1. Introduction

During the decades when the Nuba people of South Kordofan were targeted, marginalized and systematically excluded from all forms of social protection by a hostile government in Sudan, their community developed educational and health services through informal, localized and non-governmental forms of social protection.[1] With "almost no start-up resources whatsoever", the indigenous militarized defense force (the Nuba SPLM) "established networks and systems for rudimentary schools, clinics and agricultural extension centres staffed by voluntary teachers, health workers and individuals with technical backgrounds in crop and animal production."[2] Nonprofit provision can strengthen social rights protection through service delivery and rights advocacy. In the case of the Nuba community, the informal services grew in sophistication over time as international nongovernmental organizations (NGOs) gained access to the area.[3] This story invites us to consider how the triangular relations that bind non-state providers, the state and beneficiaries can be critical to the realization and enjoyment of social rights, and how the configuration of those triangular relations might impact the state's social rights obligations.

In today's interconnected world, social rights in developing countries are – to a significant extent – both realized and injured by non-state actors and through global processes. Within this context, NGOs have become increasingly important to the realization of social rights, at times challenging the centrality of the state in the field of social protection and at other times extending it. Moreover, both states and NGOs in developing countries depend heavily on foreign assistance, allowing foreign donors and international financial institutions to occupy a prominently influential role in domestic policy and politics. These complexities are exaggerated in sub-Saharan Africa, where socio-economic conditions are bleak, public social protection programs are severely underdeveloped, the presence of foreign aid and NGOs is widespread, and human vulnerability is pervasive, severe and often left unmitigated. Under such circumstances – where non-state social

1 Justin Corbett, *Learning from the Nuba: Civilan Resilience and Self-Protection During Conflict,* Local to Global Protection (2011).
2 Ibid 40-41.
3 Ibid 41.

provision is extensive, financially independent of state control, and often essential to the social wellbeing of beneficiaries – evaluating the realization and enjoyment of social rights will require a rather nuanced and multi-faceted understanding of the state's social rights obligations.

The ability of most states in sub-Saharan Africa to ensure the realization and enjoyment of social rights is severely undermined by underdevelopment, resource scarcity or unavailability and inadequate formal social protection systems. In terms of development, 70% of the world's least developed countries (LDCs) are in Africa, and 63% of African countries are LDCs.[4] Low social welfare outcomes indicate that African LDCs, of which there are 33,[5] struggle to provide the basic social needs of their populations. In terms of resources, the World Bank classifies all but 6 of Africa's LDCs as low-income countries.[6] African LDCs depend on foreign aid and foreign NGOs, which complicates the state's ability to direct the domestic development of social welfare by overshadowing their political and economic independence. It has become clear that in order to study service provision in African LDCs, one must depart from the traditional statist model and take account of the substantial involvement of third parties, including nonprofit entities, although many scholars continue to overlook non-state social protection.[7]

The past two decades have seen a dramatic rise in the number of NGOs across the globe as well as their institutional influence.[8] During that time, nonprofit organizations in general and NGOs in particular were hailed as the solution to the world's development problems. They were celebrated

4 Triennial Review Dataset (United Nations Committe for Development Policy Secretariat 2000-2015).

5 As of June 2017, these are: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, Togo, Uganda, United Republic of Tanzania and Zambia. (*List of Least Developed Countires (as of June 2017)*, U.N Committee for Development Policy, (2017) <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf>.).

6 See World Bank List of Economics (June 2017) (World Bank 2017).

7 Nicholas Awortwi and Gregor Walter-Drop, 'Governance Below the State: Non-State Social Protection Services in Africa' in Nicholas Awortwi and Gregor Walter-Drop (eds), *Non-State Social Protection Actors and Services in Africa: Governance Below the State* (Routledge 2018) 1-24, 4.

8 Garry W. Jenkins, 'Nongovernmental Orgainzations and the Forces against Them: Lessons of the Anti-NGO Movement' 37 Brook Journal of International Law 459 (2012) 479-481.

widely as grassroots organization with humanitarian aims that filled social protection gaps for the poor and promoted democracy in the then newly independent states. In recent years, however, alongside growing criticism of NGOs in general, there has been an intensification of state scrutiny directed toward NGOs, and particularly toward those with substantial ties to foreign funders. NGOs have undergone closer examination, resulting in challenges to their legitimacy, accountability, effectiveness and integrity. As non-state actors, they are largely unaccountable under international law, which in turn justifies the passage of restrictive NGO laws.

Increasingly so, some African states have enacted, drafted or threatened to draft restrictive legislation to monitor and regulate the operations of NGOs, including non-state providers of social services. Some of these legislative measures severely limit the ability of NGOs to accept foreign funding. Others forbid them from engaging in human rights advocacy, and at least one law prohibits NGOs from conducting any development work at without prior state approval. Notably restrictive laws and regulations have been enacted in Angola (legislation in 2012; presidential decree in 2015),[9] Eritrea (legislation in 2005),[10] Ethiopia (legislation in 2009)[11], Kenya (legislation in 1990),[12] Sierra Leone (regulations in 2009)[13] and Uganda (legisla-

9 Lei Das Associações Privadas Lei No 6/2012 (Angola 2012)(imposes mandatory registration requirements for NGOs; registration can be denied on public morality grounds; NGOs can be terminated when their activities are contrary to public policy); Decreto Presidencial No. 74/15, No. 74/15 (Angola 2015) (granting government broad powers to direct, control and supervise NGO activities and their financing; geographic limitations for nonprofit activities; burdensome registration requirements whereby international NGOs must register with three separate ministries; restrictions on accessing foreign funding; suspension of nonprofit activities on vague grounds such as protecting the "integrity of the Republic of Angola" or when nonprofit activities are deemed not to have been "beneficial to the community").

10 A Proclamation to Determine the Administration of Non-Governmental Organizations, Proclamation No 145/2005 (Eritrea 2005) (severely limiting the scope of nonprofit activities to emergency service provision, with heavy state supervision).

11 Charities and Societies Proclamation No 621/2009 (Ethiopia 2009) (limits access to foreign funding and restricts human rights advocacy).

12 Non-Governmental Organizations Co-Ordination Act, No 19 of 1990 (Kenya 1990) (as amended by The Statute Law (Miscellaneous Amendemendments) Act, 1991, No 14 of 1991 (Kenya 1991)) (NGO registration is mandatory; registration may be denied on "national interest" grounds).

13 Non-Government Organisations Policy Regulations (Sierra Leone 2009) (requires that all NGO projects are first discussed with government prior to their implementation; grants government power to direct NGO operations by setting guidelines, with which NGOs must ensure their operation conform).

tion in 2006 and 2016; regulations in 2009 and 2017)[14]. Likewise, restrictive NGO bills have been considered in Zimbabwe (2004),[15] Kenya (2013)[16] and Uganda (2015)[17].

Human rights observers commonly characterize this phenomenon as "shrinking civic space",[18] or an "attack" or "crackdown" on civil society.[19] This has spurred growing popular interest in the regulation of NGOs and

14 The Non-Governmental Organisations Registration (Amendment) Act, No 25 of 2006 (Uganda 2006) (penalizing the operation of non-registered NGOs with fines) ; The Non-Governmental Organisations Act, No 5 of 2016 (Uganda 2016) (imposing harsher penalties for noncompliance, including up to 3 year of imprisonment; imposing forced dissolution of NGOs on vague grounds such as "threatening national security"); The Non-Governmental Organisations Registration Regulations, 2009 No. 19 (Uganda 2009) (forbidding direct contact with people unless the NGO gives seven days written notice to the government; geographic restrictions on nonprofit activities; forbidden to engage in vaguely defined activities, such as that which is "prejudicial to the interests of Uganda and the dignity of the people of Uganda."); The Non-Governmental Organisations Regulations, No. 22 of 2017 (Uganda 2017) (imposes certain geographical constraints on NGOs).

15 For an analysis of the more restrictive provisions of the bill, see United Nations Development Programme, *The Zimbabwean Non-Governmental Orgnizations Bill 2004 and International Human Rights Law/Standards: Issues, Analysis and Policy Recommendations* (UNDP 2004) (noting restrictions on NGOs regarding access to foreign funding and the ability to involve themselves in governance issues.).

16 Statute Law (Miscellaneous Amendments) Bill. 2013, Bill No 32 (Kenya 2013) (sought to limit foreign funding to 15% of an NGO's budget, as well as to channel funds through government before it reaches an NGO).

17 The Non-Governmental Organisations Bill, 2015, Bill No 10 (Uganda 2015) (would have imposed mandatory registration for all NGOs; would have created an NGO Board, consisting of members appointed by the state, with broad powers to discipline or suspend NGOs, deny registration on any grounds it deemed fit, including in the "public interest", and revoke permits or involuntarily dissolve NGOs on "public interest" grounds; would have imposed geographic limitations on NGO activities; would have vaguely forbidden nonprofit activities that were deemed "prejudicial to the interests of Uganda and the dignity of the people of Uganda".).

18 Resolution on the Situation of Human Rights Defenders in Africa, ACmHPR (May 22, 2017) preamble.

19 Julia Kreienkamp, *Responding to the Global Crackdown on Civil Society*, Global Governance Institute, (2017) <https://www.ucl.ac.uk/global-governance/downloads/policybriefs/policy-brief-civil-society>; 'Maina Kiai Tells Conference That Civil Society Is "under Attack" in Africa' *Freedom Assembly* (Nov. 25, 2013) <http://freeassembly.net/wp-content/uploads/2013/11/Media-statement-Kiai-warns-civil-society-under-attack-in-Africa.pdf>.

other associational organizations in Africa.[20] Many have called for reforms. Most recently, the African Commission on Human and Peoples' Rights (African Commission), which is the treaty body of the African Charter for Human and Peoples' Rights (African Charter), in noting that it was "[c]oncerned by excessive restrictions imposed on the rights to freedom of association and assembly",[21] adopted new guidelines on the rights to freedom of assembly and association on the continent.[22]

Restrictive NGO laws certainly threaten the rights of NGOs to associate, assembly and speak freely. However, in least developed states where nonprofit activities are more likely to be vital to the realization of social rights, such laws may also jeopardize the rights of beneficiaries. Thus, restrictive regulation of NGOs may present an additional legal problem: whether states are complying with their social rights obligations to beneficiaries of nonprofit activities.

Research Objectives and Parameters

From this perspective, the present dissertation examines whether and how the social obligations of the state toward beneficiaries of nonprofit activities give rise to implicit state duties toward nonprofit service providers, particularly in Africa's LDCs. Most legal analysts examining NGO laws have commented on their interference with the rights of NGOs. This body of scholarship focuses mainly on the freedom of association and the right to free speech. However, since NGOs play a significant role in the realization of social rights in Africa's LDCs, highly restrictive NGO laws may significantly limit the realization and enjoyment of social rights. Thus, this dissertation employs a beneficiary-centered approach in order to highlight

20 A growing interest in NGO laws has even taken root within popular media. (E.g., Ingrid Srinath and Mandeep Tiwana, 'Civil Society: Only the Clampdown Is Transparent' *The Guardian* (Sept. 12, 2010) <https://www.theguardian.com/commentisfree/libertycentral/2010/sep/12/civil-society-millennium-development-goals>.).

21 Guidelines on Freedom of Association and Assembly in Africa, ACmHPR (African Guidelines on Freedom of Assocation and Assembly) <http://www.icnl.org/news/2017/ACHPR%20Guidelines%20english.pdf>.

22 The Guidelines were adopted by ACmHPR during its 60th Ordinary Session held from 8 May to 22 May 2017 in Niamey, Niger. (*42nd Activity Report of the African Commission on Human and Peoples' Rights,* African Commission on Human and Peoples' Rights, (2017) para. 25 <http://www.achpr.org/files/activity-reports/42/42nd_activity_report_eng.pdf>.).

the social rights obligations that states owe to beneficiaries under human rights law, and then to examine how these obligations might impact the state's regulatory duties toward NGOs.

In determining the state's social rights obligations, I examine relevant international and regional human rights treaties, the interpretive works of supervisory treaty bodies as well as relevant legal scholarship. Domestic statutory law and court decisions are offered as case studies and examples throughout the dissertation. Drawing from the Vienna Convention on the Law of Treaties (Vienne Convention), my interpretations of international law take into account the ordinary meaning of texts, within their contexts and along with the object and purpose of the instrument under examination.

Lastly, a few points of clarification are in order. First, I use the terms duty and obligation interchangeably to refer to the acts or omissions with which an actor's behavior must conform. For a duty or obligation to be legally binding, it must arise from a legal source. As aforementioned, my normative sources for the state's legal obligations will be human rights law in general, and social rights obligations in particular. Second, in order to remain within reasonable analytical limits, this dissertation focuses primarily on the regulation of NGOs, although it goes without saying that NGOs are not the only non-state actors that work toward the realization of social rights in Africa.[23] Third, although NGO laws have become more restrictive in many parts of the world,[24] sub-Saharan Africa warrants special attention due to its underrepresentation in legal scholarship, the fact that African

23 See Mark Robinson and Gordon White, 'The Role of Civic Organizations in the Provision of Social Services: Towards Synergy' in Germano Mwabu, Cecilia Ugaz and Gordon White (eds), *Social Provision in Low-Income Countries* (Oxford University Press 2001) 79 - 100, 80.

24 *E.g., see The 2014 CSO Sustainability Index: Central and Eastern Europe and Eurasia,* United States Agency for International Development (USAID), (2014) 2 (noting legal environments have been deteriorating for CSOs in Azerbaijan, Bulgaria, Hungary, Kazakhstan, Russia, Tajikistan, while legal environments "remained extremely restrictive" in Turkmenistan and Uzbekistan); *The 2013 CSO Sustainability Index: The Middle East and North Africa,* United States Agency for International Development (USAID), (2013) 2-3 (CSO regulations in recent years require CSO with foreign assistance to sign memoranda of understanding with government to declare use of foreign funding); ibid ("Several governments in the [middle east and north African] region took actions to close civic space during 2013, mirroring trends in other parts of the world"); Maina Kiai, *Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contributions Regulation Rules 2011,* U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (2016) (concluding

governments rely on foreign assistance more than governments in other regions,[25] and the extent of the continent's historical experience with foreign intervention as well as non-state (traditional or informal) means of social welfare. Finally, although the dissertation focuses on African states because of the prevalence of LDCs in sub-Saharan Africa, its ultimate theoretical findings and analyses can be generalized to all states bearing social rights obligations under human rights law. Likewise, these findings can, to a certain extent, cover cases involving other similarly situated non-state actors such as faith based and community based organizations.

State of Research

Scholarship dedicated to understanding NGOs in the developing world covers a wide range of topics and analytical approaches located within the broad strokes of development studies. To begin with, most literature on NGOs tends to evaluate their performance,[26] explain their emergence,[27]

India's restriction of foreign funding to NGOs is a violation of their international right to associate and assemble). *See also* Barbara Lethem Ibrahim, 'States, Public Space, and Cross-Border Philanthropy: Observations from the Arab Transitions' 17 International Journal of Not-for-Profit Law 72 (2015) ; Douglas Rutzen, 'Aid Barriers and the Rise of Philanthropic Protectionism' 17:1 International Journal Not-for-Profit Law 5(2015); Timothy M Gill, 'Unpacking the World Cultural Toolkit in Socialist Venezuela: National Sovereignty, Human Rights and Anti-NGO Legislation' 38 Third World Quarterly 621 (2017); Geir Flikke, 'Resurgent Authoritarianism: The Case of Russia's New NGO Legislation' 32 Post-Soviet Affairs 103 (2016) .

25 Lindsay Whitfield and Alastair Fraser, 'Negotiating Aid: The Structural Conditions Shaping the Negotiating Strategies of African Governments' 15 International Negotiation 341 (2010) 342.

26 Nicola Banks, David Hulme and Michael Edwards, 'NGOs, States, and Donors Revisited: Still Too Close for Comfort?' 66 World Development 707 (2015) ; Kevin Edmonds, 'Beyond Good Intentions: The Structural Limitations of NGOs in Haiti' 39 Critical Sociology 439 (2012) ; Mary Kay Gugerty, 'The Effectiveness of NGO Self-Regulation: Theory and Evidence from Africa' 28 Public Administration and Development 105 (2008) ; T. Jeffrey Scott, 'Evaluating Development-Oriented NGOs' in Jr. Welch, Claude E. (ed), NGOs *and Human Rights: Promise and Performance* (University of Pennsylvania Press 2001) 204-221; James Petras, 'NGOs: In the Service of Imperialism' 29 Journal of Contemporary Asia 429 (1999).

27 Lauren M. MacLean, 'Neoliberal Democratisation, Colonial Legacies and the Rise of the Non-State Provision of Social Welfare in West Africa' 44 Review of African Political Economy 358 (2017) ; Lester M. Salamon, 'Introduction: The

address concerns about their accountability and responsibilities,[28] or prescribe solutions for problems that are common within their sector.[29] Critical voices – not limited to any particular ideological tradition – can be found within the scholarship. One refers to this critical branch collectively as "the anti-NGO movement".[30] Postcolonial critiques shed light on how the objectives of NGOs are entangled with the (sometimes overriding) interests of foreign entities, and how this entanglement tends to undermine the legitimacy and effectiveness of NGOs in Africa, as well as extend parts of the imperialistic tradition of missionaries of the colonial era.[31] A related thread of critical literature narrows in on the diminishing sovereignty of states that accompanies the rise of NGOs.[32] As one writer's emblematic probe asks, when is it reasonable to consider NGOs "state sovereignty destroyers" rather than "human rights defenders"?[33]

Some development studies literature has narrowed in on the regulation of NGOs. One area of research focuses on the political processes of enacting NGO legislation and their consequences. Scholars have provided political explanations for the restrictiveness that characterizes recent trends in

---

Nonprofitization of the Welfare State' 26 Voluntas 2147 (2015) ; Redie Bereketeab, 'Conceptualizing Civil Society in Africa: The Case of Eritrea' 5 Journal of Civil Society 35 (2009); Lester M. Salamon, 'The Rise of the Nonprofit Sector' 73 Foreign Affairs 109 (1994); Lester M. Salamon and Helmut K. Anheier, 'Social Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally' 9 Voluntas 213 (1998); Lester M. Salamon, 'Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' 16 Journal of Voluntary Action Research 29 (1987).

28 Maria Nassali, *Beating the Human Rights Drum: Applying Human Rights Standards to NGOs' Governance* (Pretoria University Law Press 2015); Elizabeth Griffin, 'The Ethical Responsibilities of Human Rights NGOs' 15 International Journal of Not-for-Profit Law 5 (2013); Lisa Jordan and Peter van Tuijl (eds), *NGO Accountability: Politics, Principles and Innovations* (Earthscan 2006).

29 Pablo Eisenberg, 'Forum - Looking Ahead: What Is the Future for the Nonprofit World' 8 International Journal of Not-for-Profit Law 81 (2005).

30 Jenkins (2012).

31 Issa G. Shivji, 'The Silences in the NGO Discourse' 31 African Development 22 (2006) ; Firoze Manji and Carl O'Coill, 'The Missionary Position: NGOs and Development in Africa' 78 International Affairs 567 (2002); Makau Mutua, 'Human Rights International NGOs: A Critical Evaluation' in Jr. Welch, Claude E. (ed), NGOs *and Human Rights: Promise and Performance* (University of Pennsylvania Press 2001) 151-166; Petras (1999).

32 Jessica T. Mathews, 'Power Shift' 76 Foreign Affairs 50 (1997).

33 Lina Marcinkutė, 'The Role of Human Rights NGOs: Human Rights Defenders or State Soverignty Destroyers?' 4 Baltic Journal of Law & Politics 52 (2011).

NGO regulations.[34] Others consider how the political process of regulating NGOs can enhance society's understanding of democratic accountability and legitimacy. Susannah H. Mayhew shows how legislative debates about how to regulate NGOs can act as a catalyst to enhance national discourse about the role, accountability, legitimacy and vulnerabilities of NGOs.[35] Another area of scholarship looks more closely at the effect that NGO regulations can have on NGOs. For example, how might such regulatory control promote accountability and legitimacy within the nonprofit sector?[36] Or, from another view, how might restrictive regulatory measures affect the operations and outcomes of NGOs? Ronelle Burger examines the pitfalls of various oversight mechanisms in Uganda, and whether they are likely to improve NGO sector outcomes.[37] Finally, some scholars search for a link between NGO regulations and development outcomes in general. Ada O. Okoye examines whether the regulation of NGOs in Nigeria and South Africa promote or undercut development objectives.[38]

In a sense, Okoye's work is exemplary in that it epitomizes both the strength and shortcomings of development studies research in terms of addressing the legal questions posed by the present dissertation. Like Okoye's contribution, development studies scholarship in this area of research is incredibly valuable for legal scholars because it offers background information and theoretical considerations about the links between NGOs and social development, however such literature does not typically employ legal analysis, nor does it yield significant legal findings. Legal scholarship is still needed in order address the issue of whether states owe any special regulatory duties toward NGOs based on the social rights of beneficiaries.

Within the legal discipline, some scholarship has addressed restrictive NGO regulations, but mainly with the objective of determining whether

34 Kendra Dupuy, James Ron and Aseem Prakash, 'Hands Off My Regime! Governments' Restrictions on Foreign Aid to Non-Governmental Organizations in Poor and Middle-Income Countries' 84 World Development 299 (2016).

35 Susannah H. Mayhew, 'Hegemony, Politics and Ideology: The Role of Legislation in NGO-Governmental Relations in Asia' 41 Journal of Development Studies 727 (2005).

36 Jassy B. Kwesiga and Harriet Namisi, 'Issues in Legislation for NGOs in Uganda' in Lisa Jordan and Peter van Tuijl (eds), *NGO Accountability: Politics, Principles and Innovations* (Earthscan 2006) 81-92.

37 Ronelle Burger, 'Reconsidering the Case for Enhancing Accountability Via Regulation' 23 Voluntas 85 (2012) 88.

38 Ada Obianuju Okoye, 'The Role of Law in the Development of Nonprofit Sector in Nigeria and South Africa' (University of Cape Town 2006).

the rights of NGOs – rather than beneficiaries – were violated.[39]Analysts consider how restrictive NGO laws may encroach on the rights to associate, to speak freely and to fundraise.[40]Very little legal scholarship addresses the effect of NGO regulations on the rights of beneficiaries. One example is an article by Akingbolahan Adeniran in which a governmental proposal to delegate the management of secondary schools to nonprofit entities in Nigeria was scrutinized from the perspective of the child's right to education.[41] Although a fine example, this article – due to its limited scope – does not provide a systematic exploration of the legal relations that bind beneficiaries, nonprofits and states. What is needed is a thorough investigation into the legal aspects of this this triangular relationship, with a particular focus on the functional role of nonprofits in the realization of social rights *vis-à-vis* the state. It is this particular issue that the present dissertation aims to address, and in doing so would contribute to an underdeveloped area of scholarship.

Perhaps the most direct way to approach the issue is by examining the human rights obligations of the state regarding the obstruction of private efforts to realize social rights. While commentators agree that the state bears a negative duty to respect socio-economic rights by refraining from interfering with their realization and enjoyment, they often are only concerned with instances in which the state directly deprives people of their rights, or when the state interferes with people's ability to realize their rights by their own means.[42] Very few, are concerned with the scenario in

---

39 Burger (2012) 88 ("…much of the writing on NGO regulation has concentrated on a demonstration of the potential negative consequences of government interventions on the independence and the freedom of the sector.").

40 Livingstone Sewanyana, 'Towards an Enabling NGO Regulatory Framework in Uganda: Comparative Experiences from Eastern and Southern Africa' (Doctoral Thesis Unversity of Capetown 2014) (examines how NGO regulations in Uganda affect the rights of NGOs); Jeanne Elone, 'Backlash against Democracy: The Regulation of Civil Society in Africa' 7 Democracy and Society (2010) (examines how NGO laws in Zambia, Zimbabwe and Ethiopia affect the rights of NGOs).

41 Akingbolahan Adeniran, 'Non-Profit Privatization of the Management of Nigerian Public Schools: A Legal and Policy Analysis' 53 Journal of African Law 249 (2009).

42 See Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Ian Brownlie ed, Oxford University Press 1995) 110-111; Nsongurua J. Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' 40 Stanford Journal of International Law 105 (2004) 131-132; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the Interna-

which the state interferes with the rights provided by third parties.[43] Most legal scholars who are concerned with the regulation of non-state providers from a rights-based perspective miss the mark by focusing on for-profit providers rather than nonprofits. Adam McBeth uses a rights-based approach to make a case for more rigorous regulation of private for-profit providers.[44] He begins from the normative position entrenched in international human rights law that the state must ensure the realization of economic, social and cultural rights such that it continues to progress over time. McBeth then posits that since private providers are incentivized by profits rather than by the progressive realization of social rights, the state must supervise them and impose upon them contractual obligations or provide them with financial incentives to ensure the progressive realization of social rights and equitable access to services, especially for marginalized members of society.[45] Although McBeth's analysis is a valuable contribution to the legal understanding of state regulatory responsibilities in the context of privatization, its legal conclusions cannot be supplanted into the field of nonprofit regulation because his underlying reasoning – that social rights cannot be progressively realized through non-state providers without regulatory controls on profit-seeking behavior – simply does not hold true for the nonprofit sector.

Since each sector is incentivized differently, scholars studying NGO laws should not conflate the regulatory reasoning that concern for-profit providers with that which concern nonprofit providers. Neil Gilbert and Barbara Gilbert note that there are two ways to characterize non-state provision: as private/public or as commercial/non-commercial.[46] They note that while the privatization of social welfare generally involves moving its planning or programming further away from state control and into the private sphere, the process of commercialization on the other hand is asso-

---

tional Covenant on Economic, Social and Cultural Rights' 9 Human Rights Quarterly 156 (1987) 184-185.

43 See, e.g., M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 217-218 (asserting that states must refrain from interfereing with privately provided services, but only addresses this briefly in one paragraph; refers to the CESCR's discussion of the state's interruption of NGO services in Mexico.).

44 Adam McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties When Services Are Privatised?' 5 Melbourne Journal of International Law 133 (2004).

45 Ibid 152-153.

46 Neil Gilbert and Barbara Gilbert, *The Enabling State* (Oxford University Press 1989) 27-53.

ciated with "not only the penetration of profit-motivated providers, but also an infusion of the ethos and method of the economic market into all branches of the social market."[47] In this sense, nonprofits are not typically commercialized like their for-profit counterparts, although a significant emergence of either entity within the domain of social welfare is technically subsumed under the term "privatization". Thus, research on for-profit privatization would address an entirely different set of concerns than those raised by nonprofit privatization. In stressing some of those differences, Gilbert and Gilbert write,

> The noncompetitive service culture traditionally associated with the social market emphasizes concern for adequacy of provision over costs, status rather than contract relationships between consumer and provider, and transfer rather than exchange as the basic model of allocation.[48]

While scholars studying for-profit privatization, such as McBeth, might very well conclude that greater governmental oversight is essential to the realization of social rights, the same may not be true of regulating nonprofit providers. Indeed, existing patterns of governmental oversight appear to acknowledge this distinction, albeit in reverse order. According to a recent report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, states tend to regulate associations more restrictively than they do businesses.[49]

A similar argument for greater governmental oversight and regulation of private providers has been made by Joshua P. Reading, who examines the provision of health care in Pakistan.[50] Unlike McBeth, Reading's research considers all private providers, including nonprofit providers. However, like McBeth, Reading begins *a priori* from the position that increased regulation of private providers will improve, rather than interfere with, the realization of social rights. He asserts that "with increased government involvement, the level of health care will improve, both in terms of access and quality" and reasons that "increased expenditures lead to improved

47 Ibid 29.
48 Ibid.
49 Maina Kiai, *Annual Report: Comparative Study of Enabling Environments for Businesses and Associations,* U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, A/70/266 (2015).
50 Joshua P. Reading, (Note) 'Who's Responsible for This? Globalization of Healthcare in Developing Countries' 17 Indiana Journal of Global Legal Studies 367 (2010).

health care."[51] This line of research does not address the legal problems that arise when regulations are so restrictive that they obstruct or reduce nonprofit activities that were essential for the enjoyment or realization of social rights, and whether the state's social rights obligations toward the beneficiaries can act as a check or limit on the extent to which regulatory measures can restrict nonprofit activities.

Another way to distinguish this dissertation's objective from those of McBeth and Reading is through the paradigm of positive/negative duties. When McBeth and Reading argue for greater state oversight and intervention, they are largely extrapolating from the positive duties of the state to *do* something. Readings calls for greater governmental expenditure in health care and coordination with private providers. McBeth urges greater state supervision of private providers and the imposition of certain contractual obligations. The obligation of the state to exert at least some regulatory control on private providers is of course vital to the realization of social rights provided by nonprofits as well. What remains unclear, however, and what constitutes the primary concern of this dissertation, is whether the state bears *negative* duties. That is, whether and to what extent the state must refrain from interfering with the activities of private actors that would advance the realization of social rights, especially in the context of limited state capacity and resource scarcity.

On the peculiarities of the African context, neither McBeth nor Reading is exceedingly relevant. McBeth's article addresses international law rather generally while Reading's research uses Pakistan as an example from which he formulates generalized recommendations for all developing countries. Henry Mwebe's research, however, goes a step further in this regard by focusing on socio-economic rights in the African context.[52] Mwebe examines the impact of water privatization in South Africa on socio-economic rights and services. However, like McBeth and Redding, Mwebe's work addresses for-profit provision and, consequently, is primarily concerned with the problems that arise when the cost-cutting interests of profit-driven firms come into conflict with socio-economic development goals. Although this problem may have an analogy in the increased professionalization and self-preserving interests of NGOs in Africa, it does not address the primary concern of this dissertation: namely, the state's ability to obstruct nonprof-

51 Ibid 386.

52 Henry Mwebe, 'The Impact of Privatisation on Socio-Economic Rights and Services in Africa: The Case of Water Privatisation in South Africa' (Master's Thesis, University of Pretoria 2004).

it provision in scenarios where beneficiaries rely on nonprofit activities for the realization of their social rights.

Writing separately, Joe Oloka-Onyango,[53] Danwood Mzikenge Chirwa[54] and Aoife Nolan[55] examine state responsibility for private interferences with human rights. Although Chirwa examines human rights generally, Nolan and Oloka-Onyango focus their work on interferences with social, economic and cultural rights in particular; moreover Oloka-Onyango's attention turns primarily toward the regulation of transnational corporations. While Oloka-Onyango emphasizes how the "uniqueness of the African experience" and the particularities of African human rights law calls for a more robust protection of economic, social and cultural rights, Chiwa and Nolan employ a broad international scope without focusing extensively on the African context.[56] Ultimately, their respective works make the case that the state is responsible for harmful private conduct rather than considering the scenario envisioned by this dissertation, wherein it is rather the state's conduct that (often inadvertently) threatens social rights.

Ada Okoye Ordor's work on not-for-profit laws in Africa is a meaningful contribution to this area of scholarship.[57] Ordor asserts that comprehensive, simplified and administrable legislative frameworks for regulating the non-profit sector would be most advisable in African countries due to the emphasis on people- and development-focused approaches. While, Ordor's article provides a good overview of various legislative models in Africa for not-for profit law, her work is different than mine in part because she leans on the protection of associational rights as her normative framework. She urges for the "ongoing surveillance and safeguarding of a hard-won enabling legal environment" so as to ensure the protection of associational activities.[58] Moreover, her analysis includes all non-profit organizations

53 Joe Oloka-Onyango, 'Reinforcing Marginalized Rigths in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' 18 American University International Law Review 851 (2002-2003).

54 Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' 5 Melbourne Journal of International Law 1 (2004).

55 Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect'' 9 Human Rights Law Review 225 (2009).

56 Although Nolan limits his research to the regional level.

57 Ada Okoye Ordor, 'The Non-Profit Sector in the Context of Law in Development in Africa' 58 Journal of African Law 45 (2014).

58 Ibid 68.

generally, while this dissertation brings into sharper focus those nonprofits that are particularly important for the realization and enjoyment of social rights.

Summary of Argumentation

This dissertation builds the following line of argumentation. To begin with, international and regional human rights laws impose certain obligations upon states regarding the realization and enjoying of social rights within their territories. Because Africa's LDCs have limited institutional capacity and resources, they often do to fulfill the basic social needs of their people and sometimes fail to fulfill their own social rights obligations. In such cases, nonprofit activities that fill protection gaps serve as functional substitutes for or supplements of the state's own social welfare activities. Crucially, this means that such some NGOs are fulfilling the social rights obligations of the state. Therefore, the social rights of beneficiaries, which apply against states, give rise to implicit state obligations toward the NGOs. In other words, the legal relationship between the state and the beneficiaries of nonprofit activities can influence the legal relationship between the state and the nonprofits when those nonprofits fulfill the state's social rights obligations. These implicit state obligations toward NGOs include the obligation to facilitate and permit certain nonprofit activities. Finally, judicial review of restrictive NGO laws in LDCs should employ a heightened level of scrutiny if the court concludes that nonprofit providers are discharging the social obligations of the state.

One court in South Africa has already taken this approach to justify extensive judicial oversight of a governmental measure that regulated the funding of NGO services in the province of Free State. The following paragraphs of this introductory chapter are dedicated to summarizing the court's judgment. The keystone in this decision is a finding that nonprofits can sometimes fulfill state obligations. While the South African decision follows a similar line of argumentation to that which is presented in this dissertation, it falls short of conducting a systematic inquiry into the social and legal foundations that support its argument. The present dissertation contributes to the understanding of NGO regulations by filling this gap. The following discussion of the South African decision should serve as a preview that pulls together many of the elements that will be discussed throughout this dissertation in some depth, and offers a hint of the legal and societal relevance of the issues involved.

A Preview: The Decision of a South African Court in Free State

How might courts apply the normative position that certain NGOs are discharging the state's outstanding social obligations? A series of decisions issued by a judge in the Free State province of South Africa demonstrates how judicial recognition of this normative position can trigger rigorous judicial review of NGO regulations in order to protect the social rights of beneficiaries.

The South African court issued multiple decisions over the course of four years, yet they all deal with the same facts, involve the same parties, and bear the same case name. As such, I will refer to them collectively as *National Association of Welfare Orgs. v. Member of the Executive Council for Social Development*.[59] The applicants in all four cases were NGOs in South Africa that provided social services to children, the elderly and people in vulnerable situations within the province of Free State. The respondents were various governmental agencies that were responsible for the distribution of funding subsidies to the applicants and all other qualifying NGOs.

In the province of Free State, the government delivered directly through public institutions only a small portion of the core services that it was obliged to ensure. The remaining core services were either not provided or were delivered by NGOs through a special arrangement with the state. On the one hand, the government incorporated NGOs into part of its plan for delivering social services by granting funding awards to NGOs who provided core services. On the other hand, the government systematically underfunded NGOs through its financial awards program and thus many NGOs provided part of their services as though they were substituting for the government, meaning that they did so without the public financial support. In the worst cases, certain beneficiaries simply did not receive

59 *National Association of Welfare Organisations and Non-Governmental Organisations and Others v. Mec of Social Development, Free State and Others*, 2010 ZAFSHC 73, 1719/2010 (Free St. High Ct. 2010) (S. Afr.); *National Association of Welfare Organization and Non-Governmental Organizations and Others v. Mec for Social Development, Free State and Others* 2011 ZAFSHC 84, 1719/2010 (Free St. High Ct. 2011) (S. Afr.); *National Association of Welfare Organisations and Non-Governmental Organisations and Others v. Mec for Social Development, Free State and Others* 2013 ZAFSHC 49, 1719/2010 (Free St. High Ct. 2013) (S. Afr.); *National Association of Welfare Organisations and Non-Governmental Organisations and Others v. Mec for Social Development, Free State and Others* 2014 ZAFSHC 127, 1719/2010 (Free St. High Ct. 2014) (S. Afr.).

core services because no NGO or public institutions could provide it to them.

Under these circumstances, the court evaluated and supervised multiple revisions of the state's NGO financing policy to determine whether systematically underfunding all NGOs was consistent with the state's obligation to provide core services to the residents of Free State. The court's key finding that legitimized extensive judicial supervision over state financing policy was that NGOs in Free State were fulfilling the social rights obligations of the state.

The provincial government awarded grants to NGOs in accordance with a policy guideline entitled the *Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector*.[60] Pursuant to policy guidelines, the government would deduct from an NGO's award the amount that it determined the NGO should contribute from its own resources toward the costs of service delivery. In 2010, the applicants sued the state in order to challenge the constitutionality of the government's financing policy on the grounds that it arbitrarily and unreasonably determined how much an NGO should contribute from its own resources toward the provision of social services.

In trial, the government openly admitted that NGOs played a vital role in filling essential service gaps left behind by limited public provisioning. Of the 2000 beds that were needed in child and youth centers in Free State, the government provided only approximately 320 while NGOs provided nearly 800. [61] Most services for street children were also provided by NGOs. [62] Moreover, NGOs provided 40 % of those services that were statutorily required to be performed by social workers, such as safeguarding children in need of care, recruiting foster parents, family reunification and supervision, adoption services, and services regarding alcohol and drug dependence. [63] Remarkably, the delivery of all statutorily guaranteed services in six towns fell squarely on the shoulders of merely one NGO.[64]

The applicants demonstrated that despite the critical role of NGOs in the realization of social rights, the government continuously underfunded their programs. For example, although one NGO provided residential care

60 *National Association of Welfare Organisations v. Mec of Social Development (2010)* para. 19.
61 Ibid para. 13.
62 Ibid para. 15.
63 Ibid para. 18.
64 Ibid para. 17-18.

centers for 1000 older persons, the government funded only 290 of those residents.[65] Another NGO that cared for children in need only received enough funding to provide three basic meals at R11.84[66] per child per day, although a daily minimum of R50.00 was required per child.[67] Likewise, for the care of street children, the NGO received R400-R500 per child per month, which was a far cry from the R2000 per month that was needed for each child. The court found the R1,925 per month received by another NGO for the care of older persons in vulnerable situations was "substantially inadequate".[68] Without enough funding from the government, NGOs would have had to cut back on their services or terminate them all together.

To determine whether the funding policy violated the state's obligations, the court first determined what those obligations were by examining the social rights of children, the elderly and persons in vulnerable situations. The constitution and statutory law (Children's Act, 38 of 2005) guaranteed children the protection of the state when they were removed from the family environment. These protections included the right to "basic nutrition, shelter, basic health care services and social services."[69] The court relied on *South Africa and Others v. Grootboom and Others* to reinforce the primacy of the state's duty to guarantee these basic provisions to children without families.[70] Asserting a reasonableness standard, the court wrote, "…the State is obliged to take reasonable measures to the maximum extent of its available resources to achieve the realization of the rights of children…"[71]

After evaluating the NGO funding policy of Free State, the court concluded that the policy was "fundamentally flawed" because, although the state recognized the importance of NGO services, the funding policy,

---

65 Ibid para. 15.
66 Currency is in South African Rands.
67 *National Association of Welfare Organisations v. Mec of Social Development (2010)* para. 34.
68 Ibid para. 35.
69 Constitution of South Africa (1996) § 28(1) (b)-(d).
70 *National Association of Welfare Organisations v. Mec of Social Development (2010)* para. 40. See also, *Government of the Republic of South Africa and Others v. Grootboom and Others*, 1 SA 46, CCT 11/00 (CC 2000) (S. Afr.) para. 77 ("The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families.").
71 *National Association of Welfare Organisations v. Mec of Social Development (2010)* para. 44.

> …fail[ed] to recognize, as a fundamental principle of funding, that NPOs [non-profit organizations] that provide care to children, older persons and vulnerable persons in need as well as statutory services, fulfill constitutional and statutory obligations of the [governmental] department.[72]

In essence, NGOs were discharging the social obligations of the state, and the terms of the government's funding policy needed both to reflect and to be consistent with that notion. The court went on to conclude that while it was reasonable for funding determinations to take into account alternative funding sources that were likely available to NGOs, it needed to do so in accordance with a reasonable and transparent method of determination, which the funding policy lacked.[73]

Furthermore, the court held that the funding guidelines must not systematically underfund NGOs by approving grants amounting to only a fraction of the minimum amount needed by each NGO. In 2010 and 2011, the amount granted to NGOs was 49% less than the amount that they needed.[74] The government should ensure that the amount calculated for each NGO "does not result in the service required by the department not being provided."[75] The underlying reasoning is that inadequate funding is likely to result in inadequate provision of services, or none at all, which pose constitutional problems with respect to the rights of beneficiaries. The court elaborates on this point:

> Imagine now that the financial award allocated to the NPO is 49% less that the amount [required] which the department itself calculated as the reasonable cost to care for these children. This gives rise to many questions. What is the NPO to do in the circumstances? How will the human dignity of the child be maintained? And what about their rights to equality, because they may suffer solely as a result thereof that they happen to be referred to the NPO's child and youth care center and not, for instance, to one of the department's own institutions? Will this not result in the failure of the NPO's programme and resultant effective waste of the financial award to it?[76]

---

72 Ibid para. 47.
73 Ibid para. 48-49.
74 *National Association of Welfare Organisations v. Mec of Social Development (2011)* para. 17.
75 Ibid para. 25.
76 Ibid para. 17.

The court concluded that the funding policy was irrational and unreasonable because it underfunded all NGO-provided services, rather than prioritizing and adequately funding just a few essential NGO services.[77] "There is therefore no reason" writes the court "for the senseless procedures of approval of service plans that cannot be fully funded…and payment of palpably insufficient amounts to all approved NPO's."[78] In concluding that the funding policy guidelines failed to comply with the state's constitutional obligations, the court emphasized that funding guidelines "must not result in merely paying lip service to the fundamental principle of funding that NPOs that care for children, older persons or vulnerable persons in need or provide statutory services fulfill the obligation of the department."[79] In the end, in order to ensure that the funding guidelines complied with the state's social obligations toward the beneficiary, the court recognized a legal claim on the part of NGOs and dedicating no less than four years of close judicial supervision over multiple revisions of the NGO funding guidelines in Free State.

The most important finding of the court was that the NGOs fulfilled the state's social rights obligations to the beneficiaries. This allowed the court to hold the state to a higher standard of care regarding the manner in which it regulates NGOs. Ultimately, the regulation of NGOs was a concern for the social rights of beneficiaries. This dissertation will elaborate on this argument from the perspective of human rights law. The following chapter, chapter 2, briefly provides some background information to help situate the issue within its socio-economic, historical, and political contexts. Chapter 3 then outlines the social rights of beneficiaries under international and regional human rights law and explains how NGO-government relations can affect interference with beneficiaries' social rights. This raises the issue of whether the state's social rights obligations to beneficiaries gives rise to certain regulatory obligations toward NGOs in order to ensure the protection, respect and fulfillment of the social rights of beneficiaries.

Since not all NGOs will fulfill the state's social rights obligations, chapter 4 offers a classification of NGOs based on their propensity to fulfill social rights obligations of the state as well as whether they are essential for the realization and enjoyment of the social rights of beneficiaries. This chapter relies on the law of social rights as it is laid down in the Interna-

77 Ibid para. 22.
78 Ibid.
79 Ibid para. 25.

tional Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter.

Chapter 5 looks at how differences in the triangular relations that bind the various types of NGOs to their beneficiaries and to the state reflect differences in the legal relations among them. In particular, the state's social rights obligations to beneficiaries can augment the state's legal relation with NGOs by imposing upon the state special regulatory requirements *vis-à-vis* the nonprofit sector. Different NGO types – as they are presented in chapter 3's typology – enjoy different degrees of freedom from tight regulatory control and varying levels of state support.

Chapter 6 considers when it might be acceptable for a state to restrict and even obstruct NGOs even though doing so would limit the enjoyment of social rights for their beneficiaries. This chapter relies on the general clauses of the ICESCR, which lay out the state's obligations and powers regarding the limitation of Covenant rights. The dissertation closes with a summary and some brief concluding remarks on the role of the judiciary in these matters.