

## 5. Regulating NGOs: Limits on and Duties of the State

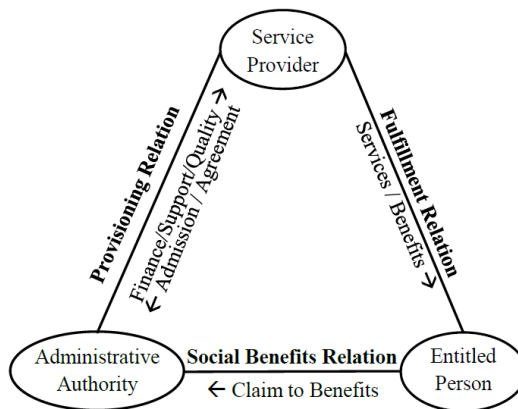
The present chapter asserts that the state's social rights obligations to beneficiaries give rise to implicit state obligations toward essential NGOs. In particular, the state's social rights obligations qualify the manner in which it may regulate different NGO types. Of the NGO-government relations classified in the previous chapter, only three will be addressed here: supplemental, substitutional and complementary NGOs. These are examined because they are essential both for beneficiaries' social rights and for states' Covenant obligations. Substitutional and supplemental NGOs are essential for the realization/enjoyment of social rights as well as the fulfillment/preemptive discharge of state obligations, while complementary NGOs share these features as a consequence of the state's own social policy design. In these scenarios, the state cannot fulfill its own social rights obligations to beneficiaries unless its treatment of NGOs is subject to certain legal limitations and requirements. In general, states must not obstruct the activities of these NGOs without providing adequate justification for doing so. However, the specificities of a state's regulatory duties toward a particular NGO type are shaped by that type's functional role; that is, whether NGOs in that category fulfill the state's Covenant obligations or preemptively discharge them.

I have excluded duplicative/non-social NGOs from my analysis because they are not reasonably necessary for the realization or enjoyment of social rights. Therefore, other than the general expectation that states – in observance of the subsidiarity principle – should restrain any inclination to control private actors and their affairs, no additional regulatory obligations on the part of the state can be drawn from the interaction of duplicative and non-social NGO's with beneficiaries. Inappropriate NGOs have also been excluded, but on separate grounds. While they are reasonably necessary for the realization or enjoyment of social rights, they do not do so in a way that fulfills or preemptively discharges the state's social rights obligations because they employ inappropriate means. The regulatory obligations of the state toward inappropriate NGOs are mostly limited to protecting the human rights of beneficiaries and others from third-party interference.

5.1. The Analytical Framework: Triangular Models for Social Rights

The legal relations between NGOs, the state and beneficiaries vary in accordance with the degree to which NGOs support realization and enjoyment of social rights, as well as the fulfillment or preemptive discharge of social rights obligations. The different NGO types reflect these variations. The way that these legal relations interact with one another can be examined more precisely by modeling them in a triangular formation. In particular, a triangular arrangement illustrates how one legal relationship within the model (i.e., the state-to-beneficiary relation) can affect another legal relationship within the same model (i.e., the NGO-to-state relation). The concept of triangular relations in the realization of social rights is borrowed from German social law, wherein the *sozialrechtliche Dreiecksverhältnis* model, translated by Ulrich Becker as “the social benefits delivery triangle” (Figure 5.1),<sup>774</sup> is used to understand the legal relationships involved when social benefits are delivered by private entities acting in collaboration with the state, as well as for examining the manner in which those legal relations influence one another.

Figure 5.1. Social Benefits Delivery Triangle.<sup>775</sup>



774 Ulrich Becker, ‘Social Services of General Interest in Germany’ in *Social Services of General Interest in the EU* (Springer 2013) 497-511.

775 Based largely on a diagram borrowed from Ulrich Becker. See *ibid* 503, fig. 19.1.

While legal relations within the triangular model have received considerable attention in German scholarship and jurisprudence,<sup>776</sup> the model is virtually non-existent in Anglo-American legal literature.<sup>777</sup> The World Bank has used a similar triangular model to illustrate service arrangements involving private providers, but it represents relationships of accountability and power rather than the legal relations that bind the parties.<sup>778</sup> The World Bank model appears to be based on the work done by Reinikka and Smith, which focuses on strengthening relationships of accountability through delegation, financing, monitoring performance and enforcing standards.<sup>779</sup> Edward Mac Abbey has modified this model by inserting NGOs as supportive actors into all three sectors of society.<sup>780</sup> Advocacy NGOs support the state's role in policy making and agenda setting; grassroots NGOs help beneficiaries and their communities – particularly poor communities – to strengthen their social capital, organize and become more civically engaged; and service NGOs provide services directly or indirectly.<sup>781</sup> In each of these models, the focus is on power and accountability, thus they emerge from organizational and political – rather than legal – perspectives. Since, however, the political and organizational aspects of the service delivery triangle are relevant for ascertaining the legal relations therein; this section will also draw upon those other disciplines.

The *sozialrechtliche Dreiecksverhältnis* model is based on a relationship between non-state entities and government that resembles the complementary arrangement described in the previous chapter, wherein government collaborates with private providers in order to promote the realization and enjoyment of social rights. Thus, most of Becker's translated version of the *sozialrechtliche Dreiecksverhältnis* (Figure 5.1) has been borrowed in this chapter's representation of the complementary arrangement between NGOs and the state. However, certain modifications have been made to Becker's version in order to tailor it to the particular way in which the complementary arrangement has been conceptualized here.

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776 Becker and others (2011); Andreas Kurt Pattar, 'Sozialhilferechtliches Dreiecksverhältnis - Rechtsbeziehungen Zwischen Hilfebedürftigen, Sozialhilfeträgern Und Einrichtungsträgern', 3 Sozialrecht Aktuell 85 (2012); B 8 So 22/07 R, 102 1, (BSG 2008) (Germany).

777 For one explanation in English of the *sozialrechtliche Dreiecksverhältnis*, see Becker (2013).

778 The World Bank, *Making Services Work for Poor People* (2004) 46-80.

779 Reinikka and Smith (2004).

780 Abbey (2008).

781 Ibid 373.

In Becker's model, beneficiaries are entitled to certain rights that the state must ensure, which are referred to as the *social benefits relation*, and that legal relation between beneficiaries and the state in turn affects the legal relation between the state and private providers. In the typical case, an administrative body formally and willingly accepts private providers into a legal relationship referred to as the *provisioning relation*, whereby the administrative authority regulates and supports the private provision of services to beneficiaries. An example of this is found in Germany, where the government finances the provision of qualified services through a system of controlled compensation that relies on price regulations and service standards.<sup>782</sup> Complementary arrangements are advantageous for the state because governments typically lack the institutional capacity and expertise that is required in order to provide all benefits directly through public programs. Thus, it is considered more efficient for the state to collaborate with private providers in the delivery of services rather than to build up new public institutions and acquire new technical expertise.<sup>783</sup> Lastly, the relationship between providers and beneficiaries is based predominantly on a professional or service-based interaction, through which beneficiaries receive social services. In the complementary model, however, this relationship can also have a legal effect on the state's obligation toward the beneficiary. The obligation of the state toward the entitled person is fulfilled once the private provider delivers the service to the entitled person through the *fulfillment relation*.

The *sozialrechtliche Dreiecksverhältnis* is, however, ill-equipped to represent the legal relations that are involved in substitutional and supplemental arrangements because the *sozialrechtliche Dreiecksverhältnis* represents the complementary arrangement and it cannot be determined categorically whether complementary NGOs fulfill or discharge state duties. This difference affects the state's legal relation with NGOs, thus necessitating different representational models. Moreover, since supplemental and substitutional NGO types are more prevalent in African LDCs, the complementary triangular model is not likely to be a useful analytical tool for de-

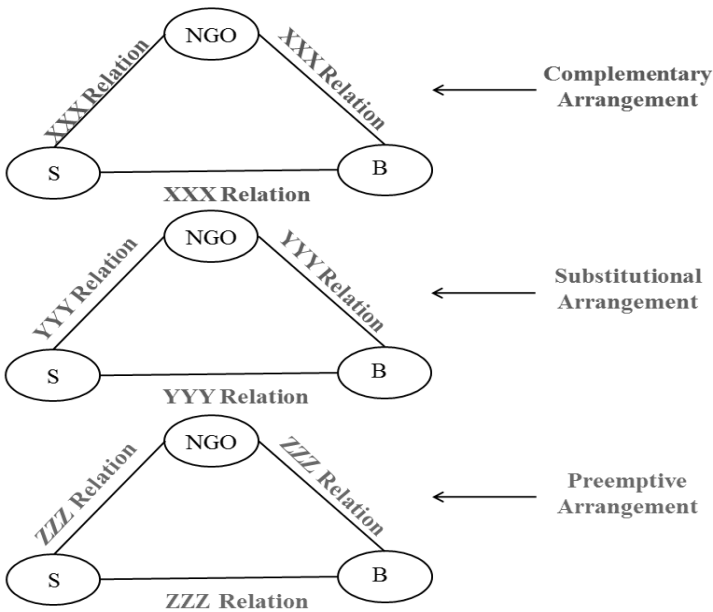
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782 Anheier and Seibel (2001) 98-109, 114-117; see also *ibid* 97 (noting that for a handful of large nonprofit entities called free welfare associations, "their role became deeply imprinted in the relevant social welfare legislation", such that public bodies must support their activities in the field of social assistance.)

783 Becker and others (2011) 341-342. This is also consistent with the principle of subsidiarity, which has a long history in German social provision and has been described as "the economic backbone of the German nonprofit sector." (Anheier and Seibel (2001) 72, 96-98.)

terminating the NGO-to-state legal relations within African LDCs. A triangular model should accurately represent the legal relations among the parties pursuant to the ICESCR so that it is possible to conduct a systematic analysis of how states should regulate nonprofit activities, especially when those activities contribute to the fulfillment or preemptive discharge of state obligations. Therefore, new triangular models are needed to accurately represent the particularities of the other two types (Figure 5.2). In this chapter, I adopt a modified version of Becker’s model as a fair representation of the complementary type, but I offer two new models for the supplementary and substitutional varieties.

Figure 5.2. Tailored Triangular Models for each NGO Type



5.2. The Three Legal Relations: State-NGO-Beneficiary

All triangular models that represent the fulfillment or preemptive discharge of state duties through nonprofit activities share three basic components, which are the relationships that link the three parties. These relational components have legal attributes that are derived from the social rights law that binds the state. The most basic relational component is the

NGO-to-state relation. It concerns the functional role of nonprofit activities *vis-à-vis* the state's social rights obligations. Since NGOs vary in their functional role, the legal aspects of their relation to states will also vary. The differences explicated by the NGO taxonomy proposed in the previous chapter are important because they indicate that different regulatory obligations will correspond to different NGO types.

The legal relations in the triangular model are defined by the legal norm that binds the state. The ICESCR has been chosen as the legal framework for analysis because it serves as an international baseline for almost all countries of the world, including the vast majority of African states. Thus, in order to avoid misunderstandings, the terminology used to represent each party within the triangular model should reflect the terminology used in international human rights law. Using the labels found in Becker's translation of the *sozialrechtliche Dreiecksverhältnis* model might suggest that the law chosen – international human rights law – guarantees social rights claims that are more concrete than a reasonable reading of the law would allow. Thus, the labels used for the triangular models presented here are modified in order to avoid such misrepresentations in the context of international law.

The *sozialrechtliche Dreiecksverhältnis* model is based on the presumption that social rights claims are concretized into social benefits entitlements. In states where governments are bound to guarantee social rights that have been concretized into specific entitlements, it is appropriate to think of beneficiaries as entitled persons. Specifically, individuals can claim concrete “benefits” from the state (*social benefits relation*). In turn, this legal basis imposes an obligation upon the state to ensure the delivery of those concrete benefits, which it accomplishes by establishing certain “administrative” duties to collaborate with private providers. This results in a relationship (*provisioning relation*) through which the administrative authority (as financier and guarantor of entitled benefits and services) and the private entity (as supplier of benefits or performer of services) work together, normally under formal agreement or administrative admission, to ensure that the entitled person receives his or her benefits or services. Finally, the state's obligation is “fulfilled” once the private provider delivers those concrete benefits to the “entitled” person (*fulfillment relation*). Each of these terms derives from a normative framework that imposes enforceable legal duties upon an administrative authority in order to guarantee concrete benefits and services to legally entitled persons. However, such arrangements are not typically found in African LDCs.

Domestic law in African LDCs often treats social rights norms as policy directives rather than as individual entitlements that correspond to enforceable state obligations.<sup>784</sup> As a practical matter, establishing collaborative provisioning relations are extremely costly. Although the complementary model is meant to be more economically efficient because the government need not establish its own institutions for the delivery of services,<sup>785</sup> it demands nonetheless a high financial commitment from the state to fund the provision of services. One does not find in Africa an abundance of domestic laws establishing concrete and justiciable social rights that amount to specific individual entitlements, coupled with enforceable corresponding duties borne by administrative agencies. Such a normative arrangement would impose unrealistic demands upon poorer states that face a scarcity of resources. Comprehensive social security schemes based on enormous financial commitments are politically unattainable in African LDCs because they would lock governments into legal obligations that they could not fulfill.

In these cases, the legal relationship between the state and the beneficiary needs another normative framework to ground the triangular relations. International or regional human rights law serves this purpose. While it remains doubtful whether human rights law clearly entitles individuals to specific benefits or services,<sup>786</sup> the ICESCR and the African Charter do create concrete state obligations as to the realization and enjoyment of social rights. Therefore, while the *sozialrechtliche Dreiecksverhältnis* refers to an *entitled person*, the adjusted models based on international human rights law will refer to *rights bearers* to reflect this difference (Figure 5.3).

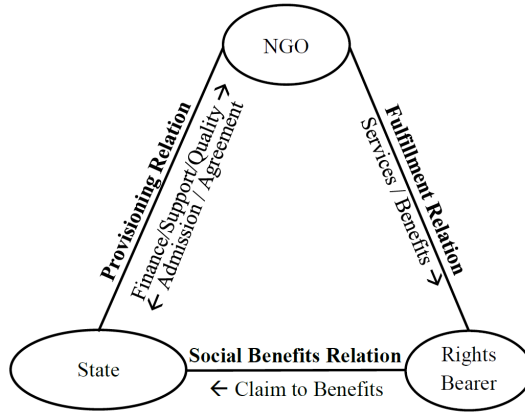
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784 Ssenyonjo, 'Influence of the ICESCR in Africa' 107-108.

785 Becker and others (2011) 341-342.

786 Although the ESCR Committee has recognized minimum essential cores for social and economic rights, commentators challenge the conceptual workability and legal enforceability of a minimum core. See, e.g., Young (2008).

Figure 5.3. Complementary Triangular Model.



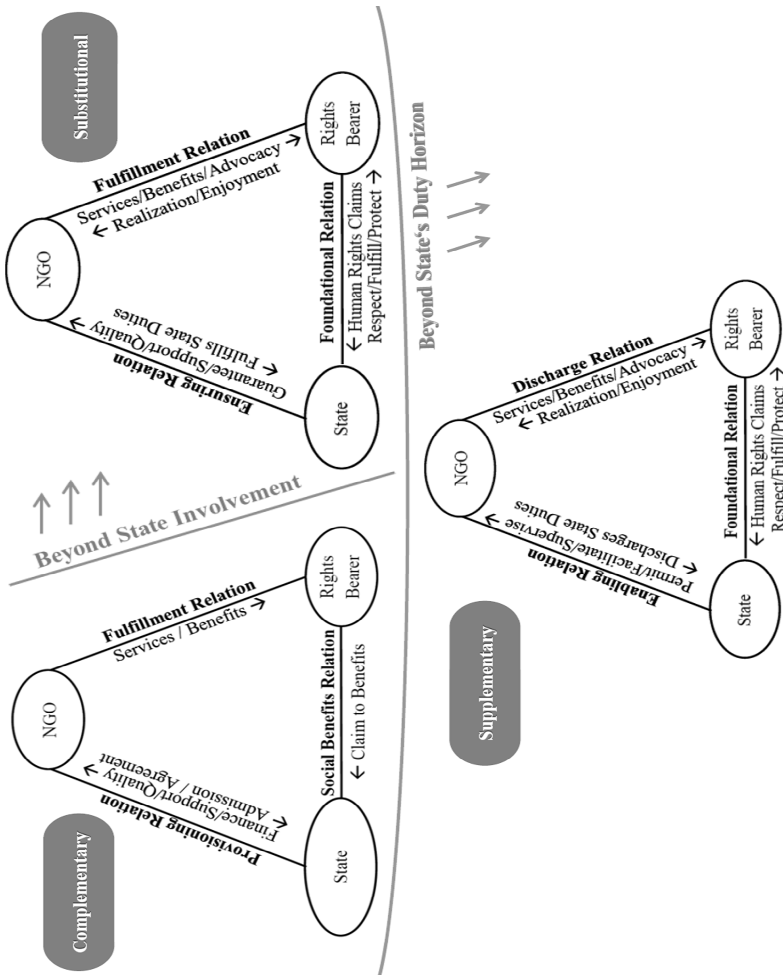
The term used for the state/governmental party within the triangular model is also modified to account for the use of international human rights law. First, for the most part, human rights law addresses *states* general rather than particular *administrative bodies* within the government. This modification takes into account the manner in which NGOs relate to all state bodies, not just the administrative arm of the state, and reflects the notion that non-administrative bodies, such as courts and legislative bodies, are also bound to protect, respect and – to the maximum extent of feasibility and appropriateness – fulfill social rights. Therefore, the state’s legislation of restrictive NGO laws is as much a concern to the social rights of beneficiaries as is its administration and adjudication of such laws. To reflect these aspects, the term *state* will replace *administrative bodies*, thereby emphasizing that the social rights obligations derived from international law bind all governmental and state bodies.

Finally, the term *NGO* is used in lieu of *service provider* so as to reflect the prevalence and diversity of the non-profit sector – as appose to the private for-profit sector – in the realization of social rights for people in African LDCs. This modification allows for an analysis of NGO laws that restrict essential nonprofit activities through advocacy. For instance, NGOs may be essential for the fulfillment or preemptive discharge of state duties without providing services because they prod the government into expanding social rights protections for political minorities or other vulnerable groups by providing information about coverage gaps or social rights injuries caused by third parties.



The following sub-sections examine the ways in which states' social rights obligations – pursuant to international human rights law – determine the nature of the three legal relations that emerge when substitutional or supplementary NGOs are involved in the realization/enjoyment of social rights. The analysis looks at each of the three legal relations in turn and investigates how they affect one another under each scenario.

Figure 5.4. *Triangular Models for Complementary, Substitutional and Supplementary NGOs*



### 5.2.1. The Beneficiary-to-State Relation

The first relationship stretches between the state and the beneficiary. In the *sozialrechtliche Dreiecksverhältnis* it is often referred to as the *Leistungsverhältnis* (the *social benefits relation*). There, the state is generally bound by constitutional and international law to guarantee the social rights of its people.<sup>787</sup> Domestic laws spell out in specific and concrete terms the legal entitlements of individuals, thereby establishing their legal claims against certain administrative bodies.<sup>788</sup> This gives rise to the *social benefits relation* where entitled person can have a *claim to benefits* against the state.

In contrast, many people in Africa cannot lay claim to concrete social benefits and services against the state.<sup>789</sup> Their social rights are guaranteed at the more general level of international human rights law, and sometimes constitutional law. International law guarantees the total fulfillment of their social rights through progressive realization. Consequently, beneficiaries are *rights bearers* who have *human rights claims* against the state, rather than *entitled persons* who hold concrete *claims to benefits*. Therefore, the term *social benefits relation* should be modified so as not to suggest that international human rights law recognizes certain specific entitlements of beneficiaries.

Instead, the modified label should emphasize a chief legal function of the *social benefits relation*, which is applicable to all triangular models. German commentators note that the *social benefits relation* influences the legal relationship between the state and the provider.<sup>790</sup> In a sense, the state-beneficiary relationship functions as a *foundational* component of the state-provider relationship because the former augments the latter.<sup>791</sup> In order to emphasize this aspect of the state-beneficiary relation, the modified triangular models will use the term *foundational relation* to describe the legal relation between the beneficiary and the state. This modification applies equally to the complementary model because the complementary model also relies upon international human rights law as its foundation rather than a law that concretizes social rights into specific entitlements.

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787 Becker and others (2011) 333.

788 Ibid.

789 See *supra*, part 0 on the general problems of enforcement and justiciability regarding social rights.

790 Becker and others (2011) 333.

791 See Pattar (2012) 88.

The beneficiary's social rights correspond to certain state duties. Under international human rights law, these social rights obligations of the state include the duties to respect, protect and fulfill social rights.<sup>792</sup> Thus, the foundational relation in the supplementary and substitutional models exchanges *human rights claims*, which emanate from the rights bearer, with states' duties to *respect/fulfill/protect* the human rights of beneficiaries. In bilateral relations, these duties would normally be fulfilled through the state's interaction with the beneficiary. If, however, the state accepts or acquiesces to the involvement of nonprofit organizations,<sup>793</sup> then the state fulfills its duties to the beneficiary through its interactions with the nonprofit entity, as well as through the interactions between nonprofits and beneficiaries. Therefore, in a triangular arrangement, the foundational relation gives rise to state obligations toward the beneficiary (direct obligations) as well as obligations toward essential nonprofits (indirect obligations). The next sub-sections consider how the social rights contained within the foundational relation correspond to state duties that are performed through the NGO-to-state relation and the NGO-to-beneficiary relation.

### 5.2.2. The State-to-NGO Relation

In Becker's version of the *sozialrechtliche Dreiecksverhältnis*, the *social benefits relation* sets the aim and the parameters for the relationship between the administrative authority and the private provider. Becker refers to this second relationship as the *provisioning relation*.<sup>794</sup> The relationship between the state and the provider is initiated by some form of admission, by which the provider enters into a cooperative arrangement with the state.<sup>795</sup> This arrangement exhibits a greater deal of freedom and complexity than is afforded through a contractual purchase order for services. Becker notes, "Usually, the competent administrative body does not purchase the service from a private actor in a stricter sense, but it will merely create a legal basis for service provision..."<sup>796</sup> This "legal basis" represents the regulatory

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792 See *supra*, part 0on the general social rights obligations of states.

793 As will be explained in a later sub-section, the state's acceptance or acquiescence is a basic precondition for the state's consent to be bound the legal consequences arising from triangular relations. See *infra*, part 0on the state's admission or acceptance of nonprofits as service providers.

794 Becker (2013) 504.

795 Ibid 505.

796 Ibid 504.

framework upon which the provision of services takes place while leaving a great deal of discretion in the hands of private providers. The term *provisioning relation* is useful in capturing the complex cooperative arrangements involving complementary NGOs, whereby the state regulates the quality, prices and provisioning of services, and the private entity delivers those services in exchange for public financing. However, the term should be adjusted to account for organizational frameworks that involve supplemental or substitutional NGO types, whereby NGOs and governments are not engaged in an intricate relationship of financing, price-setting and quality control.

### 5.2.2.1. From Provisioning Relation to Enabling / Ensuring Relations

As discussed above, the *foundational* relation between beneficiaries and the state augments the relationship between the state and NGOs. It imposes an additional obligation upon the state to support, or at the very least refrain from interfering with, the efforts of NGOs to bring about the realization or enjoyment of social rights. In other words, the state's duty to the beneficiary is what gives rise to the state's obligation to support, or at the very least permit, essential nonprofit activities. The terms of a state's obligations toward NGOs will depend on whether and how NGOs assist states in fulfilling Covenant obligations.

As discussed in the previous chapter, substitutional NGOs fulfill the state's obligations because their activities take place within an area of the duty horizon that the state does not reach.<sup>797</sup> In this case, substitutional NGOs are ensuring realization and enjoyment of rights that the state is under an obligation to ensure but nonetheless fails to ensure. Therefore, I have termed NGO-state relations involving substitutional NGOs the "*ensuring relation*" since the state must ensure the very same level of realization and enjoyment that the NGO is providing. In the *ensuring relation*, states are obliged to ensure the continuation and improvement of substitutional NGO activities, as well as their replacement if such activities are terminated. States bear an obligation to both support and guarantee the effects of substitutional nonprofit activities on the realization and enjoyment of social rights. The implication is that states presumably violate their duties to respect and fulfill social rights when they implement NGO laws that restrict or obstruct substitutional nonprofit activities.

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797 See *supra* part 0on purposing a new taxonomy for NGOs based on new criteria.

Unlike substitutional NGOs, supplementary NGOs do not fulfill the state's obligations because supplementary nonprofit activities are conducted beyond the state's duty horizon. These are nonprofit activities that are essential for a level of realization/enjoyment that is not attainable for the state due to resource constraint; that is, beyond its duty horizon. However, since it is foreseeable that this higher level of achievement will eventually fall within the state's duty horizon, supplementary NGOs are preemptively discharging the state's foreseeable obligations before they ripen into standing duties. As such, the state's obligation toward supplemental NGOs is simply to enable them, which entails permitting and facilitating nonprofit activities, rather than to support and guarantee them as is the case with substitutional activities. While both enabling and ensuring consist of a negative obligation to abstain from obstructing nonprofit activities (i.e., to permit) as well as a positive obligation to take all appropriate and feasible measures that make it easier for NGOs to conduct their activities (i.e., to facilitate), the latter also includes an additional obligation to replace lost nonprofit activities (i.e., to guarantee) and to fill achievement gaps left behind by inadequate nonprofit activities or to extend their activities so as to guarantee a certain level of realization/enjoyment (i.e., to support). I use the term "*enabling relation*" to signify the NGO-state relationship involving supplementary NGOs so as to emphasize the obligation of states to permit and facilitate supplementary nonprofit activities and to exclude any state duties to guarantee or actively support the same.

There is evidence to suggest that some African jurists have already begun espousing this view. In *Michelo Hunsungule and Others (on Behalf of Children in Northern Uganda) v. Uganda*, the African Children's Committee considered whether the government of Uganda had violated the rights of children to the highest attainable health, as guaranteed by article 14 of the African Charter on the Rights and Welfare of Children.<sup>798</sup> In doing so, the African Children's Committee listed the types of governmental activities that would likely indicate a state had failed to fulfill its duties. Among those activities was, "...curtail[ing] the efforts of non-governmental organizations or other partners to contribute toward the realization of Article 14", suggesting that undermining access to NGO health services would violate the right to health.<sup>799</sup> By restricting the operational space of nonprofits, those same states could jeopardize existing social protection and facilitate interference with the social rights of beneficiaries. A teleological ap-

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798 *Hunsungule v. Uganda*.

799 *Ibid* para. 75.

proach committed to the fulfillment of state duties and the protection of social rights would indicate that NGO laws may not be so restrictive that the state no longer fulfills its legal obligations toward beneficiaries. Therefore, states must permit NGOs to operate when they are essential for the realization/enjoyment of social rights (supplemental and substitutional NGOs) and enable NGOs that are essential for the fulfillment of the state's social rights obligations (substitutional NGOs). On the presumption that they breach the social rights obligations of states, measures that make it difficult for these types of NGOs to operate should be subject to heightened judicial scrutiny: their interference with nonprofit activities must be proportional to and necessary for fulfilling a legitimate state interest.

The adjustment from provisioning in the complementary model to enabling and ensuring in the supplemental and substitutional models warrants a rigorous examination of the various components that constitute the provisioning relation within the complementary model. At the general level of principles, the concept of enabling and ensuring relations remains consistent with the principle of subsidiarity by retaining components that are important for the effective realization/enjoyment of social rights. Like the provisioning relation, relations of enabling and ensuring emphasize the devolution of decision-making power away from the hands of bureaucrats and into the judgment of reasonably independent professionals,<sup>800</sup> which some have argued is necessary for the effective delivery of complex services that require the provision of individualized solutions for complex human problems.<sup>801</sup> On closer examination, however, the three concepts vary with regard to three main structural elements that define the state-to-NGO relation. In the complementary model, these three components are *admission*, *financing* and *quality assurance*. In the supplemental and substitutional models, these components are modified in order to reflect the differences between the provisioning relation and either the enabling or the ensuring relations, respectively.

#### 5.2.2.2. From Admission to Fulfillment / Discharge of State Duties

The state's acceptance of nonprofit activities as the means of fulfilling its own social rights obligations is the cornerstone of any triangular legal relationship that fulfills social rights. Without the state's acceptance, it cannot

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800 Anheier and Seibel (2001) 72.

801 Pritchett and Woolcock (2004) 195-196.

be legally bound within a triangular relation and thus it cannot acquire additional regulatory duties and limits *vis-à-vis* NGOs. For example, in the *sozialrechtliche Dreiecksverhältnis*, governments formally engage providers through agreements that define the terms of the government's support for private provisioning and the requirements for proper provisioning.<sup>802</sup> In the triangular model of accountability offered by Reinikka and Smith, this aspect is represented by the "compact" and can only be initiated through an act of *delegation* whereby policymakers set policy outlines and authorize private providers to carry them out.<sup>803</sup> The common thread is that the state has invited or endorsed the provision of services by nonprofit entities as part of its social policy program. The admission or delegation establishes a legal relationship between the state and the private provider because it represents the state's intentional commitment to fulfilling its social rights obligations through the services provided by private entities.

While this is essentially the case for complementary arrangements, it cannot be the bases of triangular legal relations involving supplementary and substitutional NGOs because governments have not given explicit consent to accept the NGOs. Nonetheless, some level of acceptance is still required in order to overcome state sovereignty and legally bind the state within such a triangular arrangement. Most African states do not have comprehensive social policy frameworks that are based on integrating NGO entities as the primary service providers within their country. Rather, NGOs operate in an *ad hoc* and voluntary manner and provide services in their capacity as informal charitable institutions. African laws that regulate NGOs, societies, charities and other such associations often create national administrative bodies that exert supervisory control. However, these laws are not part of a larger social policy framework that aims to promote social rights. Rather, in many cases, these laws represent the government's response to real or perceived political threats of an increasingly influential sector of civil society that has deep foreign connections and commitments. The act of admission signals the beginning of a collaborative and supportive provisioning relationship between the private provider and the public authority. However, without such an agreement to collaborate, there is no expressed intent from either the State or the NGO to enter into a provisioning relationship.<sup>804</sup>

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802 Becker (2013) 505.

803 Reinikka and Smith (2004) 24-25, 29.

804 That is not to say, however, that no relationship of a legal nature exists between nonprofit providers and the state. Indeed, the state is obliged, at the very least,

The state's acceptance needs not occur by formal or explicit means. For implicit acceptance to be valid, however, it is critical that the state expresses its consent to bear additional regulatory requirements *vis-à-vis* nonprofits. This allows us to ascribe to the state acceptance of nonprofits even if its government outwardly opposes them. In supplementary and substitutional arrangements, the state's consent to be bound by international social rights law, namely the ICESCR, serves this purpose whenever the NGO is essential for the fulfillment/preemptive discharge of the state's social rights obligations or the realization/enjoyment of beneficiaries' social rights. Thus, the state's acceptance of NGOs must be derived from its consent to bear the obligations imposed upon it by the ICESCR, thereby setting the foundation for its legal relation to essential NGOs.

A state can implicitly accept nonprofit activities simply by failing to ensure that rights are realized or enjoyed through alternative means when the state is under an obligation to ensure the same level of realization or enjoyment. Choosing not to fulfill social rights through direct state provision is not a violation of the Covenant; indeed, the Covenant explicitly recognizes the role that private actors can play in this regard. The *travaux préparatoires* of the ICESCR support this assertion, particularly in relation to article 9's guarantee of the right to social security. The drafting members rejected an amendment proposed by the representative of the USSR, which would have required that "the cost of [social security] be borne by the State or the employer or both of them."<sup>805</sup> They were concerned that this proposed amendment ignored the diversity of systems in different countries for financing social security; they noted that each state should be able to use the system that is best for its own circumstances, including systems that make use of private provision.<sup>806</sup>

There is, in effect, no obligation or expectation that states provide social security through direct state action or direct state financing. Nonetheless, states are expected to *ensure* that the social rights are respected, protected and fulfilled in accordance with the terms of the ICESCR. Thus, declining to provide services directly through public institutions is tantamount to implicitly accepting private activities whenever those activities realize so-

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to respect the rights of the NGOs. As such, there are limitations in place regarding the extent to which the state can restrict the rights of NGOs to associate and speak freely.

805 Draft International Covenants on Human Rights: Report of the Third Committee (1957) paras. 78, 81, 84 (b).

806 Ibid.



cial rights to a level of achievement that the state is required to ensure. In this way, the state passively (and sometimes even grudgingly) embraces substitutional NGOs as actors within a triangular legal relationship because these NGOs fulfill the state's obligations under article 2 (1) of the Covenant. Thus, the state implicitly consents to being burdened with additional regulatory obligations *vis-à-vis* substitutional NGOs. The state cannot rely on these NGOs for fulfilling its social rights obligations and at the same time regulate them in a way that would obstruct the continued fulfillment of its social rights obligations. Without having explicitly or formally accepting substitutional NGOs, the state nonetheless becomes legally bound to these NGOs within a triangular relationship that fulfills the social rights of beneficiaries as well as the state's social rights obligations to those beneficiaries.

In the case of supplemental arrangements, grounding the legal relation between the state and NGOs is a bit more complicated. Unlike their substitutional counterparts, supplemental NGOs do not fulfill a state's standing obligations under article 2 (1). Rather, they discharge that which will foreseeably fall within the scope of the state's article 2 (1) obligations once the state's duty horizon expands to reflect an increase in the availability of resources. What is important to note is that the state has not yet acquired the obligation under article 2 (1) to reach the level of realization achieved by supplemental NGOs, and that it is only foreseeable rather than guaranteed that the state will in fact acquire the necessary resources in order to expand its duty horizon accordingly. Therefore, it cannot be said that these future obligations – which are unripe and unguaranteed to ripen into standing duties – are capable of giving rise today to additional regulatory obligations toward supplementary NGOs. In order for the state to bear heightened regulatory obligations *vis-à-vis* supplementary NGOs, its consent to be so burdened must have derived from some provision of the Covenant other than article 2 (1).

In this regard, article 5 (1) of the ICESCR provides the necessary basis for binding the state to supplementary NGOs within a triangular arrangement. In particular, article 5 (1) prohibits any interpretation of the ICESCR that would recognize for states a right to engage in any act that aims at the destruction of ESC rights or at their limitation to a greater extent than that which is permitted by the Covenant. In other words, state parties to the ICESCR have consented to waiving any rights that they may have had to destroy or extensively limit ESC rights that they were under no obligation to ensure. This directly contradicts any state claim that, by virtue of its sovereignty, it can lawfully obstruct NGOs even if doing so would very

likely result in the destruction of or extensive limitation to the ESC rights enjoyed by beneficiaries of supplemental NGOs. Rather, states aiming to destroy or extensively limit ESC rights will need to justify or excuse such measures in a manner that is consistent with the terms, object and purpose of the Covenant. This translates into an obligation to refrain from interfering with the existing enjoyment of ESC rights unless there is a justifiable reason to do so. How states may lawfully justify such limitations is discussed in depth in the chapter that follows the present one.

The states' agreement to be bound in this way under the ICESCR could serve as the foundation for its legal entanglement with supplemental NGOs within a triangular arrangement. Supplemental NGOs are essential for the realization and enjoyment of ESC rights because the state is *unable* to ensure them. Therefore, restrictive regulatory measures that obstruct the NGO's ability to continue ensuring the realization and enjoyment of these ESC rights will amount to their destruction, which is incompatible with the state's legal commitments under article 5 (1). However, one issue remains unresolved. That is the question of whether such restrictive regulatory measures amount to an "act *aimed at*" the destruction of ESC rights, as article 5 (1) requires. This is a question of the state's purpose or intent, to the extent that it can in fact formulate intent through its lawmakers and officials. The issue here is whether restrictive NGO laws aim at destroying ESC rights, such that article 5 (1) is triggered and can serve as the foundational basis for bind states to supplemental NGOs in a triangular arrangement.

At the very least, the ordinary meaning of the phrase "aiming at" is the same as acting with the knowledge that a particular (perhaps undesired) outcome, such as the destruction of ESC rights, is likely to occur. It is not necessary that the actor desires the outcome to occur if she already knows that it is likely to occur – perhaps alongside another desired outcome – as a result of her conduct. Indeed, the actor might even sincerely hope that the undesired outcome does not occur, but nonetheless disregards the risk or certainty with which it is likely to occur in order to bring about another desired outcome. This level of intent corresponds to the *mens rea* of recklessness or knowing.

Taking it a step further, one can also aim at an undesirable outcome – the destruction of ESC rights – without knowingly doing so. In this case, the level of intent required in order to hold the actor liable would be negligence. When performing an act, all *foreseeable* outcomes that are set in motion as a result of that act fall within the range of one's aim, including unlawful outcomes such as destroying ESC rights. What matters is not

whether the actor was in fact aware that an undesirable outcome stood in the path of her aim, but rather that she *should have known* it because it was a reasonably foreseeable result of her conduct. Therefore, it is only those outcomes that did not stand in the path of the actor's aim (i.e., unforeseeable results) for which she is not liable, and which are exempt from scrutiny under article 5 (1). In terms of restrictive NGO laws, this means that by virtue of consenting to article 5 (1), states have waived their right to restrain supplemental NGOs if they knew that that doing so would very likely result in the destruction of or extensive limitation to ESC rights, or if it was reasonably foreseeable that such undesirable outcomes would occur.

The notion that states cannot take measures that they *should have known* were likely to result in the destruction of or extensive limitation to ESC rights also finds support in the interpretive work of the ESCR Committee. In one of its comments, the Committee goes so far as to assert, without making any reference at all to a mandatory level of intent, that states are noncompliant simply if their policy or legislative measures lead to “a general decline in living and housing conditions”, unless they provide compensatory measures.<sup>807</sup> Elsewhere in its interpretive work on article 2 (1), the Committee has concluded that state measures are impermissible if there was reason for the state to know that the measures would likely have a retrogressive effect on the realization and enjoyment of social right. The Committee's work in this particular area is related to its doctrine of retrogressive measures, wherein retrogressive measures presumptively contravene the terms of the Covenant if they are implemented *deliberately*. What is interesting is that although the word ‘deliberate’ is weightier in terms of its intentionality than article 5 (1)'s reference to ‘aiming at’ destroying or extensively limiting ESC rights, the Committee nonetheless appears to understand ‘deliberate’ to include negligent conduct. In *Ben Djazia and Bellili v. Spain*, a decision issued by the ESCR Committee pursuant to the terms of the Optional Protocol of the ICESCR, selling public housing units to investment companies was considered a deliberately retrogressive measure although the state's purpose was not to limit the enjoyment of adequate housing.<sup>808</sup>

The local housing authority of Madrid sold the units because it sought to balance its budget, not because it hoped to reduce the availability of public housing. The measure was nonetheless dubbed deliberately retrogressive because the state knew or should have known that selling off pub-

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807 General Comment No. 4: The Right to Adequate Housing (1991) para. 11.

808 *Ben Djazia and Bellili v. Spain* paras. 17.5-17.6.

lic housing units would very likely cause retrogression in the realization of the right to housing since “the number of public housing units available annually in Madrid was significantly fewer than the demand”.<sup>809</sup> Naturally, the mere act of selling off public housing units is not itself an impermissible measure. However, coupled with the fact that public housing was already in short supply in Madrid, it became reasonably foreseeable that selling off public housing would result in a limitation on the right to adequate housing. Thus, the housing authority knew or *should have known* that this measure would cause a setback in the realization of adequate housing for all.

The attribution of knowledge to the state for the injurious effects of its laws is particularly significant in the context of restrictive NGO laws because NGO laws do not typically mention the social rights of beneficiaries, and in some cases government officials even express their desire that access to social services will improve by forcing NGOs into direct service provision as a result of restricting nonprofit advocacy.<sup>810</sup> However, where nonprofit activities are essential to the realization of social rights because the state is not capable of achieving the same level of realization, it is reasonably foreseeable that excessively restricting supplemental NGOs would result in a limitation to the enjoyment or realization of ESC rights for their beneficiaries. Moreover, allowing states to claim ignorance of these effects encourages those that seek to circumvent their Covenant responsibilities merely by issuing official statements of their desire to assist beneficiaries, despite overwhelming evidence indicating that the opposite is much more likely to occur. Thus, article 5 (1) places the state and supplemental NGOs into a triangular legal relationship, wherein the state consented to waiving its right to obstruct supplemental NGOs – in other words, the state is obliged to permit supplemental nonprofit activities that are essential for the realization and enjoyment of social rights.

In summary, the nonprofit entity that fulfills the state’s obligations – the substitutional NGO – is bound to the state in a triangular relation because it acts as the functional equivalent of the state. The underlying principle is that a state cannot circumvent its social rights obligations simply by refraining from involving itself in service provision. The legal consequence is that the state’s social rights obligations will have a carryover effect into its

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809 Ibid para. 17.5.

810 See, e.g., Decreto Presidencial No. 74/15, No. 74/15 (Angola 2015) (stating within its first paragraph that this NGO law is meant to ensure and promote the effective participation and sustainable growth of beneficiary communities.).

regulation of private providers such that it bears additional requirements *vis-à-vis* the way that it regulates substitutional NGOs. In particular, states must generally enable (i.e., permit and facilitate) substitutional nonprofit activities as well as ensure that their positive effect on social rights continues even if the NGO ceases its activities. On the other hand, the nonprofit entity that is essential for the realization and enjoyment of rights that the state is not yet obliged to ensure – that is, supplemental NGOs – is bound to the state in a triangular relation on different grounds. It does not fulfill the state's obligation, so the state does not implicitly consent to relying on the nonprofit entity to fulfill its social rights obligations. Instead, the state's consent to waive any rights it may have had to obstruct the NGO can be derived from article 5 (1) of the Covenant, wherein states agree that they do not have the right to destroy or extensively limit ESC rights. The legal consequence is that, in general, states must permit supplemental nonprofit activities, although states are under no obligation to ensure the positive effect of such nonprofit activities on the realization and enjoyment of social rights.

### 5.2.2.3. From Finance to Guarantee / Permit

The second component of the provisioning relation found in the complementary model is its *financing* structure, which comprises of both reimbursement and price control mechanisms for the private provision of services. Reinikka and Smith explain that financing can enhance accountability of nonprofit provision by providing the nonprofit entity with the means to carry out its work.<sup>811</sup> Neither state reimbursements nor price controls are prominent features of substitutional or supplementary models – which are more common within low-income African LDCs – because NGOs in these scenarios have become integrated with the state's own social policy programs. As for *reimbursements*, most low-income African LDCs lack the resources to compensate NGOs their nonprofit activities. NGOs in African LDCs rely heavily on foreign funding rather than domestic resources. This is consistent with the supplementary and substitutional arrangements, where nonprofit activities fall beyond the range of activities that the state is willing or able to reimburse.

As for *price control* mechanisms, their primary aim is to limit the providers' fees so that services are accessible and continued provisioning is

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811 Reinikka and Smith (2004).

sustainable. This is based on the presumption that private providers are for-profit entities that will heighten service fees in order to maximize their profits. The *sozialrechtliche Dreiecksverhältnis* model reflects this bias toward for-profit provision. Its structure includes regulatory instruments “concerning the fixing of tariffs and prices”, in addition to the delivery and quality of services.<sup>812</sup> Since the state will eventually reimburse private providers for the services that they delivery to beneficiaries, price controls measures are part of the state’s efforts to control its costs and ensure the financial stability of its social security system.<sup>813</sup> The implication here is that but-for price controls, private providers would hike up their prices so high that it would threaten the very stability of the entire social security system. This formulation of the *provisioning relation* seeks to ameliorate the risk of inhibited realization or enjoyment that is associated with profit-seeking incentives and, as such, is not appropriate for triangular models that instead envisions nonprofit provision.

Where not-for-profit entities are the predominant actors engaged in the realization and enjoyment of social rights, such as in low-income African LDCs, there is no expectation that they will charge prohibitively excessive fees, if any at all, which means there is no need for price control mechanisms. This applies to complementary arrangements, although complementary arrangements – like the *sozialrechtliche Dreiecksverhältnis* – include a financing component within the provisioning relation. Unlike the *sozialrechtliche Dreiecksverhältnis* model, however, the financing component found within the complementary model relates only the reimbursement of nonprofit provision without requiring the imposition of price control mechanisms. In the case of the enabling relation and the ensuring relation, which correspond respectively to supplemental NGOs and substitutional NGOs, the financing component is either limited or dropped all together. This is because, unlike the complementary model and the *sozialrechtliche Dreiecksverhältnis*, states in supplementary and substitutional arrangements have not indicated any intent to ensure the realization/enjoyment of rights through direct cooperation with NGOs.

In the supplemental arrangement, the state is not bound to ensure nonprofit activities, thus there is no obligation to reimburse them. The appropriate modification of the state-to-NGO relation here would be to *permit*

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812 Becker (2013) 505. See also Ulrich Becker and others, ‘Strukturen Und Prinzipien Der Leistungserbringung Im Sozialrecht’, 1 Vierteljahresschrift für Sozialrecht (VSSR) 1 (2012) 11-21.

813 Becker and others (2012) 13-14.

nonprofit activities rather than to *finance* them. As for the substitutional arrangement, states may acquiesce to ensuring the fulfillment/enjoyment of social rights through nonprofit activities that are fully funded through external resources rather than directly funded by the state, thereby alleviating the state of any obligation to reimburse the NGOs. If, on the other hand, substitutional NGOs lack adequate funding, then there would be an obligation upon the state to choose from either funding the nonprofit activities or providing services directly through public programs in order to bridge the fulfillment gap. Thus the *financing* component is modified to merely *guaranteeing* that the social rights outcome of substitutional nonprofit activities continue to occur; meaning that the state bears an obligation to ensure the replacement of lost substitutional nonprofit activities, although it is not necessarily required to replace them through direct state action or through public funds.

#### 5.2.2.4. From Quality to Quality / Supervise

The last structural component of the *provisioning relation* that needs to be reviewed is *quality* assurance. States that choose to engage private providers as a means of fulfilling their social rights obligations toward rights bearers are responsible for the quality of those provisions. Simply put, if the quality of those services falls below certain minimum standards of acceptability, then the state has failed to fulfill its obligation toward rights bearers. In Reinikka and Smith's accountability model, this aspect of the "compact" is enhanced through monitoring performance.<sup>814</sup> They posit that the greatest difficulty for states in this regard is gathering adequate and accurate information about their performance.<sup>815</sup>

Since private providers are stepping in for the state, the state must ensure that the quality of private services is at least as high as the quality of services which the state itself would have been obliged to provide. Conversely, states are under no obligation to ensure that the quality of privately provided services is higher than that which the state itself is obliged to provide. Since the main factor that distinguishes supplemental and substitutional NGOs is whether their activities fall within the state's duty horizon, we can expect that the duty of the state to ensure a certain standard of

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814 Reinikka and Smith (2004) 25.

815 Ibid.

quality will differ depending on whether the NGO is a supplemental or substitutional entity.

In the supplemental scenario, the state's obligation to provide benefits immediately, or very soon thereafter, is limited enormously by the unavailability of resources. Many African LDCs, lacking the resources needed to provide those very services that the supplemental NGOs provide, simply bear no obligation to ensure that harmless supplemental activities of non-profit actors are of any particular quality. That does not mean that states can turn a blind eye to medical malpractice in charitable clinics or child abuse in orphanages. The state still has an obligation to protect the human rights of beneficiaries against third party deprivation, which consequently sets the minimum quality-control standard for the private provision of social services and benefits. Thus, the third structural component for the relationship between the state and private provider has been modified from *quality assurance* to *supervision* of NGOs.

The legal outcome is different in cases involving substitutional NGOs because substitutional nonprofit activities fall within the duty horizon. This means that the substitutional NGOs are supporting realization and enjoyment to a level of achievement that is within the state's feasibility frontier. Unlike in the supplemental scenario where states lack both the obligation and ability to replace supplemental activities, states are obliged to ensure and even improve upon substitutional activities until they reach up to the level of enjoyment/realization that the state is required to achieve. Therefore, the state must guarantee a certain level of quality in the activities of substitutional NGOs. Recall, however, that human rights law protects the freedom of nonprofits to serve beneficiaries, thus substandard (but not harmful) services are protected from state obstruction. This would suggest that the state must improve upon subpar nonprofit activities rather than shut them down. The state can improve upon these activities by, for example, providing NGOs with additional resources or providing beneficiaries with additional benefits or services to supplement those suboptimal activities performed by substitutional NGOs. Since the state always retains responsibility for ensuring a certain level of quality in the case of substitutional NGOs, the substitutional model keeps the *quality assurance* label as an aspect of the *ensuring relation*.

In summary, the *provisioning relation* must be modified in order to fit the realities of nonprofit activities that are more commonly found in low-income African LDCs, namely substitutional and supplemental arrangement, because *admission*, *financing*, and *quality control* are not always prominent structural components of these arrangements. States' social



rights obligations are limited by the availability of resources at their disposal. As such, states facing resource scarcities will have minimal social rights obligations. Entering into comprehensive, collaborative and supportive provisioning relations with NGOs – which is characteristic of complementary arrangements – is not required by international law, and is likely beyond the capacity of low-income African LDCs in terms of their resources. Consequently, the complementary triangular model has been modified such that the state-to-NGO relation involving substitutional NGOs is now referred to as the *ensuring relation*, and its structural components are *guaranteeing*, *supporting* and *quality assurance*. As for supplemental NGOs, their relation to the state is more properly labelled the *enabling relation*, and its structural components consist of *permitting*, *facilitating* and *supervising* NGOs.

### 5.2.3. The NGO-to-Beneficiary Relation

The last legal relationship links the beneficiary to the NGO. In the complementary model, this is called the *fulfillment relation* (or *Erfüllungsverhältnis* in the *sozialrechtliche Dreiecksverhältnis*) because it relates to the state's social rights obligation toward the entitled person. In Reinikka and Smith's triangular model, the relationship between provider and beneficiary is referred to in a very different way because their model does not represent the legal relations between parties. Reinikka and Smith call this the "client power" relation, which reflects their concern with the power of beneficiaries to hold providers accountable for the quality of their services. However, what is most important for our analysis is that it is through this relationship that social rights are realized or enjoyed.<sup>816</sup> In the complementary

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816 Furthermore, emphasizing that the NGO-to-beneficiary relation marks the moment of realization or enjoyment has the added benefit of leaving the door open for considering the horizontal application of social rights law, thereby carrying with it the potential for a social justice perspective. It is not only the state that bears responsibilities toward the beneficiary. Private actors also bear their own responsibilities towards beneficiaries when they willfully engage in the business of realizing and enjoying social rights. This perspective gains some support from the preamble of the ICESCR and articles 25, 26 and 27 of the African Charter on Human and Peoples' Rights. (Peters (2016) *Beyond Human Rights: The Legal Status of the Individual in International Law*; Clapham (2013) *Human Rights and Non-State Actors*.) One theoretical framework that underpins this perspective is the notion that both private law and international law are undergoing a process of constitutionalization. (Jan Klabbers, Anne Peters and Geir Ulfstein, *The Con-*

model, it represents the point at which the state's obligations to the beneficiary are fulfilled. While Reinikka and Smith pull the state out of the provider-to-beneficiary relation, the social rights models pulls the state back into the equation by emphasizing the fulfillment of its legal obligations.

Since substitutional NGOs fulfill the standing obligations of states to beneficiaries, it is appropriate to maintain the same label for substitutional NGOs. Therefore, the NGO-to-beneficiary relation in the substitutional model retains the term *fulfillment relation*. In supplemental arrangements, however, nonprofit activities do not fulfill the standing obligations of the state because supplemental activities take place beyond the state's duty horizon. Thus, the moment that supplemental nonprofit activities achieve the realization or enjoyment of social rights for the beneficiary does not coincide with the moment that the state's social rights obligations to the beneficiary are fulfilled. While the NGO-to-beneficiary relation represents the realization or enjoyment of social rights, it signals something other than the moment of fulfillment in a supplemental arrangement. Instead, the NGO-to-beneficiary relation is the site at which the state's foreseeable obligations are *preemptively discharged* rather than the moment at which the state's standing duties are fulfilled. The label representing the NGO-to-beneficiary relation within the supplemental model thus reflects this modification.

### 5.3. *Summary*

The triangular model is an analytical tool that can be used to examine the legal relations that bind the state, NGOs and beneficiaries, as well as the

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*stitutionalization of International Law* (Oxford University Press 2011); Hans- W. Micklitz (ed), *Constitutionalization of European Private Law*, vol 22 (Oxford University Press 2014.) This perspective is embedded with a strong social justice orientation, which resonates with the post-colonial Africanist paradigm. It views social rights as representing more than merely entitlements to specific services and benefits. Rather, "their influence should infuse the entire legal system, including the legal rules and doctrines that allocate social benefits and economic resource benefits in private relationships such as family law, property law and contract law." (Sandra Liebenberg, 'Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa' 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) 305-337, 325.).

manner in which those legal relations influence one another. In the *sozial-rechtliche Dreiecksverhältnis* and the complementary model, the state designs a larger social policy framework wherein its social rights obligations are fulfilled through coordination with the activities of non-state actors. This kind of arrangement is consistent with the state's international obligations under the ICESCR because the Covenant does not require the state to fulfill social rights obligations exclusively through direct state action.<sup>817</sup> While the complementary model is more prevalent in advanced industrial economies, it does not represent a triangular arrangement that is typically found in low-income African LDCs. Thus, there is a need for new triangular models that more accurately represent the functional role of NGOs in African LDCs, and the legal consequences thereof. The new models proposed in this chapter correspond with the characteristics of supplemental and substitutional NGOs, and thereby reflect the specific ways in which the social rights obligations of states toward beneficiaries determine the regulatory obligations of the state toward NGOs.

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817 Alston and Quinn (1987) 182-183.