3. Beneficiaries' Perspective: How NGO-State Relations Can Affect Social Rights

The analytical framework for this research is a beneficiary-centered approach. This approach is grounded in the fact that human rights law in general and the ICESCR in particular ultimately aim to protect the freedom of individuals and their right to dignified lives. From this angle, the manner in which NGOs and the state interact with one another becomes a potential social rights concern for beneficiaries of the NGOs. This chapter begins by introducing the beneficiary-centered approach and its usefulness as a critical framework for legal analysis. Next, it provides an overview and discussion of social rights as they have been guaranteed in international and regional instruments. Finally, it concludes with a discussion on how NGO-state relations can affect the social rights of beneficiaries.

3.1. A Beneficiary-Centered Approach

A beneficiary-centered approach to human rights analyses of development policies places an emphasis on the wellbeing of the intended beneficiaries of social development. This angle can get lost when analysts use only an NGO-focused approach that takes into account the liberal rights of NGOs who work to alleviate social ills, or only a state-sovereignty approach that is critical of the foreign ties of many NGOs working in Africa as well as the foreign financial support that they enjoy. An NGO-focused approach tends to underestimate the harm that NGOs can do to beneficiaries, while the state-sovereignty approach tends to understate the obligation that states owe to beneficiaries in terms of their socio-economic rights. In contrast, a beneficiary-centered approach to assessing social development in Africa aims toward the empowerment and emancipation of the poor by consciously evaluating the living conditions and lived experiences of African peoples, rather than prioritizing the civil and political rights of NGOs or legitimizing state measures that restrict nonprofit activities.[284]

284 For a discussion on the related concept of client-centered lawyering, see Derrick A. Bell Jr., 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' 85 Yale Law Journal 470 (1976). Bell argues

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

A beneficiary-centered approach is similar to the human rights based approach to development in that both envision people as rights holders rather than merely quiet recipients of charitable services, standing behind the main stage of law and politics.[285] Evaluations of how NGOs use the human rights based approach indicate that the particular manner in which the human rights based approach is applied will affect its impact on social development.[286] If such approaches are to bring about the realization of social rights, then they must challenge structural inequities in order to achieve the lasting social changes that can actually support the progressive realization of social rights.[287] This is why bringing together the human rights based approach and a beneficiary-centered approach in the assessment of social development policies can address the root causes of poverty.[288] In legal terms, this means ensuring that the state fulfills its social rights obligations toward rights holders, even when the state is not directly involved in the provision of social services. This is unlike the needs-based approach, which

---

that the attorneys who championed civil rights litigation like in *Brown v. Board of Education* risked doing a disservice to their clients when they failed to place substantive equity on the same footing as *de jure* equality. He argues for a client-centered approach to ensure that improved educational quality is at the heart of *de jure* desegregation efforts.

285 See, Katarina Tomaševski, 'International Development Finance Agencies' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev. edn, Martinus Nijhoff 2001) 403-413, 409 (explaining that the purpose of a human rights assessment of development programs is to anticipate possible adverse effects of development interventions on human rights, and prevent, reduce and mitigate harmful consequences.).

286 Hans Peter Schmitz, 'A Human Rights Based Aproach (HRBA) in Practice: Evaluating NGO Development Efforts' 44 Polity 523 (2012).

287 Cornwall and Nyamu-Musembi offer a critical perspective of how the rights-based approach to development has emerged and is practiced. They caution that unless such approaches facilitate a global transformation of power relations, mainstreaming human rights discourse into development policy is not likely to result in the meaningful realization of social and economic rights. (Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "Rights-Based Approach" to Development in Perspective' 25 Third World Quarterly 1415 (2004).).

288 See, Marius Pieterse, 'Health Care Rights, Resources and Rationing' 124 South African Law Journal 514 (2007) 518 (in response to the argument that rationing decisions are inevitable in poorer countries, Pieterse argues for an approach similar to the beneficiary-centered approach wherein "the interests affected by the outcome of rationing decisions and processes coincide with the objects of fundamental human rights.").

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> view[s] development as a need or a gift, motivated by and derived from charitable intentions and patronage relationships, rather than a reflection on rights. Needs-based approaches focus on fulfilling, for example, health care or educational needs, yet stop short of addressing structural conditions and policies that could make systematic change.[289]

In this regard, the beneficiary-centered approach transcends the depoliticization that characterizes the needs-based approach. However, it goes a step further by ensures that the rights of the beneficiaries remain at the center of legal concern. For example, while little doubt remains that severely restrictive NGO laws may interfere with the rights of NGOs, limiting one's legal analysis to the violations of NGOs' rights – and disregarding the rights of beneficiaries – is still technically a human rights based analysis. However, this view belongs to a limited debate that concerns NGOs and the political elites who would benefit from censoring them, rather than the socio-economically vulnerable individuals who depend on them.

Even when resources are severely constrained, states should prioritize the protection of vulnerable members of society. The Committee urges states to do this "by the adoption of relatively low-cost targeted programs."[290] There appears to be evidence in support of an approach that emphasizes the sustained empowerment of marginalized people rather than merely offering piecemeal provision of social services. Research on NGOs that provide services versus those that integrate advocacy into their work offers evidence in support of using a beneficiary-centered approach when seeking to assess or alleviate deprivations related to social rights. Bill Abom asserts that NGOs that provide services without a participatory or critical approach risk undermining sustainable development by breaking down social capital within the community and encouraging a dependency mindset among beneficiaries.[291] On the other hand, NGOs that engage in advocacy, community outreach and education, as well as exposing government to the perspectives of beneficiaries, are more likely to strengthen social capital

289 Susan O'Leary, 'Grassroots Accountability Promises in Rights-Based Approaches to Development: The Role of Transformative Monitoring and Evaluation in NGOs' 36 Accounting, Organizations and Society 21 (2017).

290 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 12.

291 Bill Abom, 'Social Capital, NGOs, and Development: A Guatemalan Case Study' 14 Development in Practice 342 (2004) 345-346.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

and encourage sustainable social development.[292] There is also evidence to suggest that certain forms of participatory human rights advocacy, particularly measuring the state's compliance with its social rights obligations, can have a transformative impact on beneficiaries in terms of both realizing and claiming their social rights.[293]

The dual role that NGOs play in their development work, as well as the legal measures that attempt to segregate NGOs into two broad categories, can also be understood through the opposing paradigms of the human rights based approach and the needs-based approach to development. For example, when NGOs provide services without advocating for or taking into account the social rights of their beneficiaries, they are employing a needs-based approach. While such an approach may appear to ensure harmonious state-to-NGO relations, it may also ensure that the NGO remains embedded within the same structural mechanisms that perpetuate poverty. Likewise, an analysis of NGO laws that does not take into account the rights claims of beneficiaries is not likely to address their concerns in a structural way. A needs-based approach is limited in its capacity to bring about lasting social change because it does not demand structural change. Indeed, when NGO laws include gag-rules that suppress nonprofit advocacy, they tend to push the third sector into a kind of non-confrontational, non-critical and passive role by silencing voices of dissent. These kinds of measures suppress the human rights based approach at a cost to the wellbeing of beneficiaries. Consequently, a beneficiary-centered approach is needed to bring to light that which threatens the social rights and social wellbeing of beneficiaries.

Consider a special feature of the NGO law in Ethiopia, which prohibits rights advocacy among NGOs that receive more than 10% of their funding from a foreign source.[294] Ethiopia's NGO law has been called "one of the most controversial laws in Africa"[295] due to its restrictive funding provisions and its threat of criminal sanctions. The law, referred to as the Charities and Societies Proclamation, targets human rights advocacy by stating that NGOs that receive more than 10% of their funding from foreign sources are forbidden from promoting human rights.[296] In particular, such

292 Ibid.
293 O'Leary (2017).
294 Charities and Societies Proclamation No 621/2009 (Ethiopia).
295 International Center of Not-for-Profit Law, 'Introductory Overview' 12:2 International Journal of Not-for-Profit Law 5 (2010) 6.
296 Charities and Societies Proclamation No 621/2009 (Ethiopia).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

organizations may not engaging in, *inter alia*, "the promotion of human and democratic rights; the promotion of equality of nations, nationalities and peoples and that of gender and religion; [and] the promotion of the rights of the disabled and children's rights".

The government of Zimbabwe tried to pass an NGO law in 2004 that had a similar effect. It sought to weed out human rights activities among NGOs by severely restricting the ability of NGOs to involve themselves in governance issues.[297] Foreign NGOs would not be registered if their sole or principal purpose involved issues of governance, and local NGOs were forbidden from receiving foreign funding to carry out activities involving issues of governance.[298] However as one UN report noted, separating activities involving good governance – which undoubtedly includes respecting and protecting human rights – from service provision is a particularly difficult task within the African regional framework of human rights law.[299] Since the African Charter gives both ESC rights and civil and political rights equal legal significance as human rights, NGOs that provide social services are technically involved in the protection and fulfillment of human rights. This would have made them vulnerable to penalization under Zimbabwe's NGO bill.

By effectively censoring most of the non-profit advocacy within the country, Ethiopia's Charities and Societies Proclamation considerably undermines the human rights based approach to social development. Since most nonprofit actors in Ethiopia – including nonprofit service providers – rely heavily on foreign funding, they must be careful not to engage in rights advocacy. In some cases, however, it is unclear whether an NGO's activities constitute rights advocacy or service provision. For instances, social service programs that pursue equal access to education, promote women's health, or protect affordable housing for ethnic minorities could reasonably be interpreted under the Proclamation as forms of rights advocacy. Since some degree of rights promotion could overlap with some amount of service provision, NGOs may decline to pursue certain social programs, or even abandon existing programs, in order to avoid criminal liability under Ethiopian law. Although precise information is unavailable as to the volume of nonprofit social provision in Ethiopia, the presence of nonprof-

297 See *The Zimbabwean Non-Governmental Orgnizations Bill 2004 and International Human Rights Law/Standards: Issues, Analysis and Policy Recommendations* (UNDP 2004).

298 See ibid 17-18.

299 Ibid 18.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

it service providers is substantial.[300] Moreover, their contributions are important due to the severely limited coverage of public social protection schemes as well as widespread poverty and vulnerability among its population.[301] For beneficiaries whose livelihoods depend on nonprofit activities, Ethiopia's NGO law creates a social rights dilemma by jeopardizing their access to an essential means of realizing and enjoying their social rights.

Nonprofit advocacy can be critical to the realization and continued enjoyment of social rights precisely because such activities prod or otherwise facilitate the state's capacity to honor its social rights commitments through awareness raising and engaging national stakeholders.[302] Indeed, the ESCR Committee has recognized the "essential" and "important role" of human rights NGOs in "the promotion, protection and realization of social, economic and cultural rights" due to their role in "monitoring and evaluating State parties' compliance" with international human rights law.[303] More to the point, the Committee makes it clear that, according to its own interpretation of the ICESCR, censoring or intimidating nonprofits is forbidden. The Committee writes that it

> … considers any threat or violence against human rights defenders to constitute violations of States' obligations towards the realization of Covenant rights since human rights defenders also contribute through their work to the fulfillment of Covenant rights.[304]

In the context of analyzing NGO laws, the beneficiary-centered approach to human rights and development has the advantage of circumventing the deadlock between the defenders of state sovereignty and defenders of NGOs' rights by shedding light on the state's social rights obligations to-

---

300 Daniel Hailu and Terry Northcut, 'Ethiopia's Social Protection Landscape: Its Surface and Underlying Structures' 56 International Social Work 828 (2012).

301 Amdissa Teshome and others, 'Governance Characteristics and Policy Relevance of Informal Social Protection Services in Ethiopia: When the State Is Willing but Not Able' in Nicholas Awortwi and Gregor Walter-Drop (eds), *Non-State Social Protection Actors and Services in Africa: Governance Below the State* (Routledge 2018) 25-43, 26.

302 See Patrick Mutzenberg, 'NGOs: Essential Actors for Embedding the Covenants in the National Context' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 75-95, 87-89.

303 Human Rights Defenders and Economic, Social and Cultural Rights, Committee on Economic Social and Cultural Rights, U.N. Economic and Social Council, U.N. Doc. E/C.12/2016/2 (UN 2017) para. 1.

304 Ibid para. 5.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

ward its own people, thereby contextualizing the entire debate within a beneficiary-based framework. This advantage reflects a critical edge that can accommodate post-colonial concerns by scrutinizing both foreign political entities as well as African political elites for their respective roles in the ongoing distress of African peoples.

The peculiarity of Africa's long-term dependence on foreign aid echoes earlier periods of colonial intervention wherein social programs such as health care and education were provided through missionaries in the service of colonial projects. Placing an emphasis on the rights of socio-economically marginalized individuals and groups – rather than the wellbeing of institutional actors – is a way to remain cognizant of the continent's long experience with subjugation and various forms of imperialism. Moreover, it is an attempt to ensure that human rights law does not serve to perpetuate further exploitation and injury by advancing the rights of a privileged few while neglecting the rights of the vulnerable and marginalized.

Social wellbeing of beneficiaries must also be sustainable in order to alleviate African countries of their dependence on foreign aid. Anything less would leave the realization and enjoyment of social rights vulnerable to the arbitrary contingencies and inevitable conflicts associated with foreign interests. Abdullahi Ahmed An-Na'im cautions against the impulse of the international community to choose "between rushing to 'doing something' [and] passively watching flagrant and systematic violations of basic human rights".[305] He implores those in the west instead to cultivate "the principled and institutionalized application of the same standards everywhere over time" rather than employing "self-help and vigilante justice in crisis situations".[306] In this regard, An-Na'im calls for the "promotion of local capacity", which he writes must be achieved

> …through the development of national institutions and mechanisms of accountability within the specific context of each country. In other words, such efforts must build on what actually exists on the ground because attempting to impose norms and models developed elsewhere is both objectionable as a colonial exercise of cultural imperialism, and unlikely to be workable in a sustainable manner in practice. Moreover, these efforts should always respect the independent agency and human

305 A.A.A. Naʿīm, 'Introduction: Expanding Legal Protection of Human Rights in African Contexts' in A.A.A. Naʿīm (ed), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (University of Pennsylvania Press, Incorporated 2003) 1, 2.

306 Ibid.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> dignity of its intended beneficiaries by gradually diminishing their dependency on external support. [307]

Thus, the central orientation of such human rights analysis should be to seek social wellbeing and reaffirm the dignity of people living in Africa as the central concern when evaluating state action by taking into account the distinctive circumstances found on the continent and aiming for sustainability and longevity in social welfare. The approach needed is one that is concerned not only with guaranteeing the realization of social rights for beneficiaries in sub-Saharan Africa, but also with aiming for the underlying ideal of human freedom that those rights are meant to achieve. As Ashwani Kumar posits, the poor are more than just people who lack material items such as food, income and security, they are also powerless in that they lack "freedom to achieve even minimally satisfactory living conditions."[308] Ultimately, a beneficiary-centered focus within a human rights based approach to development is about empowerment within enormously unfavorable socio-economic circumstances as well as emancipation from oppressive societal structures.[309]

3.2. Social Rights of Beneficiaries

The social rights of beneficiaries can be found in international human rights law as well as regional African human rights instruments. The social rights of beneficiaries correspond to certain state obligations toward the beneficiaries and, ultimately, give rise to additional state obligations toward nonprofit entities that are essential to the realization and enjoyment

---

307 Ibid 3. Elsewhere I have traced how at the end of the twentieth century the primary aim of international humanitarian intervention in Somalia shifted away from humanitarian protection towards an emphasis on top-down state building, consequently undermining the legitimacy of those efforts within Somalia. (Jihan A Kahssay, (Note) 'Lessons Learned from Somalia: Retuning to a Humanitarian-Based Humanitarian Intervention' 19 UC Davis Journal of International Law & Policy 113 (2012).).

308 Ashwani Kumar, 'The Question of the Poor' in Rupert Taylor (ed), *Third Sector Research* (Springer 2010) 281-298, 285.

309 See Tom Inglis, 'Empowerment and Emancipation' 48 Adult Education Quarterly 3 (1997) 4 ("…empowerment involves people developing capacities to act successfully within the existing system and structures of power, while emancipation concerns critically analyzing, resisting and challenging structures of power.").

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

of social rights. This section will provide some background on the international and regional legal frameworks wherein which social rights are enshrined, and lay out the social rights of beneficiaries that bind African states.

3.2.1. The Human Rights Framework & General Problems with Social Rights

The Universal Declaration of Human Rights recognizes social rights as being indispensable for guaranteeing human dignity and the free development of one's personality.[310] Social rights, found in articles 22, 25 and 26, include the right to social security; an adequate standard of living, including food, clothing, housing, medical care and social services that are necessary for one's health and wellbeing; special rights for the protection of children and mothers; and education. Despite its high ideals, the Declaration is not a legally binding document. There are, however, two major instruments of international law that do in fact impose social rights obligations on African states. These are the ICESCR and the African Charter. The social rights obligations of African states under these two human rights instruments will be discussed in the follow subsections, yet it is worthwhile noting here that there are still several more instruments of international human rights law that recognize social rights and impose corresponding obligations upon states.[311]

Although states are bound by their social rights obligations, the strength of these obligations is overshadowed by the fact that social rights are largely unenforceable at the international level.[312] Moreover, there remains

310 Universal Declaration of Human Rights, UNGA (adopted 10 December 1948) UN Doc A/810 (UDHR) art. 22.

311 E.g., International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art. 5 (e) (iii - v); International Covenant on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (ICEDAW) arts. 11 (1) (e), (2) (b) (c), 12 (1 -2), 14 (2) (b - d); Covenant on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) arts 20, 23-28.

312 The ICESCR establishes the competence of a treaty body (originally the UN Economic and Social Council, but later the Committee on Economic, Social and Cultural Rights) to supervise State compliance, but does not authorize any tribunal to hear or adjudicate individual complaints, and does not propose any

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

doubt as to their justiciability.[313] At the theoretical level, these concerns are often the consequence of efforts to distinguish economic, social and cultural (ESC) rights from their civil and political counterparts. This is part of a longstanding theoretical debate in law about whether human rights are indivisible and interdependent, or whether they may be arranged in a hierarchical order.[314] To summarize the point, the ESCR Committee wrote,

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.[315]

Yet, any view that arranges human rights norms into a hierarchy would be contrary to the formal position of international[316] and regional[317] law,

---

enforcement mechanism for the recommendations issued by treaty body. (See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) arts. 16 - 22).

313 See Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' 98 American Journal of International Law 462 (2004); but see Mónica Feria Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' 29 Human Rights Quarterly 431 (2007).

314 Formally, there is international recognition of the interdependence, indivisibility and interrelatedness of human rights norms. In practice, however, there is a divergence in the manner in which different human rights norms are treated by states and by the courts. (Dinah Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners' 65 Saskatchewan Law Review 301 (2002) 302-303, 308-331.).

315 General Comment No. 9: The Domestic Application of the Covenant, Committee on Economic Social and Cultural Rights, U.N. Doc. E/1998/24 (UN 1997) para. 10.

316 UDHR preamble; ICESCR preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble. Vienna Declaration and Programme of Action, (July 12, 1993) U.N. Doc. A/CONF.157/23 para. 5 (endorsed by World Conference on Human Rights, UNGA (Dec. 20, 1993) UN Doc. A/RES/48/121) ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.").

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

each of which acknowledge the interconnectedness and interdependence of human rights norms. On this point, the ESCR Committee,

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[318]

Despite their questionable justiciability at the level of theory, there is evidence to suggest that jurisprudence on ESC rights continues to develop around the world within the regional and domestic fields.[319] Notwithstanding, in general, domestic law and domestic courts in sub-Saharan African countries have yet to concretize social rights fully into individual entitlements with corresponding state duties.[320] There are of course a few exceptional cases where there has been significant progress, such as the well-known judicial treatment of constitutionally guaranteed socio-economic rights in South Africa.[321] There are also examples where rights have been concretized through legislation. In Kenya, for example, the child's right to free and compulsory education has been made concrete through the Children's Act and the Basic Education Act, although in other areas of social law, such as housing, health and water, individuals still use constitu-

---

317 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR) preamble ("…civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights").

318 General Comment No. 9: The Domestic Application of the Covenant (1997) para. 10.

319 See generally, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Expereinces of Justiciability,* International Commission of Jurists (2008) <https://www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf> (reviewing the enforcement and justiciability of economic, social and cultural rights at the regional and domestic levels).

320 Manisuli Ssenyonjo, 'Influence of the ICESCR in Africa' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 99-123, 107-108.

321 See Mirja Trilsch, 'What's the Use of Socio-Economic Rights in a Constitution? – Taking a Look at the South African Experience' 42 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 552 (2009).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

tional law to claim social goods through litigation.[322] Finally, there seems to be some evidence to suggest that the process of concretization might be able to begin from even as high up as international law. According to one study, the creation of the ICESCR was followed by increased institutionalization of social security laws across 173 countries.[323] While it cannot be said for sure whether the relation is causal,[324] these findings nonetheless leave open the possibility that international recognition of ESC rights might have had a lasting impact on their domestic concretization.

These legally protected rights do not always translate into greater social wellbeing and protection in everyday life. Where social rights legislation does exists, as in the case of social security and social assistance law in Tanzania, coverage can be so limited and the quality of social goods so poor that social rights are effectively no more than privileges.[325] In some countries, such as Botswana, social rights guarantees are left out of the constitution entirely.[326] In other countries, like Namibia, most social rights appear in the constitution as policy directives rather than individual rights *per se*.[327] These constitutional directives are found in a number of African constitutions. To understand how they differ from concrete social rights entitlements, consider the example of Uganda.

---

322 Godfrey O. Odongo and Godfrey M. Musila, 'Direct Constitutional Protection of Economic, Social and Cultural Rights in Kenya's 2010 Constitution' in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016) 338-371.

323 Lyle Scruggs, Christian Zimmermann and Christopher Jeffords, 'Implementation of the Human Right to Social Security around the World: A Preliminary Analysis of National Social Protection Laws' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Review* (Cambridge University Press 2013) 117-134.

324 But see Ssenyonjo 112 (asserting that the adoption of ESC rights in the domestic law of African dualist states was influenced in part, but not explicitly, by the ICESCR.).

325 Tulia Ackson, 'Justiciability of Socio-Economic Rights in Tanzania' 23 African Journal of International and Comparative Law 359 (2015) 365-372.

326 Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-Economic Rights in Botswana' 57 Journal of African Law 108 (2013) 109.

327 John Cantius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' 2 African Journal of Legal Studies 1 (2006) 8-10.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Although Uganda is a member to the International Convention on Economic, Social and Cultural Rights,[328] its constitution does not treat ESC rights the same as civil and political rights. The Ugandan constitution declares, as one of the state's objectives, the "guarantee and respect [of] the independence of non-governmental organisations which protect and promote human rights."[329] It also recognizes some social state objectives, including a declaration that the state "shall endeavor to fulfill the fundamental rights of all Ugandans to social justice…and shall, in particular, ensure that…all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits."[330] Yet, it remains unclear whether these objectives translate into constitutionally guaranteed social rights.[331] On the other hand, the constitution explicitly and thoroughly sets out constitutional protections of civil and political rights, including the right to a fair hearing.[332]

In general, the realization and enjoyment of social rights in sub-Saharan Africa remains rather weak at the domestic level due to the fact that social rights are not widely concretized. Instead, social rights are guaranteed by the broad strokes of international (and sometimes constitutional) law. However, as suggested early, domestic courts are typically reluctant to concretize social rights directly from constitutional or international law.[333] This reluctance is captured well by Odongo and Musila in their assessment of judicial enforcement of socio-economic rights enshrined in Kenya's 2010 constitution. In their view,

---

328 'Status of International Covenant on Economic, Social and Cultural Rights' (*United Nations*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en>; 'Status of International Covenant on Civil and Political Rights' (*United Nations*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>.

329 Constitution of Uganda (1995; rev. 2005) Objective V.

330 Ibid Objective XIV.

331 See *Centre for Health Human Rights & Development & Others v. Attorney General*,UGCC 4, Petition No. 16 of 2011 (CC 2012) (Uganda) (in holding that petitioner's claims represented political questions rather than constitutional challenges, the Constitutional Court of Uganda denied petitioner's request for a declaration that the constitution guarantees a right to health and that the government's health policies violate the right to health of pregnant women.).

332 Constitution of Uganda art. 28.

333 Ssenyonjo 109-122 (noting that in practice, domestic courts in both dualist and monist African states are reluctant to give full effect to ESC rights directly from the ICESCR.).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> ...it appears, as we have argued below, that court's refusal to consider individualised relief is consistent with the general approach adopted by Kenyan courts in ESC rights cases so far: they focus on structural conditions that would enable the state to progressively meet its obligations rather than on providing immediate relief upon demand.[334]

There are doctrinal grounds for the difficulty that courts encounter whenever they are asked to concretize social rights from international and constitutional instruments. First, the language of social rights found in constitutional and international instruments tends to be so broad that their distillation into specific entitlements does not lend itself well to principled legal reasoning. Terms such as 'health', 'education', 'housing' and 'social security' are equivocal in their meaning, and determining the specific content of their essential cores is fraught with unprincipled or incoherent methods.[335] Second, it is difficult for a court to ascertain in concrete terms the state's constitutional or international duties with respect to realizing these social rights because such rights are typically subject to internal[336] and external[337] limitations clauses.[338] Finally, courts hesitate to shape social

---

334 See, e.g., Odongo and Musila 364-365.

335 See Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' 33 Yale Journal of International Law 113 (2008); Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' 22 American University International Law Review 163 (2006).

336 For example, some commentators view those rights that guarantee mere *access* to a good as having an internal limitation built into the scope of the right itself. See Odongo and Musila 346-347 (*quoting and citing* Japhet Biegon, 'The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues' in Japhet Biegon and Godfrey M. Musila (eds), *Judiciary Watch Report: Judicial Enforcement of Socio-Economic Rights under the New Constitution : Challenges and Opportunities for Kenya*, vol 10 (Kenya Section of the International Commission of Jurists 2011).).

337 Under international law, social rights are subject to resource limitations and other limitations determined by law for the purpose of promoting general welfare. (ICESCR arts. 2(1) & 4.).

338 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 116. Cf. Scott Craig and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' 141 University of Pennsylvania Law Review 1 (1992) 72-73 (cautioning that the imprecision of social rights "should not be overstated", and calling upon the judicial branch to make constitutionally guaranteed social rights more precise and concrete through "years of repeated applications of practical reasoning to facts at hand".).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

rights into individual entitlements for specific goods or to grant judicial remedies because doing so involves addressing questions of a predominantly political nature, which some have argued threatens to upset democratic safeguards against the consolidation of power into the hands of unelected officials, and raises concerns about judicial accountability.[339]

Despite the difficulty in domestically concretizing internationally guaranteed social rights, international human rights law is not irrelevant as it does impose real, albeit not always concrete, duties upon states. Human rights law guarantees certain social rights to individuals, for which the state bears corresponding legal obligations. This gives rise to a legal relationship between the beneficiary and the state. In order to protect, respect and fulfill the social rights of beneficiaries, states must take steps toward the progressive realization of social rights, to the maximum of available resources.[340] One consequence of this distinction between concrete legislation and broadly defined human rights is that people in African do not have a right to a particular service or benefit *per se*, but rather to the progressive realization of their social rights.

Closely related to the issues of justiciability and enforceability is the question of individual entitlements. Some have argued that, because their

339 Navish Jheelan, 'The Enforceability of Socio-Economic Rights' 2 European Human Rights Law Review 146 (2007). See also Shadrack B. O. Gutto, 'Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa' 4 Buffolo Human Rights Law Review 79 (1998); Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' 13 Oxford Journal of Legal Studies 18 (1993). Cf. Larry Alexander, 'What Is the Problem of Judicial Review?' in José Rubio Carrecedo (ed), *Political Philosophy: New Proposals for New Questions* (Franz Steiner Verlag 2007) 173-181, 177 (noting that although legislative interpretations of the constitution boast democratic legitimacy, "legislatures lack the power to entrench their laws against future legislatures. That is why the courts when engaging in constitutional decisionmaking have a settlement advantage over legislatures, at least if the courts follow a moderately strong doctrine of precedential constraint."); International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Expereinces of Justiciability* (2008) 73-77 (pointing out that the boundary separating a legal issue from a political one is rather blurry, and emphasizing that, regarding the justiciability of ESC rights, "[t]he issue is not whether the judiciary should have the leading role in the implementation of public policies intended to comply with constitutional or international ESC rights obligations…[but] Rather, the fundamental question is what role the courts should have to supervise the implementation of these policies, according to constitutional, international human rights or legal standards.").

340 ICESCR art. 2.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

realization necessitates the demand for public goods, social rights do not yield individual rights that each person can claim against the state.[341] However, the recent emergence of an individual complaint mechanism for the ICESCR suggests that blanket denials of an individualized component to social rights may be too simplistic.[342] The individual complaint mechanism came into force in 2013 by way of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which allows the ESCR Committee to adjudicate individual complaints against State Parties to the OP-ICESCR.[343]

A key feature of the OP-ICESCR is the CECSR Committee's power to request interim measures from state parties prior to the resolution of a case. These measures require states to perform, or abstain from performing, specific acts meant to prevent exceptional and irreparable damage to the enjoyment of covenant rights.[344] Although some states are reluctant to acknowledge the binding effect of interim measures, international bodies insist that they are legally binding upon state parties.[345] The existence of such a binding mechanism for individual complaints supports the notion that social rights are individual rights, yet the low ratification rate of the OP-ICESCR rather indicates the reluctance among states to recognize the same. As of February 2017, only 22 countries had ratified the OP-ICE-

341 See, e.g., Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2d edn, Oxford University Press 2008) 42.

342 See, Martin Scheinin, 'Indirect Protection of Economic, Social and Cultural Rights in International Law' in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press 2016) 72-87, 73.

343 See 'UN Lauds New Tool Enabling Individual Complainst on Economic, Social and Cultural Rights' *UN News Centre* (Feb. 6, 2013) <http://www.un.org/apps/news/story.asp?NewsID=44081#.WJMqCZUzVaS>.

344 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 Dec. 2008, entered into force 5 May 2013) 2922 UNTS 27 (Op-ICESCR) art. 5.

345 See Christian Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* International Commission of Jurists & Inter-American Institute of Human Rights, (2008) 71 <https://www.icj.org/wp-content/uploads/2009/07/Commentary-OP-ICESCR-publication-2009-eng.pdf>; Viviana Krsticevic and Brian Griffey, 'Interim Measures' in Malcolm Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 293-326, 320-325.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

SCR.[346] Likewise, within the African continent, commitment to the OP-ICESCR is extremely low despite efforts of the African Commission on Human and Peoples' Rights to urge African states to ratify the OP-ICESCR.[347] As of September 2018, only three African countries were state parties to the optional protocol.[348] If more African states join the OP-ICESCR in the future, intern measures could be employed to require states to amend problematic NGO laws.

3.2.2. International and Regional Protection for Social Rights

At the international level, social rights are most prominently featured in the ICESCR. As of 2017, the ICESCR enjoys wide acceptance among African states. It has been ratified by all but four African countries (South Sudan, Mozambique, Comoros and Botswana).[349] Ten African states parties to the treaty have filed declarations or reservations to its terms, although two have since withdrawn their reservations.[350] Of the remaining eight, only five state parties make reservations that explicitly limit their obligations regarding social rights. Kenya limits its obligation to provide workers with remunerated maternity leave, while Algeria, Madagascar, South Africa and Zambia restrict their obligations regarding the free and compulsory provision of primary education to all.[351] The withdrawn reservations, previously submitted by Congo and Rwanda, also limited the duties of those states with regard to the provision of education.[352] With the exception of these limitations on the provision of education, almost all African states are bound by all the terms of the ICESCR.

---

346 See 'Status of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*United Nations*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en>.

347 Resolution on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, ACmHPR (May 2, 2012) (Resolution on the OP-ICESCR).

348 See 'Status of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'(*United Nations*).

349 'Status of International Covenant on Economic, Social and Cultural Rights' (*United Nations*).

350 Ibid.

351 Ibid.

352 Ibid.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

At the regional level, the African Charter recognizes certain social rights, which are enshrined in articles 16 and 17.[353] These include the right to the best attainable physical and mental health, and the right to education. Notably missing are the rights to food, water, housing, social security and an adequate standard of living. However, the African Commission has recognized additional social rights by deriving them from others explicitly guaranteed in the Charter. These will be discussed in detail below.

Additionally, social rights are protected in the African Charter on the Rights and Welfare of the Child (African Children's Charter),[354] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[355] Finally, various 'soft law' documents recognize social rights at the regional level. They include the Pretoria Declaration on Economic, Social and Cultural Rights in Africa[356], the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights[357] and other resolutions of the African Commission. Although technically non-binding,[358] these documents offer guidance on the normative content of social rights in Africa and are legally significant because the African Commission often relies on them in its opinions.[359] Some international lawyers insist that relying on 'soft law' and other non-binding texts in order to interpret the provisions of a treaty is at odds with

353 African Charter.

354 African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (ACRWC), arts. 11, 14.

355 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) AU Doc. CAB/LEG/66.6 (African Women's Protocol), arts. 12-16.

356 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, ACmHPR (Dec. 7, 2004).

357 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Chart on Human and Peoples' Rights, ACmHPR (Oct. 24, 2011).

358 Sibonile Khoza, 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria: Recent Developments' 4 African Human Rights Law Journal 334 (2004) 338.

359 See, e.g., *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan*, Communication 379/09 (ACmHPR 2014) para.134; see also *Purohit v. Gambia, paras. 81-82* (*relying* on Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care, UNGA (Dec. 17, 1991).).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the Vienna Convention.[360] However, the African Commission may be justified in doing so due to the broad spectrum of interpretive tools made available to it by Articles 60 and 61 of the African Charter.[361]

As of September 2018, the African Court on Human and Peoples' Rights, which is a judicial body, has not yet issued a decision on the normative content of social rights or the state's social rights obligations under African human rights law.[362] The only two regional bodies that have done so are the African Commission and the African Children's Committee. As such, this chapter will review the jurisprudence emanating only from these two treaty bodies in order to clarify the core obligations of African states regarding the realization and enjoyment of social rights.

3.2.2.1. The Committee on Economic, Social and Cultural Rights

The ESCR Committee serves as the Covenant's treaty body and issues interpretive guidelines through the adoption of general comments.[363] These comments provide normative content to the social rights and corresponding obligations declared in the Covenant. Although the general comments of UN treaty bodies are not legally binding *per se*, they represent the official interpretation of the treaty body and are not without any legal significance or consequence.[364] In international law, treaty interpretation and state practices are important indicators of a norm's legal character. States are not permitted to decide for themselves whether they have violated the ICESCR. As per the purpose of ICESCR, the ESCR Committee has that fi-

360 Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 739-771, 765.

361 African Charter arts. 60-61 (permitting broadly the use of "…African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.").

362 It appears that the primary reason for this is a lack of applications lodged before the courts alleging social rights violations.

363 See Tomuschat (2008) 190-191.

364 Nigel S. Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 621-648, 639-641; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002) 167-168.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

nal responsibility.[365] Regarding state practice, states rarely put forward their own interpretation of specific provisions of the ICESCR.[366] Moreover, they tend to accept interpretations of the ESCR Committee, thereby implicitly endorsing them.[367]

The legal significance of general comments is also characterized by their impact on court opinions. Judicial bodies, including domestic courts, sometimes rely on the interpretation of treaty bodies as though they had persuasive authority. For instance, the International Court of Justice (ICJ) modeled its own interpretation of human rights treaties in accordance with the jurisprudence of treaty bodies. Following the interpretations of the U.N. Human Rights Committee (HRC), which is the supervisory body of International Covenant on Civil and Political Rights, the ICJ writes:

> 66. … Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[368]

3.2.2.2. African Commission on Human and Peoples' Rights

The African Commission shoulders the task of interpreting the African Charter through the promulgation of guidelines and principles, which states may use to implement Charter provisions.[369] Its interpretations draw upon relevant international and regional human rights instruments, including the International Covenant for Economic, Social and Cultural

---

365 Alston and Quinn (1987) 163.

366 Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 42 Vanderbilt Journal of Transnational Law 905 (2009) 920-921.

367 Ibid 921.

368 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. Rep. 639, (ICJ 2010) para. 66-67.

369 African Charter art. 45 (1) (b); Udombana (2004) 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' 119.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Rights.[370] The African Charter explicitly permits reliance on a broad range of sources for its interpretation, including "African practices", which do not obviously constitute binding legal sources.[371] Some scholars argue that the Charter even permits the use of 'soft law' or treaties that are not yet in force.[372]

Although it remains doubtful that the Commission's outputs bind African states, some commentators (including, at times, the African Commission) insist that they do.[373] The African Commission's outputs, like those of the ECSCR Committee, nonetheless provide persuasive insight into the normative content of social rights guaranteed by the African Charter, as well as the states' corresponding duties.[374] Moreover, they are legally significant due to their impact on the decisions of judicial bodies. In the same case ICJ cited earlier, the court remarked on its willingness to rely on the interpretations of the African Commission:

> Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter…[375]

Although binding legal norms are preferred for the enforcement of law, non-binding 'soft law' can still be effective in improving state compliance. Rachel Murray and Debra Long have gone so far as to argue that the binding/non-binding distinction is an "unhelpful distraction" for the evaluation of state compliance with the Commission's decisions.[376] Their research concludes that the non-binding status of the African Commission's

370 African Charter arts. 60-61.
371 Ibid art. 61.
372 E.g., Fitzmaurice (2013) 765.
373 R. Murray and D. Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015) pp. 52-56.
374 See ibid 58-61.
375 *Case Concerning Ahmadou Sadio Diallo* para. 67.
376 Murray and Long (2015) 58.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

findings does not preclude compliance by African States.[377] Indeed, Kofi Oteng Kufur argues that by clarifying the meaning of rights, the African Commission is "making the law more determinate", which in turn "creates the conditions for the [States] parties to fulfill their obligations."[378] Murray and Long assert further that in some cases insisting upon the binding effect of the Commission's decisions may be undesirable because doing so would likely result in political backlash and "undermine the overall authority of the African Commission."[379] As some observers have commented, the "persuasive style" of the African Commission's outputs "takes the law as an invitation to dialogue between more or less equal parties", and "the [state] authorities respond better to something that won't criminalise them and where there will be less public criticism, and this may ultimately result in greater compliance."[380]

3.2.2.3. African Committee of Experts on the Rights and Welfare of the Child

The Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is the treaty body charged with interpreting and monitoring the implementation of the African Children's Charter.[381] The African Children's Charter guarantees various social rights.[382] Article 11 lays out the right of children to education, including "free and compulsory basic education." Article 14 guarantees children's right to the "best attainable state of physical, mental and spiritual health".

The Committee's findings offer persuasive interpretations of the Charter in at least two meaningful ways. First, they provide clear guidance on the normative content of the state's minimum core obligation. Second, they contribute guidance on the general obligations of states. For instance, in implementing General Comments of the ESCR Committee, the African Children's Committee agrees that states have obligations to "protect, ful-

377 Ibid 56.
378 Kufuor (2010) 72.
379 Murray and Long (2015) 57.
380 Ibid 16-17 (internal quotation marks and citations omitted).
381 African Children's Charter arts. 32, 42; *Michelo Hunsungule and Others (on Behalf of Children in Northern Uganda) v. Uganda*, Communication No. 1/2005 (ACmERWC 2013) para. 39.
382 African Children's Charter.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

fill, respect and promote."[383] The Committee notes further that although the "general obligation that States undertake is subject neither to progressive realization, nor to available resources",[384] certain specific provisions of the Charter, including the right to health, are subject to these qualifications.[385] The Committee strongly insists that states must fulfill its obligations effectively in accordance with "due diligence" and "reasonableness" standards.[386] The key question is, has a government "take[n] all reasonable steps necessary to fulfill its obligations under the Charter?"[387]

3.2.3. Social Rights and their Normative Content

The text of the ICESCR explicitly recognizes several social rights. These include rights relating to social security, health, education, housing and an adequate standard of living. Although these rights are enshrined in law, their meaning is rather ambiguous as the Covenant leaves key terms undefined. The right to social security is guaranteed to everyone and includes social insurance, although these terms are not defined.[388] Likewise, the Covenant guarantees the right to an adequate standard of living for each person and his or her family, which includes adequate food, clothing and housing as well as continuously improving living conditions, without explicating what precisely constitutes an adequate standard of living, food, clothing, etc.[389] The same can be said of the remaining social rights, which are "freedom from hunger";[390] and the "enjoyment of the highest attainable standard of physical and mental health".[391] The right to education, however, has been fleshed out a bit more.[392] It includes free and compulsory primary education, as well as some degree of secondary, tertiary and fundamental education.[393] Ultimately, however, the Covenant does not en-

383 *Centre for Human Rights, University of Pretoria and La Rencontre Africaine Pour La Defense Des Droits De L'homme v. Senegal*, (ACmERWC 2014) para. 47.
384 *Hunsungule v. Uganda* para. 37.
385 Ibid para. 72.
386 Ibid, paras. 38, 69-70.
387 Ibid, para. 70.
388 ICESCR art. 9.
389 Ibid art. 11 (1).
390 Ibid art. 11 (2).
391 Ibid art. 12 (1).
392 Ibid art. 13 (1).
393 Ibid art. 13 (2).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

dow social rights with sufficient normative content to determine what precisely each right entails. This means that their contents are up for interpretation.

The Committee has developed a body of texts – particularly its General Comments – that are dedicated to interpreting the meaning of Covenant rights. These texts tend to use a teleological style of interpret in order to construct social rights in the broadest way possible, which also allows the Committee to take advantage of the Covenant's call for the *full* realization of social rights. While such a broad interpretation seems harmless since states may achieve these lofty goals progressively, such a construction appears to give social rights an idealistic, rather than legalistic, character.

Regarding the right to adequate housing, the Committee has noted that this includes "the right to live somewhere in security, peace and dignity" rather than a more narrowly constructed notion such as "merely having a roof over one's head".[394] While the Committee recognizes that the adequacy of housing will vary in relation to the given circumstances, it insists that certain aspects of adequacy are inherent to the right to housing.[395] These include security of legal tenure, the availability of services, materials, facilities and infrastructure, the affordability, habitability, accessibility and cultural adequacy of housing, and the proximity of housing to employment and social facilities.[396]

The right to adequate food is similarly interpreted in a broad manner so as to be fully realized "when every man, woman and child…have physical and economic access at all times to adequate food or means for its procurement."[397] This is far from a restrictive construction that would limit the right to "a minimum package of calories, proteins and other specific nutrients."[398] The Committee also incorporates the notion of sustainability into the right to adequate food in order to protect the rights of future generations.[399] Finally, the Committee asserts that the right to adequate food implies that dietary needs must be met and that food must be safe to consume, culturally acceptable (or made acceptable for consumers through

394 General Comment No. 4: The Right to Adequate Housing, Committee on Economic Social and Cultural Rights, U.N. Doc. E/1992/23 (UN 1991) para. 7.
395 Ibid para. 8.
396 Ibid paras. 8 (a) - (g).
397 General Comment No. 12: The Right to Adequate Food (1999) para. 6.
398 Ibid.
399 Ibid para. 7.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

proper labelling, processing and distribution), and both available and accessible.[400]

The right to education is similarly construed in a broad manner, such that the Committee emphasizes four generic aspects: availability, accessibility, acceptability and adaptability of education.[401] The right to technical and vocational training has received additional attention from the Committee. It is said to include a variety of aspects, such as acquiring knowledge and skills which contribute to one's personal development, self-reliance and employability.[402] Once again, the Committee's broad generalization are a way to universalize some basic standards for social right while leaving intact the discretion of each state to determine the particularities of social rights in accordance with the prevailing conditions within the state.

In the case of the right to health, the Committee is careful not to employ the widest possible interpretation. It notes cautiously that the "right to health is not to be understood as the right to be *healthy*".[403] It notes that the state cannot be the guarantor of good health or provide protection against every possible illness or disease.[404] Instead, the right "must be understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[405] This includes freedom to control one's body and health, such as sexual and reproductive health,[406] and freedom from bodily interference, such as torture, experimentation and non-consensual medical treatments.[407] The Committee also notes that normative contents of the right to enjoy the highest attainable standard of health is partly defined, or perhaps limited, by the availability of the state's resources.[408]

In other ways, however, the right to health is understood broadly. It includes the right to a system of health protection, as well as the right to un-

400 Ibid para. 9-13.
401 General Comment No. 13: The Right to Education, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/1999/10 (UN 1999) para. 6.
402 Ibid para. 16.
403 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 8 (emphasis in original).
404 Ibid para. 9.
405 Ibid.
406 General Comment No. 22: The Right to Sexual and Reproductive Health, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/22 (UN 2016).
407 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 8.
408 Ibid para. 9.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

derlying determinants of health, such as access to water, adequate sanitation, food, housing and healthy occupational and environmental conditions.[409] Moreover, the Committee insists upon the generalizable aspects that it has found in other social rights – the availability, accessibility, acceptability and quality of health care – each aspect being adjustable in accordance with prevailing conditions.[410] Finally, the Committee constructs implicit rights from the Covenant's explicit mandate that states achieve a non-exhaustive list of objectives.[411] These rights, some of which overlap with others previously mentioned, include the right to maternal, child and reproductive health, to healthy natural and workplace environments, to prevention, treatment and control of diseases and to health facilities, goods and services.[412]

Perhaps the Committee's most ambitious interpretation of the Covenant is its construction of the implicit right to water, which is not featured explicitly anywhere in the Covenant. The Committee reasons that the right to water must exist because it is a necessary precondition for the realization of almost every other social right, as well as the right to life and the human dignity.[413] It is as if the right to water lurks in all corners of the Covenant. In terms of its generic aspects, this right entails entitlement to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use," as well as water of a decent quality.[414] More specifically, the right to water includes the freedom to maintain access to existing water supplies, free from interferences such as arbitrary disconnections or contamination, as well as "the right to a system of water supply and management".[415]

Finally, the Committee has weighed in on the right to social security. This is perhaps the most difficult right to interpret because the Covenant provides absolutely no definition or explanation for what social security might entail, except to note that it includes social insurance. As such, the Committee relies heavily on Conventions of the International Labor Organization. It notes that the right to social security is essentially the right to

409 Ibid paras. 8 & 11.
410 Ibid para. 12.
411 ICESCR art. 12 (2) (a) - (d).
412 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) paras. 13-17.
413 General Comment No. 15: The Right to Water, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/2002/11 (UN 2003) paras. 3 & 6.
414 Ibid paras. 2 & 12.
415 Ibid para. 10.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

access benefits in order to secure protection from a variety of social risks.[416] These risks include income unaffordable access to health care; insecurity brought on by sickness, disability, maternity, injury, unemployment, old age, or death of a family member; and insufficient family support.[417] In terms of freedoms and entitlements, the right entails freedom from unreasonable restrictions of existing social security coverage, as well as the right to "equal enjoyment of adequate protection from social risks and contingencies".[418] Finally, the Committee articulates the generic aspects of availability, adequacy, and accessibility, which relate to having a transparent social security system in place that includes social assistance and non-contributory schemes with universal coverage.[419]

Unlike the ICESCR, the African Charter only explicitly recognizes two social rights: the right to "the best attainable state of physical and mental health" and the "right to education."[420] However, the African Commission has expanded the scope of protection rather extensively to include a wide range of social rights, often by relying on the ICESCR and the interpretive work of the ESCR Committee.[421] According to its construction of the African Charter, several social rights are implicitly guaranteed, including access to basic shelter, housing, sanitation and safe water;[422] right to food;[423] electricity;[424] protection from arbitrary and forced eviction;[425] access to affordable and reasonable health facilities, goods and services for

416 General Comment No. 19: The Right to Social Security, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/19 (UN 2007) para. 2.
417 Ibid paras. 2 & 10 (2).
418 Ibid para. 9.
419 Ibid para. 10 (1) - (4).
420 African Charter arts. 16 & 17 (1).
421 Ssenyonjo 101-103.
422 *SERAC v. Nigeria, paras. 51- 52, 59-61*; see also Resolution on the Right to Water Obligations, ACmHPR (Feb. 28, 2015).
423 *SERAC v. Nigeria* para. 65; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, Comm. Nos. 279/03, 296/05 (ACmHPR 2009) para 209.
424 *Free Legal Assistance Group and Others v. Zaire (DRC)*, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (ACmHPR 1996) para. 47.
425 *SERAC v. Nigeria* para. 63; see also Resolution on the Right to Adequate Housing and Protection from Forced Evictions, ACmHPR (Oct. 9-22, 2012).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

all;[426] free and compulsory primary education;[427] and affordable vocational training and adult education.[428]

In summary, both the ICESCR and the African Charter enshrine certain social rights but leave much for interpretation, without which the rights would lack substantive content. By means of their interpretive work, the ESCR Committee and the African Commission have stepped in to provide guidance on the normative aspects of social rights. By looking to the object and purpose of their respective treaties, as well as the principle of human dignity, they are able to broaden the scope of protection. The downside is that such broad strokes lend social rights an ambitious and idealistic character. On the other hand, the treaty bodies counterbalance these seemingly lofty goals by leaving states a great deal of discretion to define the concrete peculiarities of each right in accordance with prevailing conditions, especially with regard to what constitutes an adequate amount of benefits. In this way, their interpretive work provides some meaningful normative content while remaining sensitive to the different needs and capabilities among states. It is from this normative framework that the corresponding social rights obligations of states must be understood.

3.2.4. Minimum Essential Levels of Social Rights

The ESCR Committee recognizes that minimum essential levels exist, but often refers to them in rather general terms without specifying precisely their normative contents. Instead, minimum essential levels tend to read like a list of prioritized societal objectives or aims rather than substantive benefit levels. For example, in terms of the right to adequate food, states must act immediately to take "the necessary action to mitigate and alleviate hunger."[429] A state violates its Covenant obligations when, although having the available resources to do so, it "fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from

426 *Purohit v. Gambia* para. 80 (*reaffirmed* in *Egyptian Initiative for Personal Rights & Interrights v. Egypt* Comm. No. 323/06 (ACmHPR 2011) paras. 261, 264). See also Resolution on Access to Health and Needed Medicines in Africa, ACmHPR (Nov. 24, 2008); Resolution on the Health and Reproductive Rights of Women in Africa, ACmHPR (May 16-30, 2007).

427 Resolution on the Right to Education in Africa, ACmHPR (20 April 2016).

428 Ibid.

429 General Comment No. 12: The Right to Adequate Food (1999) para. 6.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

hunger."[430] Here, the prioritized objectives are mitigating and alleviating hunger, although it is not clear what quantity or quality of nutritional intake is needed in order to mitigate or alleviate hunger. Some commentators have noted the wisdom in leaving these normative determinations to the judgement of judicial bodies.[431]

The work of the ESCR Committee has, however, provided some insight into the matter by requiring states to include the results of specified assessments into their regular reporting duties. In this way, the ESCR Committee establishes certain normative standards with respect to each right, which all states must either report to have achieved or explain the reasons for failing to do so. Likewise, the African Commission and the African Children's Committee have also weighed in on the issue, however in slightly different ways. While the Children's Committee has provided normative content for a few social rights, the African Commission has conceptualized minimum essential levels predominately as state duties to respect existing social rights achievements, namely by refraining for destroying them or obstructing one's access to existing resources that are necessary for the enjoyment of social rights. As such, this subsection will discuss the jurisprudence of the Children's Committee as well as the ESCR Committee, but will leave out much of the African Commission's findings.

The Committee asserts that states have an immediate core obligation to ensure non-discriminatory and physical access to minimum essential amounts of safe water that is sufficient to prevent disease, affordable for vulnerable and marginalized groups, within a reasonable distance from the household, available in equally distributed facilities, and can be accessed without a threat being posed to one's personal security.[432] Here, the prioritized objectives are preventing disease, affordability for all, and reasonable and equitable accessibility. Again, the normative specificity is left open for

---

430 Ibid para. 17.

431 Scott and Alston note that,

> While *precise* identification of the minimum… as some objective measures is of course an illusory quest, the responsibility to exercise best judgement in the national and local context cannot be avoided. Courts will of course have to balance reaction to deprivation on a 'calling it as we see it' case-by-case basis with a pragmatic sense of what remedies are desirable and likely to prove effective.
>
> (Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' 16 South African Journal on Human Rights 206 (2000) 250 (emphasis added).).

432 General Comment No. 15: The Right to Water (2003) para. 37.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

interpretation. It is unclear, for example, how much water is needed to prevent disease, or what price point is considered affordable.

The right to adequate housing also corresponds to certain core obligations, though the Committee is much more precise here as to the normative content of these obligations. States must refrain from forcibly evicting people from their homes, which amounts to a *prima facie* violation, and they must take adequate measures to prevent and punish forced evictions carried out by third parties.[433] The Committee notes in *Ben Djazia and Bellili v. Spain* that a forced eviction can occur even when the eviction is due to the expiration of the term of a rental lease between private parties if the State does not guarantee the eviction is compatible with Covenant rights and duties.[434] Moreover, "evictions should not render individuals homeless", since the State must "ensure, where possible, that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[435] The Committee found Spain violated the authors' right to adequate housing because it did not sufficiently demonstrate why no alternative housing was made available for the authors and their small children to prevent homelessness after they were evicted from their rental property.[436] Here, is it quite clear that the minimum essential level for the right to adequate housing is to be free from forcible eviction and homelessness, which includes the right to receive adequate notice about legal action that could result in the loss of housing.[437]

The Committee also sets objectives for minimum essential levels regarding the rights to education and the highest attainable standard of health. As for the right to health, the state must ensure, *inter alia*, equitable access to health services and goods without discrimination, access to minimum essential food and freedom from hunger for everyone, and providing essential drugs.[438] Likewise, objectives are set for the right to education, such

---

433 General Comment No. 7: The Right to Adequate Housing - Forced Evictions, Committee on Economic Social and Cultural Rights, U.N. Doc. E/1998/22, annex IV (UN 1997) paras. 8-9; General Comment No. 4: The Right to Adequate Housing (1991).

434 *Ben Djazia and Bellili v. Spain*,U.N. Doc. E/C.12/61/D/5/2015, Communiciation No. 5/2015 (CESCR 2017) (U.N.) paras. 14.1 - 14.2.

435 Ibid para. 15.2.

436 Ibid paras. 17.1 - 17.8.

437 *Idg v. Spain*,U.N. Doc. E/C.12/55/D/2/2014, Communiciation No. 2/2014 (CESCR 2015) (U.N.).

438 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 43.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

as, *inter alia*, access to public educational programs that are free from discrimination, provide compulsory and free primary education for all, and ensure that – subject to minimum educational standards – education may be chosen freely without state or third party interference.[439] Moreover, the text of the Covenant also sets objectives regarding the right to education, such as the full development of the human personality and the sense of dignity, strengthening respect for human rights, enabling people to participate effectively in a free society, promoting tolerance and friendship among all national, ethnic, racial and religious groups, and furthering the activities of the UN with respect to maintaining peace.[440] Once again, these minimum essential levels do not indicate what quality of health or education is required to guarantee that the prioritized objectives will be obtained.

The African Children's Committee provides further guidance on minimum essential levels for the rights of children to health and education. In *Centre for Human Rights and Other v. Senegal*, [441] the African Children's Committee considered a case involving a certain group of Senegalese children, referred to as *talibés* students, who were allegedly in the care of exploitive private entities called *daraas*. The African Children's Committee concluded that the state violated the rights of these children to health and education in part by failing to provide them with adequate education and primary health services.

Regarding the right to the best attainable health, the African Children's Committee noted that a "[f]ailure to provide safe drinking water amounts to a violation",[442] of the African Children's Charter, and that states must "ensure the provision of adequate nutrition".[443] The African Commission has echoed the same in *Social and Economic Rights Action Center and Other vs. Nigeria*, whereby the Commission announced that a "failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine… constitutes a violation of Article 16" of the African Charter.[444]

As for the right to education, states must provide "free and compulsory basic education without any discrimination", which the African Children's

439 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 5; General Comment No. 13: The Right to Education (1999) paras. 51 & 57.
440 ICESCR art. 13 (1).
441 *Centre for Human Rights v. Senegal.*
442 Ibid, para. 52.
443 Ibid, para. 51.
444 *SERAC v. Nigeria, para. 47.*

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Committee notes is a position supported by the African Commission's construction of the African Charter on Human and Peoples' Rights.[445] The education provided must be of acceptable quality and "should be directed toward the child's personality, talents and mental and physical abilities to their fullest potential". [446] The *daraas* did not provide the *talibés* children with an adequate education. Additionally, rather than charge school fees, *daraas* forced *talibés* students to meet daily begging quotas, which kept students away from their studies for many hours per day, thereby depriving them of an adequate education.

The African Children's Committee concluded that Senegal failed to provide "necessary sanitation and nutrition to the *talibés*", in violation of their right to the best attainable health,[447] and failed to fulfill its obligation "to provide free and compulsory education to all children". [448] The Committee reasoned:

> The Respondent State, however, has failed to provide free and compulsory education to all children in accordance with the Charter. Consequently the *talibés* are forced to attend in the *daaras* where they are not subject to school fees except for the daily quota they should bring by begging. Nevertheless, the children do not get the necessary education they are entitled to in the *daraas*… as they spend more time in begging to fulfill their daily quota. In addition, the government failed to provide the necessary curriculum and facilities in which the *daraas* function in delivering education.[449]

In an earlier decision, the African Children's Committee fleshed out in greater detail the rights of children to health and education. That decision, which was supported in part by a parallel case decided on the same facts by the African Commission,[450] is *Institute for Human Rights and Development in Africa and Other v. Kenya*.[451] There, the African Children's Committee dealt with the discriminatory denial of nationality to Kenyan-born chil-

445 *Centre for Human Rights v. Senegal, para. 46.*
446 Ibid, para. 46.
447 Ibid, para. 56.
448 Ibid, para. 48.
449 Ibid, para. 48.
450 *The Nubian Community in Kenya v. The Republic of Kenya*, 317/06 (ACmHPR 2015).
451 *Institute for Human Rights and Development in Africa and Other on Behalf of Children of Nubian Decent in Kenya v. Kenya*, No. 002/Com/002/2009 (ACmERWC 2011).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

dren of Nubian descent. The complainants argued that without nationality cards, Nubian-descendent children were systematically excluded from public services, including essential health and education services. Although the Committee found Kenya had violated the rights of Nubian children on discriminatory grounds, this case is nonetheless relevant because it contributes persuasive guidance on the normative content of the state's core obligation with respect to health and education.

After reaffirming that the state must provide "free and compulsory basic education", the Committee went further to clarify what tangible provision must be made in terms of education. The Committee noted that providing basic education "necessitates the provision of schools, qualified teachers, equipment and the well recognised corollaries of the fulfillment of this right."[452] Regarding the right to health, the Committee expands the notion to include the provision of services necessary for health, namely electricity, water and medicine. Reasoning that "the underlying conditions for achieving a healthy life are protected by the right to health", the Committee concludes that "the lack of electricity, drinking water and medicines amount to a violation of the right to health."[453]

Regarding the right to social security, states must, at the very least, "respect existing social security schemes and protect them from unreasonable interference",[454] which includes protecting "self-help or customary or traditional arrangements for social security" as well as "institutions that have been established by individuals or corporate bodies to provide social security."[455] In *Rodríguez v. Spain*, the Committee noted that the minimum essential level associated with the right to social security is "access to a social security scheme" for all people that will "enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education."[456] Non-contributory schemes or assistance must be provided to those who "are unable to make sufficient contributions for their own protection."[457] With regard to welfare benefits in particular, the right to social security entails access to social welfare benefits, whether in cash or in kind, that are "adequate in amount and duration in order that everyone may realize his or her rights to family

452 Ibid, para. 63.
453 Ibid, para. 59.
454 General Comment No. 19: The Right to Social Security (2007) para. 59.
455 Ibid paras. 44-45.
456 *Rodríguez v. Spain*,U.N. Doc. E/C.12/57/D/1/2013, Communiciation No. 1/2013 (CESCR 2016) (U.N.) para. 10.3.
457 Ibid para. 10.4.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

protection and assistance, an adequate standard of living and adequate access to health care."[458] Again, the Committee provides a list of prioritized objectives, such as enabling people to access basic shelter, but does not specify what amount or duration of benefits is necessary to achieve these objectives.

3.3. NGO-Government Relations: How Things Can Go Wrong For Beneficiaries

Here, the chapter turns to the relationship between NGOs and governments in order to examine how that relationship might interfere with the social rights of beneficiaries. Although drawn mostly from sociological and political disciplines, this information provides my legal analysis with the theoretical framework that is necessary in order to deduce that the regulation of nonprofit entities might in fact interfere with the social rights of beneficiaries. Political and social scientists have examined and evaluated the relationships of the government with non-state service providers (NSPs), as well as NGOs in general. This body of research also examines the regulatory measures that govern NSPs. Literature from these disciplines supports two key assertions. First, that in low-income countries that depend on the charitable provision of services, such as African LDCs, the relationship between NSPs and the government can have a significant impact on the social wellbeing of beneficiaries. And second, that a balanced regulatory framework for NSPs is essential to the wellbeing of beneficiaries. This section will review these findings in order to position my legal analysis within a theoretical background that explains why legal environments that enable and permit nonprofit provision are necessary for the realization of social rights in African LDCs.[459]

Because scientific studies demonstrating a clear causal link between poor NGO-government relations and deteriorating social rights of beneficiaries are unavailable or simply too difficult to find, anecdotal evidence is relied upon at times to illustrate that, in general, soured NGO-government relations tend to, or at least *could*, be detrimental to the realization of social rights in countries where nonprofit entities provide essential service. The objective here is to provide empirical evidence for the claim that NGO-

458 Ibid paras. 10.1 - 10.2.

459 See Ordor (2014) (providing a law and development perspective on how an enabling legal environment for nonprofit organizations also promotes development objectives in Africa.).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

government relationships, and particularly those of a regulatory nature, matter for the realization of social rights in African LDCs, and thus that the social rights of beneficiaries should be taken into account when evaluating the legality of NGO laws.

3.3.1. NGO-Government Relations

In countries where NGOs are major players in the delivery of social services,[460] the relationship between NGOs and the government is more likely to affect the social rights of beneficiaries. If NGO-government relations harden, deteriorate or become combative, beneficiaries' wellbeing and their access to social services are at risk.[461] If, on the other extreme end, their relations are too tangential and the government does without basic regulatory measures, then beneficiaries are vulnerable to abuse or neglect by unrestrained private entities. In order to evaluate whether the state is fulfilling its social rights obligations in countries that depend on the non-profit sector for service provision, one must take into account how the relationship between the NSPs/NGOs and the government might promote or interfere with those rights. I will be using the terms NSPs and NGOs interchangeably to refer generally to not-for profit nongovernmental service providers.

---

460 See, e.g., Gaspar K. Munishi, 'Social Services Provision in Tanzania: The Relationship between Political Development Strategies and NGO Participation' 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) 141, 149-150;Abel G. M. Ishumi, 'Provision of Secondary Education in Tanzania: Historical Background and Current Trends' 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) 153, 156-157; Fabius Passi, O., 'The Rise of Peoples' Organizations in Primary Education in Uganda' 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) 209, 220-221.

461 An extreme example of this occurred between the '60s and '80s when the Tanzanian government took over secondary schools operated by NSPs as part of a socialist nationalization agenda. Since the government lacked the resources needed to operate all the schools, its forcible acquisition severely limited access to secondary education. Analysts mark this period as "an irreparable secondary education setback in school and enrolment expansion, which has continued to cause Tanzania to lag behind its neighbours." (Ishumi 156-157.).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

3.3.1.1. Complications of the NGO-Government Relationship

Several developmental and political factors influence the relationship between NSPs and the government because that relationship sits within a larger web of relationships. At the core of most academic literature on this issue is an acknowledgment that NSPs are part of a wider social network that influences their relationships with government agencies.[462] As Mina Silberberg notes, "Nongovernmental organizations operate within a specific context that conditions the choices they can make and the effects of those choices."[463] This context includes other NSPs, various public bodies, donors, internal NSP staff, members and beneficiaries. NSPs rely on their social capital, which means they draw on their social networks for resources.[464] Developing and maintaining fruitful social networks is essential for raising capital in the nonprofit world. Complications can arise when the interests held by different actors with their networks come into conflict with one another.

The wide-reaching network of NGOs is implicated within the commonly debated themes in African politics relating to the defense of state sovereignty and maintenance of national independence.[465] In part, the NGO's relationship with government depends on the particular composition of the NGO's social network. Critics express concern that NGOs serve the interests of foreign entities that lay beyond the government's control, rather than their beneficiaries.[466] In other words, NGOs can appear to serve many masters. Some states call into question the autonomy and trustworthiness of NGOs that have strong ties to foreign donors. From both a technical and political perspective, the more robust that an NGO's social capital is, the less dependent the NGO is upon the government as a fund-

---

462 See Kelly Teamey, *Whose Public Action? Analysing Inter-Sectoral Collaboration for Service Delivery* (2007) 16, 36.

463 Mina Silberberg, 'Balancing Autonomy and Dependence for Community and Nongovernmental Organizations' 72 Social Service Review 47 (1998) 49.

464 Social capital is "the sum of resources, actual or virtual, that accrue to an individual or a group by virtue of possessing a durable network of more or less institutionalised relationships of mutual acquaintance and recognition." (Teamey (2007) 16 (citing Pierre Bourdieu and Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992)).).

465 Bratton (1989) 'The Politics of Government-NGO Relations in Africa' 573; Sangeeta Kamat, 'The Privatization of Public Interest: Theorizing NGO Discourse in a Neoliberal Era' 11 Review of International Political Economy 155 (2004) 159.

466 Kamat (2004) at 160.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

ing source, and the less regulatory influence the government can exert on the NGO through funding contingencies and financial incentives. Since many NGOs rely on foreign funding, they may be pressed into subservient roles in relation to donors rather than serving national social policy objectives. Under such circumstances, the only prominent regulatory tool that remains at the government's disposal, other than its penal law, is a supervisory framework that imposes strict registration and programming requirements.

3.3.1.2. The Peculiarities of Regulating NGOs in Informal Security Regimes

To understand how the regulation of NSPs might require special attention in the context of Africa's LDCs, it is helpful to borrow Ian Gough's concept of informal security regimes, which is an effort to model welfare systems in developing countries.[467] Gough contends that scholars can no longer apply the welfare state regime paradigm to developing countries without "a radical reconceptualization"; meaning "there must be a broadening of focus from *welfare state regimes* to *welfare regimes*."[468] He proposes a broader analytical framework than the more narrowly constructed notion of the *welfare state regime* so as to generalize the latter away from its Western liberal philosophical underpinnings. Gough explains,

> In particular, the welfare mix must be extended beyond "the welfare state," financial and other markets, and family/household systems. The important role of community-based relationships must be recognized, ranging from local community practices to NGOs and clientelist networks. In addition, the role of international actors cannot be ignored as it often has been in the welfare state literature: this embraces aid, loans, and their conditions from international governmental organizations, the actions of certain transnational markets and companies, the interventions of international NGOs, and the cross-border spread of

467 Others have also noted the limited capacity of African states to implement and enforce their rules in the field of social policy, as well as the need for further research on the role of non-state social protection in governance within the context of limited state capacity. (Awortwi and Walter-Drop at 5-7.).

468 Ian Gough, 'Mapping Social Welfare Regimes Beyond the OECD' in Melanie Cammett and Lauren M. MacLean (eds), *The Politics of Non-State Welfare* (Cornell University Press 2014) 17-30, 19.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> households via migration and remittances. The result is an extended *welfare mix* or *institutional responsibility matrix*…[469]

While, in theory, the classical welfare state regime is generally thought of as a "relatively autonomous" institutional landscape characterized by the "welfare mix of market, state and family", the informal security regime features a state that is "weakly differentiated from other power systems" and is situated within a "broader institutional responsibility matrix with powerful external influences".[470] Hence, for the informal security regime, it is presumed from the outset that "people rely heavily on *non-state* institutions and relationships … to meet their security needs",[471] which resonates with the circumstances in African LDCs. Gough's work also includes a third regime type for developing countries, which he refers to as the "insecurity regime". Statistical analysis of empirical data appears to confirm Gough's assertion that welfare regimes in developing countries tend to cluster into these three meta-types.[472]

In the welfare state regime, restrictive NGO laws may cause little or no harm to the social rights of beneficiaries, because the state ensures social rights more or less autonomously through the welfare mix of market, state and family. Even if NGOs provide services within the welfare state regime, the state is capable of replacing their services in the event that the NGO is dissolved. In such cases, the liberal rights of NGOs are understandably the primary human rights claims of concern. In an informal security regime, however, restrictive NGO regulations are much more likely to have an amplified effect on the social rights of beneficiaries because non-state actors can play a much bigger role in the realization of social rights. [473] A rather extreme example of this scenario occurred in Sudan within the last decade.

Sudan is an example of an informal security regime (or even what Gough refers to as an *insecurity* regime). As such, its institutional responsibility matrix includes external actors like international NGOs, and people rely heavily on non-state institutions, including the informal and nonprof-

---

469 Ibid.

470 Gough, 'Welfare Regimes in Development Contexts: A Global and Regional Analysis' 32, Figure 1.3.

471 Gough, 'Mapping Social Welfare Regimes Beyond the OECD' 19 (emphasis in original).

472 Ian Gough and Miriam Abu Sharkh, 'Global Welfare Regimes: A Cluster Analysis' 10 Global Social Policy 27 (2010).

473 Geof Wood, 'Informal Security Regimes: The Strength of Relations' in Ian Gough and others (eds), *Insecurity and Welfare Regimes in Asia, Africa and Latin America* (Cambridge University Press 2004) 49-87, 50.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

it sectors, so social protection. Any reduction in social services would be especially dire because its institutions already struggle to provide adequate and sufficient services. For example, one study describes the inadequacy of emergency and basic health services in Sudan:

> Prolonged conflict in Sudan has disrupted the health system; much of the infrastructure has either been destroyed or needs to be repaired. As a result of the use of dilapidated buildings and a lack of necessary equipment, many health facilities are not currently functional. This situation also applies to various programs as well. The referral system between the different levels is still rudimentary.
> Despite governmental requirements, overall basic health service coverage is low. There are also significant urban, rural, and regional disparities in the availability of health resources and services. Many of the health facilities either do not function or do not satisfy minimum requirements. [474]

Within this context, in 2009, the Sudanese government expelled several international humanitarian NGOs, citing criticism of NGO accountability and credibility.[475] Commentators insist the "expulsions were plainly retaliatory" against international NGOs and the international community in general since they occurred the very next day after the International Criminal Court indicted Sudanese President Omar Hassan al-Bashir for crimes allegedly committed in Darfur.[476] Aid agencies, including the United Nations,[477] warned that the expulsions would have a devastating impact on

474 A. A-Rahman, Gabrielle A. Jacquet and Nada Hassan, 'The State of Emergency Care in the Republic of the Sudan' 4 African Journal of Emergency Medicine 55 (2014) 57-58; see also, *Oncology Services in Sudan: Realities and Ambitions, Conference Report,* Sudanese Medical Association UK & Ireland, (2013) (recent decades have seen a rising cancer epidemic in Sudan); Yousra Elbagir, 'Patients over Politics: Sudanese Breast Cancer Clinic That Beat Sanctions' *The Guardian* (1 Oct. 2016) <https://www.theguardian.com/world/2016/oct/01/patients-over-politics-sudanese-breast-cancer-clinic-that-beat-sanctions> (reporting that there are only two radiotherapy machines in the country).

475 See 'Sudan Expels 10 Aid NGOs and Dissolves 2 Local Groups' *Sudan Tribune* (4 Mar. 2009) <http://www.sudantribune.com/spip.php?article30382>.

476 Jenkins (2012) 494-499.

477 'Statement Attributable to the Spokesperson for the UN Secretary-General' *United Nations Secretary-General* (5 Mar. 2009) <https://unamid.unmissions.org/statement-attributable-spokesperson-un-secretary-general-0>.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the delivery of social services and humanitarian aid in Sudan.[478] And, in fact, it did. According to one report, the expulsion reduced access to health care, water, sanitation, hygiene and food aid to over 1 million people.[479] Informal security regimes are severely limited and open systems of social protection with heavy reliance on external resources and actors. For this reason, the realization and enjoyment of social rights within such regimes are particularly sensitive to shocks within the informal and non-state sectors.

The emergence of non-state service provision in African states must be viewed with a certain degree of caution, and warrants the state's imposition of at least a minimal regulatory scheme to ensure the protection of social rights. As Geof Wood has stressed in his analysis of Gough's informal state regimes, "there cannot be a naïve optimism about the role of a 'progressive' civil society as compensating for the state." Wood explains the pitfalls of non-state provision by building upon Gough's concept of an informal security regime and employing what he terms "a peasant analogue".[480] He argues that the relationships between non-state institutions and the poor are often themselves hierarchical and asymmetrical, particularly in sub-Saharan Africa and South Asia.[481]This tends to lead to problematic inclusion, whereby (informal) rights are embedded into hierarchical relationships, and operate "within relations of adverse incorporation and clientelism".[482] This structural mechanism perpetuates the very same preconditions of poverty that have long undermined the sustained and meaningful resilience of the poor.[483] Hence, "poorer people acquire some short-term assistance at the expense of longer-term vulnerability and dependence."[484]

Ultimately, Gough's and Wood's conceptualization of informal security regimes presents a challenging conundrum for social rights lawyers and

---

478 See, Louis Charbonneau, 'Sudan Expulsion of NGOs Leave Aid Gap - UN' *Reuters* (9 Mar. 2009) <https://www.reuters.com/article/idUSN09481219>; 'NGO Expulsion to Hit Darfur's Displaced' *IRIN News* (Khartoum, 9 Mar. 2009) <http://www.irinnews.org/news/2009/03/09/ngo-expulsion-hit-darfurs-displaced>; 'Health Fears as Sudan Expels NGOs' *Aljazeera* (5 Mar. 2009) <http://www.aljazeera.com/news/africa/2009/03/200935174114968814.html>.

479 U.S. Dep't of State, 2009 Human Rights Report: Sudan (Mar. 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/2009/af/135978.htm.

480 Wood 55 (internal quotation marks omitted).

481 Ibid 72-79 ; see also Bratton (1994) Institute for Development Research, *Civil Society and Political Transition in Africa* 8-9.

482 Wood 77.

483 Ibid.

484 Gough, 'Mapping Social Welfare Regimes Beyond the OECD' 20.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

development policymakers: pro-poor regulatory frameworks within informal security regimes should neither leave the social rights of the poor in the unbridled hands of non-state actors, nor overwhelm existing informal systems of security. A law that regulates nonprofit providers must—if it is to remain vigilant against social rights violations—strike an appropriate balance between promulgating burdensome regulations on the one hand, which invites corruption, clientelism and non-compliance, and failing to provide an adequate regulatory framework on the other, which leaves beneficiaries vulnerable to the outcomes of uncontrolled (and likely hierarchical) relations with NSPs. The following sub-sections offer further discussion on how a failure to strike this balance within LDCs can result in interferences with the social rights of beneficiaries.

3.3.1.3. NSP-Government Relations can interfere with Social Rights

All forms of government-NSP relations, even celebrated official partnerships, can result in an interference with the social rights of intended beneficiaries if the due care is not taken to prioritize the rights of beneficiaries. A Kenyan example, in which the government partially funded certain community-operated schools, is a case in point. There, community-level NSPs partnered with the government to open *harambee* primary schools, of which only some were supported by public funds.[485] *Harambee* schools served to minimize the enrollment gap left by government schools in underserved communities, yet they were poorly funded and the quality of their education was quite modest in comparison to government schools. However, the problem did not arise from a lack of state resources to fund the *harambee* schools. Rather, it was that the private provision of primary education freed up government resources that were then invested into Universities, leaving primary students underfunded.[486] This contravenes the state's core obligation to prioritize primary education over higher forms of education, and to ensure that such basic education is compulsory and free.[487] Although *harambee* schools were run by community-based organizations, the state retained the primary obligation to fulfill the right to free and compulsory primary education.

485 Makau 99-100.
486 Ibid.
487 This obligation of the state is discussed later in greater detail in part 0on the minimum essential levels of social rights.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Often when government-NSP relations pose a threat to the realization or enjoyment of social rights, that improper interference disproportionately impacts vulnerable groups of beneficiaries. This is evident in the Kenyan example above. By rerouting public funds into Universities and leaving the *harambee* schools in the underfunded hands of community based organizations, the government was deepening structural poverty and perpetuating inequitable access to education, especially since *harambee* students were also less likely to gain admission into Universities and thus less likely to benefit from the redirected educational funds.[488] This is inconsistent with the obligation of states to prioritize the most vulnerable members of society, even as they take steps towards progressively realizing social rights.

Because NSP-government relations involve dynamic two-way exchanges, relationships that get stuck in a damaging feedback loop will likely serve to reinforce, rather than to alleviate, the deterioration of social rights. For instance, a government that mistrusts NGOs might hamper service provision by passing restrictive NGO laws. As discussed earlier, this is especially burdensome for structurally marginalized or vulnerable groups in LDCs because they are most in need of charitable services. However, since the continued marginalization of vulnerable groups tends to indicate governmental neglect or abuse, efforts by NGOs to assist vulnerable communities through addressing structural barriers might position them in a critical or confrontational stance *vis a vis* the government. In other words, the NGOs' focus on serving vulnerable groups by tackling structural obstacles tends to highlight the need for greater governmental accountability and redress. This could deepen an NGO-government relationship based on the exchange of mistrust, confrontation and avoidance, which, when entrenched within a system of structural marginalization, tends to reinforce – rather than alleviate – the social risks faced by the most vulnerable members of society. Consider briefly, as an example, how a climate of mistrust and criticism growing between NGOs and the government of Egypt recently affected the provision of services used by a group that was particularly vulnerable to structural impediments: victims of police torture. Albeit not an example from an African LDC, the following incident in Egypt is conceptually useful as an illustration of the rather generalizable mechanism that was elaborated above.

After the protests and subsequent regime change of 2011, the Egyptian government clamped down on NGOs with foreign funding. The government froze NGOs' accounts and arrested and prosecuted their key leaders,

488 Makau 99-100.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

some of whom faced lifetime sentences under the foreign funding law of 2014.[489] By July 2016, the government had dissolved over 400 NGOs, in some cases claiming that NGOs had maintained ties with terrorist organizations.[490] Some estimated that over 1,300 NGOs had been dissolved, including schools and hospitals.[491] In February 2016, the government ordered the closure of an anti-torture NGO called the El Nadeem Center, which was the country's leading institution for the rehabilitation of torture victims and victims of violence.[492] In addition to providing torture victims with counselling and legal assistance, the NGO regularly issued reports on torture perpetuated by the Egyptian police as part of its efforts to address structural problems relating to police brutality.[493] In its attempt to shut down the El Nadeem Center, the government accused it of violating licensing laws, which the NGO vehemently denied.[494] Representatives of the NGO believe it was being targeted because it was a "voice of dis-

489 'Egyptian Court Approves Asset Freezes in High-Profile NGO Trial' *Thomson Reuters Foundation* (Sept. 17, 2017) <http://news.trust.org/item/20160917125847-us9sg>; 'Civic Freedom Monitor: Egypt' (*International Center for Not-for-Profit Law*) <http://www.icnl.org/research/monitor/egypt.html#analysis>.

490 'Social Solidarity Ministry Shutters at Least 39 More NGOs, over 400 Closed This Year' *Mada Masr* (July 8, 2015) <https://www.madamasr.com/en/2015/07/08/news/u/social-solidarity-ministry-shutters-at-least-39-more-ngos-over-400-closed-this-year/>.

491 'Egypt Dissolves 57 NGOs for Brotherhood Links' *Middle East Monitor* (Sept. 7, 2015) <https://www.middleeastmonitor.com/20150907-egypt-dissolves-57-ngos-for-brotherhood-links/>; 'Egypt Government Seizes More Hospitals, Firms Owned by Muslim Brotherhood' *Ahram Online* (June 23, 2016) <http://english.ahram.org.eg/NewsContent/1/64/226670/Egypt/Politics-/Egypt-government-seizes-more-hospitals,-firms-owne.aspx>; 'Three International Schools Shut Down, 28 Warned' *Egypt Independent* (Apr. 20, 2016) <http://www.egyptindependent.com/news/three-international-schools-shut-down-28-warned>.

492 'Egypt: Unprecedented Crackdown on NGOs' *Amnesty International* (Mar. 23, 2016) <https://www.amnesty.org/en/press-releases/2016/03/egypt-unprecedented-crackdown-on-ngos/>; 'Egypt's Health Ministry Orders Shutdown of Anti-Torture NGO El-Nadeem' *Ahram Online* (Feb. 17, 2017) <http://english.ahram.org.eg/NewsContent/1/0/187869/Egypt/0/Egypts-health-ministry-orders-shutdown-of-antitort.aspx>.

493 Amro Hassan, 'This Group Stood up to Egypt's Crackdown on Human Rights Organizations' *Los Angeles Times* (Apr. 5, 2015) <http://www.latimes.com/world/middleeast/la-fg-egypt-dissident-crackdown-20160405-story.html>.

494 'Anti-Torture NGO El-Nadeem Rejects Health Ministry's Reasons for Shutdown' *Ahram Online* (Feb. 25, 2016) <http://english.ahram.org.eg/NewsContent/1/64/188500/Egypt/Politics-/Antitorture-NGO-ElNadeem-rejects-health-ministrys-.aspx>.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

sent".[495] In the end, it was the NGO's provision of services and assistance to this vulnerable group of torture victims that drew public attention to the government's responsibility for their injuries, and it was the same vulnerable beneficiaries who bore the brunt of this volatile relationship between the NGO and the government when the NGO's operation came under attack.

3.3.2. Regulating Nonprofit Providers: Challenges and Pitfalls

The protection of social rights in African LDCs requires a balanced and clear regulatory framework for nonprofit providers. Both inadequate and burdensome regulations undermine the social rights of beneficiaries. The former leaves NGOs unchecked while the latter limits their capacity for service. Salamon and Toepler use supply-side and demand-side economics to theorize how regulatory mechanisms can enhance the nonprofit sector or cause it to shrink and deteriorate.[496] For example, laws that restricted many activities, set up barriers to establishment or burdened the financial viability of nonprofit organizations were likely to increase the transaction costs to nonprofits of coming into existence or persisting. On the demand side, laws that forbid nonprofit entities from distributing profits, as well as laws that establish reporting, transparency, registration and public participation requirements make it easier for beneficiaries to trust, approach and engage nonprofit entities.

Edward Mac Abbey refers to this balanced approach as "constructive regulation", and insists upon the government's use of varying degrees of regulatory control over NGOs depending on the capacity of the NGOs to bear compliance costs and the risk that they might cause injury to beneficiaries.[497] From an empirical perspective, Sophie Trémolet *et al.* found that the regulation of non-state water and sanitation provision in certain developing countries demonstrated that

> …regulation…can play a decisive role in making water and sanitation services more accessible to the poor in providing private operators with the right incentives to serve them. But … regulation can [also] in-

495 Hassan (2015).

496 Lester M. Salamon and Stefan Toepler, Center for Civil Society Studies, *The Influence of the Legal Environment on the Development of the Nonprofit Sector* (2000).

497 Abbey (2008) 375-376 (articulating three levels of regulatory control: minimal regulation, self-regulation and formal regulation).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> troduce obstacles to serving the poor, for example when small-scale private providers are relegated to illegality and are thereby not encouraged to further develop services to fill the gap opened by insufficient coverage by the main operator.[498]

Overly burdensome or complicated regulations are also particularly problematic for LDCs because they are difficult for the state to enforce and implement. States that lack the administrative capacity or the political will to implement all regulations that they promulgate are susceptible to corruption and clientelism, which in turn undermines the enjoyment and realization of social rights. Since, the complexity and sheer quantity of regulatory measures placed upon nonprofit providers can have as deleterious an effect on the welfare of beneficiaries in African LDCs as the lack of regulatory oversight, a balance must be struck between the two forms of regulatory control. Susannah H. Mayhew contends that striking a balance within the regulatory framework will depend on the government's accountability and capacity to develop and enforce regulation, NGOs' legitimacy and capacity to meet objectives, and the political will of both parties to engage one another constructively.[499] The follow sections will similarly review various pitfalls and challenges of regulatory control over NGOs with special reference to the relative capacities of the government and NGOs.

3.3.2.1. Irrationality, Corruption and Arbitrary Implementation

Laws and regulations must be rational as a basic requirement of the rule of law. Irrational regulations open the door to unreasonable or even corrupt implementation because they invite administrators to act arbitrarily. Consider again the South African case from Free State, which was discussed at length in the opening chapter.[500] This case illustrates how irrational or unreasonable funding regulations can pose a real danger to the enjoyment and realization of social rights. Having recognized NGOs as partners and key players in the delivery of social services, the government of South Africa chose to extend its social services by providing funding to service-

498 Sophie Trémolet, *Adapting Regulation to the Needs of the Poor: Experience in 4 East African Countries*, Building Partnerships for Development in Water & Sanitation, (BPD Research Series, 2006) 2 <https://www.ircwash.org/sites/default/files/Tremolet-2006-Adapting.pdf>.

499 Mayhew (2005) 749-754.

500 See *supra* chapter 0.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

oriented NGOs.[501] The court in the province of Free State evaluated the constitutionality of the NGO funding policy guidelines promulgated by the provincial government. It found that irrational funding measures enabled arbitrary funding outcomes, leading to the loss of precious resources that were urgently needed for the realization and enjoyment of social rights in Free State. The court concluded that the irrationality of the NGO funding policies had a deteriorating effect on the realization of social rights, and it was upon this rationale that it ordered the government to revise its funding policy and supervised the revision process with a high level of scrutiny.

Corruption at the stage of implementation certainly undermines the realization of social rights. In another South African example concerning the funding of community health workers (CHWs) in the province of Gauteng, poor implementation of the government's funding model resulted in the interruption of services that were sorely needed for the protection of health. CHWs are vital to the health care system in South Africa because they connect vulnerable and poor households to the health care and social services that they need but would otherwise have difficulty accessing.[502] However, without proper support, the CHWs are unable to do their work. State funding in this particular province was offered to NGOs who in turn hired CHWs, but the funding mechanism of the state was inadequate and fell into disorder. One court found that the government's funding model become "increasingly unworkable, occasioning extended work-stoppages".[503] The court noted that, "The factors contributing to this included widespread corruption…includ[ing] the funding of NPOs [non-profit organizations] operated by officials and non-payment or underpayment of CHWs."[504] The negative impact on the social rights of households was evident. The CHWs in Gauteng were less effective than their counterparts in

501 Policy on Financial Awards to Service Providers, Department of Social Development, Ministry of Social Development, (S Afr 2003) <http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=34&Itemid=39> ("Historically, social welfare services have been a joint responsibility of government and civil society, with government providing financial support to organisations through subsidisation.").

502 Maryse C. Kok and others, 'Optimising the Benefits of Community Health Workers' Unique Position between Communities and the Health Sector: A Comparative Analysis of Factors Shaping Relationships in Four Countries' 12 Global Public Health 1404 (2017).

503 *Mokoena and Others v. Mec Gauteng Department of Health: Mahlangu N.O*, 2016 ZALCJHB 98, J 352/16 (Labour Ct. Johannesburg 2016) (S. Afr.).

504 Ibid.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the province of Eastern Cape largely due to the fact that Gauteng CHWs were funded irregularly and inadequately through the province's funding model, while those in Eastern Cape received the support they needed through NGOs that paid them from private funding sources.[505] Without proper implementation of nonprofit regulations, inefficiencies and corruption are likely to threaten the realization of social rights.

3.3.2.2. Limited State Capacity to Implement Regulations

When a public body has promulgated more regulations than it has the capacity to enforce, a dysfunctional bureaucratic setting emerges wherein more rules exist than can be implemented.[506] Under such circumstances, administrators will need to choose which regulations to enforce at any particular moment. This leaves them with vast executorial discretion and increases the risk that dysfunctional practices will arise from a conflict of interests, such as clientelism and corruption.[507] The problem of overregulation is pronounced whenever the interests of the government come into conflict with the social rights of beneficiaries. This can occur when the government aims to suppress political dissent, or control and redirect foreign funds intended for NGOs.[508] Richard Batley asserts that 'pro-service' regulations are most likely to occur when the state regulates within its capacity.[509] These problems are particularly challenging for LDCs in Africa

505 Nonhlanhla Nxumalo, Jane Goudge and Lenore Manderson, 'Community Health Workers, Recipients' Experiences and Constraints to Care in South Africa – a Pathway to Trust' 28 AIDS Care 61 (2016).

506 Gregor Dobler, 'Private Vices, Public Benefits? Small Town Bureaucratisation in Namibia' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012) 217-232, 222-226.

507 Ibid.

508 See Richard Batley and Claire Mcloughlin, *State Capacity and Non-State Service Provision in Fragile and Conflict-Affected States,* Governance and Social Development Resource Centre (2006) 34 <http://www.gsdrc.org/docs/open/eirs3.pdf>; Mayhew (2005) 782.

509 Batley and Mcloughlin (2006) 21 ("…cases of effective (pro-service) regulation were likely to occur where the regulator had information, was capable of enforcing standards, had no incentive to repress non-state providers, and where providers have incentives to comply").

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

where governments lack the capacity to enforce all regulatory requirements imposed upon non-state providers.[510]

Richard Batley and Claire Mcloughlin offer a conceptual framework for evaluating the risks associated with heavy regulations in states that have low capacity for implementation. Batley and Mcloughlin temper the "obligatory nature of [the state's] engagement with specific NSPs" by taking into account "the risk of doing harm through poor or unsustained interventions".[511] Their model suggests that a "less is more" model is better for low-capacity states. They observe that non-obligatory engagements, such as dialogue and mutual agreements between the state and non-state providers, pose lower risks than more obligatory engagements, such as regulation and contracting.[512] The "government's capacity to plan, co-ordinate, organize, regulate and finance the non-state sector" is key to their analysis because governments must make "strategic choices about how to deploy their limited capacity…without risk to pro-poor and pro-service outcomes."[513]

Notably, Bately and Mcloughlin do not recommend that states with low capacity levels forgo all NSP regulations. Rather, they recommend *restrained* regulations, such as "[m]utual planning of standards" by the government and non-state providers, as well as "[e]stablishing (but minimizing) 'entry' requirements based on service inputs".[514] They explain that the problem is primarily with "command and control regulation", which were often "unnecessarily elaborate and input-focused, placing unrealistic capacity requirements on both the implementing agency and the NSP, with the result that this sort of regulation is often unenforced or avoided."[515] The implication for African LDCs is that rigid, complicated and burdensome NGO laws, which the state often cannot properly enforce, will likely lead to more harm than good for the beneficiaries of nonprofit provision.[516]

---

510 See Richard Batley, 'Engaged or Divorced? Cross-Service Findings on Government Relations with Non-State Service-Providers' 26 Public Administration and Development 241 (2006) 245; Trémolet (2006) 8.

511 Batley and Mcloughlin (2006) 33.

512 Ibid 31.

513 Ibid 36.

514 Ibid 31.

515 Ibid 34.

516 Youssef Tawfik, Robert Northrup and Suzanne Prysor-Jones, *Utilizing the Potential of Formal and Informal Private Practitioners in Child Survival: Situation Analysis and Summary of Promising Interventions,* Academy for Educational Development (2002) 10-11 <http://pdf.usaid.gov/pdf_docs/Pnacp202.pdf>.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

This supports Ada Ordor's call to establish and protect enabling legal environments for non-profit organizations in Africa. [517]

3.3.2.3. Burdensome Rules and Noncompliance

The issue of how best to ensure regulatory compliance is complicated by the myriad ways in which the state seeks to achieve compliance through varying degrees of control.[518] Thus, this issue cannot be addressed here in great detail. Instead, the assertion is simply that burdensome regulations – understood here in terms of the impact on the financial and operational ability of the entity subject to regulation – can overwhelm the capacity of nonprofit providers. This occurs when the regulatory requirements imposed upon nonprofit providers are so burdensome that they cannot comply without significantly diminishing their capacity to provide social services. If the capacities of a significant portion of them are diminished, then many beneficiaries are likely to encounter deteriorating social services in places where nonprofit provision is important for the realization of social rights. In some cases, nonprofit providers may leave the sector all together due to high regulatory pressure.

On the other hand, many of them will remain in the sector but simply forgo compliance.[519] A certain degree of noncompliance is unavoidable. However overly burdensome laws, in which the costs of compliance render the continuation of service too difficult to sustain,[520] can incentivize further noncompliance.[521] Summarizing the findings of a comparative study on the regulation of non-state providers in six sub-Saharan African and South Asian countries, Batley concludes, "[i]n the face of burdensome rules, providers ignore regulations or circumvent them often finding it preferable to remain unrecognized." [522] Moreover, widespread noncompliance may undermine the social rights of beneficiaries if it leads to non-

517 Ordor (2014).
518 See Peter N. Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' 8 Governance 527 (1995).
519 Salamon and Toepler (2000) 2.
520 Ibid 4 (describing law can create high transaction costs and "affect the extent to which nonprofit institutions come into existence and persist".).
521 See, e.g., Ann P. Bartel and Lacy Glenn Thomas, 'Direct and Indirect Effects of Regulation: A New Look at Osha's Impact', 28 The Journal of Law and Economics 1 (1985) 5-7.
522 Batley (2006) 245.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

state providers ignoring regulations that are meant to control the quality of services. These issues are especially problematic for African LDCs where the state already struggles with its capacity to enforce law, let alone ensure compliance in all cases.

3.3.2.4. Inadequate Regulatory Oversight

Bately posits that "[b]ad regulation is worse than none", reasoning that a lack of regulation would afford non-state providers a welcomed degree of innovative freedom. [523] However, a rights-based approach rejects the notion that the state can sit idly by while the social rights of its people are subject to unbridled interference by non-state providers. Inadequate regulatory oversight threatens to undermine the social rights of beneficiaries in at least two ways.

First, the total absence of regulation would invite and tolerate fraudulent, unscrupulous or otherwise harmful non-state entities into the sector, for which the state retains responsibility. In *Centre for Human Rights, University of Pretoria and Other v. Senegal*, the African Children's Committee on the Rights and Welfare of Children heard a case involving a group of children referred to as *talibés* who attended private schools called *daaras*. Although the students were not required to pay school fees at the *daaras*, they were forced to meet daily begging quotas.[524] The Committee found that Senegal violated its social rights obligations under the African Children's Charter because it did not provide adequate regulatory oversight to ensure the right to education for these children. [525]

Second, creating a weak regulatory framework around a widespread and deeply embedded nonprofit sector carries with it the risk of state capture or capture of the policy process. As the regulatory distance increases between the state and nonprofit providers, the government becomes more "hollow" in terms of its separation from service outputs.[526] Peter Grabosky cautions, "To the extent that these private interests dominate the public agenda, there is a risk that they will pursue their own interests and priori-

523 Ibid.

524 *Centre for Human Rights v. Senegal,* para. 48.

525 Ibid paras. 48-50 (the court concluded that the state failed to provide "the necessary curriculum and facilities in which the daaras function in delivering education.").

526 H. Brinton Milward and Keith G. Provan, 'Governing the Hollow State', 10 Journal of Public Administration Research and Theory 359 (2000).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

ties." African LDCs are experience a great deal of hollowness as a practical consequence of their limited capacity and resources, therefore they are vulnerable to state capture. Their regulatory capacity must be put to use efficiently in order to reduce these risks.

Third, abdication by the state is particularly troublesome because it would weaken the political relationship between citizen and state, which is an essential pillar of democracy. Geof Wood coins such a scenario "The Franchise State" and warns that it "renders democracy meaningless and toothless".[527] He asks rhetorically,

> …do citizens lose basic political rights if the delivery of universal services and entitlements is entrusted to non-state bodies which would at best only be accountable to the state rather than directly to those with service entitlements? Can the state devolve responsibility for implementation without losing control over policy (since practice is policy) and therefore losing responsibility for upholding the rights of its citizens? If the answer to the first question is 'yes' and to the second 'no', then we have states without citizens.[528]

A legal human rights approach would suggest that inadequate regulatory oversight over nonprofit providers occurs when the state does not ensure that its own social rights obligations are fulfilled. States must act with due diligence to ensure the protection of social rights whenever private parties are involved. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Committee on Human and Peoples' Rights followed the Inter-American Court of Human Rights to declare that due diligence required the state to "organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[529] Therefore, inadequate regulatory measures would amount to due diligence, and the state would be responsible for any harm caused by nonprofit providers.

---

527 Geof Wood, 'States without Citizens: The Problem of the Franchise State', in David Hulme and Michael Edwards (eds), NGOs, *States and Donors: Too Close for Comfort?* (Macmillan 1997) 79-92, 81.

528 Ibid.

529 *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 254/02 (ACmHPR 2006) 143, 147 ("Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation..."); see also *Velasquez Rodriguez v. Honduras*, (Ser. C) No. 4 (IACrtHR 1988).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Therefore, providing sufficient regulatory oversight would mean ensuring that beneficiaries' social rights are indeed being realized, and not violated, by the private provision of services. On the one hand, regulatory measures must protect beneficiaries against unprincipled or predatory organizations that would pose as benevolent nonprofit providers. On the other hand, they should target the quality of services, as well as the equitable provision thereof, so as to ensure that service provision is aligned with constitutional and human rights norms and principles.

3.3.2.5. The Concurrence of Burdensome and Inadequate Rules

In many cases, nonprofit providers are subject to both burdensome and inadequate regulatory measures. They are often burdened as to their inputs or entry into the service provision sector, while they are simultaneously subject to inadequate regulation as to the quality of their outputs. This combination can undermine the protection of social rights because it diminishes the capacity of NSPs to provide services while concurrently neglecting the quality of those services. In this regard, Batley writes,

> Whether there is elaborate and inappropriate *entry* regulation as in education or little if any in the case for water and sanitation, monitoring and control of the quality of *performance* is largely absent in all service sectors, except in South Africa. Entry standards have the effect of restricting formal permission to operate, and therefore also access to markets, subsidies and donor funding, but they rarely set a practicable basis on which standards of operation can be assessed. The non-state providers that are approved are then able to operate without regard to quality of output, while the unapproved continue to operate in any case. [530]

This finding may explain why, as previously discussed, Batley and Mclouglin concluded in a separate study that regulations in fragile or low-capacity states are more likely to be 'pro-service' if they sought to incentive – rather than control – NSPs, and emphasized output standards rather than entry requirements.[531] Political theory may provide one explanation for such poor regulatory design. The government's interest in maintaining power and control over the polity can lead it to use NGO regulations as a

530 Batley (2006) 245 (emphasis in original).
531 Batley and Mcloughlin (2006) 34.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

means of silencing critical or oppositional voices.[532] Ronelle Burger explains that this political motivation reflects "indifference towards the outcomes of the NGO sector" and could explain the poor design of NGO regulations.[533] Rather than protecting the political elites through an assertion of state sovereignty, the objective of NGO regulations should be protecting the welfare of beneficiaries. In this regard, the World Bank and others calls for a "compact" between government and NGOs, which is based on incentivizing NGOs through strong relationships of accountability.[534]

Although the "perfect" regulatory balance is nothing short of an idealistic notion, it remains within the providence of law to carve out analytical boundaries for permissible and impermissible regulatory control over NGOs, even if the specific details regarding the margins of those boundaries are fated to proceed through ceaseless litigation. Enhancing social protection of beneficiaries and ameliorating social risks should serve as guiding principles for the regulatory design of NGO laws where nonprofit entities are essential to the realization of social rights. In legal terms, the analytical boundary between lawful and unlawful regulatory control could be fixed by the (admittedly flexible) limits that are set through social rights law. Therefore, lawful NGO regulations are those that aim to protect social rights and support their progressive realization.

3.4. Conclusion

While nonprofit providers have been immensely instrumental to strengthening social protection in Africa, they have exhibited their own flaws and weaknesses, as their integrity remains vulnerable to corruption and other organizational vices. On the other hand, African states remain wary of foreign political influence and some suspect that NGOs might facilitate such interference. These tensions present a challenge for regulators that seek to retain and foster the benefits of an active nonprofit sector while simultaneously stemming its shortcomings. Indeed, studies on the regulation of non-

532 Salamon and Toepler (2000) 1 (citing Julie Fisher, *Nongovernments: NGOs and the Political Development of the Third World* (Kumarian Press 1998).).

533 Burger (2012) 105.

534 *Making Services Work for Poor People*, The World Bank, (World Development Report, vol 2004 2004) 95-110 <https://openknowledge.worldbank.org/bitstream/handle/10986/5986/WDR%202004%20-%20English.pdf?sequence=1&isAllowed=y>; Ritva Reinikka and Nathanael Smith, *Public Expenditure Tracking Surveys in Education* (International Institute for Educational Planning 2004).

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

profit providers suggest that governments, and particularly those in low-capacity states, tend to have poor NGO laws that impede rather than promote nonprofit provision. This dissertation suggests that a key normative guideline for balancing the regulation of nonprofit providers is the realization and protection of social rights. International and regional human rights law guarantee a number of social rights relating to social security, housing, health, education, food and water, an adequate standard of living and continuously improving living standards. Additionally, certain minimum essential levels have been articulated by treaty bodies that are tasked with providing interpretive guidance. By ensuring that NGO laws are promoting, rather than hindering, the realization of these social rights, states can protect individuals against unscrupulous NGOs without deterring the beneficial outcomes of NGO activity. In this way, human rights law can serve as the normative framework with which to evaluate whether NGO laws are balancing the positive potential of nonprofit provision against its risks.

https://doi.org/10.5771/9783748906926-81, am 12.10.2024, 10:06:02
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb