitimacy of IBJ’s approach. Chapter 4 presents three dimensions of IBJ’s approach: its general operations, its specific in-country activities, and its real and intended impact. A discussion of how we can evaluate IBJ’s legitimacy in light of the theoretical framework follows in Chapter 5. Primarily, I work from Uhlin’s table, “Questions for evaluating democratic legitimacy of transnational actors” and the “rules of thumb” suggested in Pallas (2010a), and then bring in issues raised by other authors. This method of using existing theoretical literature on legitimacy to evaluate specific case studies on TCSOs and other international organisations (IOs) has previously been employed by Lieberherr (*op. cit.*), Pallas (2010b), and Pearce (1997), amongst others.

The case study sources presented in Chapter 4 are a number of IBJ documents collected during my time as an intern with the organisation. These mainly constitute annual reports, post-activity reports, grant proposals, reports submitted to grant-giving organisations, Memoranda of Understanding (MoUs) with government bodies and local NGOs, and promotional pieces. To a large extent, my research objective concerns IBJ’s approach and intentions, what it does and why. I have no rational reason to believe that IBJ would misrepresent what it does and why in its official documentation, and so I view this as valid data for my purposes. That having been stated, I acknowledge that many of these documents were created for promotional purposes; and therefore, they may skew towards IBJ’s virtues more than an independent report carried out by an independent organisation or researcher might. Further, more in-depth evaluations of IBJ’s activities and legitimacy will require this kind of independent documentation. I must also acknowledge my own positionality as a former (unpaid) employee of IBJ. This acknowledged, the IBJ documents I present are not for the primary purpose of giving evidence for IBJ’s virtues, but rather as tools for a theoretical discussion about how we can evaluate the legitimacy of such a CSO within a certain context. I am interested in presenting as critical and objective an analysis as possible within these constraints.

3 Theoretical Framework

3.1 Legitimacy and democracy

3.1.1 Evaluating legitimacy

“Legitimacy rules,” writes Van Rooy, “are moving targets, difficult to describe and pin down on a piece of paper”:

one person’s rule need not be shared by another, most are often implied rather than stated, many are commonly contradictory and habitually mutated, and all are always juggled with power differences.... Yet rules that are wielded without conscious consideration and careful examination nonetheless have very real consequences in shaping what decisions are made, what money is spent, and whose lives are affected. [Van Rooy 2004: 62]

Legitimacy, like power, is not a tangible good that is either possessed or not possessed outside of a sociopolitical interchange. It is not created solely through the execution of an action, but also through how that action is understood and perceived by others. Moreover, that understanding and perception might change as new information is uncovered or as opinion shifts. Why the action was executed, how it was executed, who it was executed by, and what the action resulted in all have innate roles to play in the generation of legitimacy. Uhlin argues that “legitimacy should be viewed as a social construction”, and “there are no objective technical solutions to legitimacy problems that can be designed by experts independent of the context” (*op. cit.*: 22). He is therefore cautious about promoting “operational criteria” in order to measure “the democratic legitimacy of different [transnational actors (TNAs)]” (*ibid.*: 33). Favouring instead to ask “how the different sources of democratic legitimacy are socially constructed” (*ibid.*: 34).

Yet Van Rooy’s use of such an immutable concept as “rules” could be seen as representative of a desire among stakeholders – whether they are scholars, states, international organisations, civil society professionals, or individual citizens – to “pin down” to some extent how the legitimacy of an actor or action is evaluated before, during, and after the event. To do this necessitates a good degree of abstraction and a reliance on heuristics. For example, Van Rooy’s assertion that “legitimacy depends on acceptance of (any actor’s) grounds for representativity” might be a useful heuristic for furthering the debate; however, by definition it tells us little about complex empirical reality (*op. cit.*: 68). In reality, particularly the reality of transnational governance and policymaking, those who must “accept” an actor’s “grounds for representativity” in order to generate legitimacy could be a

multitudinous and diverse lot. If only a small minority of people accept the grounds for representativity of an actor, does that mean that the actor carries legitimacy, albeit in low quantity? How about if that small number of “acceptors” has greater authority to do the accepting? What if, in turn, the legitimacy of that group’s authority is not accepted by some portion of those they represent or affect? In order to evaluate a CSO’s legitimacy, particularly its democratic legitimacy, it is necessary to define what we mean by “representativity” and other elements of democracy beyond the more familiar context of national governance.

3.1.2 Defining democratic legitimacy

The post-war era of globalisation, however this term is defined, has meant an increased number and diversity of actors with the power to affect policy, directly or indirectly, at the global and the state level. Economic globalisation and the rise of transnational corporations (TNCs), the formation of international organisations (IOs), such as the United Nations, the World Trade Organization, and the African Union, and a proliferation of TCSOs and philanthropic organisations have all created a world where the lines between constituencies are blurred and the nation state is not the lone, or in some cases, not even the most important power wielder. However, as Uhlin points out, “the democratic credentials of these actors are all challenged” (*op. cit.*: 16). One reason for this is immediately apparent: who do these organisations legitimately represent? Have democratic principles and mechanisms been present in the election of representatives or the passing of international legislation? Are there mechanisms in place so that the *demos* can hold policymakers to account for undesirable, or undesired, outcomes²?

On the other hand, as Van Rooy observes, CSOs have frequently been championed as the solution to the problem of national and global democratic deficits, rather than as a potential part of it. “Civil society,” she writes, “is... often described as a necessary tool for ensuring democracy” (*op. cit.*: 9). This is because, in theory, CSOs have the potential to act as an ombudsman between the public and the state, or between the public and other organisations. Van Rooy cites a 1992 book by Siegel and Yancey when she lists the following “essential democratic functions” that CSOs perform:

- Providing a means for expressing and actively addressing the varied and complex needs of society.
- Motivating individuals to act as citizens in all aspects of society rather than bowing to or depending on state power and beneficence.
- Promoting pluralism and diversity in society, such as protecting and strengthening cultural, ethnic, religious linguistic, and other identities.

² For a theoretical discussion about accountability in global governance and the global *demos* see Grant & Keohane (2005) and Goodin (2007).

- Creating an alternative to centralized state agencies for providing services with greater independence and flexibility.
- Establishing the mechanisms by which governments and the market can be held accountable by the public [*ibid*: 9-10]

Van Rooy adds that “just because CSOs *can* do such things does not mean they necessarily *do* carry them out” (*ibid*: 10, emphasis in original). It follows that Siegel and Yancy would probably judge a CSO’s democratic legitimacy by how well it serves these functions. As an example of how democratic legitimacy is context-specific, it is important here to note that Siegel and Yancy are writing about then “recent Central and East European transitions”, and thus many of their criteria for democratic legitimacy relate to moving governance in a more pluralistic direction away from the centralised, communist state. However, according to Dingwerth (*op. cit.*), pluralism is only one model for democratic legitimacy at the global level.

In his summary of “empirical papers on democratic governance beyond the state”, Dingwerth identifies several “models” of democratic legitimacy: “constitutional approaches” -- theory of the world (minimal) state and cosmopolitan democracy -- pluralistic approaches, and deliberative or discursive democracy. The first two are models that include “more government”, the third includes “less government”, and the fourth includes “more discourse” (*ibid*). He defines “the pure” normative doctrine of pluralism as:

the acknowledgement that modern societies are characterised by a high degree of social differentiation, a diversity of life styles, and a plurality of interests. In these diverse societies, independent organisations act as intermediate institutions through which interests can be aggregated and articulated. The approach assumes that, in principal, all interests can be articulated and organised and that a balance between these interests can be achieved. [*ibid*: 14]

The democratic legitimacy of a CSO in this pluralistic sense could thus be evaluated for how well it manages to “aggregate and articulate” the interests of those it represents. The democratic legitimacy of civil society in general could be evaluated for how well the entire sector manages to strike a balance between all the different interests in society. Dingwerth finds that pluralistic approaches are preferable to constitutional approaches for transnational governance because they omit vertical organisation in favour of horizontal organisation, and state-centrism in favour of polycentrism. However, he concludes that pluralistic approaches are less preferential than deliberative approaches for transnational governance, because it is most often the case that disparities in resources between “intermediate institutions” are such that no true pluralistic balance can be realised.

Deliberative democracy derives its legitimacy from the process of “collective will-formation”; policy is formulated through procedural deliberation

or “mutual reason-giving”, where all who have a stake in the outcome of a decision³ are given an opportunity to contribute to that decision (*ibid*: 15). Within this model, a policy or law is

legitimate only if it is based on the public reasons resulting from an inclusive and fair process of deliberation in which all citizens may participate and in which they may continue to cooperate freely. [Bohman cited in Dingwerth 2004: 16]

Dingwerth concludes that the deliberative model “seems most suitable for transnational governance” because it “rel[ies] on a horizontal mode of political coordination, combin[es] aspects of input, throughout and output legitimacy, and... combin[es] the democratic quality of procedures with concerns about socializing and civilizing effects” (*ibid*: 20). However, he also asserts that the deliberative model is also “attractive for local and national politics” (*ibid*: 18). If we agree with him, then should the democratic legitimacy of a TCSO be evaluated by the extent to which it practices and promotes this all-inclusive process of collective decision-making at the national and transnational levels?

3.2 “Dimensions”, “components”, “types”, and “roles”

3.2.1 “Dimensions” of legitimacy: representation and participation

Dingwerth proposes four “dimensions” or “sources” of legitimacy in order to evaluate the legitimacy of “rule-making-processes” at the national and transnational levels; these are: participation or inclusiveness, democratic control, argumentative practice, and good results (*op. cit.*: 20). This sub-chapter focuses specifically on the first of these; the last three are discussed in tandem with the “components” of legitimacy in sub-chapter 3.2.2.

Participation refers to those who are included, and how they are included, in a decision-making process. It is a “core element of democratic theory”, as one can

hardly speak of democratic legitimacy where none of the individuals subject to a collective decision has taken part in its making. In turn, it goes without saying that decision-making equally implies individuals that actually make a decision; in other words, any decision-making process presupposes at least some degree of participation. The real

³ Dryzek and Niemeyer (2008) suggest that, in practice, an advocate or group of advocates could be chosen to “give reasons” for a certain position, thus averting problems of scale.

question of democratic legitimacy is therefore not so much about whether there is participation, but to what extent those who are subject to a decision have been included in the decision-making process. [*ibid*: 21]

Dingwerth splits the term into two different aspects: “scope” and “quality”, while Uhlin uses the term “inclusion” to mean scope and the term “participation” to mean quality. Participatory quality refers to the degree to which the members of a constituency are actively involved in a decision-making process; scope refers to who is given the opportunity to participate.

The primary normative and practical challenge of participatory scope or inclusion is to identify “the proper constituency or *demos* concerning a specific issue” (Uhlin 2010: 26). “Ideally,” Uhlin writes, “all those significantly affected by a decision should participate directly in decision-making”, although this “‘all-affected principle’ suffers from both practical and normative problems” (*ibid*; and see Goodin 2007; Erman & Uhlin 2010). It should be noted that in a liberal democratic state, participation is intertwined with “representation”, another potential source of legitimacy according to Uhlin. Specifically, it is one of the key participatory activities of the constituency of a liberal democracy to elect a representative. Uhlin differentiates between “representative democrats”, those who emphasise “formal mechanisms” of democracy, such as “election of leadership”, and “participatory democrats”, who are more “concerned with the actual inclusion of affected people”; however, in the case of transnational governance, including cases that involve TCSOs, formal mechanisms of direct representation are not as present, and therefore participatory scope is even more important as a criterion of legitimacy (*ibid*).

On the subject of NGOs, Van Rooy writes about representation and participatory scope as if they are by and large the same:

Groups are thought to be representative if their members are of a certain character, quality, or quantity. What numbers of people are involved? How encompassing is the membership? Does it cover all those who matter? [*op. cit.*: 63]

The “volume”, “breadth”, and “depth” of an organisation’s “membership” – those included in the initiatives of the NGO -- are important to their legitimacy because they indicate the organisation’s authority to represent those they claim to. While volume (size) and depth (commitment) of membership are important, “globalization activists (and some of their skeptics) put greater weight on the character of that membership”, or the breadth (*ibid*: 64). A wide breadth of participation would mean a broad cross-section of stakeholders is included in the decision-making process. When a broad or comprehensive scope is not present, it can mean the representatives of a CSO are “speaking on behalf” of their intended beneficiaries without the legitimate authority to do so. Also, the absence of a broad participatory scope could lead to the undue influence of the “loud minority”, when “‘minority’ views... unduly sway public policy” (*ibid*: 65).

Van Rooy argues that one “response” to too-narrow participatory scope has been to “re-jig the debate in terms of ‘partnership’” (*ibid*: 68). She writes that “partnership” is “code for the desire for more equitable power relations between Northern and Southern organizations involved in joint efforts” (*ibid*). In practice, this has meant “new experiments in cooperation”, the inclusion of “Southerners on boards of directors”, and sometimes the movement of “responsibility entirely to Southern directors” (*ibid*).

3.2.2 “Components” of legitimacy

The complexity of legitimacy, how it can be gained, maintained, or lost by different actors in different contexts, and especially how it can be affected by the action to outcome relationship in different actors’ approaches, makes it desirable to employ the three chronological “components”⁴ of legitimacy: input, throughput, and output. Uhlin frames his discussion around these components by way of establishing questions we can ask about a *transnational* actor’s legitimacy, but most of these, congruent with Dingwerth, could also apply to local and national politics (*op. cit.*). Uhlin’s table is included in Chapter 5.

Input legitimacy is usually said to subsume the two attributes discussed in sub-chapter 3.2.1: representation and participatory scope/inclusion (Uhlin 2010; Pallas 2010a; Dingwerth 2004). Throughput legitimacy concerns the second and third of Dingwerth’s four dimensions: democratic control, which subsumes transparency and accountability (*op. cit.*: 22), and argumentative practice, or “deliberation” as it is referred to by Uhlin (*op. cit.*: 31). Much has been written, and much more could be written, on the throughput-related concepts, transparency and accountability. However, they are secondary to the focus of this thesis and so will only be defined briefly.

Democratic control is the extent to which “the governed can... influence the behaviour of the governors” and can be considered a “passive form[...] of participation” (Dingwerth 2004: 22). A good general definition of transparency is

the extent to which individuals who may be significantly affected by a decision are able to learn about the decision-making process, including its existence, subject matter, structure and current status. [Dingwerth cited in Uhlin 2010: 26]

Accountability is summed up by Grant & Keohane as a proposition that

some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these

⁴ These three terms are referred to as “components” in Pallas 2010a.

standards, and to impose sanctions if they determine that these responsibilities have not been met. [Grant & Keohane 2005: 29]

Therefore, “effective accountability requires mechanisms for information and communication between decision-makers and stakeholders and mechanisms for imposing penalties” (Uhlin 2010: 27). As with participatory scope, one of the essential difficulties of accountability in practice is identifying a constituency. To whom should the actor be made accountable? In their study, in which they measure the accountability of several transnational NGOs, Piewitt *et. al.* (2010) explain that transnational NGOs are often concerned with their accountability to several groups of stakeholders: their members, their donors (which frequently includes state governments), and the general public.

The quality of deliberation, according to Uhlin, should be evaluated by means of “critical reflection” (*op. cit.*: 31). In a system of deliberative democracy, judged most suitable for transnational governance by Dingwerth, there must be a “genuine willingness to adjust one’s position in response to rational arguments” (*ibid*). Interestingly, Uhlin points out that “the coercive and confrontational methods” of some TCSOs “do not fit well within a deliberative democratic framework” (*ibid*).

Output legitimacy refers to consequences. How can we evaluate the legitimacy of a TCSO based on their results? Using a broad definition of legitimacy, this means that legitimacy can be generated in a national or transnational context through “good results”, or how “the substance of a decision enhances the common good” (Dingwerth 2004: 26). However, with regard to *democratic* legitimacy, Uhlin raises an important point of divergence. Democratic output legitimacy, as defined by Uhlin, does not mean a TNA’s effectiveness, but a TNA’s “democratizing impact on global governance” (*op. cit.*: 32). As we shall see in sub-chapter 3.2.4, democratic output legitimacy can also be taken to mean the democratizing impact of a CSO on a specific country (Pallas 2010a). Importantly, Uhlin also notes that TNAs might have to make trade-offs “between democratic and non-democratic aspects of output legitimacy” in order to meet their objectives (*op. cit.*: 32).

Before moving on to the next section, it should be added that the clean lines of demarcation between input, throughput, and output legitimacy only exist theoretically. As Uhlin writes, “the different democratic values organized under the input, throughput, and output headings are interrelated” (*ibid*: 23). For example, comprehensive participatory scope, greater transparency, deliberation, and accountability could just as well be *outcomes* of an NGO initiative, rather than inputs or throughput.

3.2.3 “Types” of legitimacy

The legitimacy of CSOs is not only evaluated by its democratic qualities, but also by its ethical, altruistic, or social justice-enhancing qualities. Of course, the two are related – stronger democratic institutions can theoretically lead to stronger

social justice – but because we are working from a clear definition of democratic legitimacy provided by Uhlin, it may also be useful to define some other types of legitimacy.

Scholte argues that

To date, mainstream perspectives have tended to adopt a technocratic approach, whereby a global governance arrangement would acquire legitimacy on the basis of efficient delivery of material objectives such as welfare, security and sustainability.... Yet for legitimacy to be deeper and more solid it must also have other grounds besides technical performance, including legality, democracy, morality and charismatic leadership. [*op. cit.*: 114).

This is not to say that CSOs or other actors cannot earn legitimacy through providing effective technical assistance, indeed many of them do. However, effective technical assistance is not always enough. Pallas notes that effective service provision can even be deleterious to democratic legitimacy because it may “prop up an undemocratic state, even as it mitigates its impact on its citizens” (Pallas 2010a: 227). Along these same lines, Scholte argues that legality is one necessary criterion to differentiate between the legitimate service provision of organisations such as UNICEF, and the illegitimate service provision (no matter how effective it is) of “Triad societies and the Cosa Nostra” (*op. cit.*: 114). Legality also provides legitimacy in transnational governance due to the “informal” nature of some TNAs. Particularly when paramilitary groups, “transgovernmental networks of civil servants”, and “corporate responsibility schemes” are often able to operate with little transparency, accountability, and are even able to circumvent the rule of law (*ibid.*: 115).

With regard to moral legitimacy, Scholte offers several examples of how initiatives based in moral concerns are often able to gain legitimacy. For instance: the UN “bolstered its legitimacy by galvanizing opposition to apartheid in South Africa”; the Kimberley Process “owes its legitimacy largely to the morally right cause of suppressing trade” in blood diamonds; and “the Global Fund attracts support for its just purpose of alleviating human suffering in epidemics” (*ibid.*: 116). Interestingly, Scholte also asserts that the legitimacy of TNAs can also be earned through charismatic leadership, “the capacity to inspire and mobilize followers” (*ibid.*: 116). This view of legitimacy as something based in personalities, or how the governed relate and are inspired by their governors, seems like a fascinating avenue for further research, but it is too difficult to evaluate using the material I have at this time.

3.2.4 Pallas’s four “roles”

Another important theoretical aspect of legitimacy for this thesis is provided by Pallas (2010a). Building on Uhlin’s definition of democratic legitimacy and context-specific framing of legitimacy evaluation, as well as the debates surrounding the behaviour of CSOs, governance, and policy-making in general,

Pallas suggests four context-determined “roles” that a CSO does, or should, play in order to be considered democratically legitimate. To be clear, it is *democratic* legitimacy that Pallas is concerned with, rather than the other types presented in sub-chapter 3.2.3. However, Pallas includes in his definition of democracy both “popular sovereignty” and “the protection of citizen rights”, without qualifying that these need to be understood as political rights (*ibid*: 223). Because Pallas does not “enumerate these rights in detail”, democratic legitimacy, in his definition, could include the protection of due process rights, ESC rights, or more controversial rights (*ibid*: 223).

With regard to democratic legitimacy, Pallas argues, “CSOs actually operate in three different contexts”: undemocratic states, such as “Eastern Europe or apartheid South Africa”, democratic states, which “have some measure of liberal democracy and... are acknowledged as democratic by their peers”, and the international realm, “where they are often beyond the control of any one state or institution” (*ibid*: 225). Within these three contexts, a CSO can be a “revolutionary, advocate, agent, or authority”, and their democratic legitimacy, Pallas argues, can be evaluated based on how well they fill that role in that context (*ibid*).

Pallas’s “advocates” only operate in a democratic context where the state guarantees democratic rights (*ibid*: 227). These CSOs “can enhance the democratic rights of a state’s citizens by monitoring or facilitating state processes” (*ibid*). Pallas argues that the legitimacy of these actors should be “judged on either input or throughput”, or their representativity and how well they “support the practices of transparency, accountability, and deliberation” to “enhance democracy” (*ibid*). However, advocates should never be judged by output legitimacy, because in a democratic state, it is the government, not CSOs, who should be responsible for outcomes (*ibid*). Pallas’s “advocates” heuristic is generally in agreement with Van Rooy and Uhlin, while also supplying a useful, context-specific “rule of thumb.”

“Agents” are those CSOs “acting on behalf of an established authority”, such as the government, in a formal capacity (*ibid*: 228). According to Pallas, these CSOs’ democratic legitimacy

must be judged by the democratic credentials of the state or institution on whose behalf it acts. If a CSO acts on behalf of a democratic state, it may be considered democratic; if it acts on behalf of an undemocratic one, it may be considered as undemocratic because of the type of regime it is supporting. [*ibid*]

“Authorities” are those CSOs that are either formally participating “in international decision-making” or are engaged in “global policymaking” through the “propagation of international norms” (*ibid*: 229). This would include CSOs such as IBJ, who are engaged globally in efforts to change and/or enforce state policy to make it congruent with international norms such as those found in the Universal Declaration of Human Rights. Because, at present, “no enforceable democratic rights exist” for politics at the global level, Pallas argues that “authorities” must be judged by the same inputs and outputs – “equal

representation, respon[ce] to citizen control, and protect[ion of] fundamental rights – as other “international actors” (*ibid*: 230).

Finally, “revolutionary” CSOs are those operating in undemocratic states. Pallas argues that a CSO in this context “must be legitimated by its efforts to reform or replace the existing regime” (*ibid*: 227). A CSO not engaged in this endeavour in an undemocratic state may earn *moral* or *technocratic* legitimacy, but it does not earn *democratic* legitimacy. Also, “revolutionaries” “should be judged purely on outputs”; this is because “representation, participation, or transparency is meaningless if national democracy is not established” (*ibid*). Throughout Pallas’s article, it also seems to be tacit that a “revolutionary” CSO is in a position of confrontation with the existing regime. The possibility that a CSO might “reform or replace the existing regime” in a cooperative manner is not explored. For example, Pallas defends his evaluation of the legitimacy of “revolutionary” CSOs by stating that

[t]he literature on civil society and national democratizations clearly reflects the standards of the revolutionary role. Such literature describes undemocratic regimes and judges civil society, usually positively, for its role in *contesting* them. [*ibid*: 230, emphasis added]

Although he is in accordance with other scholarly literature, I find the “revolutionary” heuristic the most problematic for two reasons.

First, Pallas states that “[f]or the sake of parsimony” he does not qualify the different degrees of democracy a regime might exist in along a continuum (*ibid*: 225). Doing so might have been outside of his scope, but it seems that not doing so creates unnecessary ambiguities. For example, imagine a state that is deemed undemocratic according to political rights measurement organisations, such as Freedom House, but has passed some civil and/or political rights legislation, but does not have the resources or state capacity to properly enforce it. Should a CSO working *with* an “undemocratic” state to strengthen capacity to enforce laws that could have a democratizing impact be deemed democratically illegitimate? In a simplistic way, this scenario describes IBJ’s work in Rwanda and Zimbabwe.

Second has to do with intention. Pallas states that legitimacy should be based on a CSO’s “efforts”, but then also states that it needs to be judged entirely on outcomes. If we interpret “efforts” to mean intentions – not passive “good intentions”, but active, effective intentions – than this seems more of an input than an output. If a CSO puts its best efforts into improving democracy within a country, but fails, should it be judged illegitimate? How long does the organisation get to succeed before it is judged to be a failure, and thus democratically illegitimate? Both of these points have implications for Chapter 4 and 5.

4 Analysis: International Bridges to Justice

4.1 General operations

Karen Tse, the public defender, United Nations consultant, and Unitarian Universalist minister who founded IBJ, received her inspiration from a trip to Cambodia:

I remember peering through the bars of a cell in Cambodia and talking with a young boy who had been detained, tortured by the police, and was languishing in prison.... Like most prisoners in Cambodia, he had no lawyer or human rights worker to defend him or safeguard his rights, and he had no pending trial date to determine his guilt or innocence. I flashed back to ten years before, to my college days of organizing letter-writing campaign for political prisoners. We had demanded that they be free from torture and be granted their right to fair and speedy trials. But as I came face to face with this young boy, I realized that neither I nor my fellow student would have written a letter for him. He was not a political prisoner; he was just an unimportant 12 year old boy whose mischievous behavior, trying to steal a bicycle, had landed him in this quandary. [quoted in Bach *et al.* 2012: 111-112]

On further research, Tse discovered that of the 113 countries where torture was found to take place, 93 had passed laws ensuring the right to legal counsel and the right not to be tortured (TED Talk 2011). Several of these laws were passed as part of IMF and World Bank “Second Generation conditionalities” (see Stokke 2009; Davis & Trebilcock 2001). This was therefore not a problem of passing Western common law reforms at the state level, but a problem of administering and enforcing those laws at the local level.

Difficulties of transplantation have two dimensions that are relevant here. In line with the arguments of Trubek & Galanter (1974), Merryman (1977), Golub (2007), and Green (1997) it is often not enough to transplant Western institutions to developing countries without also transforming local attitudes towards criminality, and doing away with customary practices of legality that may be at odds with the Western legal framework. This need not be taken as a case of moral relativism (see Green 1997: 51); it just means that different norms can emerge out of different cultural and historical circumstances. Tse observed of the prison guard on duty at the 12-year-old boy’s cell that he

did not appear concerned that I was talking to this boy who bore obvious signs of beating. They didn't have much to hide; the use of force to extract confessions was just a part of standard police operating procedures. [Tse 2008: 111]

Tse understands this normative behaviour as one legacy of Pol Pot and the Khmer Rouge, rather than as a long-rooted Cambodian cultural norm (*ibid*). The second relevant problem of transplantation is also related to regimes such as the Khmer Rouge: the post-conflict decimation of legal sector capability. Tse believes that at the end of the Khmer Rouge period “fewer than ten attorneys had survived”, and no “structures or procedures were in place to implement” the new criminal procedural code (*ibid*). In post-conflict Rwanda and Burundi, post-Cultural Revolution China, and impoverished Zimbabwe there is a similar situation (IBJ.org 2013b; IBJ.org 2013c; IBJ.org 2013d; IBJ.org 2013e).

IBJ's country programmes are all built on the same model. Employing an “IBJ Country Fellow”, the organisation opens “Defender Resource Centers” (DRCs) – essentially law offices – to serve as headquarters in the field. In Cambodia, the Fellow is Ouk Vandeth, who was a student at a Buddhist monastery before the rise of the Khmer Rouge forced him into a labor camp. After witnessing extensive torture there, Vandeth became a public defender after his release, and at the time when Tse approached him to join IBJ in 2007, he was working for an NGO that focused on protection of the legal rights of the poor (Bach *et. al.* 2012: 115). This engagement of deeply committed, locally-operating legal professionals is a standard part of IBJ's approach. Apart from the China and Singapore programmes, which together employ four American staff, all IBJ country programme staff members reside and were born locally (IBJ.org 2013f). From the DRCs, country programme staff carry out a number of activities which, taken together, are meant to provide direct technical legal assistance to indigent accused individuals, and initiatives to entrench criminal rights and defense in the institutional fabric of the country (see the following sub-chapter).

One of the most interesting aspects of IBJ's approach is that it works in a partnership role with governments, as well as other local NGOs. Taylor (2004 and 2006) has written extensively on the phenomenon of NGOs working in partnership with government officials in Russia, and has identified three discrete CSO approaches, which he refers to as “Civil Society I”, “Civil Society II”, and “Civil Society III.” Civil Society I is concerned with “civic norms”, educating citizens about the “norms and values” within “a liberal democracy”; Civil Society II is concerned with staying “autonomous” from the government in order to act “as a potential counter-weight to an over-reaching state; and “Civil Society III... stresses the possibility of a more positive relationship of mutual assistance and partnership between the state and civil society” (Taylor 2006: 195-196). According to Thomas Carothers, “this [third] approach is gaining ground in democracy assistance programmes” and “civil society programmes... in transitional countries now typically seek a productive dialogue with state institutions and view state and civil society as partners more than opponents” (quoted in Taylor 2006: 196).

Because it employs both state partnership and grassroots rights-awareness activities, IBJ's approach is a hybrid of Civil Society I and III. In an article written about IBJ for *Innovations*, IBJ board member and editor for *The Economist*, Kenneth Cukier, writes that "[t]he IBJ method is novel. Most human rights groups take the opposite approach. Rather than work with governments, they relish their role as outside agitators. To work within the system would seem tantamount to condoning it" (Cukier 2008: 136). With regard to Human Rights Watch, he also writes that the "naming and shaming" approach is "vitaly important, yet leaves the fundamental problems unaddressed" (Cukier 2008: 136). In a grant proposal to the Buckminster Fuller Institute, IBJ highlighted this difference between itself and the two more famous organisations, while also implying that government elites have an economic interest in IBJ's intervention:

Human Rights Watch seeks to document and expose particularly egregious cases of human rights violations, but does not work to repair the troubled regimes that it rebukes. Similarly, Amnesty International's classic letter-writing campaigns to mobilize public opinion, while effective with respect to individual cases, do not seek the transformation of entire criminal justice systems. International Bridges to Justice also seeks to end human rights abuses. But its approach is completely unique. IBJ recognizes that in order to create sustainable change at the systemic level, strong relationships with host governments are paramount.... Economic prosperity cannot exist where laws are regularly ignored and crimes regularly go unpunished. It is thus in the interest of everyone, from the most powerful elites to the most indigent and helpless, that a justice system actually protects people's fundamental human rights. [IBJ BFI Proposal 2013]

IBJ has therefore signed Memoranda of Understanding (MoUs) with every country's Ministry of Justice (MoJ) in which it operates, as well as with several law NGOs and bar associations.

4.2 Activities

4.2.1 Defender trainings

IBJ's training of local public defenders takes various forms depending on the country programme. In China, the oldest and second most well-established programme after Cambodia, training workshops, "Lawyers Salons", and symposia have been held in Beijing, X'ian, and Wuhan (IBJ China DRC Report 2012). These have been attended by thousands of lawyers. In the newer and less-funded programmes in Africa, trainings take the form of more modest workshops of often less than 50 participants (IBJ EuropeAid Report 2012). In either case, the principle is the same. The trainings are hosted by local staff and bar association partners; and American lawyers, often Tse's personal friends working on a *pro*

bono basis, are flown in to give extra instruction and mentorship. As well as learning best practices relevant to local laws, and the IBJ philosophy that torture can be prevented by “early access to counsel”, the lawyers are taught to train and mentor other lawyers in a similar fashion (IBJ Annual Report 2010: 9). Usually, lawyers are given a dedicated seminar about how to tactfully instruct judges *mid-trial* in the local laws pertaining to rights abuses (IBJ EuropeAid Report 2012).

4.2.2 Roundtables

As part of its objective to strengthen rule of law from the inside out, IBJ frequently hosts “roundtable” meetings where it brings in various “justice sector stakeholders”, such as “lawyers, police, prison officials, prosecutors,... judges” civil society representatives, and journalists “to engage with one another and identify common ground” (IBJ Vision-Impact Report 2013: 3). These often result in “candid discussions about corruption and trust of public officials” (Bach *et al.* 2012: 122). The meetings are frequently organised around specific topics or themes. For example, Burundi hosted a roundtable in November 2012 on the “Rights of the Child” ((IBJ Vision-Impact Report 2013: 6).

4.2.3 Rights-awareness

In order to “engage[e] people in awareness of their legal rights” IBJ hosts radio rights-awareness broadcasts, hangs posters urging people to “Know Their Rights!” in prisons, courthouses, and other government buildings, and goes to the streets dispensing rights awareness pamphlets and surveys. 50-150 of these “grassroots events” are carried out every year (IBJ EuropeAid Report 2012: 15). In Burundi, Zimbabwe, and India, IBJ Country Fellows and staff have visited prisons and given rights-awareness lectures to hundreds of prisoners (IBJ EuropeAid Report 2012; IBJ Vision-Impact Report 2013).

4.2.4 Case support

After the lawyer trainings, IBJ-mobilised lawyers defend a number of detainees and accused, usually on an entirely *pro bono* basis. The numbers vary from country-to-country. IBJ lawyers will often seek out prisoners at local prisons and interview them to determine who is incarcerated without a scheduled court date.

4.3 Impact and long-term goals

Tables 1-4 denote a portion of IBJ's quantitative impact over a number of years. There are a few things to consider when looking at them. First, a technical point: in Cambodia, there is a difference between "IBJ defenders" and "defenders trained by IBJ." The latter are defenders operating officially under IBJ auspices. Second, several of the figures are self-reported estimates. For example, IBJ cannot know the exact number "of defendants served by those trained" because often these are independent lawyers who take cases outside of IBJ's purview. This is not to say that IBJ does not strive for some level of accuracy in its reporting, but it does need to be acknowledged. Third, the numbers must be viewed in proportion. 57, 024 cases handled in China seems like a large number, but that is in proportion to a prison population that exceeds an estimated 1.57 million (IBJ Annual Report: 10).

IBJ normally reports its impact through qualitative evidence, and it does have some notable successes in terms of systemic impact. For example, in Burundi in 2010:

President Pierre Mkuruziza ordered the immediate release of hundreds of non-violent prisoners from his country's overcrowded facilities. His presidential decree allowing this release came as a result of several IBJ Roundtable discussions on prison overcrowding. The decree quoted IBJ's slogan 'Freedom is the rule; detention is the exception.' [IBJ Vision-Impact Report 2013: 6]

Also in Rutana, Burundi, three roundtables were held "to discuss a newly-proposed criminal procedural law," which IBJ's Burundi staff supported (*ibid*: 3). The roundtables were attended by an MP and a Member of Senate. The new criminal law was passed by the Parliament and the Senate "promptly" afterwards (*ibid*). Of course it could be argued that Burundi's Parliament and Senate would have passed the legislation anyway, but IBJ, as host of the meetings, was in a position to influence legislative policy. In Zimbabwe,

Prosper Kunaka, a 19-year old Zimbabwean man, had already spent 6 months in pre-trial detention on false charges when Pamela, an IBJ legal fellow discovered the case and obtained his release without fee in April 2011. "Free bail" was a practice unheard of before IBJ's intervention in Zimbabwe began. It is now recognized and routinely practiced in the court of Norton, a small town outside Harare. Lawyers throughout Zimbabwe now cite this as precedent to secure "free bail" in other parts of the country. [*ibid*: 8]

There are too many examples like this to go into them all here. Suffice it to say that IBJ is in a position to influence policy, and normally this is achieved by capitalising on existing laws rather than pushing for reforms. However, it must be noted that it is the long-term goal of the organisation to instill Western-style public legal aid systems in the countries where it works, and due process rights throughout the world (see IBJ.org 2013a). From Bach *et. al.*: "[our] programmes, beginning at the local level, are designed to then trickle up over time,

simultaneously creating a sustainable and replicable model while generating grassroots demand to which policy makers respond” (Bach *et al.* 2012: 126). In other words, a European-based NGO, made up predominantly of Americans, mobilises local people to demand legal sector change.

Table 1. “IBJ Scale of Impact – Africa” (IBJ Internal Document 2013a)

IBJ'S SCALE OF IMPACT - AFRICA + JM							
KEY PERFORMANCE INDICATORS PER PROGRAM	2007	2008	2009	2010	2011	2012	2013
Defender Capacity Building							
# of trainings held	0	1	3	8	9	12	15
# of countries reached	0	1	3	3	3	3	3
# of defenders trained	0	16	158	184	228	285	356
# of defendants served by those trained	0	384	3950	4416	5472	6840	8550
Judicial System Reforms							
# of roundtables held	0	0	8	11	16	20	25
# of countries reached	0	0	2	3	3	3	3
# of participants to roundtables	0	0	124	165	240	300	375
# of firm commitments obtained	4	2	19	21	25	31	39
# of people benefited by implementation of firm commitments	1200	600	5700	6300	7500	9375	11719
Awareness Raising Campaigns							
# of campaigns implemented (all media included)	1	2	6	24	30	38	47
# of countries reached	1	2	2	3	3	3	3
# of people reached	25000	50000	550000	1500000	2000000	2500000	3125000

Table 2. “IBJ Scale of Impact – China” (IBJ Internal Document 2013b)

IBJ'S SCALE OF IMPACT – CHINA							
KEY PERFORMANCE INDICATORS PER PROGRAM	2007	2008	2009	2010	2011	2012	2013
Defender Capacity Building							
# of trainings held	7	7	15	18	29	35	42
# of countries reached	1	1	1	1	1	1	1
# of defenders trained	325	434	860	1032	1650	1980	2376
# of defendants served by those trained	7800	10416	20640	24768	39600	47520	57024
Judicial System Reforms							
# of roundtables held	12	8	10	13	21	25	30
# of countries reached	1	1	1	1	1	1	1
# of participants to roundtables	332	220	300	364	583	999	1213
# of firm commitments obtained	5	3	3	6	10	12	14
# of people benefited by implementation of firm commitments	507	558	776	931	1489	1786	2143
Awareness Raising Campaigns							
# of campaigns implemented (all media included)	4	3	2	3	5	6	7
# of countries reached	1	1	1	1	1	1	1
# of people reached	26300	15000	45280	54336	72448	86937	104324
Online courses							
# of people who completed online courses	0	0	0	54	1080	1890	2700
# of courses offered	0	0	0	1	20	35	50

Table 3. “IBJ Scale of Impact – Cambodia” (IBJ Internal Document 2013c)

IBJ'S SCALE OF IMPACT – CAMBODIA							
KEY PERFORMANCE INDICATORS PER PROGRAM	2007	2008	2009	2010	2011	2012	2013
Defender Capacity Building							
# of trainings held	3	3	5	9	11	13	16
# of countries reached	1	1	1	1	1	1	1
# of defenders trained	40	64	250	300	360	432	518
# of defendants served by those trained <small>(average lawyer defending an estimated 30 cases per yr)</small>	120	1920	7 500	9 000	10 800	12 960	15 552
# of cases represented by IBJ lawyers	30	60	517	1044	1 380	1 296	1 555
Judicial System Reforms							
# of roundtables held	1	3	5	10	12	14,4	17
# of countries reached	1	1	1	1	1	1	1
# of participants to roundtables	50	150	495	990	1 188	1 425	1 711
# of firm commitments obtained	1	2	5	10	12	14,4	17
# of people benefited by implementation of firm commitments <small>(average number of people benefitted estimated at 200)</small>	1000	2 000	5 000	10 000	12 000	14 400	17 280
Awareness Raising Campaigns							
# of campaigns implemented (all media included)	13	20	45	60	72	86	104
# of countries reached	1	1	1	1	1	1	1
# of people reached	455	800	7,001,469	7 300 000	7 360 000	7 720 000	7 864 000
Online courses							
# of people who completed online courses	0	0	0				
# of courses offered	0	0	0				

Table 4. IBJ's progress handling cases in Cambodia 2008-2011. [Bach *et al.* 2012: 127]

Year	Total number of clients	Number of bail application approved	Number of reduced sentences	Number of acquittals and dismissals
2008	60	42	7	10
2009	517	185	37	86
2010	1044	215	343	181
2011	1380	175	348	77
Total	3,001	617	735	354

5 Discussion & Conclusion – how can we evaluate legitimacy in the case of IBJ?

As previously stated, IBJ works to spread and strengthen rule of law norms internationally through initiatives such as the 12 Year Plan to End Torture, and it also operates at the national level through its country programmes. Although Uhlin’s questions for evaluating democratic legitimacy were devised to pertain to transnational actors, I see no reason why many of them cannot also be applied to CSOs that operate at the national level. Therefore, most of Uhlin’s questions are relevant to IBJ on two different levels.

5.1 Democratic input legitimacy

Table 6. “Questions for evaluating democratic legitimacy of transnational actors” (from Uhlin 2010: 33)

<p>Input Legitimacy</p> <p><i>Representation</i></p> <p>How representative is the actor of its constituency? What is the quality of electoral representation? What is the quality of non-electoral mechanisms of authorization by stakeholders?</p> <p><i>Inclusion</i></p> <p>To what extent are those significantly affected included in decision-making, deliberation, and other activities? To what extent does the actor give voice to marginalized people?</p> <p>Throughput Legitimacy</p> <p><i>Transparency</i></p> <p>To what extent are decision-making processes and other activities open and transparent?</p> <p><i>Accountability</i></p>
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According to what principles is the actor accountable?

To which stakeholders is the actor accountable?

Does accountability involve control and sanctions or voluntary responsiveness?

Participation

What are the forms and quality of participation?

Deliberation

To what extent is deliberation characterized by critical reflection?

Output Legitimacy

Consequences

What are the democratic consequences of the actor's activities?

Does the actor contribute to the democratization of global governance, and if so, how?

Immediately we run into the challenge of defining IBJ's "constituency," and in this case, I argue that it should be defined in congruence with Goodin's (*op. cit.*) and Grant & Keohane's (*op. cit.*) "all significantly-affected" principle. As a CSO concerned with macro-level social and political change, and working in partnership with the government, IBJ's initiatives have the potential to significantly affect everyone in society. However, how well does IBJ represent everyone in the countries where it works?

The first point here is that IBJ works to uphold penal code legislation, but what was the democratic quality of the processes which first led to the implementation of this legislation? In Rwanda, for example, legislation is passed by an elected parliament, but in 2008, representatives of the Rwandan Patriotic Front ran unopposed (Nyulawglobal.org 2007; Afp.com 2008). In total, five of the countries where IBJ works to strengthen laws "on the books" have low quality of political representation according to FreedomHouse.org (Freedomhouse.org 2013a; Freedomhouse.org 2013b; Freedomhouse.org 2013c; Freedomhouse.org 2013d; Freedomhouse.org 2013e). We do not need to entertain the idea that due process rights and the right not to be tortured might be considered undesirable by some portion of the electorate; the point is, desirable or not, the laws that IBJ seeks to enforce might not have been passed democratically.

Second, although IBJ seeks to protect the rights of marginalised individuals and to help them out of unfortunate circumstances, it does not, as of yet, include them directly in decision-making processes. By this I mean that poor individuals, or civil society organisations representing them, are not routinely included at deliberative meetings, such as the roundtables. If the voice of the indigent accused is heard at roundtables, it is through the lawyers. However, it could be argued that IBJ does give voice to indigent accused individuals by

helping them to get their day in court. It could also be argued that when IBJ helps to get a prisoner acquitted, it is setting them free to participate in the political and social life of a free citizen, but their situation before they were incarcerated – which may include poverty, or being subject to an undemocratic state – will probably not have changed. On the other hand, IBJ could probably be credited with empowering local legal professionals who might have come from poor or marginalised circumstances. It also strives to educate people in their legal rights, which, although it is not “giving voice”, is potentially empowering.

In this context, giving voice to the poor and marginalised might look something like what Golub (*op. cit.*) advocates. Golub is concerned with the “legal empowerment” of the poor, which “involves”:

an emphasis on directly strengthening the roles, capacities and power of the disadvantaged and civil society, as opposed to focusing on state institutions. A legal empowerment programme will select issues and strategies flowing from the evolving needs and preferences of the poor, rather than starting with a pre-determined, top-down focus on judiciaries or other state institutions. Particular attention will be paid to administrative agencies, local governments, non-state justice systems, media, community-organising, group formation or other processes and organisations that can help advance the rights and well-being of the poor, rather than a focus on a narrowly defined justice sector.... Legal empowerment should seek to pay greater attention to domestic ideas and initiatives, or experience from other developing countries, rather than Western imports. [*ibid*: 10]

This is not to say that IBJ is not, to a commendable extent, concerned with the plight of the poor and marginalised. Nor is it to say that IBJ does not engage with the grassroots. What is a matter of debate is to what extent IBJ addresses root causes of criminality, or helps grassroots and community actors to have their say in the *formation* of domestic legal policy.

5.2 Democratic throughput legitimacy

There are two ways in which we can view IBJ’s democratic throughput legitimacy, or democratic control. Either as the democratic qualities that are present during the organisation’s activities, or as the democratic, throughput-related outcomes that it achieves or tries to achieve. The former relates more to Uhlin’s questions concerning the democratic credentials of the organisation itself, while the latter has to do with its democratising impact on an undemocratic country. This is one example of how the “components” are not always easy to separate; sometimes one actor’s output can be another actor’s throughput.

As for the first understanding, I will deal here briefly with transparency, accountability, and deliberation. IBJ's decision-making processes and activities are transparent to a certain number of stakeholders. This would include the government, IBJ's partners in local civil society and bar associations, donors, and others who are directly involved in the organisation's activities and deliberative processes. Related to the questions of inclusion in the previous sub-chapter, some of IBJ's activities would not be transparent to all of the people whom its activities might affect, specifically, ordinary citizens not involved in decision-making processes. When IBJ members meet at roundtables with a specific group of officials to deliberate over a specific issue in the legal system, what was said, how it was said, and what was decided will only be available to a select group of people. In this case, we have traded-off of transparency for deliberation. This has led to several beneficial outcomes (see sub-chapter 4.3), which could be credited to a high level of "critical reflection" in certain stakeholders, but the democratic legitimacy as we have defined it is questionable.

The same could be said for IBJ's accountability. There are no formal mechanisms in place for IBJ to be held accountable to ordinary citizens. However, some would argue that IBJ's MoUs with undemocratic governments might make them *too* accountable to the state. For example, Gready (*op. cit.*) elucidates how one rule of law NGO, the French Penal Reform International (PRI), had its mission derailed due to its partnership with an overbearing Rwandan government. Also, several examples of the pitfalls of not enough CSO autonomy are presented in Hulme & Edwards (1997).

5.3 Democratic output legitimacy

IBJ does, however, try to increase citizen's democratic control in certain ways within the limits of its own objectives. This is exemplified by its rights-awareness campaigns – trying to empower citizens by making them aware of their legal rights under the laws of their own countries – and by its long-term goal to make policymakers more responsive to grassroots demand that those rights be upheld.

However, this brings up some ambiguities in our theoretical framework. With regard to democratic legitimacy, is it enough to try to strengthen legal rights institutions when working in, and partnering with, an undemocratic state? Returning to the issues raised by Pallas, even if IBJ has some ability to increase democratic control in the very specific way mentioned above, does its position as a partner of the state allow it enough freedom to affect long lasting change? Because it does not attempt to "reform and replace" undemocratic regimes directly, does it fail as a "revolutionary?" Or, do its attempts to strengthen certain rights institutions leave it in a democratic legitimacy grey area?

IBJ does fulfill part of Pallas's criteria for democratic legitimacy as an "authority", because, in its endeavour to uphold universal human rights norms, it has had significant success "protecting fundamental rights" in several countries.

Should we then say that IBJ has a moderate amount of democratic legitimacy as an “authority”, but no democratic legitimacy as a “revolutionary”?

Perhaps we must agree with Pallas’s and Uhlin’s assertions that democratic legitimacy needs to be judged based purely on democratising outcomes. However, I would argue that this is not a simple task either, because initiatives in the present may not bear fruit until sometime in the distant future. Must we say that IBJ has no democratic legitimacy at present, until we have seen, in the fullness of time, whether or not its initiatives eventually helped in the reformation or replacement of the undemocratic regime? Or can we say that IBJ’s *intentions* qualify it for some democratic legitimacy now?

So where does this leave us with regard to evaluating IBJ’s democratic legitimacy? When the dust settles, it is not completely clear whether or not IBJ “has” democratic legitimacy. If we are to try and evaluate it using our theoretical framework as a yardstick, or as a checklist, then I think we have determined that IBJ does not have *categorical* democratic legitimacy. However, we have also seen that the organisation has had a significant positive impact on the countries where it works. It could thus be argued that IBJ has high levels of moral and technocratic legitimacy. This trading off of democratic legitimacy – as embodied by a “revolutionary” role contra to an undemocratic state -- for other types of legitimacy is shown by Taylor (2006) to be a potentially parallel characteristic among many “Civil Society III” organisations. Like the Russian CSOs Taylor is concerned with, IBJ’s “fortunes” are “dependent on a small number of committed and well-placed individuals”, and because it relies so heavily on government cooperation and acquiescence (not to mention foreign donor funding), “the long-term sustainability of [its] work” could be “in doubt” (Taylor 2006: 208). Also in congruence with Taylor, it is necessary to point out that we need not “insist on one model of NGO activity” (Taylor 2006: 209); those aspects of democratic legitimacy that are traded off by a Civil Society III organisation in the execution of its approach, can be, and often are, taken up by a Civil Society II organisation operating in the same country.

It is also important to remember Uhlin’s caveat about using one standard of “operational criteria” to gauge all instances of legitimacy. Harkening back to sub-chapter 3.1.1, legitimacy is not only context-derived in the manner which Pallas elucidates, but socially-constructed. How an academic or a government official evaluates the legitimacy of an organisation might differ completely from how an individual citizen might.

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