

## 7. Conclusion: NGO Regulations and Aid Efficacy

All over the world, NGOs have seen a dramatic growth in their numbers in recent decades. They were celebrated as a promising supplement to official development aid and as a more direct means for funders to reach beneficiaries. However, anti-NGO sentiments have been steadily emerging. One scholar described this growing critical voice as “a movement” and “a force with which to be reckoned”.<sup>909</sup> Perhaps unsurprisingly, governments across the globe have also become wary of NGOs, and in particular of their financial dependence on foreign entities, which often includes foreign states. There is some credence to these concerns. Despite all the social development efforts that have been made over the course of decades, progress has been rather slow in Africa. The reasons for this are varied and multifaceted. Yet, what is certain is that NGOs and state efforts to restrict them are only one part of a larger and more complex process directed toward social development and social welfare. It is worthwhile seeing the bigger picture as well. To that end, this chapter does two things. First, it summarizes the theoretical and doctrinal findings of this dissertation regarding the manner in which restrictive NGO regulations can interfere with the social rights of beneficiaries. Second, it seeks to contextualize the way in which restrictive NGO laws interfere with social rights by asking the much broader questions that is of relevance to the social wellbeing of beneficiaries: why hasn’t social development worked in Africa?

### Regulating NGOs for the Protection of Social Rights

A legal trend has been developing across Africa that aims to restrict civil society organizations and NGOs.<sup>910</sup> Many express their concern that the cornerstones of a free civil society – namely the rights to associate and speak freely – are coming under attack. A less common concern among scholars is that such state measures might also threaten the social rights of beneficiaries. These stakes are even higher in least developed countries – most of which are located in sub-Saharan Africa – where restrictive NGO

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909 Jenkins (2012) 464.

910 International Center of Not-for-Profit Law, ‘Introductory Overview’ (2010) 7-8.

laws are likely to push people even further into poverty and exacerbate their vulnerability. Consider the case of Angola, which was home to 462 NGOs by 2008,<sup>911</sup> and which was ranked in 2015 as the least sustainable environment in sub-Saharan Africa for civil society organizations.<sup>912</sup> Civil society organizations from Angola have been concerned that the government's harassment and intimidation of human rights defenders undermined the defense of social rights.<sup>913</sup> The ESCR Committee shared this concern in its Concluding Observations for Angola in 2008 where it "urge[d] the State party to establish legal guarantees to enable NGOs to carry out their activities for the promotion and protection of economic, social and cultural rights without arbitrary interferences."<sup>914</sup> The Committee does not, however, make the link between the state's Covenant obligations toward beneficiaries and its treatment of NGOs that are involved in the realization and enjoyment of ESC rights.

A human rights analysis of restrictive NGO laws should focus on the social wellbeing of beneficiaries, especially when least developed countries are concerned. In this regard, the ICESCR guarantees rights related to social security, health, education, housing and an adequate standard of living. While these rights are enshrined in the Covenant, giving them the status of legal rights, their full realization requires a great deal of effort and resources on the part of states. This is particularly challenging for least developed countries, where the availability of resources is rather limited. It is for this reason that the Covenant qualifies the corresponding obligations of states. In essence, states are required to do all of and only that which they are capable of doing in order to bring about the realization of social rights. To this aim, article 2 (1) of the ICESCR imposes upon states a general obligation to use all appropriate means to the maximum of their available resources. This means that a state that lacks the capacity to reach a par-

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911 Core Document Forming Part of the Reports of States Parties: Angola, International Human Rights Instruments, United Nations, HRI/CORE/AGO/2008 (UN 2008) para. 78.

912 United States Agency for International Development (USAID), *The 2014 CSO Sustainability Index: Central and Eastern Europe and Eurasia* (2014) xvii.

913 'Committee on Economic, Social and Cultural Rights Hears from Human Rights Institutions and Civil Society from the United Kingdom, the Former Yugoslav Republic of Macedonia, and Angola.' *United Nations Office of the High Commission for Human Rights* (13 June 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20087&LangID=E>>.

914 Concluding Observations on the Third Period Report on Angola (2008) para. 13.

ticular level of social rights achievement will not have violated the Covenant if it can prove “that every effort has been made to use all the resources at its disposition”.<sup>915</sup> The obligation to use the maximum of available resources implies that a distinction must be made between states that are unwilling to fulfill their obligations, and those that are unable to do so. Similarly, the Committee notes that “[a] State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations”, rather than one that merely lacks the resources to do so.<sup>916</sup>

Moreover, states are under no obligation to achieve full realization immediately. Instead, article 2 (1) of the ICESCR only requires that they take steps in that direction with the view of achieving full realization progressively. This, however, is far from a license for states to circumvent their obligations. Indeed, the ESCR Committee has cautioned that article 2 (1) cannot be construed in such a manner as to render it devoid of all meaning or consequence.<sup>917</sup> The term “progressive” favors the speedy realization of rights, such that states are required “to move as expeditiously and effectively as possible toward that goal.”<sup>918</sup> To fulfill this obligation, states must “take steps” that are “deliberate, concrete and targeted” through the use of “all appropriate means, including ... legislative measures”.<sup>919</sup> These steps must be taken in “good faith”.<sup>920</sup>

On the one hand, the language of progressive realization provides the states with some leeway to achieve social rights incrementally over time. On the other hand, the call for using all appropriate means and the maximum of available resources indicates that states may not delay the realization of social rights and that they must do all that they can do to achieve that aim. In this sense, the social rights obligation of states is a dynamic concept that grows over time as though it were an expanding horizon that depends on a country’s given circumstances. How, then, should the state’s

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915 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 10.

916 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 47.

917 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 9.

918 Ibid; General Comment No. 12: The Right to Adequate Food (1999) para. 14.

919 General Comment No. 3: The Nature of States Parties' Obligations (1990) paras. 2-3.

920 General Comment No. 15: The Right to Water (2003) paras. 40-41.

social rights obligations be calculated when NGOs with external funding sources enter into the picture?

In least developed countries, such NGOs do not draw on the state's limited resources because they depend mostly on foreign funders. Consequently, their nonprofit activities can expand the realization of social rights beyond the state's own duty horizon. Such NGOs could be referred to as *supplemental* NGOs because their activities supplement that of the state. In another scenario, nonprofits can realize social rights within the state's duty horizon – meaning that they achieve a level of realization that the state is capable of achieving, and therefore is obliged to achieve. These NGOs can be called *substitutional* NGOs because they substitute for the state by fulfilling the state's outstanding social rights obligations. In each scenario, the contours of the state's social rights obligations are shaped by the fact that these NGOs are stepping in to realize social rights that the state cannot – or simply does not – ensure.

The manner in which nonprofit activities can affect the state's social rights obligations depends on whether the nonprofit activities are essential for the realization or enjoyment of social rights, or for the fulfillment of the state's social rights obligations. When nonprofit activities are a significant way for people to realize and enjoy their social rights, they become part of a triangular relationship that involves the state and beneficiaries. This triangular relationship has a legal character: The state owes social rights obligations to beneficiaries whose rights are in turn realized through nonprofit activities. The task that remains is to clarify the terms of the legal relationship between nonprofits and the state.

Nonprofits that substitute for the state in the fulfillment of social rights obligations are those that are essential for a level of realization that the state is obliged to ensure but nonetheless does not ensure. In such a case, the state's duty to fulfill social rights requires not only that it permits and facilitates nonprofit activities, but also that it ensures their replacement if these activities were to come to an end. If, on the other hand, nonprofit activities are supplementing for the state in that they achieve a level of realization that lies beyond the state's duty horizon, then the state's duty to respect social rights requires only that it permits and facilitates such supplemental nonprofit activities, without the additional requirement of ensuring their continuation. The reason for this is that the state was never required to achieve the same level of realization reached by supplemental nonprofits. Finally, a state's duty to protect the rights of beneficiaries against third party interference requires that it takes reasonable measures

to ensure that NGOs are not harming the rights of their beneficiaries, or – under separate legal grounds – the rights of others.

From a regulatory perspective, this means that states must provide some oversight to ensure that beneficiaries are not harmed or exploited by unscrupulous NGOs or scammers posing as NGOs. Yet, states cannot exert so much regulatory control that beneficial nonprofit activities are hampered or obstructed. This balance is rather difficult to define *a priori* by law because it depends on a variety of political, social and economic factors. Rather, states must enjoy a certain degree of discretion in determining how best to regulate NGOs while also respecting the social rights of beneficiaries. However, when state measures that affect NGOs are so restrictive as to constitute limitations on ESC rights, these state actions must comply with the rules on limitations. There will undoubtedly be times when it is appropriate for states to restrict NGOs, even if doing so would limit the enjoyment or realization of social rights for their beneficiaries. This would be the case, for example, when an NGO is harming one group in order to benefit another. In these scenarios, however, the state's authority to limit the social rights of beneficiaries is subject to certain limitations. Articles 2 (1), 4 and 5 of the ICESCR provide guidance on when and how the state may limit Covenant rights.

Article 4 is of particular interest because it is the Covenant's general limitations clause. According to its terms, states may limit Covenant rights only when such limitations are determined by law, serve the general welfare and remain consistent with the nature of the rights being affected. Although article 4 permits limitations to social right under limited circumstances, it does not address the limitation of *NGO-provided* rights. In fact, it makes explicit reference to rights provided by states, thereby appearing to exclude from its scope of application the limitation of rights provided by non-state actors. However, such a conclusion would lead to results that are incompatible with the object and purpose of the Covenant: depending on which perspective one takes, this would mean either that states may *never* limit rights provided by NGOs or that they can *always* limit rights provided by NGOs. Instead, when NGOs function as either a substitute for the state in the fulfillment of state obligations or as a supplement of the state in the realization of social rights, it seems fair and reasonable to apply article 4 analogously to any state measures that would limit the social rights *provided by* NGOs. The drafting history of ICESCR also supports such an analogous treatment of article 4.

The lawfulness of state measures that restrict nonprofit activities that are essential for the *realization* of social rights but not for their enjoyment are

evaluated under a different legal standard. Such nonprofit activities are preparatory in nature: they do not result in the immediate attainment of rights, but they set up the preconditions that are necessary for those rights to be realized and therefore enjoyed. An example of nonprofit activities that are essential only for realization would be training teachers or advocating for safer health care standards. Direct service provision, on the other hand, could constitute an activity that is essential for the enjoyment of social rights. Article 2 (1) indicates when the state may restrict nonprofit activities that are essential only for realization. The state's power to restrict such nonprofit activities is limited to instances when nonprofit activities employ inappropriate means. Article 4 would not be applicable in this case because it only refers to the *limitations* of social rights, which must first be enjoyed before they can be limited.

### Adjudicating the Lawfulness of NGO Laws

The main argument of this dissertation has been that restrictive NGO laws can become incompatible with the states' social rights obligations whenever NGOs are essential for the realization or enjoyment of social rights. However, one might wonder about the practical significance of these findings, which lies in their potential application in courts of law. Judicial evaluations of how governments treat or regulate NGOs that are essential for the enjoyment of social rights, or for the fulfillment of a state's social rights obligations, should address the issue of whether the state is circumventing or neglecting its social rights obligations by restricting nonprofit activities. One way to do this is to use a heightened level of scrutiny to evaluate restrictive NGO laws whenever courts determine that the nonprofit activities being restricted are essential for the enjoyment of social rights. Restricting such essential activities will result in limitations to the enjoyment of social rights, and whenever states limit the enjoyment of social rights, the standard established under article 4 of the ICESCR applies. This standard is a form of heightened scrutiny: governments must demonstrate that restricting nonprofit activities that are essential for the enjoyment of social rights is *necessary* for the promotion of the general welfare, and they must ensure that such restrictive measures remain consistent with the nature of the social rights being affected. On the other hand, if the realization of social rights is being limited rather than their enjoyment, then adjudicators should apply a different standard of scrutiny, which is based on article 2 (1) of the ICESCR. The article 2 (1) standard permits states to

restrict or obstruct nonprofit activities that are essential for the realization of social rights only when such activities employ inappropriate means.

Admittedly, the practical utility of some of these legal findings will depend on politically determined facts. For example, whether an NGO is a substitutional nonprofit entity that can benefit from the protection of heightened judicial scrutiny depends on whether the state is obliged to achieve the level of realization that the NGO has already achieved through its activities, which in turn depends on the predominantly political question of whether the state is in fact using the maximum of its available resources. However, this is important mostly for cases in which the legal question is whether the state must replace lost nonprofit activities. If the only legal issue to be resolved is whether the state must permit an NGO's operations, then a court only needs to certify that the nonprofit entity satisfies the qualifications for being recognized as a *supplemental* NGO. These qualifications are less strict because they require merely that the NGO is essential for the realization/enjoyment of social rights, but not necessarily the fulfillment of the state's social rights obligations. This determination does not depend on the predominantly political question of whether the state is capable of achieving the level of realization that the NGO has already achieved, but rather on the factual question of whether the state is indeed ensuring the same level of achievement for beneficiaries – regardless of whether it is required to do so. If NGOs are providing services that the state simply does not provide, and if their activities are both appropriate and essential for their enjoyment or realization, then these nonprofits are generally protected against obstructive state measure, unless the state can justify its restrictive measures under article 4 of the ICESCR. In such a case, a court could apply heightened scrutiny without needing to take on the problematic role of asking and answering political questions.

While this dissertation began with an observation about LDCs in sub-Saharan African states, its doctrinal findings are generalizable to other regions and other states because it relies predominantly on international human rights law. The regulation of nonprofit providers in the global North could be examined using the same analytical framework. For example, although nonprofits may not be essential for the fulfillment of states' social rights obligations in industrialized welfare states, supplemental NGOs – those that provide services beyond that which the state is required to ensure – are still essential for the realization and enjoyment of certain social rights. This is true because the full realization of social rights is an expanding, dynamic ideal rather than a fixed, predetermined level of achievement. There is no cap on how far social rights achievements can go, thus

supplemental NGOs exist even in the wealthiest of states. These NGOs should also fall under the protection of the ICESCR, and courts should ensure that state efforts to restrict or obstruct them are subject to the appropriate level of scrutiny.

The aim of this doctoral thesis has been to examine in a systematic manner the legal consequences of restrictive NGO laws on the social rights of beneficiaries. This has been a primarily doctrinal and theoretical contribution to the legal scholarship. In reality, however, the enjoyment and realization of social rights through nonprofit activities both succeeds and fails within the messiness of the everyday life as well as the larger political, economic and social contexts of developing countries. The remainder of this closing chapter is an attempt to contextualize the work of this dissertation within the larger framework of foreign aid, its processes and its efficacy *vis-à-vis* the enjoyment and realization of social rights through nonprofit means.

### Foreign Aid and its Impact on the Capabilities of NGOs

Although massive amounts of foreign aid have been directed toward African states, social development indicators continue to rank African peoples among the world's most impoverished.<sup>921</sup> Even some long-term and targeted aid programs have not been effective in reducing poverty on the continent.<sup>922</sup> Likewise, even though some African governments depend heavily on foreign aid,<sup>923</sup> whether foreign assistance has been effective for

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921 World Development Indicators Database, Gross Domestic Product 2015 (World Bank 2015) <<http://databank.worldbank.org/data/download/GDP.pdf>> (African countries are among poorest nations; Africa ranks as the poorest region of the world).

922 For instance, in evaluating the outcome of the International Monetary Fund's (IMF) poverty reduction strategy in Sub-Saharan Africa over the last fifteen years, one report found that while the wealthiest Africans got wealthier, the IMF's poverty reduction strategy "neither reduced poverty headcount, nor raised the income share of the poorest quintile". (Daouda Sembene, International Monetary Fund, *Poverty, Growth, and Inequality in Sub-Saharan Africa: Did the Walk Match the Talk under the Prsp Approach?* (IMF 2015) 6 <<https://www.imf.org/external/pubs/ft/wp/2015/wp15122.pdf>>.).

923 By 2015, fourteen countries received foreign aid that amounted to 10 percent of their Gross National Income (GNI). Five of those countries received aid that amounted to at least a fifth of their GNI, and aid received by one country amounted to more than half its GNI. (Geographical Distribution of Financial



social development continues to be a controversial topic that is subject to mixed criticism.<sup>924</sup>

In terms of social welfare, the lowest performing states are also characterized by their high reliance on foreign aid.<sup>925</sup> African countries that rely heavily on foreign aid – namely Ethiopia, Burundi, Rwanda, Senegal and Zambia – exhibit low and falling life expectancy, poor secondary school enrolment, relatively weak states and low levels of public spending on health and education.<sup>926</sup> On the other hand, countries that rely more extensively on tax revenues (Kenya, Namibia, South Africa and Zimbabwe) and mineral exports (Botswana) than on foreign aid are the best performing welfare regimes in sub-Saharan Africa.<sup>927</sup> While it is always difficult to determine causality and its direction, many explanations have been offered to make sense of this low return on aid.<sup>928</sup>

Some critics offer structural arguments by pointing out the unfavorable financial or economic conditions of African countries. One study of the least developed African countries asserts that doubling overseas development aid only hurts lesser developed countries.<sup>929</sup> This is because each country has a specific absorption capacity for aid, beyond which additional assistance can overwhelm existing projects.<sup>930</sup> On the other hand, LDCs in

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Flows to Developing Countries, Development Co-operation Report, and International Development Statistics, Net ODA Received (% of GNI) (Development Assistance Committee of the Organisation for Economic Co-operation and Development <[www.oecd.org/dac/stats/idsonline](http://www.oecd.org/dac/stats/idsonline)>.).

924 See Evelyn Wamboye, Abel Adekola and Bruno S. Sergi, 'Foreign Aid, Legal Origin, Economic Growth and Africa's Least Developed Countries', 14 *Progress in Development Studies* 335 (2014).

925 See Ian Gough and Miriam Abu Sharkh, 'Financing Welfare Regimes: Mapping Heterogeneous Revenue Structures' 20 *International Journal of Social Welfare* 280 (2011) 286; Gough and Abu Sharkh (2010).

926 Gough and Abu Sharkh (2011) 286-287 (comparing revenue sources); Gough and Abu Sharkh (2010) (comparing welfare regime performances). However, while Ghana also relies heavily on foreign aid, it performs better than its peers because it benefits from higher literacy rates among its youth. (Ibid.).

927 Gough and Abu Sharkh (2011) 286-287 (comparing revenue sources); Gough and Abu Sharkh (2010) (comparing welfare regime performances).

928 See generally, Bräutigam and Knack (2004).

929 Wamboye, Adekola and Sergi (2014) 351.

930 Elliot R. Morss, 'Institutional Destruction Resulting from Donor and Project Proliferation in Sub-Saharan African Countries' 12 *World Development* 465 (1984).

Africa carry significant debt,<sup>931</sup> which can undermine their progress. In many states, more domestic expenditure is dedicated to repaying foreign debts than funding health care or other essential services.<sup>932</sup> Blaming poor governance and corruption, other analysts point to the vices associated with receiving “free” money. Proponents of this argument claim that direct aid fosters corruption in governments and has led to the mass misappropriation of aid money rather than to the advancement of social welfare outcomes in Africa.<sup>933</sup>

Some direct their criticism toward foreign donors, asserting that the manner in which they have influenced and directed development programming has undermined the efforts made by developing states to promote welfare within their countries.<sup>934</sup> The problem is not so much foreign aid in and of itself, but rather the *way* in which foreign aid is delivered.<sup>935</sup> In one example, the UN Committee on the Rights of the Child (CRC) expressed its concern that aid money from the United Kingdom was funding private, for-profit providers of primary education in developing countries. The Committee cautioned, “Rapid increase in the number of such schools may contribute to sub-standard education, less investment in free and quality public schools, and deepened inequalities in the recipient countries”, and urged the UK to “ensure that its international development cooperation supports the recipient States in guaranteeing the right to free compulsory primary education for all.”<sup>936</sup>

Furthermore, foreign donors are criticized for exerting too much thematic control over development projects. For example, Lisa McIntosh

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931 Between 2011 and 2012, the average external debt stock of LDCs in Africa was 30% of GNI, with the range extending from 93% in Sao Tome and Principe to 18% in Rwanda and Guinea. (United Nations Under-Secretary-General and High Representative for LDCs, LLDCs and SIDS, *Extreme Poverty Eradication in the Least Developed Countries and the Post-2015 Development Agenda* (2014) 74, Table A9.).

932 Nancy Erbe and others, ‘Negotiating and Mediating Peace in Africa’ 9 *Pepperdine Dispute Resolution Law Journal* 457 (2008).

933 See, e.g., Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is Another Way for Africa* (Allen Lane 2009) 52-57.

934 See, e.g., Tomaševski (2001).

935 Bräutigam and Knack (2004) (finding that “high levels of aid are associated with declines in the quality of governance” in sub-Saharan Africa but recommending that “the current system of institutions and incentives must be changed” rather than reducing overall levels of aid.).

936 Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, U.N. Committee on the Rights of the Child, U.N. Doc. CRC/C/GBR/CO/5 (UN 2016) para. 16-17.

Sundstrom argues that foreign assistance to NGOs in Russia was much more likely to be ineffective when it was employed to promote norms that were specific to special societal contexts rather than universally embraced norms.<sup>937</sup> This is a particular concern for NGOs that receive official aid – that is, funds for foreign governments or other political bodies.<sup>938</sup> Michael Edwards and David Hulme find that although such an arrangement does not necessarily lead to foreign thematic control of NGO programming, the risk still exists and can be managed through a partnership approach to funding.<sup>939</sup>

Donors are also scrutinized for setting up inadequate safeguards – or none at all – against the potentially negative consequences of their aid. This line criticism relies in part on instances in which donors have failed to secure their funds against fraud. For example, fraud cost Britain 1.04 million pounds in 2015 to 2016.<sup>940</sup> Foreign donors are blamed for funding projects in developing countries without adequately considering the negative consequences that intended beneficiaries may have to face. For instance, although private for-profit schools provide education for a “low” fee, one commentator argues that the use of aid money to privatize education in developing countries could deepen inequalities along lines of class, gender and able-bodiedness: very poor families would only send some of their children to school, to the detriment of girls and disabled children, while families who are even poorer would be totally underserved.<sup>941</sup> Moreover, in some instances, the quality of services funded by foreign donors has been challenged, such that the very efficacy of their programs is called

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937 Lisa McIntosh Sundstrom, ‘Foreign Assistance, International Norms, and NGO Development: Lessons from the Russia Campaign’ 59 *International Organization* 419 (2005).

938 Michael Edwards and David Hulme, ‘Too Close for Comfort? The Impact of Official Aid on Nongovernmental Organizations’ 24 *World Development* 961 (1996).

939 *Ibid* 969.

940 Tom Esslemont, ‘Tougher Scrutiny’ of Britain’s Aid Spending Sees Steep Rise in Fraud Bill’ *Thomas Reuters Foundation* (Sept. 22, 2016) <<http://news.trust.org/item/20160922131353-jxpbs>>.

941 Prachi Srivastava, ‘Low-Fee Private Schooling: What Do We Really Know? Prachi Srivastava Responds to the Economist’ (Oxfam Aug. 11, 2015) <<http://oxfamblogs.org/fp2p/its-complicated-or-low-fee-private-schooling-what-do-we-really-know/>>. See also, Oliver Balch, ‘UN Criticises UK for Spending Aid Money on for-Profit Private Schools’ *The Guardian* <<https://www.theguardian.com/sustainable-business/2016/jun/14/un-criticises-uk-government-millions-aid-money-private-schools-developing-countries>>.

into question.<sup>942</sup> For example, the United Kingdom's Independent Commission for Aid Impact announced in 2012 that while the UK had substantially expanded school enrolment in three East African countries by issuing 1 billion pounds of bilateral aid, "the quality of education being provided to most children is so low that a large majority is failing to achieve basic literacy and numeracy."<sup>943</sup>

Advocates of locally-led development have criticized the top-down structure and professionalization of the aid industry, and have urged donors to put people and beneficiaries at the center of aid.<sup>944</sup> Although it is now widely acknowledged that there is a great need for aid at the community level and that more projects should ensure local participation, donors continue to pour their funds into large international NGOs. Between 2010 and 2014, local NGOs across the globe received only 1.6% of all humanitarian aid given to NGOs during the same period.<sup>945</sup> Critiques continue to urge greater support for local NGOs, arguing that Big Aid is part of the problem.<sup>946</sup>

Some commentators have pointed to the tendency of donors to impose conditionalities upon aid recipients.<sup>947</sup> This was similarly the case with development loans. During the 1980s, structural adjustment programs required recipients of development loans to cut social welfare spending and

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942 E.g., Srivastava (2015).

943 DFID's Education Programmes in Three East African Countries, Independent Commission for Aid Impact, (UK 2012) 1 <<https://icai.independent.gov.uk/wp-content/uploads/DFIDs-Education-Programmes-in-Three-East-African-Countries-Final-Report-3.pdf>>.

944 *The World Humanitarian Summit: Putting People at the Centre*, ACT Alliance (2015) <[http://actalliance.org/wp-content/uploads/2015/12/J3734-ACT-Alliance-position-paper-for-World-Humanitarian-Summit\\_AW.pdf](http://actalliance.org/wp-content/uploads/2015/12/J3734-ACT-Alliance-position-paper-for-World-Humanitarian-Summit_AW.pdf)>.

945 *Focus on Local Actors, the Key to Humanitarian Effectiveness*, International Federation of Red Cross and Red Crescent Societies, (World Disaster Report, 2015) 105 <[https://ifrc-media.org/interactive/wp-content/uploads/2015/09/1293600-World-Disasters-Report-2015\\_en.pdf](https://ifrc-media.org/interactive/wp-content/uploads/2015/09/1293600-World-Disasters-Report-2015_en.pdf)>.

946 Bibi van der Zee, 'Less Than 2% of Humanitarian Funds 'Go Directly to Local NGOs' *The Guardian* (Oct. 16, 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/oct/16/less-than-2-of-humanitarian-funds-go-directly-to-local-ngos>>; Imogen Wall, 'We Are Demanding Change': The Somali Woman Taking on International NGOs' *The Guardian* (Mar. 21, 2016) <<https://www.theguardian.com/global-development-professionals-network/2016/mar/21/degan-ali-somali-woman-taking-on-the-humanitarian-system>>.

947 BRÄUTIGAM AND KNACK (2004) 261-262; Moyo (2009) 38-44.

liberalize markets from government interference.<sup>948</sup> Such conditionalities challenge the autonomy of African states, rendering their policymakers nearly powerless to prioritize development projects in a manner that they see fit. Some argue that policy-oriented conditionalities led African state officials to become “passive”, since the prospect of receiving substantial aid packages created “negative incentives to disagree with the donors”.<sup>949</sup>

Some conditionalities require the acceptance of foreign technical assistance, which undermines the transfer of governance skills to African governments because it “limits a central (or local) government’s ability to learn skills for more effectively managing and administering.”<sup>950</sup> Consequently, a decline in government capacity and the elimination of public subsidies has led to a reduction in social services, especially in education and health care, as well as intensified food insecurities.<sup>951</sup> This has generated more space for the expansion of non-state social provision.

Foreign aid dependency, especially when perpetuated through the extensive imposition of conditionalities, tends to undercut democratic participation within receiving states. One writer describes aid dependency as “a state of mind, where aid recipients lose their capacity to think for themselves and thereby relinquish control.”<sup>952</sup> When aid dependency systematically inflates the political influence of foreign donors within a receiving state, the legitimacy and competence of state bodies may be called into question. Within an international political system based on the primacy of nation-states, a global developmental approach that undermines the political capacity and legitimacy of a nation-state seems to cut against developmental aims by perpetuating dysfunctionality and asymmetry.

Still others draw upon all of the aforementioned criticisms to contextualize NGOs within international and historical governance practices, so as

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948 J. Barry Riddell, ‘Things Fall Apart Again: Structural Adjustment Programmes in Sub-Saharan Africa’ 30 *The Journal of Modern African Studies* 53 (1992) 57-58. See also Joel R. Paul, ‘Do International Trade Institutions Contribute to Economic Growth and Development?’ 44 *Virginia Journal of International Law* 285 (2003) 319 (‘The International Monetary Fund and foreign banks often insist that as a condition for further loans, developing countries must cut social services to balance their budgets, accelerate privatization, and eliminate trade barriers’).

949 Bräutigam and Knack (2004) 261-262.

950 *Ibid.*

951 See Riddell (1992) 58.

952 Bräutigam and Knack (2004) 257 (quoting Rehman Sobhan).

to exam critically the “aspirational capabilities” of NGOs.<sup>953</sup> Reflecting upon NGO interventions that address HIV/AIDS in Africa, Hakan Seckinelgin writes,

In short, without a doubt there are interesting and effective interventions implemented by NGOs. However, in many of these instances these interventions are based on immediate relief and are not able to engage with long-term issues. Furthermore, they are conditioned by changing international funding interests and frames. Therefore, while it is clear that that relief is an important issue, at present these NGO interventions are providing fragmented relief with a short-term vision based on the international governance of the disease that is not able to engage with the sociocultural conditions of the disease.<sup>954</sup>

Others are far more critical of the economic and political environment within which NGOs operate. Alan Fowler posits that the world presently operates within a global system of social welfare that is misaligned with the overarching values of social welfare.<sup>955</sup> In this regard, he asserts sharply that the function of aid has become to “contribute to the security of capital investment and to the stability of Southern regimes which maintain the environment necessary to produce returns on them.”<sup>956</sup> Fowler refers to this phenomenon as the “globalization of social welfare” and places the onus on NGOs in Africa to “reappraise their long-term strategies and role within the continent”, “renegotiate their position with governments” and “recognize that in global terms their resources are negligible in relation to the forces that cause and maintain poverty”.<sup>957</sup> Similarly, Terje Tvedt criticizes NGO supporters for neglecting to consider how global power relations and structural forces frame the organizational landscape of NGOs.<sup>958</sup> He proposes that NGO scholarship should focus on power and integration through a universal analytical approach that he terms “the new interna-

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953 Hakan Seckinelgin, ‘Who Can Help People with HIV/AIDS in Africa? Governance of HIV/AIDS and Civil Society’ 15 *Voluntas* 287 (2004).

954 Ibid 301-302.

955 Fowler (1995).

956 Ibid 66.

957 Ibid 67.

958 Terje Tvedt, *Angels of Mercy or Development Diplomats?: NGOs & Foreign Aid* (Africa World Press 1998).

tional social system”, which reflects the interaction between foreign donors, states, development NGOs and beneficiaries.<sup>959</sup>

Likewise, albeit from historical and post-colonial perspectives, Issa Shivji argues that the shortcomings of development aid in Africa, and particularly of foreign NGOs in Africa, are contemporary symptoms of an older colonial ailment.<sup>960</sup> He contends NGOs and the donor community promote African development and globalization without critically examining the African context. Shivji posits that globalism is a modern articulation of neo-imperialism, that—in Africa—it relies upon existing political and economic legacies of colonialism, and that it aims to advance a neo-liberal agenda for the benefit of wealthier nations and individuals. While encouraging NGOs to engage African intellectuals in academic discourse, Shivji poses the thought-provoking question: “But how can you make poverty history without understanding the ‘history of poverty’?”<sup>961</sup> Others have echoed this concern, arguing that NGOs must “think outside existing institutional culture... mainly by acknowledging that the causes of poverty and vulnerability must be understood, and that the study of power relations becomes a key part of the analysis.”<sup>962</sup>

Makau Mutua argues that international human rights NGOs are “ideological analogues, both in theory and in method, of the traditional civil rights organizations that preceded them in the West”, and stresses that western industrialized nations provide the moral, financial and social sources upon which INGOs continue to draw support.<sup>963</sup> The Boards of INGOs, he contends, are “dominated by Westerners”, and that a “tapestry of social and business ties, drawn from leading Americans who believe in liberal values and their internationalization through the human rights regime, underlines the agenda of INGOs.”<sup>964</sup> Mutua delivers a damning conclusion and urges readers to initiate in earnest a postliberal society. He writes,

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959 Terje Tvedt, ‘Development NGOs: Actors in a Global Civil Society or in a New International Social System?’ 13 *Voluntas* 363 (2002).

960 Shivji (2006).

961 Ibid 43.

962 *Focus on Culture and Risk*, International Federation of Red Cross and Red Crescent Societies, (World Disaster Report, 2014) 94 <<http://www.ifrc.org/Global/Documents/Secretariat/201410/WDR%202014.pdf>>.

963 Mutua, ‘Human Rights International NGOs: A Critical Evaluation’ 151, 153.

964 Ibid 154-155.

The facade of neutrality, the fiction that INGOs do not seek the establishment of a particular political system, in this case, a liberal democracy, must be abandoned immediately. No one should be expected to believe that the scheme of rights promoted by INGOs does not seek to replicate a vision of society based on the industrial democracies of the North. Only after openly conceding that INGOs indeed have a specific political agenda can discussions be had about the wisdom, problems, and implications for the advocacy of such values.<sup>965</sup>

This critical perspective is also reflected in the domestic laws that restrict and target human rights NGOs. Consider, as well, Ethiopia's restrictive NGO law,<sup>966</sup> which operates by foreignizing NGOs that most people would normally think of as Ethiopian organizations. It does this by categorizing all NGOs receiving more than 10% of their funds from foreign sources as foreign entities, without regard to any other factor. For example, an NGO run entirely by and for Ethiopian citizens and receives 85% of its funding from domestic sources would still be considered a foreign NGO, and would thus be barred from promoting human rights. Painting otherwise apparently local NGOs as foreign entities offers political elites an ideological advantage with political currency in post-colonial societies. It allows African governments to position themselves dialectically as the protectors of state sovereignty and national independence in opposition to agents of foreign interests (i.e., the NGOs), who are suspected of following neo-imperialistic agendas on behalf of foreign handlers.

All together, these writers represent a critical voice that contextualizes NGOs within larger systems and structures in order to examine their shortcomings and capabilities. They remind us that any understanding of the ways in which NGOs can realize or interfere with the social rights of their beneficiaries is incomplete without considering this larger context. Despite these complexities, we should remain mindful of the wellbeing of beneficiaries, who are often among the most vulnerable members of society in terms of social development and social wellbeing. This could not be more urgent than at a time when space for civil society continues to shrink across the globe. While states must certainly be held accountable for the fulfillment of their social rights obligations to the poor who live within their territories, we should not allow the ideal of an international order consisting of equally powerful and sovereign nation-states lock our analysis

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965 Ibid 159.

966 Charities and Societies Proclamation No 621/2009 (Ethiopia).



into a rigid focus on the territorial obligations of states, such that we fail to acknowledge when other states and non-state actors are responsible for social harms. A beneficiary-centered approach encourages a critical perspective by keeping what is important at the forefront of analysis. In this way, the fate of NGOs, states and others remain firmly tied to the wellbeing of the poor.