2. Background: Social Development and NGOs in Africa

Many argue that a primary function of the modern democratic state is to promote the welfare of its people, which in turn supports the state's legitimacy.[80] In African countries, where state legitimacy is often contentious, states have garnered acceptance with their populations through social provisioning. Social welfare was an essential component of legitimate governance in pre-colonial African societies.[81] Likewise, expanding social welfare was central to the legitimacy of post-colonial states.[82] Furthermore, when welfare provisioning declined in the 1980s, it undermined the social contract and threatened to unravel social and political stability.[83] If ensuring social welfare is such a core function of the state that is tied to its very legitimacy, then what is to be made of poorer states that struggle to address severe and widespread human suffering? Does the state still bear any responsibilities to ensure social welfare when it lacks the resources or the capacity to provide services directly?

These questions are particularly relevant for African LDCs, where human welfare is quite dim. Many African states claim their failure to alleviate poverty and guarantee human security is justified due to the unavailability of resources. However, a state's resources amount to far more than merely its financial capacity. In African LDCs, where financial resources are indeed scarce, analysts must look beyond whether the state is directly providing social services in order to determine whether it is in fact doing all that it can do to promote social welfare. In particular, since the non-profit provision of social services is an important avenue of social protec-

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80 Paul Spicker, *Principles of Social Welfare: An Introduction to Thinking About the Welfare State* (Routledge 1988) 53; Wisdom Gagakuma and Zigiju Samuel, 'Effectiveness of Capacity Building Programs in Fragile States: The Ethiopia Case' in Dele Olowu and Paulos Chanie (eds), *State Fragility and State Building in Africa: Cases from Eastern and Southern Africa* (Springer International Publishing 2015) 113-134, 136-137; Edward Kofi Quashigah, 'Legitimate Governance: The Pre-Colonial African Perspective' in Edward Kofi Quashigah and Obiora Chinedu Okafor (eds), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (Springer Netherlands 1999) 43-66; Adebayo O. Olukoshi, *The Politics of Opposition in Contemporary Africa* (Stylus Pub Llc 1998).

81 Quashigah.

82 Olukoshi (1998) 19-20.

83 Ibid.

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tion in African LDCs, any state measure that has the effect or purpose of obstructing nonprofit activities should raise serious doubt about whether the state is doing all that it can do to promote social welfare.

In order to understand how the regulation of NGOs might interfere with the social rights of beneficiaries, it is helpful first to understand the contexts within which NGOs have emerged in Africa, the role that they have played in the realization of social rights, their relation to foreign aid, and the growing anti-NGO sentiments advanced by their critics. The current chapter will provide this background in preparation for the legal analysis that follows.

2.1. Theory and Context

The following sections provide the theoretical and socio-economic foundations upon which the legal analysis is built. In particular, social development is discussed in relation to law and theory as well as the socio-economic context of Africa's LDCs. In particular, this sub-section examines the existing socio-economic context of African beneficiaries and how states and NGOs have both been involved in the alleviation and exacerbation of social rights. This is meant to provide a factual and conceptual background for a better understanding of the challenges that states face when regulating NGOs and how those regulations can interfere with the social rights of beneficiaries.

2.1.1. Social Development in Theory and Law

Social development theories underlie any understanding of the way that NGOs relate to the governments of least developed African countries, which in turn affects the legal relations between them. The term 'social development' connotes the progress made within a society as measured by indicators of social wellbeing, such as health and education outcomes. Since such indicators continue to reveal a bleak picture of social wellbeing in sub-Saharan Africa, social protection is an important component to development theory and practice in African states. This is particularly true in the context of social service provision, which is considered a key compo-

nent of the 'solution' to development problems.[84] As such, development scholars, who work in a wide range of disciplines linked to the social sciences, have proposed theories and models to explain and analyze the various social provision arrangements that arise within different societies. Thus, a basic understanding of development theories is helpful to examining the duties of the state toward NGO service providers.

2.1.1.1. Development Theories

Development theories suggest that social provision in developing countries typically involves a variety of non-state and international actors because the capacity of developing countries is constrained by the limited availability of financial and technical resources. So as to properly conceptualize the relationship between government and NGOs in the provision of social service, the following paragraphs briefly summarize the relevant theories and models from development studies.

Early development theories supported state-centered service provision. Development theorists and practitioners initially believed that transplanting a centralized, bureaucratic and top-down model from certain European countries into poorer countries would be the most effective and appropriate way to solve the problems of under-development.[85] In terms of provisioning, this approach would advance centralized service provision by the government. Others refer to these earlier ideas within development studies as structuralist theories because they emphasized the role of the state and of planning.[86] Structuralism relied upon economic theories on

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84 Armando Barrientos, 'Social Protection' in Bruce Currie-Adler and others (eds), *International Development: Ideas, Experience & Prospects* (Oxford University Press 2014) 188-203, 188 & 191; Lant Pritchett and Michael Woolcock, 'Solutions When the Solution Is the Problem: Arraying the Disarray in Development' 32 World Development 191 (2004) 192 (noting how most development studies scholars agree that key social services should be part of the development agenda).

85 David Williams, 'The Study of Development' in Bruce Currie-Adler and others (eds), *International Development: Ideas, Experience & Prospects* (Oxford University Press 2014) 21-34, 23-26 (noting that development studies has always struggled with how far it can generalize the knowledge generated within its discipline into policy prescriptions for all developing countries.).

86 John Harriss, 'Development Theories' in Bruce Currie-Adler and others (eds), *International Development: Ideas, Experience & Prospects* (Oxford University Press 2014) 35-49, 38-40.

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the failure of markets to provide public goods.[87] This theory suggests that, due to the presence of market imperfections such as information asymmetries, moral hazard, externalities and the free rider problem, only government can ensure the provision of certain goods, often referred to as public or collective goods.[88] The market, with its competitive ethos and profit-distributing imperatives, simply could not effectively overcome these imperfections. For some time, structuralist development policies were fairly popular. After years of implementing what Lant Pritchett and Michael Woolcock refer to as "the strategy of 'skipping straight to Weber'", the results yielded some successful cases – however, not without many disastrous failures.[89]

Later, liberalist thinking became prominent in development practice. Liberal policies championed by international financial institutions were implemented in developing countries to pry markets open through slashing government expenditure and privatizing service provision. These policies also failed to deliver meaningful results and were largely criticized by the 1990s. As a result, disarray and disagreement emerged within in development studies, leading one scholar to note that "by the 1990s development theory was in crisis, given the practical failures of both structuralism and of liberalism, and the fact that many developing countries, particularly in Africa, were experiencing violence and civil war."[90] The lesson, it seems, is that development theories needed a more nuanced and perhaps less ideological approach.

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87 Public goods (or 'collective goods') are goods that, once produced, can be consumed by additional consumers at no additional costs, and from which consumers cannot be excluded. (Paul A. Samuelson, 'The Pure Theory of Public Expenditure' 36 The Review of Economics and Statistics 387 (1954); Randall G. Holcombe, 'A Theory of the Theory of Public Goods' 10 Review of Austrian Economics 1 (1997).).

88 Samuelson (1954) 389; William H. Oakland, 'Theory of Public Goods' in Alan J. Auerbach and Marin Feldstein (eds), *Handbook of Public Economics*, vol 2 (1987) 485-535, 485, 509; Robert P. Inman, 'Markets, Governments, and the "New" Political Economy' in Alan J. Auerbach and Marin Feldstein (eds), *Handbook of Public Economics*, vol 2 (1987) 647-776, 653-672 ("…in many important instances governments are necessary for economic efficiency, and…the central features of those instances is the need for the coercive enforcement of cooperative behavior among self-seeking agents.").

89 Pritchett and Woolcock (2004).

90 Harriss 44-46.

2.1.1.2. Theories on Service Provision in Developing Countries

In terms of achieving the realization of social rights, there is no single development strategy that has worked or will work for all states. Most scholars now agree that the emergence of social welfare in developed countries is primarily a consequence of history rather than the predominance of liberalist or structuralist thinking. Each regime developed over time in response to the particular dynamic socio-political conditions within which it was embedded.[91] Understandably, scholars warn against hastily transferring the approaches used by developed countries into the social policies of today's developing countries, as though they were golden standards of development. As Armando Barrientos remarks, while

> [t]here is a great deal for us to learn from the experiences of developed countries as regards poverty reduction and development… conditions in developing countries strongly recommend against transferring European approaches and institutions slavishly to developing countries.[92]

In terms of service provisioning, scholars reject a "one-size fits all" approach, offering instead a variety of approaches as alternatives to both the centralized-bureaucratic approach and the liberal privatization agenda.[93] Pritchett and Woolcock examined the array of service arrangements currently proposed by development scholars. Their analysis indicates that due to the immense complexity and expense of providing social services, no single service arrangement can be heralded as a universally appropriate solution for service provision in all countries.[94]

Although others might reasonably disagree, these authors argue that the complexities of service provision are inherently incompatible with the log-

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91 See Salamon and Anheier (1998); Walter Korpi, 'An Augmented Rational-Action Analysis of the Origins and Path Dependency of Welfare State Institutions in Western Countries' 13 Rationality and Society 235 (2001).

92 Barrientos 192.

93 Ibid 191-193; Pritchett and Woolcock (2004) 203-206.

94 They argue that since providing social services requires a high volume of human-to-human interaction ("transaction intensive") and a great deal of independent decision-making authority on the part of professionalized providers ("discretionary practices"), service provision is extraordinarily difficult for any single sector within a society to perform on its own – let alone any single sector of a developing nation. (Pritchett and Woolcock (2004) 204.).

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ic and imperatives of large-scale bureaucratic provisioning.[95] At the same time, they assert that neoliberal calls to "amputate" the state by weakening its role in service provision are shortsighted because some services will not be provided to the population without substantial state support.[96] Neither an amputation of government nor an intensification of the same large-scale Weberian bureaucratic approach to development is appropriate for the provision of services that are transaction intensive and discretionary.[97] Pritchett and Woolcock advocate instead for an approach that models different solutions for different societies based on the peculiarities of their underlying conditions.[98] In particular, societies should strike a cooperative balance between government, private providers and beneficiaries:

> It is in the tension between the interests and incentives of administrators, clients, and front-line providers that the solutions (plural) lie. These tensions—between specialists and the people, planners and citizens, authority and autonomy—cannot be escaped; rather, they need to be made creative rather than destructive.[99]

Third sector scholars bolster this recommendation. They argue that government-private partnership is a staple of modern social policy. Lester Salamon explains why both the state and the voluntary sector are necessary for the effective provision of social services. His third-party government theory posits that the government's involvement in welfare provision is the inevitable consequence of failures in both the market and the voluntary sector.[100] He emphasizes the primacy of private nonprofit provision by arguing that where the government emerges as the solution for failures in the voluntary sector, the government takes on a supportive subsidiary role in partnership with nonprofit providers. Salamon reasons that government and the nonprofit sector benefit mutually from one another and are thus interdependent. He explains that, "governments and nonprofits are the yin and yang of modern social policy, with superbly synched patterns of strengths and weaknesses."[101]

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95 Ibid 195-196.
96 Ibid 201-202. See also Harriss 43-44 (noting the rise and fall in the 1980s of market-first theories in development studies, as well as the policies they inspired, which precipitated Africa's 'lost decade' of delayed development).
97 Pritchett and Woolcock (2004) 201-202.
98 Ibid 207.
99 Ibid (internal citation omitted).
100 Salamon (1987).
101 Salamon (2015) 2150.

There are some problems with using Salamon's theory in the African context. Having been developed with wealthier states in mind, the third-party government theory presumes that governments have the capacity to provide services neglected by the nonprofit sector. It is questionable whether this presumption holds true for African LDCs, where governments have limited capacity to provide public services each time the voluntary sector fails to do so.[102] Empirical evidence on the collective volunteerism in Africa seems to suggests, at least at the grassroots level, that non-state provision emerges in low-capacity states in order to fill service gaps left behind by government, not the other way around as Salamon theorizes.[103] In other words, in low-capacity states, it is more likely that government failure mobilizes non-state provision, rather than voluntary sector failure tending to inspire the provision of public social services.

Moreover, Wolfgang Seibel's theory of functional dilettantism contests Salamon's underlying premise that the government's interest in collaborating with the nonprofit sector is the potential for improving the effectiveness and efficiency of service provision.[104] More recently, Salamon has written,

> …in different ways, and in widely differing environments, a significant process of "nonprofitization" of the welfare state is taking place as governments turn increasingly to nonprofit organizations to assist in carrying out publicly funded functions…. suggesting a growing realization of the limitations facing exclusive reliance on state institutions in the delivery of important human services and of the special qualities that nonprofit organization can bring to the social welfare arena as an active collaborator of the state.[105]

In contrast, Seibel posits instead that governments work with nonprofits precisely because nonprofits are prone to voluntary failures. In this way,

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102 MacLean (2017) (noting that, with Botswana and South Africa as notable exceptions, African governments have weak capacity to deliver or finance social services).

103 Erin Hern, 'In the Gap the State Left: Policy Feedback, Collective Behavior, and Political Participation in Zambia' 52 Studies in Comparative International Development 510 (2017).

104 Wolfgang Seibel, *Funktionaler Dilettantismus: Erfolgreich Scheiternde Organisationen Im "Dritten Sektor" Zwischen Markt Und Staat* (Nomos-Verlag-Ges. 1992).

105 Salamon (2015) 2154.

governments that offload social problems that they cannot or simply desire not to fix can appear to do so legitimately.[106]

Historical perspectives have contributed a different understanding to the emergence of nonprofit service providers in Africa. Burton Allen Weisbrod theorized that nonprofit provision emerged because governments failed to provide services that were in demand.[107] His conclusion is observable in African societies, namely that the nonprofit sector grows in order to fill the service gaps left behind by government failure whenever the third sector has the financial capability to do so, and whenever there is a demand for such services.[108] However, the underlying political mechanisms in his theory do not appear to describe African LDCs very well with respect to both the demand for and supply of nonprofit services.

On the demand side, Weisbrod's theory suggests that minority voters determine the level, nature and quality of services that NGOs will provide. His theory relies on the presence of a functioning democratic system, wherein the government 'hears' voters through fair and competitive elections, and thereafter fulfills the social demand of the median voter. In heterogeneous societies, groups of minority voters, whose political interests were 'unheard' by the government, then come together to provide supplementary services through the voluntary sector. Such an efficient and effective democratic process is far from the reality observed in many African states.[109] Thus, while voter competition is likely a relevant factor to the growth of nonprofit services in electoral democracies, this democratic nar-

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106 Wolfgang Seibel, 'The Function of Mellow Weakness: Nonprofit Organizations as Problem Nonsolvers in Germany' in Estelle James (ed), *The Nonprofit Sector in International Perspective: Studies in Comparative Culture & Policy* (Oxford University Press 1989) 177-192; Wolfgang Seibel, 'Successful Failure' 39 American Behavioral Scientist 1011 (1996).

107 Burton Allen Weisbrod (ed), *The Voluntary Nonprofit Sector: An Economic Analysis* (Lexington Books 1977).

108 See, e.g., Jennifer N. Brass, 'Why Do NGOs Go Where They Go? Evidence from Kenya' 40 World Development 387 (2012) 395 (finding that in Kenya, "on a per capita basis, NGOs are more prevalent in [geographic] places where the state is weak" and estimating that nearly a quarter of NGOs worked in health and education sector); Jennifer N. Brass, 'Blurring Boundaries: The Integration of NGOs into Governance in Kenya' 25 Governance 209 (2012) 220-221, 216 (finding that over 90% of NGOs in Kenya focus on service provision, and that the government explicitly relies on NGOs for the funding and delivering of services, including in the education and health sectors.).

109 *Populists and Autocrats: The Dual Threat to Global Democracy*, Freedom House, (Freedom in the World, 2017) 11, 20-24 <https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf>.

rative alone cannot explain the rise of nonprofits in Africa. Instead, government failure in service provision is likely the consequence of challenges of a more structural nature. As a result of continued economic and political instability, as well as neo-patrimonial political systems, African LDCs likely lack the institutional and financial capacities in addition to the political incentives to deliver the services that are in demand.[110] Furthermore, the demand for NGO services is more likely to reflect the extent to which the needs of beneficiaries coincide with donor interests rather than the outcome of competitive elections. Since many African beneficiaries have little political clout to affect reforms in domestic social law and policy, domestic social institutions and social laws are not likely to offer adequate legal protection for social rights. This suggests that international law and non-state actors are could play an important role for the realization and enjoyment of social rights in African LDCs.

On the supply side, Weisbrod's theory presumes citizens are financially capable consumers who purchase supplementary services delivered through the nonprofit sector. However, the average person in Africa is not the primary source of financial support for nonprofit providers because her personal financial resources are severely limited. People in Africa live in the poorest region of the world. The World Bank reported that in 2013, over 40% of people in Sub-Saharan Africa lived below the international poverty line, and that "the region's poor are, on average, living much further below the US$1.90-a-day extreme threshold" than all other regions of the world.[111] All in all, Sub-Saharan Africa is home to half of the world's poor.[112] When the third sector fills service gaps resulting from government failure, its services are not financed predominantly through user fees paid by minority voters, as Weisbrod's theory presumes. Evidence on foreign

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110 See Philippa Bevan, 'The Dynamics of Africa's in/Security Regimes' in Ian Gough and Geof Wood (eds), *Insecurity and Welfare Regimes in Asia, Africa and Latin America: Social Policy in Development Contexts* (Cambridge University Press 2004); Ian Gough, 'Welfare Regimes in Development Contexts: A Global and Regional Analysis' in Ian Gough and others (eds), *Insecurity and Welfare Regimes in Asia, Africa and Latin America* (Cambridge University Press 2004) 15-47; Michael Bratton, *Civil Society and Political Transition in Africa*, Institute for Development Research, 6 (Reports, 1994) 8-9 <https://www.issuelab.org/resources/19673/19673.pdf> 8.

111 *Taking on Inequality*, World Bank, (Poverty and Shared Prosperity) 36 <https://openknowledge.worldbank.org/bitstream/handle/10986/25078/9781464809583.pdf?sequence=24&isAllowed=y> (Note that the international poverty line is set at 1.90 USD per person per day).

112 Ibid 37.

funding[113] suggests rather strongly that the rise of NGO-providers in Africa has been made possible by the availability of *foreign* aid, rather than through the personal resources of the median voter. In other words, non-profits in Africa receive substantial financial support from foreign donors. This suggests that state efforts to restrict access to foreign funding for non-profits in African LDCs should raise concerns about the viability of the nonprofit sector, as well as the social rights of beneficiaries that depend on it.

In acknowledgment of the various ways in which nonprofit sectors have developed around the world, more recent scholarship has tried to catego-rize the different paths of emergence. Taking a historical view, Salamon and Anheier use social origins theory to postulate that country-specific so-cial histories related to class struggles have shaped the scale of the nonprof-it sector and its embeddedness within the state's social policy frame-work.[114] They conclude by offering a typology of nonprofit development based on dominant historical trends. These models characterize the way in which nonprofits are embedded into the state structure.[115]

This work, however, was developed with reference to the social histories of advanced industrial societies with sizeable urban middle classes.[116] As such, it is not evident that such a theory would explain the emergence, scale and embeddedness of African nonprofit sectors.[117] Melanie Cammett

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113   See *supra* part 0 on the extent to which NGOs in Africa rely on foreign funding.

114   Salamon and Anheier (1998); see also Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990) (using a similar analysis to offer three state models prior to Salamon and Anheier's contribution, but without focusing on the emergence of the third sector).

115   They are *liberal* (e.g., U.S. & U.K.), *statist* (e.g., Japan), *corporatist* (e.g., Germany & France) and *social democratic* (e.g., Sweden & Italy). (Salamon and Anheier (1998).).

116   According to Salamon and Anheier, while states in the liberal nonprofit regime serve the interests of the middle class, they predominantly serve their own inter-ests in the statist model. The corporatist regime is the consequence of political compromise between various classes, which forced the state to work with non-profits in service provision. Social democratic regimes emerged when an orga-nized working class managed to dominate the political reigns of the state. (Ibid.).

117   The majority of LDCs in Africa are predominately service-oriented or agricul-tural economies. (*Extreme Poverty Eradication in the Least Developed Countries and the Post-2015 Development Agenda*, United Nations Under-Secretary-General and High Representative for LDCs, LLDCs and SIDS, (State of the Least Developed Countries, 2014) 84-88 <http://unohrlls.org/custom-content/uploads/2014/10/St ate-of-the-Least-Developed-Countries-Report-2014.pdf>.).

and Lauren M. MacLean offer another typology of nonprofit-government relations in service provision, which is comparable to Salamon and Anheier's models, but for the emphasis on historical class struggles.[118] Cammett and MacLean focus instead on the comparative capacities of the state and nonprofit sector to provide social services. They identify four modes of service provision, each characterized by a high or low service capacity for the public and nonprofit sectors.[119]

Others have looked more closely at African histories to examine how colonial-era patterns of administration have persisted and influenced the division of labor in social provision today between non-state actors and the government.[120] Wietzke's examination of the geographically uneven supply of private education in sub-Saharan Africa suggests that the present patterns of distribution and prevalence in private schools was influenced by corresponding patterns of missionary schools during the colonial period.[121] Examining the enduring legacies of colonial public institutions, MacLean argues that differences in colonial administrative approaches[122] can account for at least some of the cross-national variation in the preva-

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118 Melanie Cammett and Lauren M. MacLean (eds), *The Politics of Non-State Welfare* (Cornell University Press 2014).

119 Low capacity states engage low capacity nonprofit sectors in modes of *appropriation*, whereby nonprofit providers control access to limited state resources and services. Low capacity states can also engage high capacity nonprofits through a *substitutional* relationship, where the nonprofit sector steps in to provide services that the state lacks the capacity to provide. According to MacLean, these are the most common relational modes in Africa because most African states have a limited capacity to provide services themselves. In high capacity states, nonprofit-governmental relations can be characterized as either *state-dominated* (low nonprofit capacity) or as a mode of *coproduction* (high nonprofit capacity). (MacLean (2017).).

120 In explaining the origins of NGOs in developing countries, Cammett and MacLean note that dominant theories focus on market failures, state failures, or pro-market policies and decentralization reforms of the 1980s. Although, as the authors point out, these theories cannot explain variations across different developing countries. They argue instead that "variations in non-state social welfare in many developing counties" can be explained by differences in "the particular historical context of state administrative power." (Melanie Cammett and Lauren M. MacLean, 'Introduction' in Melanie Cammett and Lauren M. MacLean (eds), *The Politics of Non-State Welfare* (Cornell University Press 2014) 1-16, 13.).

121 Frank-Borge Wietzke, 'Historical Origins of Uneven Service Supply in Sub-Saharan Africa: The Role of Non-State Providers' 50 The Journal of Development Studies 1614 (2014).

122 Notably, the indirect rule of British colonial administrations as compared to the centralized administration imposed by French colonial authorities.

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lence and emergence of nonprofits within West Africa.[123] Her historical assessment suggests that the nonprofit sector flourishes more broadly today in countries that were once governed by decentralized colonial rule, namely former British colonies, and less broadly in countries that were colonized in a centralized administrative manner, such as former French colonies. [124]

Development theory indicates that the best way to provide social services will differ from country to country. However, third sector scholarship points to a growing dependence upon the nonprofit sector for service provision. This suggests that while many types of NGO-state relations could work for the provision of services, NGOs will likely play a significant role in many developing countries. Thus, it is important to consider how NGO-state relations can affect the social rights of beneficiaries, and what such an affect indicates for the social rights obligations of states.

2.1.2. Socio-Economic Context of African LDCs

The realization of socio-economic rights is an important part of development in Africa. This is reflected in the continent's human rights system. As one scholar has noted, the African Charter "narrows the scope of governments to circumvent their collective rights obligations",[125] and the treaty body that interprets the African Charter "has removed any doubt about the enforceability of collective rights".[126] This has led the same commentator to conclude that, "collective rights have been placed at the centre of the African human rights system."[127] Others posit that the African Charter's emphasis on second-generation rights reflects a particularly African concept of human rights.[128]

It has been further asserted that for the Charter to have any meaningful relevance to the needs of African peoples, its implementation must include

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123 MacLean (2017).
124 Ibid.
125 Kofi Oteng Kufuor, *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan US 2010) 61.
126 Ibid 80.
127 Ibid.
128 See, e.g., H. W. O. Okoth-Ogendo, 'Human and Peoples' Rights: What Point Is Africa Trying to Make?' in Ronald Cohen, Goran Hyden and Winston P. Nagan (eds), *Human Rights and Governance in Africa* (Univeristy Press of Florida 1993) 74-86, 81-82.

a strong emphasis on collective rights.[129] Okoth-Ogendo insists that such assessments

> …must go beyond what has become the stock-in-trade of Western human rights activism concerning Africa, namely, the endless recital of civil and political rights violations with very little appreciation of the material conditions under which these occur.[130]

Likewise, the African Commission notes that human rights law must respond appropriately to the distinctive circumstances found in Africa, which compels particular attention is paid to the protection of socio-economic rights. The Commission writes:

> The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective…[131]

Because Africa has sustained a staggering degree of poverty and other social ills, an Africanist approach to addressing the human rights challenges of restrictive NGO laws must emphasize the importance of guaranteeing socio-economic rights. In this regard, a general overview of the societal context in Africa's LDCs will assist in understanding the role and impact of nonprofit provision for beneficiaries in those countries. These circumstances indicate the level of social rights realization and also shape the social rights obligations of states, which in turn affect the legal relations be-

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129 E.g., see generally, Joe Oloka-Onyango, 'Ngo Struggles for Economic, Social, and Cultural Rights in Utake: A Ugandan Perspective' in Makau Mutua (ed), *Human Rights NGOs in East Africa: Political and Normative Tensions* (University of Pennsylvania Press 2009) 75-111; Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism' 51 African Studies Review (2008); Issa G. Shivji, *The Concept of Human Rights in Africa* (Codesria Book Series 1989).

130 Okoth-Ogendo 82; Mikuin Leliel Balanda, 'African Charter on Human and Peoples' Rights' in Konrad Ginther and Wolfgang Benedek (eds), *New Perspectives and Conceptions of International Law: An Afro-European Dialogue* (Springer-Verlag 1984) 134, 137.

131 *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (ACmHPR 2001) para 68.

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tween NGOs and the state. For the least developed African countries, the social obligations of the state are defined within a context that is characterized by the state's reliance on foreign aid, its subordinate economic position *vis-à-vis* international markets, its limited use of advanced technologies, its fiscal inefficiencies, and growing inequalities within its territory.[132]

African LDCs struggle to meet the very basic needs of many people.[133] In terms of material possessions and vulnerability, approximately 40% of Africa's population lives in poverty.[134] In six African countries, the poverty rate exceeded 70 per cent in 2011.[135]Although the continent's poverty[136] ratio is lower now than in the 1990s, it is the only developing region in the world that has sustained a significant net growth in the absolute number of people living in extreme poverty.[137] Moreover, from 1995-2012, Africa exhibited the lowest poverty reduction rate of all continents.[138] In 2012, the number of people in Africa who lived in poverty was 330 million; more than two out of five adults cannot read or write; and nearly two out of five children are malnourished. [139] By 2013, the number of people living in poverty increased to 388.7 million.[140] The World Bank reported that all of the top ten countries with the highest poverty ratios in 2013 were in Africa, as well as more than half of the top ten countries with the highest number of poor residents.[141] All but one of these African countries listed

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132 See J. Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Duke University Press 2006).

133 See, Nsongurua J. Udombana, 'Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa' 93 Cornell International Law Journal 181 (2006) 210-221.

134 Zivanemoyo Chinzara and others, 'Growth and Development Finance Required for Achieving Sustainable Development Goals (Sdgs) in Africa' 29 African Development Review 15 (2017) 19.

135 Burundi, the Democratic Republic of Congo, Liberia, Madagascar, Malawi and Zambia. (*The Path to Gradution and Beyond: Making the Most of the Process,* United Nations Conference on Trade and Development (UNCTAD), (The Least Deveoped Countries Report, 2016) 19 <http://unctad.org/en/PublicationsLibrary/ld c2016_en.pdf>).

136 Poverty measures were based on the international poverty line, which is 1.90 USD per person per day.

137 World Bank, *Taking on Inequality* 38-39.

138 Kathleen Beegle and others, *Poverty in a Rising Africa,* World Bank Group, (Africa Poverty Report, 2016) 57 <https://openknowledge.worldbank.org/bitstre am/handle/10986/22575/9781464807237.pdf?sequence=10&isAllowed=y>.

139 Ibid 1, 12 & 57.

140 World Bank, *Taking on Inequality* 36.

141 Ibid 41.

by the World Bank are also characterized by the United Nations as least developed countries,[142] indicating that it is particularly difficult for them to break out of 'poverty traps' wherein most people receive just enough or not enough income to meet their basic needs.[143]

Exacerbating Africa's development challenges is the fact that public institutions and services remain weak and fragmented, and government resources are limited.[144] In general, social protection schemes on the continent do not benefit from ample investments.[145] In most cases, these schemes are either nonexistent or have very low coverage.[146] For example, primary education is not universal in Africa, and the continent suffers from the largest shortage of teachers worldwide.[147] This makes it a daunting and challenging task for African LDCs to ensure that even the very basic levels of social rights are realized and enjoyed. As noted by the African Union (AU), most African states have "overstretched social infrastructure and facilities, especially, in health, education and employment sectors". [148] The AU noted further that, "[r]educing inequity in access to basic social services remains a major challenge for many African countries."[149]

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142 United Nations Conference on Trade and Development (UNCTAD), *The Path to Gradution and Beyond: Making the Most of the Process* (2016) xiii (a country may be designated LCD status only if it meets certain criteria: a maximum national income per capita threshold of $1,035 and low index results based on indicators relating to population nutrition, health, school enrolment, literacy, and economic vulnerability.).

143 Ibid 18.

144 Brian Levy and Sahr John Kpundeh (eds), *Building State Capacity in Africa: New Approaches, Emerging Lessons* (World Bank Publications 2004).

145 Social Policy Framework for Africa, African Union, CAMSD/EXP/4(1) (Afr U 2008) 17 <http://www.un.org/esa/socdev/egms/docs/2009/Ghana/au2.pdf>.

146 Emerging Issues: Social Protection, Commission for Social Development, U.N. Economic and Social Council, UN Doc. E/CN.5/2011/8 (UN 2010) paras. 8-10.

147 *The World Needs Almost 69 Million New Teachers to Reach the 2030 Education Goals*, United Nations Educational, Scientific and Cultural Organization (UNESCO), (UIS Fact Sheet, 2016) <http://unesdoc.unesco.org/images/0024/002461/246124e.pdf>; Kate Hodal, 'UN Warns Universal Education Goal Will Fail without 69 Million New Teachers' *Guardian* (5 Oct. 2016) <https://www.theguardian.com/global-development/2016/oct/05/un-universal-education-goal-fail-69-million-new-teachers-unesco>.

148 Social Policy Framework for Africa (2008) 13, para. 22.

149 Common African Position (CAP) on the Post-2015 Development Agenda, African Union, (AU 2014) 4 <http://www.uneca.org/sites/default/files/uploaded-documents/Macroeconomy/post2015/cap-post2015_en.pdf>.

Without external assistance, it is doubtful that African states are presently capable of mobilizing sufficient domestic resources in order to ensure the enjoyment of even the very basic levels of social welfare, in addition to financing other important governmental expenditures.[150] Indeed, many African states have become dependent on foreign aid. In 1999, 27 sub-Saharan countries received at least 25% of their governments' expenditures from overseas development assistance.[151] While things have improved since then, there are still a number of countries that depend rather heavily on international aid. In 2011, foreign official aid and assistance amounted to more than 25% of government expenditures in at least eight sub-Saharan countries.[152]

A quick review of basic social outcome indicators also suggests that African LDCs do not ensure the enjoyment of social rights at very basic levels.[153] Consider the performance of African states with regard to achieving the right to health through the provision of essential primary health care services.[154] In 2015, the World Health Organization reported that, "as the result of unsafe health care" in hospitals within the African and Eastern Mediterranean regions between 2009 and 2014, over 10,000 deaths were known to have occurred (although some estimates were in the millions).[155] African states can hardly be said to be fulfilling their social rights obligation when patients are being infected with fatal diseases as a result of

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150 See *Mobilizing Domestic Financial Resources for Implementing Nepad National and Regional Programmes & Projects: Africa Looks Within,* NEPAD Planning and Coordinating Agency, UN Economic Commission for Africa (2014) <http://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/DRM_ENGLISH_REPRO_OP.pdf> (noting the potential of Africa's domestic financial resources to lift countries out of the aid dependency cycle if only those resources were mobilized and unobstructed by challenges such as poor governance and illicit financial flows.).

151 Deborah A. Bräutigam and Stephen Knack, 'Foreign Aid, Institutions, and Governance in Sub-Saharan Africa' 52 Economic Development and Cultural Change 255 (2004) 257-258.

152 The World Bank, African Development Indicators, *Net ODA Received (% of Central Government Expenditure)* (2017).

153 See, e.g., Beegle and others (2016) *Poverty in a Rising Africa.*

154 General Comment No. 14: The Right to the Highest Attainable Standard of Health, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/2000/4 (UN 2000) para. 43; General Comment No. 3: The Nature of States Parties' Obligations, Committee on Economic Social and Cultural Rights, U.N. Doc. E/1991/23 (UN 1990) para. 10.

155 *Partnerships for Safer Health Service Delivery: Evaluation of Who African Partnerships for Patient Safety 2009-2014,* World Health Organization, WHO/HIS/SDS/

receiving public health care services that are deemed "unsafe". This is but one example of many that illustrate how resource-strapped African states struggle to ensure the enjoyment of very basic levels of social welfare and, in some cases, might even deprive social rights in their efforts to realize them.

Consequently, many people in African LDCs cannot readily depend on their governments to ensure their social rights are realized and enjoyed. Instead, many rely on informal arrangements such as families and mutual assistance schemes at the community level.[156] However, these informal mechanisms are undermined by limited resources, urbanization and other societal factors.[157] Although the state retains the primary obligation to realize social rights, services and assistance provided by nonprofits have become vital for the realization and enjoyment of social rights in the least developed African countries. This results in a triangular engagement that encompasses NGOs (providers or advocates), beneficiaries (rights bearers), and the state (duty bearer). For many people in sub-Saharan Africa, it is through this triangular relationship that the progressive realization of social rights occurs – or is arrested.

2.1.3. Defining Non-Governmental Organizations

NGOs are notoriously difficult to define. Instead of indicating a category of organizations through an affirmative description of what it contains, the term instead describes only what the category *does not contain*: governmental organizations.[158] Thus the 'NGOs' can take on a variety of meanings,

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2015.13 (2015) 6 <http://www.who.int/patientsafety/implementation/apps/evaluation-report.pdf>.

156 See generally Stephen Devereux and Melese Getu (eds), *Informal and Formal Social Protection in Sub-Saharan Africa* (Fountain Publishers 2013). E.g., Helmut K. Anheier and Lester M. Salamon, *The Nonprofit Sector in the Developing World: A Comparative Analysis* (Manchester United Press 1998) 162-166 (in Ghana, informal traditional organizatons as well as church groups and modern NGOs have played important roles as providers of social and development assistance, including building schools and hospitals and delivering health and social services.).

157 Emerging Issues: Social Protection (2010) para. 7.

158 There is a similar problem with the term "non-state actors". (See Philip Alston, ''Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 3-36.).

depending on the purpose of the analysis. For my purposes, I have excluded the private for-profit sector because the way that they are regulated by the state follows an entirely different line of reasoning. Even if businesses like private hospitals provide social services, the primary regulatory concern is controlling the negative effects of profit-seeking behavior, which is not a problem with non-profit entities. Moreover, the emergence and maintenance of the non-profit sector has its own distinct political and historical trajectory that has shaped its relation to the state *vis-à-vis* protecting and fulfilling the social rights of beneficiaries. Furthermore, since the focus of the dissertation is on the fulfillment and protection of social rights, NGOs that are not socially oriented are excluded, such as cultural groups and political parties. Beyond those limits, the term includes a wide range of actors from international NGOs to local community based organizations and faith-based organizations.

I do not limit my analysis to NGOs that provide social services because advocacy NGOs can also contribute significantly to the fulfillment of social rights by alerting the government and others of areas of deficiencies and social need.[159] The line between advocacy and service provision is not always clear.[160] NGOs that provide services often engage in non-confrontational forms of advocacy.[161] There is some evidence to suggest that even when service-providing NGOs are heavily dependent on the state, financially or otherwise, they still influence state policy and practice implicitly and incrementally "by example and interaction while avoiding confrontation with the government."[162] This evidence led researchers to conclude that,

> By comparison with the blunt view of much of the literature –that collaboration [with the state] in service delivery undermines NGOs' freedom to undertake advocacy—our evidence supports the view that it affects how, not whether, they influence policy and its implementation.[163]

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159 See, Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3d edn, Oxford University Press 2008) 368-369.
160 *See supra* part 0on the beneficiary-centered approach.
161 Richard Batley, 'Structures and Strategies in Relationships between Non-Government Service Providers and Governments' 31 Public Administration and Development 306 (2011).
162 Ibid 316.
163 Ibid.

Moreover, even when advocacy NGOs are in a confrontational relationship with the government, they can still have a positive effect on social rights. Consider the example of Zimbabwe, a country situated within a region where the relationship between NGOs and governments has been strained over the last few decades.[164] NGO-government tensions within East Africa have culminated in the promulgation of regulatory frameworks designed to keep NGOs and civil society in line so as to diminish what governments perceive to be threats to their legitimacy in the areas of governance and service provision.[165] In a study of NGO-government relations in Zimbabwe from 1980 to 2000, Sara Dorman explains how a non-controversial stance among NGOs – which reduced them to need-based service providers – hurt social welfare outcomes.[166]

A main contributing factor in their progression toward taking on a non-confrontational stance *vis-à-vis* the government was the tendency among NGOs to professionalize as they grew. Dorman explains that as "donor funding to NGOs increased staff numbers and strengthened their positions *vis-à-vis* volunteers" so too did the "tendency of so-called voluntary organizations to 'professionalize'" themselves.[167] Increased donor funding led to the expansion and 'professionalization' of NGOs in Zimbabwe, thus strengthen their interest in self-preservation.[168]

Consequently, NGOs of the 1990s focused their attention on social service provision in Zimbabwe and maintained a non-adversarial relationship with the government, in part due to material and ideological restraints. NGOs avoided confrontation with government "[e]ven when legislation was implemented to control NGO activity",[169] and even when the Economic Structural Adjustment Programme (ESAP) of the Mugabe government caused visible social harm to the poor. Dorman writes,

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164 Chris Maina Peter, 'Coming of Age: NGOs and State Accountability' in Makau Mutua (ed), *Human Rights NGOs in East Africa: Political and Normative Tensions* (University of Pennsylvania Press 2009) 305-318, 312-315 (outlining the historical tension between NGOs and the governments of Uganda, Tanzania and Kenya).
165 Ibid.
166 Sara Rich Dorman, 'Inclusion and Exclusion: NGOs and Politics in Zimbabwe' (Doctoral Thesis, University of Oxford 2001).
167 Ibid 163. This internal transition did not happen smoothly. Dorman explains that ideological conflicts emerged between the new career-oriented staff and the "'old, committed' members" as the organizations professionalized.
168 Ibid.
169 Ibid 163, 193.

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> The introduction of health user fees and school fees, in urban areas, coupled by decreases in the availability of drugs and equipment for hospitals, have led to decreasing levels of maternal health, and left many others unable to seek medical care or remain in hospital for treatment. School fees have led to declining enrollment in education in urban areas and the overburdening of rural schools, where poor urban children may be sent since there are no school fees.[170]

Aligned with the government in a non-confrontational relationship, NGOs served beneficiaries by focusing on needs-based provision instead of engaging the government on a policy level, even though it was precisely the government's policy that was causing harm to their beneficiaries. Dorman explains,

> Those organizations which might have been expected to lobby for change, particularly for change in socio-economic policies, did not do so. NGOs stress that ESAP's implementation took them by surprise, that people believed the government when it said that the Social Dimensions Fund would support the poor and that they didn't know how to respond to ESAP. Even the ZCTU [Zimbabwe Congress of Trade Unions], which did publically question the implementation of ESAP, moved from a confrontational engagement with the state, to a much more co-operative one between 1992-5.[171]

NGOs in Zimbabwe did away with the kind of right-based advocacy that might have prodded the government into addressing structural obstacles that undermined the realization and enjoyment of social rights.

Things changed in the mid-1990s, however, when Zimbabwe considered rolling out a second phase of structural adjustment programs. This time, at least one international NGO strongly criticized the government's program. In 1994, OXFAM published a damning report on the government's implementation of user-fees and the decline in funding for health. Dorman describes the government's reaction:

> The government's attack on OXFAM alleged factual inaccuracies in the report and their failure to clear the field research conducted with the Government Research Council. The government hinted that OXFAM had come close to abrogating its agreement to "respect the law and institutions of Zimbabwe and...conduct its affairs in consultation

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170 Ibid 167.
171 Ibid 168.

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with the Government, people, and institutions of Zimbabwe." The government was appalled at the unnecessarily public character of OX-FAM'S disclosure in New York, without having previously shown the material to the Zimbabwean government. A *Financial Times* report alleged that the Zimbabwean government was threatening to expel OX-FAM.[172]

The OXFAM report was a form of advocacy that, although adversarial and confrontational, was made on behalf of beneficiaries and with the ultimate aim of ameliorating their deprived living conditions. More importantly, the report may have been effective: Dorman notes that the government removed user fees for rural residents a year later, "suggesting that the government may have rejected the medium, but accepted the message."[173]

A fiery governmental response, such as the threats and ridicule hurled at OXFAM, coupled with highly restrictive regulations, serves to reinforce a submissive role for NGOs within a non-confrontational relationship with government, and undermines the social rights of beneficiaries. Thus, the efforts by governments to censor NGOs or force them into an exclusively provisioning role should raise concerns about the social welfare of beneficiaries. Finally, although not the primary focus of this dissertation, it is worthwhile mentioning that in contemplating the way that NGO advocacy might lead to pro-poor changes in society, knowing the structural framework of power within a state is just as important as understanding the relationship between NGOs and government.[174]

In summary, for the analytical purposes of this dissertation, the term NGOs will be used in reference to organized individuals who do not distribute profits and are not officials or agents of the state. Furthermore, their objectives are charitable and socially oriented, and their activities include service provision and advocacy. This definition is consistent with the way that NGO laws in Africa have typically characterized NGOs. For example, under Kenya's NGO law, the Non-Governmental Organizations

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172 Ibid 170.
173 Ibid.
174 Gathering lessons from the confrontational capacity of NGOs in Zimbabwe, Dorman writes,
      …the process of challenging authority, whether we call it rebellion, revolution, liberation or democratization, must be understood in the context from which it is derived. It is only by understanding the nature of the authoritarian system that we are able to understand the challenge – or lack of challenge – to it. (Ibid 22.).

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Co-ordination Act (1990), an NGO is "a private voluntary grouping of individuals" who organize themselves "for the benefit of the public at large and for the promotion of social welfare, development charity or research".[175]

2.2. NGOs and Social Development

NGOs have become thoroughly embedded into all sectors of society, in particular during the last few decades. They often play an important role in social welfare in developing countries due to their nonprofit status and their penchant for social justice and the alleviation of poverty. Conversely, NGOs have the capacity to do harm to their beneficiaries, a point which has been duly noted by their critics. This section aims to provide a background on NGOs in sub-Saharan Africa within the context of social development by outlining their promising emergence and reviewing some of the challenges and criticism they have faced in recent years.

2.2.1. Social Protection and the Role of NGOs in Africa

Social protection is conventionally understood as a function of the state in the fulfillment of its duties toward society.[176] Thus, many governments, including those in African countries, focus mainly on building formal systems of social protection.[177] However, formal social protection programs

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175 Non-Governmental Organizations Co-Ordination Act, No 19 of 1990 (Kenya) § 2 (as amended by The Statute Law (Miscellaneous Amendemendments) Act, 1991, No 14 of 1991 (Kenya) and The Statute Law (Miscellaneous Amendemendments) Act, 1992, No 11 of 1992 (Kenya 1992).).

176 Borrowing from the UN's notion of social protection, the African Union states that the purpose of social protection is "to ensure minimum standards of well-being among people in dire situations to live a life with dignity, and to enhance human capabilities." Social protection should be aimed at "ensuring a minimum standard of livelihood for all people in a given country" and includes "measure to secure education and health care, social welfare, livelihood, access to stable income, as well as employment." (Social Policy Framework for Africa (2008) p. 9, para. 13.).

177 See Stephen Devereux and Melese Getu, 'The Conceptualisation and Status of Informal and Formal Social Protection in Sub-Saharan Africa' in Stephen Devereux and Melese Getu (eds), *Informal and Formal Social Protection in Sub-Saharan Africa* (Fountain Publishers 2013) 1-8.

in Africa only cover a small fraction of society; some estimates suggest that 90 % of people in the low-income countries of sub-Saharan Africa are not covered by any formal social protection program.[178] Meanwhile, informal or non-state mechanisms are pervasive throughout the continent, as they appear to constitute "primary lines of protection for the majority in developing countries."[179] Perhaps this is why the AU recognizes the important role of private parties, stating that "[s]ocial protection includes responses by the state *and society* to protect citizens from risks, vulnerabilities and deprivations."[180]

Under the strains of urbanism and the limited financial capacity of African LDCs, informal social protection continues to be important for coping with social risks and shocks.[181] The African Union notes that African states observe an "almost complete reliance on informal networks for social protection."[182] Informal social protection schemes take many forms, as illustrated by the following excerpt:

> Informal social security entitlements are offered by traditional solidarity (such as support payments, gifts, dowries and bequests, which are all based on generalised reciprocity), indigenous self-help (such as burial funds, savings clubs and community support, which are all based on balanced reciprocity) and modern self-help, which can be initiated from above, such as cooperatives, trade unions, charities or NGOs. They can also be initiated from below such as through farmers'' organisations, religious groups or self-help groups on their own behalf. Unconventional social security may provide food (food for work), loan insurance, employment security (guaranteed employment) and a strengthened capacity for solidarity.[183]

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178 Awortwi and Walter-Drop 3.
179 See Mamo Hebo, ''Giving Is Saving': The Essence of Reciprocity as an Informal Social Protection System among the Arsii Oromo, Southern Ethiopia' in Stephen Devereux and Melese Getu (eds), *Informal and Formal Social Protection in Sub-Saharan Africa* (Fountain Publishers 2013) 9-42, 14.
180 Social Policy Framework for Africa (2008) p. 9, para. 13(emphasis added).
181 Devereux and Getu (2013) *Informal and Formal Social Protection in Sub-Saharan Africa.*
182 Social Policy Framework for Africa (2008) 13, para. 22.
183 United Nations Economic Social Commission for Asia the Pacific, *Sustainable Social Development in a Period of Rapid Globalization: Challenges, Opportunities and Policy Options* (United Nations Publications 2002) 146.

In light of Africa's longstanding reliance on foreign assistance and continued significance of informal social protection arrangements,[184] the private nonprofit sector is an important player in the field of social welfare. This is particularly true in the context of LDCs, where limited resources and high levels of poverty present enormous challenges for governments seeking to offer social protection without relying on NGOs to deliver social services.[185] The vital role of NGOs in social protection can also be seen in the context of fragile states.[186]

NGOs in Africa can, and often do, play a crucial complementary role in a country's national social welfare by reaching underserved or excluded communities. One commentator goes so far as to claim,

> In Sub-Saharan Africa the non-state sector has played a significant role in the provision of health and education services since the colonial period despite the imposition of controls by some governments. In no other region has the direct involvement of civic organizations in service provision achieved such prominence, and for this reason it merits more detailed consideration.[187]

One study on NGOs in East African countries suggests that NGOs have a comparative advantage with respect state governments in the realm of service delivery when, among other things, "their work is with groups considered to be 'illegal' or 'victims' and not recognizable by the state – examples would be squatters, street children and petty traders."[188] Moreover, NGOs are said to be better than the governments at providing services that are "innovative or tailored to local circumstances."[189] For example, NGOs supported secondary education in Kenya in the '70s and '80s by equipping eight state schools with computers.[190] Similarly, a Kenyan NGO provided a compact, tailored, flexible and relevant educational curriculum for indi-

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184 See Bevan.

185 See *Managing Risk, Promoting Growth: Developing Systems for Social Protection in Africa*, World Bank, (2012) 47 <https://openknowledge.worldbank.org/handle/10986/23744>.

186 See ibid 47-48.

187 Robinson and White 82.

188 Alan Fowler, 'NGOs & the Globalization of Social Welfare: Perspectives from East Africa' in Ole Therklindsen and Joseph Semboja (eds), *Service Provision under Stress in East Africa: The State, NGOs & People's Organizations in Kenya, Tanzania & Uganda* (Centre for Development Research 1995), 63.

189 Ibid.

190 B. M. Makau, 'Dynamics of Partnership in the Provision of General Education in Kenya' in Ole Therklindsen and Joseph Semboja (eds), *Service Provision under*

gent urban children, which was meant to equip them with "practical skills (e.g., carpentry, crafts, and tailoring), basic literacy, and social skills."[191]

Consider the provision of health care services in Africa, and the significant role of NGOs therein. One reason that NGOs are particularly important in this regard is that public health care is severely underdeveloped across the continent. One analyst describes the situation in the following way:

> In many African countries the quality of government health facilities is often very poor, coverage is limited, technical capacity is inadequate, decision-making is over centralized, and service provision is plagued by inefficiencies and petty corruption.[192]

Likewise, in *Purohit and Moore v. The Gambia*, the African Commission recognized the overwhelming obstacles that African states face in fulling the very basic needs of African people. Commenting on what it calls a "depressing but real state of affairs", the Commission notes that it is:

> … aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.[193]

NGOs play a significant role in the health sector by functioning primarily in the areas of service delivery and health advocacy.[194] This is especially the case in low-income countries and middle-income countries, where NGOs are mostly engaged in delivering services, raising awareness and campaigning about disease prevention.[195] International NGOs respond to global health problems with projects such as vaccination programs and emergency response; they also tend to engage in the establishment of health services and hospitals in developing countries.[196]

Stress in East Africa: The State, NGOs & People's Organizations in Kenya, Tanzania & Uganda (Centre for Development Research 1995) 87, 95-96.

191 Ibid 96.

192 Robinson and White 82.

193 *Purohit and Moore v. Gambia*, 241/01 (ACmHPR 2003) para. 84.

194 Maria Piotrowicz and Dorota Cianciara, 'The Role of Non-Governmental Organizations in the Social and the Health System' 67 Przeglad Epidemiologiczny 69 (2013) 71.

195 Ibid.

196 Ibid 72.

Regarding the provision of health care services in particular, community-based NGOs can provide localized interventions, which are particularly important to ensure timely access to essential health care. In 2007, the World Health Organization (WHO) Regional Office for Africa held a panel discussion on the role of the community in improving maternal, newborn and child health (MNCH) within the region. Emphasizing the need for localized health care services, panel participants reported that "Mothers and children continue to die due to the triple delays in *seeking* appropriate care, *reaching* the health facility and *receiving* the appropriate management at the facility."[197] The report referred to "community empowerment, participation and ownership of community-based interventions" as being "essential for increased utilization and access to services", and called for the "involvement of the community in the planning, implementing and monitoring of community-based health services." [198]

Noting that access to affordable and accessible health services remained a challenge in Africa, panel participants highlighted the importance of foreign funding. They stated that although community-based programs are essential to MNCH programs, domestic financing of health services for mothers and children was inadequate precisely at the community level, which rendered community-based programs dependent upon external funding.[199] Moreover, panel participants emphasized the important contribution of NGOs to MNCH. They indicated that "Nongovernmental organizations working through government structures can play a major role in advocacy and implementation of MNCH programs through capacity building, including institutional strengthening."[200] In summary, the participants of the WHO African Region panel confirmed the vital role of foreign funding, community based services, and NGO communities that work in concert with African governments. The report did not call for tightening NGO operations or severing their ties to foreign funding in health care services. Rather, the report of the panel recommended that

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197 The Role of the Community in Improving Maternal, Newborn and Child Health in the Who Africa Region, Regional Committee for Africa, World Health Organization, AFR/RC57/16 (b) (UN 2007) 1 <http://www.afro.who.int/sites/default/files/sessions/working_documents/AFR-RC57-16b%20REPORT%20OF%20THE%20PANEL%20DISCUSSION%20-%20FINAL.pdf> (emphasis in original).
198 Ibid.
199 Ibid 2.
200 Ibid.

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"Partnerships at national and global levels should be strengthened to ensure adequate resources for MNCH." [201]

Finally, if they manage to establish and maintain a collaborative relationship with government, NGOs can enhance performance of and access to existing public services. First, they can expand the availability of resources and audit the quality of public services.[202] Second, NGOs can act a bridge between informal and formal services, thereby promoting the formalization process. Poor and vulnerable communities in LDCs typically rely on informal social protection schemes due to the inaccessibility or unavailability of formal services. NGOs activities can be critical in this regard by helping these communities to access semi-formal and then formal systems of protection.[203] As with all their other contributions, they do this through a variety of strategies including community empowerment, political advocacy and involving themselves in the provision of services.

2.2.2. NGOs in Sub-Saharan Africa

It is difficult to know the exact number of NGOs that operate in sub-Saharan Africa today.[204] However, writers have noted their remarkable growth during the post-independence period. [205] Instead of attempting the notoriously difficult task of quantifying NGOs in Africa, this section will provide a brief view into their emergence and relationship with governments. The

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201 Ibid 3.

202 Tayo O. George and others, 'Effective Service Delivery of Nigeria's Public Primary Education: The Role of Non-State Actors' 15 Journal of African Development 221 (2013) (although these authors also considered corporate bodies in their study, their findings appear to be equally applicable to nonprofit providers.).

203 Edward Mac Abbey, 'Constructive Regulation of Non-Governmental Organizations' 48 The Quarterly Review of Economics and Finance 370 (2008) 372.

204 One international directory of development organizations estimates that civil society organizations have approximately 8600 offices and that international organizations have 1600 offices in Africa (including North Africa), however the directory collects most of its contacts through voluntarily self-reporting. (*Directory of Development Organizations: Resource Guide to Development Organizations and the Internet*, (vol Africa 10th edn, 2010) <https://www.ecoi.net/file_upload/1 002_1264767399_uganda.PDF & https://www.ecoi.net/file_upload/1002_12647 08453_botswana.PDF>.).

205 See Michael Bratton, 'The Politics of Government-NGO Relations in Africa' 17 World Development 569 (1989) 571; Jenkins (2012) 469-474.

following pages begin by summarizing the historical origins of NGOs in Africa as well as the political and economic context of their subsequent rise to prominence. This prefaces a discussion on the relationship between NGOs and governments as well as some of the criticism lodged against NGOs. These pages are meant not to serve as a comprehensive historical record of NGOs in Africa, or to capture fully the deep and complex dynamics of NGO-government tensions. Rather, it offers a brief overview of certain political and historical aspects in order to provide a contextualized understanding of the rise in recent years of restrictive NGO regulations.

2.2.2.1. History of Associational Life and Non-State Service Provision in Africa

The history of associational life in general is very long.[206] Social provisioning by non-governmental actors is also not new.[207] In Africa, there is a long history of nongovernmental forms of organized social welfare, mainly through extended family networks and civil society. [208] For example, lineage funds of pre-colonial times speak to this heritage. Historians note that these were "corporately owned" funds that were financed by members of a lineage in order "to insure lineage members against enslavement and to use in other crises, especially famine and illness."[209] Likewise, secret societies in parts of West Africa served the function of ensuring the provision of general education and various social services including medical treatment.[210]

During the colonial era, Africans were systematically marginalized within or excluded from the political and economic spheres, and were subjected to racial discrimination in the social service sector.[211] Associational life

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206 One anthropologist dates formal common interest associations back to at least the Neolithic era. (Robert T. Anderson, 'Voluntary Associations in History' 73 American Anthropologist 209 (1971).).

207 Cammett and MacLean note that "[m]any NSPs [non-state service providers] were established long ago and have extensive institutional legacies." As an example, they point out that there have been faith-based organizations present Tanzania since at least the colonial period. (Cammett and MacLean, 'Introduction' 14.).

208 Bratton (1989) 'The Politics of Government-NGO Relations in Africa' 570-571.

209 Philip Curtin and others, *African History* (Little Brown 1978) 568.

210 Kenneth L. Little, 'The Role of the Secret Society in Cultural Specialization' 51 American Anthropologist 199 (1949).

211 Bratton (1989) 'The Politics of Government-NGO Relations in Africa' 570-571.

– being suppressed within the political sphere – was predominantly engaged in the provision of social services.[212] A significant contribution of voluntary associations was to promote social welfare for Africans, who were systematically marginalized by the colonial state.

Within the advent of urbanization, larger cities saw the blossoming of social groups around kinship ties into "home-town" or "village" associations.[213] Newcomers from the countryside sought out such ascriptive-based associations for social support in larger cities.[214] Many of these groups served primarily to promote the social and economic wellbeing of their members.[215] They provided members with financial assistance for the cost of medical care and other social expenses.[216] Many also financed the development of their ancestral regions by building schools, clinics and other public structures that promoted social protection, such as water systems and roads.[217]

Voluntary associations also used political advocacy to enhance the socioeconomic wellbeing of their members. As members grew discontent with colonial rule, some associations pushed for greater political participation by black Africans.[218] During the Great Depression of the 1920s and 1930s, organized economic strikes spread across colonized African societies.[219] These strikes targeted the entire colonial system as a whole, thereby pressuring colonial authorities to begin investing in economic and social development.[220] As a result, public investments were made into education and

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212 Livingstone Sewanyana, *Comparative Experiences of NGO Regulatory Frameworks: Eastern and Southern Africa* (Verlag Dr. Kovac 2017) 170-173.

213 Kenneth L. Little, 'The Organisation of Voluntary Associations in West Africa / Les Associations Volontaires En Afrique Occidentale' 9 Civilisations 283 (1959).

214 Blessing Mberu, Donatien Béguy and Alex C. Ezeh, 'Internal Migration, Urbanization and Slumbs in Sub-Saharan Africa' in Hans Groth and John F. May (eds), *Africa's Population: In Search of a Demographic Dividend* (Springer 2017) 315-332, 317.

215 (2003) *Encyclopedia of Twentieth-Century African History* (Paul Tiyambe Zeleza and Dickson Eyoh eds, Routledge 2003) 96.

216 Ibid ; Little (1959) 'The Organisation of Voluntary Associations in West Africa / Les Associations Volontaires En Afrique Occidentale'.

217 *Encyclopedia of Twentieth-Century African History* 96 ; Dwayne Woods, 'Elites, Ethnicity, and 'Home Town' Associations in the Côte D'ivoire: An Historical Analysisof State-Society Links' 64 Africa: Journal of International African Institute 465 (1994) 471-472.

218 *Encyclopedia of Twentieth-Century African History* 96.

219 Ibid ; see also Curtin and others (1978) 577-579.

220 *Encyclopedia of Twentieth-Century African History* 96.

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other areas of social protection.[221] Colonial welfare and development laws emerged in order increase social expenditures on welfare and to expand associational life.[222]

Such an active and critical third sector clearly posed a threat to the efficient execution of colonial projects. Not surprisingly, colonial authorities encouraged the formalization of associations to keep them under state control,[223] and rendered them 'legible' to authorities.[224] Consider the example of Angola under Portuguese rule. Angolans living under the colonial rule of the Portugal began forming political associations in the 20th century and sought to improve the lives of Angolans. By the 1920s, the Portuguese government began restricting these associations by controlling, supervising, censoring and even expelling their leaders. One historian notes that the government viewed this as "a threat from the 'nativist movement' in Angola".[225] In 1935, Portugal began requiring registration of all associations in all of its territories, which included colonial territories in Africa, in order to dissuade and criminalize what its lawmakers deemed to be "secretive" organizations.[226] These earlier associational laws were in many ways the precursors of today's NGO laws in Africa: they typically limited associations to service-based operations—prohibiting political involvement—and kept associations under tight state supervision.[227]Colonial powers formalized, or 'legitimized', civil society by way of legal and institutional mechanisms that imposed registration and operational requirements and monitored compliance.

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221 Ibid 96-97; Sewanyana (2017) 172-173 ; see also Bratton (1994) Institute for Development Research, *Civil Society and Political Transition in Africa* 10 ("While liberalization may occur at the initiative of a progressive faction that splits the state elite, more commonly it is a response to escalating economic protest…").

222 Sewanyana (2017) 172-173.

223 See Peter 312-315 (Until 2002, Tanzania relied on colonial-era legislation to impose registration requirements on NGOs. That same law was used by British colonialists to restrain civil society organizations that challenged the colonial regime in Tanzania.).

224 James Scott posits that states standardize and regularize social practices that are otherwise 'illegible' and exceptionally complex for officials to keep track of and to regulate. (James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).).

225 Ronald H. Chilcote (ed), *Protest and Resistance in Angola and Brazil: Comparative Studies* (University of California Press 1972) 74.

226 Associações Secretas, Lei No 1901 (Portugal 1935).

227 *Encyclopedia of Twentieth-Century African History* 97; Sewanyana (2017) 173-174.

William Olsen has studied similar phenomena involving the colonial regulation and registration of traditional medicinal practices of African societies.[228] From these observations, he concludes that the practice of regulating civil society in Africa may have emerged as an adaptive state measure to achieve the unchanged colonial objective of disciplining and controlling indigenous subjects. Olsen writes, "…in the nearly 40 years of colonial engagement with witchcraft and witch-finding movements, the British changed the content of their 'official' orientation towards these practices but their purposes of regulation and discipline remained intact."[229]

Threats to African associational life did not end with colonialism. Voluntary associations were once again under attack after the end of colonial rule, but this time from African regimes.[230] Recounting the historical relationship between voluntary associations and the state primarily in Côte d'Ivoire, Dwayne Woods writes,

> Following independence, Africa's ruling elites sought to suppress all forms of ethnic affiliation and independent associational activity. They justified their actions on the basis that tribalism and ethnicity were detrimental to national unity and economic development. In the Côte d'Ivoire the Parti Démocratique de la Côte d'Ivoire (PDCI) served one function—namely the suppression of all independent associational life... Simply put, the party served as an instrument for President Felix Houphouet-Boigny to limit participation, especially participation based on ethnic ties. A similar process of restricting political input from social groups occurred elsewhere in Africa…[231]

Non-governmental associations in Africa have taken form as professional associations, ethnic welfare groups and churches.[232] But it was not until the rise of foreign aid in the 1980s that NGOs proliferated across the continent in their modern form as institutionalized, foreign-funded organizations that had strong international ties and took on a significant role in humanitarian assistance and social welfare.

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228   William C. Olsen, 'The Empire Strikes Back: Colonial "Discipline" and the Creation of Civil Society in Asante' 30 History in Africa 223 (2003).

229   Ibid 226.

230   Bratton (1994) Institute for Development Research, *Civil Society and Political Transition in Africa* 5.

231   Woods (1994) 466 (internal citations ommitted) (Woods notes, however, that despite these challenges, associations managed to survive.).

232   Bratton (1989) 570-571.

2.2.2.2. The Rise of Foreign-Backed NGOs

Africa, along with the rest of the world, saw a sharp growth in NGOs dur-
ing the late 1980s and 1990s, leading one third-sector scholar to declare
that time as the beginning of an "associational revolution [that] may prove
as significant as the rise of the nation-state."[233] Consider their rise in East
Africa. According to one account, there were more than 400 NGOs in
Kenya alone by the late 1980s, which is nearly a fourfold increase from the
125 NGOs that were there in 1974. [234] By another account, Kenya is be-
lieved to have had 4,000 NGOs by the year 2000, and 6,000 NGOs by
2010.[235] Similarly, the number of NGOs in Ghana increased from 80 in
1980, to 700 in 1990, to 1,300 in 2000, and finally to 4,772 in 2010.[236] Tan-
zania also experienced an extraordinary rise in NGOs from 25 in 1980 to
over 5000 NGOs in 2010.[237] The proliferation of NGOs was observed in
other continents as well.[238] In addition to their growing numbers, NGOs
were significant in terms of their mobilization of resources. By 1992, inter-
national assistance to developing countries that came either from or
through NGOs amounted to $8 billion, which represented 13 % of all de-
velopment assistance, and amounted to more than the UN's contribution
to development assistance for the same period.[239]

On a global scale, the world saw a dramatic growth in NGOs during the
1990s.[240] To explain this NGO-boom, scholars point to cultural and politi-
cal shifts in the 1980s that changed the conditions within which NGOs op-
erated. First, donor countries from the "global north" that championed ne-
oliberal ideologies common in western societies advanced democracy aid
campaigns by promoting NGOs in the developing world.[241] Democracy
aid campaigns were based on the notion that a strong and active civil soci-
ety would enhance democratic governance, and northern donor countries
tried to accomplish that goal by pumping funding into NGOs.

Second, the advancement of structural adjustment programs through
neoliberal pro-market policies backed by international financial institu-

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233 Salamon (1994) 114.
234 Bratton (1989) 571.
235 Cammett and MacLean (2014) 'Introduction' 8.
236 Ibid.
237 Ibid.
238 Ibid.
239 P. J. Simmons, 'Learning to Live with NGOs' 112 Foreign Policy 82 (1998) 87.
240 Jenkins (2012) 472-474.
241 Ibid 474-477.

tions led to massive cuts in public social spending within developing countries, thereby creating the opportunity for NGOs to expand within the social service sector. [242] By the 1980s, official funding for development aid (that is, direct funding to governments) declined, thus the space for nonstate social provisioning steadily widened.[243] Structural adjustment programs ultimately failed to lift people in developing countries out of poverty and eventually came under scrutiny before they were finally abandoned. [244] But by then, the NGOs were already there.

Meanwhile, neoliberal aid packages had urged developing countries toward decentralized models of governance, thus burdening local levels of government with the task of financing and delivering social welfare services.[245] This incentivized local governments to "contract out" their services to NGOs.[246] In some areas, decentralization went even further than the level of local government. In 1994, the World Bank reported that it had "increasingly used nongovernmental organizations (NGOs) in the delivery of services," and that "in several countries, public works agencies [had] been set up with Bank encouragement *outside the structure of government* to manage and implement public works".[247] Today, it is not uncommon for nonprofits to be the only service providers available to certain segments of the population.[248]

As social indicators worsened and public services diminished, NGOs flourished to fill remaining gaps in social protection.[249] They have become rather important for vulnerable and marginalized groups. The U.N. Committee on Economic, Social and Cultural Rights (ESCR Committee) has

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242 Ibid; Helmut K. Anheier and Lester M. Salamon, 'The Nonprofit Sector in Comparative Perspective' in Walter W. Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2nd edn, Yale University Press 2006) 89-114, 92-93.
243 See Jenkins (2012) 476-477.
244 See ibid.
245 Cammett and MacLean, 'Introduction' 13.
246 Ibid 13, n. 10.
247 Mike Stevens and others, *Governance: The World Bank's Experience*, World Bank, (1994) 20 <http://documents.worldbank.org/curated/en/711471468765285964/pdf/multi0page.pdf> (emphasis added).
248 E.g., Concluding Observations on the Initial and Second Period Report of Djibouti, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/DJI/CO/1-2 (UN 2013) para. 22 (noting that a large number of children in Djibouti live and work in the streets; regretting that "their care is managed entirely by civil society organizations, whose capacity is limited.").
249 See Jenkins (2012) 476-477.

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also recognized their importance in this regard on at least two occasions. First, when it insisted that "States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food."[250] And second, when it noted that "States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health."[251]

As nonprofit sectors in developing countries expanded to fill protection gaps, Northern donors have been there to continue supporting their growth with foreign funding.[252]According to one commentator, NGOs in the 1980s were receiving 22% of total aid funds.[253] During the same period, the growth rate for donor-to-NGO funding was almost five-folds that of total overseas development aid to governments of developing countries.[254] While some understood that a shift in donor funding had occurred, for many there was "a dawning realization" by the late 1980s "that a greater share of North-South resource transfers pass[ed] through NGOs than [was] commonly realized."[255]

Today foreign funding remains a significant and vital source of financial resources for NGOs in Africa.[256] While it is difficult to find comprehensive data on the share of NGOs' resources that come from foreign donors, existing evidence on a few sub-Saharan African countries suggests that NGOs' reliance on foreign funds, rather than household or government resources, is quite substantial. By one estimate, NGOs in Kenya (over 90% of which focus on service provision) receive 91% of their revenues from international sources, while 8% comes from private sources and only 1% from the

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250 General Comment No. 12: The Right to Adequate Food, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/1999/5 (UN 1999) para. 35.
251 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 62.
252 See Jenkins (2012) 476-477.
253 Tim Brodhead, 'NGOs: In One Year, out the Other?' 15 World Development 1 (1987) 1.
254 Ole Therklindsen and Joseph Semboja, 'A New Look at Service Provision in East Africa' in Ole Therklindsen and Joseph Semboja (eds), *Service Provision under Stress in East Africa: The State, NGOs & People's Organizations in Kenya, Tanzania & Uganda* (Centre for Development Research 1995) 17.
255 Brodhead (1987) 1.
256 Bratton (1994) Institute for Development Research, *Civil Society and Political Transition in Africa* 8.

Kenyan government.[257] In Mozambique, it is estimated that foreign funding accounted for 71% of revenues collected by the nonprofit sector in 2003, while membership fees and service fees collected from private enterprises and households amounted to 10.7% and government subsidies and contracts made up only 3% of total revenues.[258] For all nonprofit organizations in Cameroon that worked in the social, health, education, housing and development sectors, contributions from foreign sources or other nonprofit organizations amounted to 67% of 2011 revenues, while only 17% came from households and 8% came from the government.[259]

Evidence is also available on the share of foreign aid directed toward NGOs worldwide. The OECD reports that in 2011, over $19 billion (or 14.4%) of official development assistance from OECD countries was channeled through NGOs worldwide, with $1.1 billion going to and through NGOs based in developing countries.[260] Social infrastructure and services has been a priority for foreign donors. It is the main sector through which Oversees Development Aid (ODA) is channeled through NGOs. Fifty-one per cent (or $9 billion) of bilateral ODA was directed toward NGOs working in this sector,[261] and at least 24% of all ODA channeled through NGOs in 2011 was dedicated to health, education, water supply and sanitation, other social infrastructures and services, and food aid.[262]

2.2.2.3. Governments Restricting NGOs

African governments and intellectuals also noticed the growth of NGOs, as their resources were significant in size. In Kenya, for example, NGO re-

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257 Brass (2012) 'Blurring Boundaries: The Integration of NGOs into Governance in Kenya' 210 & 216.

258 Saide Dade, *The Dimension of NPI in Mozambique: A Satellite Account Perspective*, (2009) table 8 <http://ccss.jhu.edu/wp-content/uploads/downloads/2011/10/Mozambique_SatelliteAccount_2009.pdf>.

259 Author's own calculations of percentages from a data reported by the Cameroonian government (*Compte Satellite Des Institutions Sans but Lucratif: De L'année 2011*, Institut National de la Statistique (2014) table 3.1 <http://ccss.jhu.edu/wp-content/uploads/downloads/2015/01/Cameroon_SatelliteAccount_2014.pdf>.).

260 *Aid at a Glance: Flows of Official Development Assistance to and through Civil Society Organizations in 2011*, Organization for Economic Cooperation and Development, (2013) 3 <http://www.oecd.org/dac/peer-reviews/Aid%20for%20CSOs%20Final%20for%20WEB.pdf>.

261 Ibid 10.

262 Ibid 14.

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sources between 1980 and 1990 amounted to 31% of government expenditure on education, health, labor and social welfare.[263] Governments grew weary of NGOs as they continued to receive funds that might have otherwise supported government projects.[264] One Africanist scholar insisted that an anti-state stance among donors "was the real push behind the upsurge in NGO activity."[265] Governments across the continent started to pass laws that placed restrictions on foreign aid to NGOs. Proponents of today's restrictive NGO laws continue to express a similar disenchantment and mistrust of the alliance between NGOs and their Northern donors,[266] often recasting the NGO-boom as a political takeover or bombardment by what one Zimbabwean official has referred to as "non-*governable* organisations".[267]

African states that seek to control or direct the nonprofit sector are not likely to do so through financial incentives due to their own financial limitations and due to the fact that NGOs typically rely on foreign funding. Thus, states will likely resort to regulatory and legislative means, despite their limited capacity to do so. Kendra Dupuy *et al* find that in low and medium-income countries, a growing inflow of foreign funding is associated with heighted restrictions on foreign funding to NGOs.[268] Paradoxically, this indicates it is governments with the greatest need for foreign assistance that are restricting foreign aid flows.[269] Dupuy *et al* explain that when governments believe internationally funded NGOs are enabling or empowering political opposition, they will risk economic and reputational

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263 Fowler (1995) 61.

264 Jephias Mapuva and Loveness Muyengwa-Mapuva, 'A Critique of the Key Legislative Framework Guiding Civil Liberties in Zimbabwe' 15 Potchefstroom Electronic Law Journal 125 (2012) 128.

265 Shivji (2006) 39.

266 A general mistrust of the global North among independent African states predates the emergence of NGOs in Africa. Historians of the 1970s noted "a general fear of 'neocolonialism'" among African states, which included the belief that – despite their independence from colonial rule – industrialized nations still controlled African economic life through direct means of political intervention as well as through indirect means. (Curtin and others (1978) 541.).

267 Staff Reporter, '29 NGOs Banned in Crackdown' *New Zimbabwe* (14 Feb 2012) <http://www.newzimbabwe.com/news-7189-29+NGOs+banned+in+crackdown/news.aspx> (emphasis added) (quoting Governor of Masivingo, Titus Maluleke, after the sudden de-registration of 29 NGOs in Zimbabwe).

268 Dupuy, Ron and Prakash (2016).

269 Ibid.

harm in order to secure themselves against threats to their political survival; this is especially the case after nationally competitive elections.[270]

Consider the recent example of South Sudan as a prototypical scenario in which tensions between NGOs and government have led to tightening controls on NGOs in low-income countries. Not long after its independence from Sudan in 2011, the new state of South Sudan found itself in a dire situation. By May 2016, public services were collapsing. The country's largest public hospital had experienced weeklong power outages, shortages of medical supplies, essential drugs, oxygen supplies and water.[271] Women were giving birth by candlelight, and patients in need of surgery were being turned away. The government had not paid its medical staff for months, and hospitals did not have enough fuel for their generators. Similarly, the educational system suffered from inadequate support.[272] Public university professors went on strike because they had not been paid their salaries for months, and half of the children in South Sudan were out of school.

One explanation for the collapse in public social services was a reduction in oil revenue, which was caused by falling oil prices and declining oil production.[273] Since South Sudan relies mostly on oil revenues, the government's financial capacity to meet social needs had severely diminished. The financial problem was compounded by an armed internal conflict that began in December 2013, which necessitated high military expenditure and resulted in a humanitarian crisis.[274] The government was unable to organize and provide even minimal social protection. Private providers of social services, including NGOs, UN Agencies and community-based organizations, tried to fill the protection gap. Officials felt that nonprofit actors with foreign ties posed a threat to the state's newfound independence. As

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270 Ibid 300.

271 Jason Patinkin, 'It's Like Florence Nightingale's Time': South Sudan's Public Services Collapse' *The Guardian* (27 May 2016) <http://www.theguardian.com/global-development/2016/may/27/south-sudan-public-services-collapse-juba-teaching-hospital-like-florence-nightingale-time>.

272 Ibid.

273 See 'South Sudan Oil Revenue at $3.38 Bln, Hit by Conflict and Price Falls' *Reuters* (3 Jan. 2015) <http://www.reuters.com/article/southsudan-crude-idUSL6N0UI02D20150103>.

274 Jacey Fortin, 'Power Struggles Stall South Sudan's Recovery' *New York Times* (31 May 2016) <http://www.nytimes.com/2016/05/31/world/africa/south-sudan-struggles-to-collect-taxes-after-years-of-war.html>.

tensions grew between the third sector and the state, the South Sudanese government tried to control NGOs through legislation.

In 2015, aid agencies feared that certain provisions of an NGO bill that was proposed in 2013 and approved by parliament in May 2015 would "not regulate NGO operations, but rather hinder their ability to serve South Sudanese people at a time when needs are escalating".[275] The bill prohibited foreigners from constituting more than 20 percent of an NGO's staff.[276] One government official stated that the law is intended to ensure that more jobs are given to South Sudanese workers. He accused NGOs of employing too many foreigners and warned that their registration would be denied if they did not employ nationals.[277] The minister of Justice, Paulino Wnanawilla, complained that NGOs were uncooperative and ignored the government's efforts to coordinate services. The minister explained, "There is no country where you have free lunch; you go and you do business as you want… You cannot operate in a country under your own conditions." The bill was signed into law in February 2016 along with another act that widens the government's power to monitor NGOs. These new acts are the Non-Governmental Organizations Act of 2016 and the Relief and Rehabilitation Commission Act of 2016.[278]

Restrictive NGO laws have appeared in other parts of Africa as well. Uganda's NGO Registration Act (2009) required NGOs to provide the government with a written notice of their intention to make direct contact with people within their operational area at least one week prior to doing so.[279] NGOs, including those that were wholly owned and operated by Ugandans, could operate only within the particular geographic area that

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275 See 'South Sudan Risks 'Catastrophe' with New Aid Agency Law, Warn NGOs' *The Guardian* (14 May 2015) <http://www.theguardian.com/global-development /2015/may/14/south-sudan-aid-agency-law-risks-catastrophe-warn-ngos>.

276 See 'S. Sudan Parliament Passes NGOs Bill, Gives Requirements for Relief Agencies' *Sudan Tribune* (12 Mar. 2015) <http://www.sudantribune.com/spip.ph p?article54953>; 'South Sudan Risks 'Catastrophe' with New Aid Agency Law, Warn NGOs' (2015).

277 'S. Sudan Parliament Passes NGOs Bill, Gives Requirements for Relief Agencies' (2015).

278 'South Sudanese President Signs NGO Bill into Law' *Sudan Tribune* (11 Feb. 2016) <http://sudantribune.com/spip.php?article57988> ; 'South Sudan Tables NGOs Bill for the Second Time' *Sudan Tribune* (20 Jan. 2016) <http://www.suda ntribune.com/spip.php?article57749>.

279 The Non-Governmental Organisations Registration Regulations, 2017 No. 22 (Uganda 2017).

the government had authorized for them.[280] Moreover, the law rather vaguely proscribed NGO activities that were "prejudicial" to the "security of Uganda" or to the "interests of Uganda and the dignity of the people of Uganda".[281] Likewise, it allowed government to involuntarily dissolve NGOs for failure to comply with its provisions, and broadly "for any other reason the [National] Board [of Non-Governmental Organisations] considers necessary in the public interest."[282] The terms "public interest", "security of Uganda", "interests of Uganda" and "dignity of the people" were left undefined by the NGO law. Uganda enacted a new NGO law in 2016 and new NGO regulations in 2017 that maintain many of these features, including burdensome registration requirements and the imposition of criminal sanctions for violations.[283]

2.3. Conclusion

Since their rise in the 1980s, NGOs have become a fixture of social welfare in the least developed countries of Africa. They arose into prominence due to their presumed advantage in service provision and governance. However, as time has passed, scholars and politicians alike have begun to view their role in social development with a critical eye. Of particular concern is their dependence upon foreign sources of aid, which – unsurprisingly – mirrors the dependency among African governments on the same. The conflicting objectives among states to benefit from the resources and activities of NGOs as well as to keep them at arm's length reflect the long and complicated history of social protection in Africa. That history exhibits a compilation of indigenous and familial traditions of informal protection; missionaries entrenched within colonial agendas; and politicized community organizing in the name of social justice. From this historical background of political tension, and within the existing socio-economic context of deep and widespread poverty, emerges the current dilemma: African states are passing restrictive NGO laws that are justified in terms of their sovereignty but have the potential to interfere with the social rights of beneficiaries.

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280 Ibid § 13(d).
281 Ibid § 13(c), (g).
282 Ibid § 17(3)(e).
283 The Non-Governmental Organisations Act, No 5 of 2016 (Uganda); The Non-Governmental Organisations Regulations, No. 22 of 2017 (Uganda 2017).

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