6. Evaluating NGO Laws: Unlawful Restrictions on Social Rights?

The previous chapters have argued that certain NGOs are essential for the realization/enjoyment of beneficiaries' social rights as well as the fulfillment/preemptive discharge of states' duties, indicating that state measures that restrict essential NGOs may breach states' social rights obligations and limit the social rights of beneficiaries. In general, the ICESCR prohibits restricting Covenant rights, including the social rights guaranteed therein. Textual evidence coupled with a teleological interpretation of the Covenant as well as the *travaux préparatoires* all indicate the same.[818] This suggests that restrictions upon nonprofit activities that are essential for the realization and enjoyment of social rights are also generally prohibited because it is reasonably foreseeable that they will result in limitations to the ESC rights of beneficiaries. Such restrictions would undoubtedly undermine precisely those conditions that have become necessary for the enjoyment or realization of social rights, as well as the Covenant's overarching purpose of achieving human freedom and human security for all.

Nevertheless, as discussed in the previous chapter, restricting NGOs will be reasonable or even necessary at times in order to protect the rights of beneficiaries. The issue that now remains is whether the resulting restriction on social rights is permissible. The present chapter addresses the following question: to what extent does the Covenant permit NGO laws that result in restrictions on the enjoyment or realization of beneficiaries' social rights? The answer depends on the type of restriction being imposed, the legitimacy of the state's aim in imposing such restrictions, and whether the restrictions are proportional to the state's objective.

818 See *supra* part 0on the subsidiarity principle as a component of the ICESCR's overarching purpose (discussing the Covenant's aim to protect and achieve human freedom, which would be inconsistent with any interpretation of the Covenant that recognizes a general right of the state to restrict ESC rights).

6.1. Three Types of Restrictions: Obstructions, Derogations and Limitations

The ICESCR contemplates at least three different ways that ESC rights may be restricted. These can be distinguished by whether they interfere with the realization of rights or with their enjoyment. Realization and enjoyment have different but related meanings: Realization marks the moment when a rights bearer begins to exercise or enjoy a right; thus, enjoyment is the consequence of realization. Enjoyment continues until there is an interruption in the exercise of a right or in the ability to exercise it. The effects of restricting enjoyment are unlike the effects of restricting realization. For example, while the latter might result in a withdrawal of existing services, the former is characterized by the lost opportunity to provide new services or to expand coverage for existing services. Furthermore, limiting the existing enjoyment of rights can result in extraordinary personal harm because people tend to plan around and rely on the continued enjoyment of their rights, which is neither unreasonable nor unforeseeable when their right to the "continuous improvement of living conditions" is taken into account.[819]

Nonprofit activities are essential for the realization of social rights when they are preparatory in nature, in that they achieve the necessary preconditions for the enjoyment of a right without directly bringing about its enjoyment. Examples of nonprofit activities that are essential for realization but not for enjoyment include training medical staff, building educational facilities, informing beneficiaries about existing services, and advocating for the expansion of services. On the other hand, nonprofit activities that are essential for enjoyment are typically direct service provision programs. The manner in which states regulate NGOs that are essential for the realization/enjoyment of social rights can result in one of three types of restrictions to the social rights of beneficiaries.

The enjoyment of social rights can be *destroyed* (i.e., derogated from) or *limited*, while the realization of rights can be *obstructed*. The destruction of a right occurs when the state totally derogates from it by completely suspending its enjoyment or making it practically impossible to continue enjoying the right. Limitations are less damaging because they do not amount to a total destruction. Rather, rights bearers can continue to enjoy their rights, although they are constrained in their ability to do so, or in the manner in which they choose to enjoy their rights. Finally, the realization of rights may be totally or partially obstructed by state measures that

819 ICESCR art. 11 (1).

make it either impossible or highly unlikely that certain unrealized rights will become enjoyable in the foreseeable future.

Distinguishing between whether an NGO law interferes with the enjoyment of rights or with their realization is important because the Covenant treats these restrictions differently in terms of their permissibility. Article 4 is the Covenant's general limitations clause. It addresses the permissibility of limiting the enjoyment of Covenant rights. Here is the text of article 4 in its entirety:

> The State Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 2 (1) relates to obstructing the realization of ESC rights, rather than limiting their enjoyment. Although this provision neither directly nor explicitly concerns the obstruction of realization, its terms clearly imply certain criteria for their permissible use. For convenience, the text of article 2 (1) is reproduced here:

> Each State Party of the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[820]

Unlike how article 4 permits limitations of rights under certain circumstances, article 2 (1) relates primarily to the duties of states to realize ESC rights. However, by defining the boundaries of the state's obligations to realize social rights, it implicitly carves out legitimate grounds for obstructing realization attained by state or non-state actors. Namely, states are only required to realize social rights through means that are both appropriate and feasible. Therefore, it must be permissible for states to obstruct or forgo the realization of social rights when it would be infeasible or inappropriate to do so. While article 4 limits the state's power to restrict rights, article 2 limits the state's obligation to realize rights.[821]

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820 Ibid art. 2(1).

821 See Saul, Kinley and Mowbray (2014) 246-247.

Article 2 (1) should not be used to evaluate the lawfulness of limiting the enjoyment of ESC rights that have already been realized. The drafting history of articles 2 (1) and 4 indicates that drafting members who supported the adoption of a general limitations clause reasoned that it was patently inappropriate to use article 2 as a general limitations clause because doing so would allow broad and unrestricted limitations on ESC rights. One report on the matter noted,

> The provision of the general article [which eventually became article 2] should, in their view, relate only to the general level of attainment of the rights and should not be invoked by States as grounds for detailed limitations on them. The general article did not indicate what limitations could be legitimate and it was necessary to state clearly that limitations would be permissible only in certain circumstances and under certain conditions. [822]

While article 4 provides the criteria for permissible limitations, article 5 describes what qualifies as a forbidden limitation. Article 5 relates to the destruction of Covenant and non-Covenant rights, as well as to the use of limitations beyond those explicitly permitted by the Covenant. It generally protects Covenant and non-Covenant rights against derogations and extensive limitations. Article 5 (1) states:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

This provision relates to the abuse of rights, whereby one party might claim that, in order to realize its own rights, the rights of others must be violated. Article 5 (1) prohibits all such derogations, as well as limitations that fail to conform to the requirements of article 4.

Article 5 (2) is directed toward the protection of *non-Covenant* rights against certain derogations and restrictions, as well as preserving higher

822 Report to the Economic and Social Council on the Eigth Session of the Commission (1952) para. 155.

standards of protection for ESC rights that might exist at the national level.[823] Here is the text of article 5 (2):

> No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 5 (2) essentially forbids limiting or destroying non-Covenant rights on the grounds that the Covenant does not explicitly recognize them. States still may restrict non-Covenant rights, but they will need another reason to do so. In considering the permissibility of limitations under the African Charter, the African Commission similarly recognizes a "general rule that no one has the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised elsewhere."[824]

The term "fundamental rights" should not be understood to mean the minimum level of protection. The *travaux préparatoires* reveal that proponents of the adopting the provisions found in article 5 (2) sought to protect existing standards of protection that *exceeded* those guaranteed by the Covenant.[825] Even some of those who opposed the provision when it was proposed did so because,

> …[they] thought it inconceivable that any State ratifying the covenant would use it as a pretext to abridge the rights and freedoms already exercised and guaranteed within its territory if the covenant should impose lesser obligations in a particular sphere.[826]

Rather than thinking of "fundamental rights" in this context as minimum standards, it is more accurate to understand the term to mean rights that are recognized by law or perhaps by color of law. Thus, if, by virtue of domestic law, a state attains higher levels of realization for ESC rights than the Covenant requires (e.g., high-value cash transfers to each household; debt forgiveness for all student loans), and recognizes those levels of real-

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823 The *travaux preparatoires* indicate that this provision was proposed with the aim of protecting rights enjoyed to a greater extent under national law than was provided for by the Covenant. (Ibid paras. 149-150.).

824 *Prince v. South Africa*, Comm. No. 255/2002 (ACmHPR 2004) para. 43.

825 Report to the Economic and Social Council on the Eigth Session of the Commission (1952) para. 150.

826 Ibid para. 151.

ization as the fulfillment of legal rights even though they are not explicitly guaranteed by the Covenant (e.g., a right to basic income; a right to free higher education), then it cannot justify arbitrarily restricting those rights on the grounds that the Covenant did not explicitly oblige the state to guarantee those rights in the first place. Again, the state still may restrict those rights and regress from levels of realization already attained, but it will need to identify another (legitimate) reason for doing so. Lastly, article 5 (2) tends to support the ESCR Committee's doctrine against the use of retrogressive measures. If this provision represents the unwillingness of member states to condone the limitation and restriction of rights not even mentioned within the Covenant, it stands to reason that the Covenant does not take lightly the use of retrogressive measures against Covenant rights.

6.2. The Permissibility of Limiting NGO-Provided Rights

It will undoubtedly be necessary at times for states to limit non-state activities that provide social rights in order, for example, to promote general welfare or fulfill the state's obligation to protect the rights of others. Yet, article 5 (1) appears to forbid the use of limitations beyond those permitted by the Covenant, and the general limitations clause - article 4 - does not explicitly permit limitations on rights provided by non-state actors. Without the ability to limit rights provided by nonprofits, the ability of states to regulate NGOs on legitimate grounds would be compromised. For instance, a devious nonprofit entity might provide basic services, like delivering food, in exchange for sworn loyalty from beneficiaries in support of a particular political agenda. In such cases, it would be unthinkable that the Covenant would require states to permit inappropriate NGO activities on the pretext that article 4 does not explicitly authorize such limitations. Such an interpretation would clearly undermine the Covenant's commitment to the interconnectedness of all human rights in general,[827] and to the protection of all peoples' right to self-determination in particular.[828] How, then, could the Covenant be interpreted such that the limitation of rights provided by NGOs is permitted, subject to certain restrictions?

827 ICESCR preamble.
828 Ibid art. 1.

In my view, since essential NGOs, such as those that play a substitutional role, are acting as the functional equivalent of the state in terms of fulfilling the state's social rights obligations, it would stand to reason that the Covenant would similarly restrict state efforts to limit those social rights enjoyed by beneficiaries of essential NGOs. To come to this conclusion, one must look carefully at the ordinary meaning of the texts found in articles 4, 5 and 2 (1) within their contexts and in accordance with the object and purpose of the Covenant.

6.2.1. The Permissibility of Limiting ESC Rights in General

As mentioned above, the state can restrict social rights in one of three ways: by derogating (destroying) from or limiting the enjoyment of rights, or by obstructing their realization. The Covenant provides some guidance as to the lawfulness of such restrictions by providing specific and general restrictions upon Covenant rights, as well as by defining the boundaries of permissibility.

6.2.1.1. Specific Limitations Clauses of the ICESCR: Article 13 (3) and (4)

Some articles of the ICESCR specifically limit Covenant rights, such as those relating to trade unions[829] and the rights of non-nationals in developing states.[830] No specific limitations have been placed directly upon social rights. There are, however, specific limitations placed on the right to establish private schools and the right to select a private education for one's own children. Article 13 (3) limits the freedom of parents to choose non-public schools for their children by requiring that they choose only schools that "conform to such minimum standards as may be laid down or approved by the State". In the fourth paragraph of article 13, the freedom of private parties to create educational institutions are

> subject always to the observance of the principles set forth in paragraph 1 of this Article [art. 13] and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

829 Ibid art. 8.
830 Ibid art. 2 (3).

Although these are limitations on rights that are not social rights, they may interfere with the right to education, particularly when access to public schools is rather limited. Placing such restrictions on educators and parents can limit the scope of education that is available to potential students. When alternative education of comparable quality is available to potential students, then such a limitation on the right to education is minimal or nonexistent. Thus, the only limitations that need to be evaluated are those imposed upon the rights of educators and parents, which can be done according to the provisions of article 13 (3) and (4). If, however, the private school is essential to the realization or enjoyment of education because the state has failed to ensure alternative means of acquiring education, then the permissibility of the resulting limitation on the right to education must also be evaluated.

Consider the example of Ethiopia's NGO law, which targets nonprofits receiving more than 10% of their funding from a foreign source – which constitutes a large share of the nonprofits in Ethiopia – by forbidding them from promoting human rights. Like article 13 of the ICESCR, the African Children's Charter[831] forbids state interference with the private establishment of schools, as long as such schools observe the child's right to education and conform to minimum educational standards set by the Ethiopian government.[832]One could hardly argue that prohibiting the promotion of human rights qualifies as a minimum educational standard because Ethiopia's NGO law neither explicitly contemplates basic childhood education nor indicates any legislative intent to advance the education of children. This kind of legislation is plainly a violation of the freedom of private actors to establish and maintain private schools.

Since article 13 does not address secondary interferences with ESC rights, it lacks the necessary safeguards for evaluating such limitations. It does not, for example, try to protect the nature of the right to education or require that all limitations serve the public welfare. Therefore, the indirect interference with the right to education must be evaluated in accordance with the general clauses of the ICESCR, which address the permissibility of restrictions on ESC rights. A major attribute of this approach is that ESC rights will always enjoy the minimum baseline of protection that is built into the general clauses. For example, in a state where the availability

831 Ratified on Oct. 2, 2002. ('Ratification Table: African Charter on the Rights and Welfare of the Child' (*African Union*) <http://www.achpr.org/instruments/child/ratification/>.).

832 African Children's Charter art. 11 (7); ICESR art. 4.

of free public education is severely limited, the state cannot set minimum standards of education so high that they effectively prohibit the establishment of nonprofit schools that would have otherwise provided at least some basic form of education where there was none at all. Article 13 (3) and (4) protect the right to education by ensuring the education that is available to students is only of a good quality. It allows states to exclude private schools of lesser quality when public education of a better quality is readily available. However, when public schools are a rarity, using article 13 to obstruct the establishment of private education would tend to degrade or limit the right to education, thereby triggering a need to apply the protective provisions of the general clauses that relate to restricting Covenant rights.

6.2.1.2. Permissibility of Limitations According to the African Charter

As for the African Charter, it does not explicitly limit ESC rights. Its text imposes neither specific limitations on ESC rights, nor any general limitations clause. The African Commission understands this to mean that it should be very cautious when permitting states to restrict Charter rights:

> The spirit behind the absence of such a general limitation must be understood as the desire to avoid abusive restriction of rights, a restriction which will be applied only under very limited and legally circumscribed conditions.[833]

The Commission has declared "a general principle that applies to all rights" that "[g]overnments should avoid restricting rights" and that "[n]o situation justifies the wholesale violation of human rights", thereby effectively restricting the permissible use of limitations and totally rejecting the general use of derogations.[834] Thus, when the Commission infers from the Charter the permissible use of limitations, it does so in a restrictive man-

833 *Groupe De Travail v. DRC*, para. 66.

834 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (ACmHPR 1998) para. 65; see also, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 and 89/93 (ACmHPR 1999) paras. 80 & 82.

ner.[835]Consequently, the Commission has read into the Charter the twin principles of proportionality and necessity for all limitations in order to restrict their permissible use.[836] It notes that,

> The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.[837]

Furthermore, in defining the permissibility of limitations, the Commission has ensured the protection of fundamental rights guaranteed under international law,[838] as well as what appears to be a core minimum of enjoyment against total derogation.[839]As for the legitimacy of the state's reason for limiting rights, article 27 (2) of the African Charter offers some guidance. It states:

> The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

This clause suggests that states are likely justified in restricting rights if they do so for one of these reasons. The Commission likewise recognizes these particular purposes as "[t]he only legitimate reasons for limitations".[840] Noting that the Charter does not feature a general derogations clause, the Commission concluded that "limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances."[841]

835 *Groupe De Travail v. DRC* para. 66; *Media Rights Agenda and Others v. Nigeria* para. 69.
836 *Groupe De Travail v. DRC* para. 66.
837 *Media Rights Agenda and Others v. Nigeria* para. 69.
838 *Amnesty International and Others v. Sudan* para. 80; *Groupe De Travail v. DRC* para. 67.
839 *Media Rights Agenda and Others v. Nigeria* para. 70.
840 Ibid para. 68.
841 Ibid para. 67.

6.2.2. Articles 4 and 5 Do Not Forbid the Limitation of NGO-Provided Rights

Article 4's explicit reference to "rights provided by the State" as well as its silence as to rights provided by non-state actors, leaves one wondering whether limitations on rights provided by NGOs are permissible, forbidden or restricted in any way. On the one hand, article 4 could be interpreted as a blanket prohibition of all limitations on rights provided by NGOs. This, however, is at odds with the purpose and object of the Covenant since it would effectively allow all NGOs – including inappropriate NGOs – to escape regulatory control as long as they provide some ESC rights. On the other hand, since article 4 does not explicitly restrict limitations on social rights provided by nonprofit entities, one may arrive at the opposite conclusion: limitations on rights provided by NGOs are *always* permitted. Analysts who neglect the impact that NGO restrictions can have on social rights are unwittingly aligned with this approach. Both interpretations are extreme and have undesirable consequences. They either create a loophole for predatory or exploitative nonprofits by protecting them against state regulation as long as they also provide some ESC rights for some beneficiaries, or they suggest that states have unbridled authority to limit social rights as long as non-state actors provide them. These conclusions are incompatible with meaning of article 4, in light of its context[842] and the object and purpose of the Covenant.

Readings of article 4 that forbid or permit all limitations of social rights provided by NGOs are based on the same error of interpretation: the notion that the application of a law in one area of context (rights provided by the state) automatically excludes or necessitates its application in another context (rights provided by NGOs). Instead, to determine whether and to what extent the Covenant permits limitations on rights provided by NGOs, it is necessary to look beyond the text of article 4 and to consider other parts of the Covenant as well as its purpose and object. The ESCR Committee has emphasized, "the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to per-

842 Note that article 4 must be read in conjunction with article 5 (1), which generally forbids the limitation of rights beyond the extent to which the Covenant already permits. This precludes an interpretation of article 4 whereby states are permitted to wield unlimited power to restrict social rights as long as those rights are provided by NGOs.

mit the imposition of limitations by States."[843] Likewise, the limitation clause should take a beneficiary-centered approach in order to prioritize the protection of rights rather than to serve as a technical means for NGOs to escape regulatory control or for states to circumvent their Covenant obligations. Ultimately, the answer to the question, "when are limitations to rights provided by NGOs permissible?" must remain compatible with the norms and principles of the Covenant.

It cannot be interpreted from article 4 that the use of limitations under all circumstances other than when rights are provided by the State is simply forbidden. Even the ordinary meaning of the text in this article does not require such a conclusion. The phrase "in the enjoyment of *those rights provided by the State* in conformity with the present Covenant"[844] has been inserted into a line of text that establishes the criteria for the permissibility of limitations, thus it has the grammatical function of qualifying the statement into which it was inserted rather than being itself qualified. In this case, the qualification serves to confine the range of limitations that are of concern to only those limitations that affect rights provided by the state. It would be a mistake to understand it the other way around, namely as indicating that it is only those rights provided by the state that may be subject to limitations. In other words, article 4 restricts the range of limitations that are of concern rather than the range of rights that may be limited. Therefore, limitations affecting rights provided by non-state actors are not forbid; they are simply not of concern to this article.

This narrowed scope of concern is reaffirmed by the words, "…the State may subject such rights only to such limitations as are determined by law…" Here, the term "only" precedes the words "to such limitations …" and does not precede the words "such rights", thereby indicating that it is the range of limitations that are being restricted rather than the range of rights that may be limited. This leaves the door open to an interpretation of article 4 whereby limitations on rights provided by non-state actors might be permissible.

However, article 4's silence on the matter should not be understood to mean that all limitations on NGO-provided rights are permissible, without due regard to their proportionality *vis-à-vis* the legitimacy of the state's underlying interests or the extent to which such rights are limited. Making no mention of limitations to rights provided by non-state actors, article 4

843 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 28.

844 (Emphasis added.).

neither explicitly permits nor forbids the use of such limitations. Yet, as a practical matter, when NGOs are prevalent and essential to social rights and to the fulfillment or preemptive discharge of state duties, the state must be able to regulate them to a certain extent, even if – at times – regulatory restrictions result in a limitation to the ESC rights of their beneficiaries.

Similarly, a combined literal reading of articles 4 and 5 (1) might appear at first glance to permit all limitations or the complete destruction of ESC rights, as long as it was not the state's aim to do so, and as long as the rights effected were provided by non-state actors.[845] This is essentially what is happening in African states. In general, existing NGO laws that restrict nonprofit activities do not appear to aim at the destruction or limitation of social rights. In fact, many of these laws do not mention social rights at all, which suggests that lawmakers are not considering the negative impact that they could have on the enjoyment and realization of social rights. Some might even argue that restrictive NGO laws would *enhance* social rights by forcing NGOs to focus predominantly on service provision instead of advocacy. Thus, these laws can inadvertently result in restrictions to the enjoyment and realization of social rights. In such cases, the limitation on social rights is indirect because lawmakers seek primarily to control NGOs or limit their political influence rather than to interfere with the social rights of their beneficiaries.

Technically speaking, this kind of inadvertent limitation on ESC rights is not forbidden according to a literal reading of article 4 (which does not address rights provided by NGOs) and article 5 (1) (which forbids only those acts that aim at restricting ESC rights). However, one should not arrive at such a conclusion lightly. Adjudicators should be careful to vet out cases in which the state knew or should have known that restricting NGOs would result in an interference with the social rights of beneficiaries. A heighten level of scrutiny is especially appropriate when the NGOs are essential for the realization/enjoyment of social rights or for the fulfillment/preemptive discharge of state duties. Moreover, a heightened level of judicial scrutiny in this regard would incentivize lawmakers to ensure that

845 This is because article 4 does not explicitly forbid limitations on rights provided by non-state actors, and because article 5 (1) only explicitly forbids acts *aimed at* the destruction or extensive limitation of ESC rights, thereby leaving open the issue of whether acts that only inadvertently bring about the same effects are therefore permissible.

they are reasonably informed about the impact that their laws will likely have on the realization and enjoyment of ESC rights.

Although as a practical matter, states must be able to limit NGO-provided rights to a certain extent, article 5 (1) disqualifies all interpretations of the Covenant that would permit any act aimed at limiting ESC rights to a greater extent than is permitted by article 4 and the specific limitations clauses. How, then, can the Covenant be interpreted such that it permits limitations on NGO-provided rights – subject to certain restrictions – but also remains consistent with the terms of article 5 (1)? The solution is to ground such an interpretation squarely within the scope of article 4. In other words, in order to be consistent with the requirements of article 5 (1), limitations imposed upon rights provided by NGOs are permissible to the extent that their permissibility can be derived from the existing general limitations clause. As such, I propose that article 4 applies analogously to limitations imposed upon NGO-provided rights whenever those rights are provided by substitutional or supplemental NGOs, or by their minimum NGO counterparts, because those rights are treated as the functional equivalent of rights provided by the state. Under this interpretation, the ICESCR limits how restrictive NGO laws are allowed to be such that any resulting interference with the enjoyment or realization of social rights must satisfy the requirements of article 4.

6.2.3. Article 4 Can Be Used Analogously for NGO-Provided Rights

The preliminary question is whether the text of article 4 indicates that its provisions should *never* be applied to the limitation of rights provided by non-state actors; that is, whether it forbids its analogous application to rights provided by NGOs. While at first glance the text of article 4 might appear to restrict its application to rights provided by the state, further investigation reveals that this is not the case. The ordinary meaning of those words in the context of the surrounding words indicates that a different interpretation is proper.

Although the text of article 4 includes the phrase "those rights provided by the State in conformity with the present Covenant", it is not clear whether the meaning of this phrase is to prohibit the use of restrictions on rights provided by non-state actors. For example, the meaning of this phrase might be to exclude the use of limitations on rights not yet provided such as those not yet realized or enjoyed. Likewise, the meaning of the phrase could be that it excludes the use of limitations on rights provided in

conformity with other Covenants, such as the ICCPR. To understand the meaning of this phrase, one must look beyond the four corners of the Covenant.

The Committee on ESC rights has not provided much guidance on the meaning or underlying reasoning of article 4, let alone any guidance on this particular issue. The drafting history, however, provides some guidance. It seems that excluding from the applicable scope of article 4 those rights provided by non-state actors was barely within the drafters' range of awareness, let alone forming part of their intent. The members of both the Third Committee of the General Assembly and the Commission on Human Rights paid virtually no attention to this question. There is, however, one exception. During general debates of the Third Committee on the general provisions of the ICESCR as they had been drafted by the Commission on Human Rights, Miss Marsh of Canada noted that she would have preferred that article 4 be amended so that the words "those rights provided by the State" would have been deleted.[846] However, she did not submit an official amendment, and the issue was neither discussed nor raised again. The Third Committee adopted article 4 unanimously,[847] without any changes, and without discussing or fully considering whether the rights provided by non-state actors should be subject to limitations and whether the use of such limitations should be restricted. Earlier drafting history also reveals the uncontroversial nature of the words "rights provided by the State". They were accepted by the Commission without any debate about their meaning.[848]

The drafting history of how this phrase was originally proposed and why it was partly amended provides more insight into its meaning. The phrase first appeared during the seventh session of the Human Rights Commis-

846 Miss Marsh would have removed the words "in the enjoyment of those rights provided by the State in conformity with this Covenant, the State may…" and inserted in its place "in ensuring the enjoyment of the rights set forth in this Covenant, they may…" (Summary Record of the 1185th Meeting, Third Committee, U. N. General Assembly, UN Doc. A/C.3/SR.1185 (UN 1962) para. 18.).

847 Summary Record of the 1206th Meeting, Third Committee, U. N. General Assembly, UN Doc. A/C.3/SR.1206 (UN 1962) para. 53.

848 Summary Record of the 306th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.306 (UN 1952); Draft International Covenants on Human Rights: Report of the Third Committee (1955); Summary Record of the 308th Meeting (1952); Summary Record of the 234th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.234 (UN 1951); Summary Record of the 235th Meeting (1951); Summary Record of the 236th Meeting (1951).

sion. It was part of the original proposal for a general limitations clause proposed by the representative of the United States.[849] That proposal was the following:

> Each State Party to the Covenant recognizes that in the enjoyment of those rights provided by the State in conformity with this Part of the Covenant, the State may subject such rights only to such limitations as are determined by law and solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[850]

The phrase "rights provided by the State in conformity with this Part of the Covenant" was by no means an absentminded insertion. It was noted by the Chairman of the Commission that the United States' proposal was "obviously" drafted in the same way as existing limitations provisions within the Covenant.[851] Likewise, the United States by its own admission mimicked the text of article 29 of the Universal Declaration of Human Rights.[852] However, while much of the United States' proposal was copied verbatim from the pre-existing texts, none of those pre-existing texts included language that restricted their application to rights provided by states. This language was deliberately added to the United States' proposal for a particular purpose. That purpose, however, was not to exclude from article 4's scope of application those rights provided by non-state actors.

The first and perhaps primary purpose of inserting this phrase was to distinguish between limitations on rights already being enjoyed (i.e., provided by the state) and those not yet realized (i.e., *not yet* provided by the state), rather than distinguishing between rights provided by the state and those provided by non-state actors. There was concern among some members, including the United States, that the way in which article 2 and the substantive articles had been formulated, the Covenant imposed upon

849 Summary Record of the 234th Meeting (1951).

850 United States Proposal Relating to the General Clause Concerning Economic, Social and Cultural Rights, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/610/Add.2 (UN 1951).

851 Summary Record of the 234th Meeting (1951); Report to the Economic and Social Council on the Seventh Session of the Commission on Human Rights, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/640 (UN 1951) annex I (articles 13-16 of the draft international covenant include specific limitations for certain civil and political rights).

852 Summary Record of the 234th Meeting (1951).

states an ever-increasing duty to realize ESC rights that – once realized – were absolute and could never be limited. The general limitations clause was meant to allow states some degree of freedom to limit rights once they've already been realized, which was simply beyond the scope of article 2's leniency. In defense of her delegation's proposal for a general limitations clause, Mrs. Roosevelt – the representative of the United States – explained the following:

> …each of the articles on economic, social and cultural rights so far adopted began with the words: "The States Parties to this Covenant recognize the right of everyone…"; those rights were thus set forth in absolute, unqualified form.
> …The United States delegation proposed the inclusion in the part of the Covenant dealing with economic, social and cultural rights of a general recognition that rights, when provided by the State, would not necessarily be absolute, but might be subject to the limitations mentioned in article 29 of the Universal Declaration of Human Rights.[853]

The second reason for the insertion appears to have been driven by the geopolitical divides of that era. Throughout the drafting history,[854] a division among drafting members is evident as to whether ESC rights should be treated differently than civil and political rights, and this historical context provides another explanation for the insertion of the lines "provided by the State". Although a single unified Covenant was the instrument originally intended for guaranteeing all human rights, certain members (chief among them, the delegation from the United States) sought to separate the two categories of rights into distinct legal spheres. However, very likely due to heavy resistance from those opposing such a measure (lead primarily by the delegation from the USSR), those who sought to distance ESC rights from civil and political rights were only able to do so through a series of small changes. These changes began with moving the ESC rights into their own section within a unified draft Covenant and ended with each category of rights being separated its own distinct legal instrument. In the middle of this process, while ESC rights were still to be guaranteed within a unified Covenant, albeit within its own section and subject to its own general provisions, the United States proposed the adoption of a general limitations clause exclusively for ESC rights. The USSR and others who

853 Ibid (emphasis in original.).
854 Ibid; Summary Record of the 235th Meeting (1951); Summary Record of the 236th Meeting (1951).

opposed the move argued fervently that a general limitations clause for ESC rights was both unnecessary – because it was difficult to imagine when it would ever be appropriate to limit ESC rights – and dangerous – because it threatened to render ESC rights completely meaningless. These members believed that ESC rights had already been severely weakened as a result of, *inter alia*, being separated from civil and political rights within the Covenant and being subjected to the language of "progressive realization".

From this historical vantage point, it stands to reason that the line "rights provided by the State in conformity with this Part of the Covenant" was inserted by the United States delegation not for the purpose of fully allowing or completely prohibiting the limitation of ESC rights provided by non-state actors, or even for the purpose of restricting the application of article 4 to rights provided only by state actors. Rather, it was very likely the result of efforts by the United States and its supporters on the Commission to create a general limitations clause that would apply *only to ESC rights* (i.e., "…this Part of the Covenant…") and not to civil and political rights. The operative phrase here is not "those rights provided by the State", but rather "provided by the State *in conformity with this Part of the Covenant*".[855]

Ultimately, neither the text of the Covenant nor the drafting history precludes the analogous application of article 4 to limitations on rights provided by non-state actors. Moreover, bringing the limitation of rights provided by NGOs within the purview of article 4 would extend much needed protection to the rights of beneficiaries against extensive state interferences, particularly when NGOs are essential for the realization and enjoyment of social rights or the alleviation of their total deprivation. Therefore, I propose extending the scope of article 4 such that it applies to state measures that restrict NGOs whenever those NGOs are substitutional, supplemental or the minimum form of either type.

6.2.4. Using Article 4 to Restrict Limitations on NGO-Provided Rights

The previous sub-section argues that states are allowed to limit rights provided by NGOs. If applied analogously, article 4 would not only permit

855 (Emphasis added.) This was later changed to "…in conformity with the present Covenant" once ESC rights were separated from civil and political rights and placed into their own Covenant.

the use of limitations on rights provided by NGOs, but it would also restrict their use. Limitations must be (1) determined by law, (2) compatible with the nature of the rights being limited, and (3) implemented solely for the purpose of promoting the general welfare in a democratic society.

The first requirement ensures that states do not arbitrarily impose limitations on right provided by NGOs. This rules out arbitrary limitations of rights and makes it procedurally (and perhaps politically) more cumbersome for states to limit ESC rights. Procedurally speaking, the legislative process that gives rise to NGO laws would normally fulfill this requirement. However, it is questionable whether the substantive provisions constitute lawful limitations under article 4 if rather than directly limiting ESC rights they merely grant governmental officials unfettered discretion to do so indirectly by shutting down NGOs, freezing their financial accounts or denying them important licenses, access to beneficiaries in need, or access to foreign funding. For example, Uganda's former NGO law, the Non-Governmental Organisations Registration Act (2009), authorized a public body called the National Board of Non-Governmental Organistions to dissolve NGOs for a number of reasons as well as "any other reason the Board considers necessary in the public interest."[856] The words 'public interest' are left undefined. Setting aside the question of whether all NGOs in Uganda are helpful to beneficiaries,[857] the very fact that the Uganda is a poor country with high poverty rates and inadequate governmental social protection schemes indicates that at least some nonprofit activities will be essential for beneficiaries.[858] Thus, while it is reasonable and in fact necessary for the government to regulate NGOs in order to protect beneficiaries

856 The Non-Governmental Organisations Registration Regulations, 2017 No. 22 (Uganda 2017) § 17(3)(e).

857 See *Human Development in Uganda: Meeting Challenges and Findinal Solutions,* World Bank, (2009) 44 <http://documents.worldbank.org/curated/en/659361468175487874/Uganda-Human-development-in-Uganda-Meeting-challenges-and-finding-solutions>; Susan Dicklitch and Doreen Lwanga, 'The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda', 25 Human Rights Quarterly 482 (2003); *Uganda - the Role of Nongovernmental Organizations and Community-Based Groups in Poverty Alleviation,* World Bank (1994) <http://documents.worldbank.org/curated/en/363831468765338754/Uganda-The-role-of-nongovernmental-organizations-and-community-based-groups-in-poverty-alleviation>.

858 Uganda is both a low-income and least developed country with a national poverty rate averaging 19.7 %, and 42 % in northern Uganda. (*Poverty Maps of Uganda*, World Bank (2018) 18 <http://documents.worldbank.org/curated/en/456801530034180435/Poverty-Maps-of-Uganda> .).

against inappropriate conduct, very restrictive NGO laws will likely impede nonprofit activities that do in fact assist portions of the population who are in need of assistance and whom the government does not reach. Such interferences with social rights must comply with the requirements of article 4, which means they must be determined by law. In cases involving substitutional or supplemental NGOs, granting the Board virtually unfettered discretion to decide when NGOs were to be dissolved was tantamount to allowing limitations to social rights to be determined by public officials rather than by law. Uganda has since enacted a new NGO law whereby only courts of law now have the power to involuntarily dissolve NGOs.[859]

These kinds of laws do not state clearly the manner in which the social rights of beneficiaries may be limited, thus limitations are not *determined* by law, even though they are *consistent* with the law that regulates NGOs. Yet, as the drafting history reveals,[860] there is a clear distinction between the phrases 'determined by law' and 'consistent with law', the latter being less stringent than the former because it allows limitations to be determined by acts of governmental officials acting in accordance with NGO laws rather than being determined by the law itself. The requirement is that the law – rather than a governmental official – determines whether and how a limitation on the rights provided by NGOs will occur. Lawmakers must have intended to limit the rights of beneficiaries through NGO regulations. Inadvertent limitations are not permissible.

Article 4's second requirement is that limitations must remain compatible with the nature of the rights being limited. The meaning of this is that although restrictions on NGOs may limit social rights, those limitations must not extinguish the nature of the ESC rights that are being limited. This criterion is critical for ensuring that limitations do not cross the line and become full derogations by entirely destroying the substance of a right. Some commentators have noted the difficulty in imagining any limitation to social rights that would still be compatible with the nature of those rights.[861] It is unclear, for instance, how a state might limit the right to health or freedom from hunger in such a way that remains compatible with the nature of those rights. It is even more difficult to imagine how limiting the very essential core of a social right would still be compatible

859 The Non-Governmental Organisations Act, No 5 of 2016 (Uganda) arts. 48 & 50.
860 Summary Record of the 236th Meeting (1951).
861 Alston and Quinn (1987) 202-203.

with the nature of that right since minimum essential levels reflect the nature of Covenant rights, thus restricting them would be tantamount to obliterating the nature of those rights. For that reason, some have argued that limitations affecting minimum essential levels are impermissible because they cannot satisfy the requirements of article 4. [862]

At the very least, ensuring the nature of social rights must include refraining from causing their complete destruction and alleviating their total deprivation. This constitutes the core obligation of the state. Consequently, in the context of substitutional and supplemental NGOs, article 4 forbids the use of NGO laws that are so restrictive that the social rights of beneficiaries are completely destroyed. However, the case of minimum substitutional and minimum supplemental NGOs is of particular significance in this regard because these NGOs alleviate the total deprivation of social rights, and they are essential to their alleviation because the state does not and/or cannot ensure the same. Therefore, their activities respectively fulfill or preemptively discharge the positive core obligations of states.

Consider, as an example, how Ethiopia's NGO law nearly completely destroys a part of the child's right to education that is provided by NGOs. In addition to being a party to the ICESCR, Ethiopia has also signed and ratified regional human rights instruments, including the African Charter [863] and the African Children's Charter[864]. Like article 13 of the ICESCR, the African Children's Charter recognizes the child's right to education, as well as "the liberty of individuals and bodies to establish and direct educational institutions".[865] Consider now the example of an NGO that establish schools for children with foreign funding. Under Ethiopia's NGO law, such a school is forbidden from promoting human rights.[866] This prohibition directly violates Ethiopia's commitments under the international human rights law, which – as the African Children's Charter mandates – includes ensuring that education

862 Müller (2009) 575, 579-583.

863 Ratified June 15, 1998. ('Ratification Table: African Charter on Human and Peoples' Rights' (*African Union*) <http://www.achpr.org/instruments/achpr/ratification/>).

864 Ratified Oct. 2, 2002. ('Ratification Table: African Charter on the Rights and Welfare of the Child'(*African Union*)).

865 African Children's Charter art. 11 (1) & (7).

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

> foster[s] respect for human rights and fundamental freedoms, with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions.[867]

The obligation to strengthen respect for human rights through education is also part of the ICESCR.[868] This feature of Ethiopia's NGO law directly and intentionally destroys a part of the right to education, which is the right to an education that strengthens respect for human rights.

Once total deprivation is alleviated for the beneficiaries, the state then bears the negative core obligation of refraining from totally destroying those minimum levels of achievement. This indicates that article 4 forbids *any* limitations on rights provided by minimum substitutional and minimum supplemental NGOs, even if in the unlikely event that doing so would promote the general welfare. This is not to say, however, that the state cannot regulate or limit these NGOs. It may indeed do so, but only to the extent that such regulatory measures do not impose a limitation on the social rights of beneficiaries. Although this rule might sound rather extreme, it is quite sensible. It is difficult to imagine a scenario in which promoting the general welfare would require restricting nonprofit activities that are vital to alleviating the total deprivation of social rights, especially when these NGOs are not minimum *inappropriate* NGOs. The regulation of minimum inappropriate NGOs is permitted through a combined reading of articles 2 (1) and article 4, which will be discussed later on in this chapter.

The last requirement of article 4 is that the limitations serve the purpose of promoting the general welfare in a democratic society. This is difficult to interpret because of its broad meaning. Unlike limitations clauses found in the ICCPR, article 4 of the ICESCR does not explicitly permit limitations for any reason other than "promoting general welfare in a democratic society."[869] Although it is unclear what precisely is meant by "general welfare", the drafting history reveals that this language was inserted as a means of preventing arbitrary and oppressive limitations of rights, such as those that would occur under a dictatorship. [870] Furthermore, there is reason to believe that the limitation of ESC rights such that particularly vul-

867 African Children's Charter art. 11 (2) (b).
868 ICESCR art. 13.
869 Ibid art. 4.
870 Draft International Covenants on Human Rights: Report of the Third Committee (1962) para. 89; see also Müller (2009) 575.

nerable individuals are disproportionately injured never promotes the general welfare. [871]

Lastly, implicit within article 4 is a requirement that the severity of limitations be proportional to the gravity of the state's legitimate aim. This can be garnered from the article's protection of the nature of rights, as well as its restrictive and protective tone. The drafting history also supports this conservative approach to permitting limitations.[872] This suggests that the greater the limitation is on a particular right, the greater the societal need must be for its limitation. In other words, not only must article 4 limitations be necessary for promoting the general welfare, but their severity should also be appropriate. [873] These requirements are based on the principle of proportionality, which is a common featured of other areas of human rights law, and has been recognized by both the African Commission and the ESCR Committee.[874] The ESCR Committee has recognized the proportionality test as an inherent component of assessing article 4 limitations. It attributes the proportionality requirement to article 5 (1), noting that "the least restrictive alternative must be adopted where several types of limitations are available."[875]

6.3. Permissibility of Obstructing the Realization of Rights by NGOs

As to the permissibility of obstructing the realization of social rights by NGOs, one must look to article 2 (1), which only requires state to states achieve the realization of social rights through appropriate and feasible

871 Müller (2009) 574.

872 Proponents of including a general limitations clause expressed the need to constrain the use of limitations such that the inevitable limitations that arise as a consequence of practical obstacles to realization would not pose a disproportionate threat to the ESC rights. (See, e.g., Draft International Covenants on Human Rights: Report of the Third Committee (1955) 3 (Mr. Hoare of the United Kingdom argued that the intent of a general limitations clause "was precisely to limit such limitations by states that were permissible only in certain circumstances and under certain conditions"); ibid 5 (likewise, Mr. Juvigny of France agreed with Mr. Hoare of the UK in concluding that a general limitations clause was necessary to protect ESC rights against extensive limitations.).

873 Müller (2009) 583-584.

874 See General Comment No. 21: The Right of Everyone to Take Part in Cultural Life (2009) para. 19; *Prince v. South Africa* para. 43.

875 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 29.

means. This would indicate that if the state obstructed efforts by NGOs to realize social rights inappropriately, or "inappropriate NGOs", such a restriction would be permissible under the terms of article 2 (1). Supplemental and substitutional NGOs, however, may not be restricted in the same way because, by definition, they realize social rights only by means that are appropriate.

Article 2 (1) establishes the obligations of the state such that states are not required to realize social rights to a level of achievement beyond that which they are capable of achieving. The article allows for progressive realization by all appropriate means and within the maximum of available resources. Although the explicit terms of article 2 (1) concern defining the scope of the state's duties, its open-ended language of progress, appropriateness and availability of resources suggests that the scope of the state's duties are rather dynamic. In this way article 2 (1) obligations can indirectly accommodate certain restrictions on the realization of social rights. Thus, states may pause the progression of realization in order to cease using inappropriate means, or due to resource constraints.

Article 2 (1) is not a limitations clause *per se*, but rather a dynamic obligations clause that allows the duties of states to shrink or expand in accordance with the availability of resources or the appropriateness of means. Technically, it is not the case that article 2 (1) permits limitations on the realization of rights provided by nonprofit entities, but rather that it does not burden states with the obligation of allowing nonprofit entities to advance realization at all times, under all circumstances and by any means they choose. More importantly, restricting realization does not automatically constitute to a limitation on social rights because rights must first be enjoyed before they can be limited. If the restriction were causing limitations on social rights, then it would need to be scrutinized under article 4. Thus, restrictions on nonprofit activities that are essential for the realization of social rights but not for their enjoyment, such as preparatory activities or those related to advocacy, are subject to review under the terms of article 2 (1).

Having rendered the state's duty to adopt a particular manner of realization dependent upon whether those means are both appropriate and feasible, article 2 (1) indirectly empowers states to restrict activities that would nonetheless lead to advancements in realization if they are inappropriate or infeasible. In other words, states are free to block the nonprofit entities if (1) those activities advance realization of social rights through inappropriate means, or (2) it is too costly for the state to permit their activity in the first place. Note that this is a more lenient standard for the permissibil-

ity of obstructions than the criteria set up by article 4 regarding limitations. The Covenant appears to be much more forgiving of restrictions on the realization of rights not yet enjoyed (i.e., pursuant to requirements of articles 2 (1) and 5) than it is of restrictions on the enjoyment of rights that have already been realized (i.e., according to the terms of article 4).

It is difficult to imagine how it might be infeasible for a state to permit nonprofit activities. It costs virtually nothing to permit nonprofit activities to take place. Of course, the state's policing and administrative costs would increase as the number of active NGOs increase within its territory, but these costs are probably negligible. Thus, barring unusual circumstances, states may not obstruct nonprofit activities that advance realization on account of resource constrains. This leaves open the issue of whether it is appropriate to allow nonprofit activities to advance the realization of social rights. And this in turn depends on whether the nonprofit activities themselves are appropriate.

At the very least, nonprofit activities will be appropriate if they are reasonably likely to advance realization in a manner that is consistent with the norms and principles of human rights law. Therefore, one reason that nonprofit activities may be deemed inappropriate is if they result in an interference with other human rights or the rights of others, which would be inconsistent with article 5 (2)'s indication that the Covenant generally does not support the derogation from or limitation of non-Covenant rights, as well as with the preamble's recognition of the interconnectedness of all human rights. In these instances, it would be permissible under article 2 (1) for the state to obstruct the realization of rights by these inappropriate means. For example, although forcibly subjecting women to medical treatments upon their husbands' requests might have been deemed appropriate in the past, it is no longer considered to be so today, and an NGO that engages in such practices may be restricted by the state, even at the cost of limiting the health "benefits" to the women. Such a limitation does not fall into the scope of article 4's requirements because it is not within the duty of the state – according to article 2 (1) – to ensure the realization of the right to health through such inappropriate means. In other words, no justification is needed to restrict an inappropriate medical procedure when the state is under no obligation to ensure its provision in the first place.

6.3.1. The Doctrine of Deliberately Retrogressive Measures

In its reading of article 2 (1), the ESCR Committee has articulated a doctrine on the use of "retrogressive measures", which it has applied when states use resource constraints as a justification for restricting rights. Although resource constraints are not typically the grounds for restricting NGOs, this can be the reason that states cite if they do not extend financial assistance to NGOs that fulfill their social rights obligations, such as substitutional NGOs and – potentially – complementary NGOs. The problem with the ESCR Committee's doctrine of retrogressive measures, however, is that it evaluates the permissibility of limitations on account of resource constraints under a more lenient standard than that which is established under article 4.

Retrogressive measures are those that would directly or indirectly diminish, or threaten to diminish, the enjoyment of Covenant rights.[876] This line of reasoning is developed from the Committee's understanding of how article 2 (1) emphasizes progressive realization and the use of maximum available resources. [877] Although social rights may be realized progressively rather than immediately, interpreting these words to mean that states can advance leisurely toward the fulfillment of social rights or that there are no time limits whatsoever placed upon their fulfillment would be tantamount to gutting Covenant obligations of all their meaningful content. This is why the Committee has reasoned that states must "move as expeditiously and effectively as possible towards that goal," [878] and then from there has concluded that retrogressive measures are presumably impermissible. According to the Committee, the state's use of deliberately retrogressive measures raises a rebuttable presumption that states are failing to fulfill their article 2 (1) obligations to achieve full realization in a progressive manner.

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876 See General Comment No. 4: The Right to Adequate Housing (1991) para. 11 ("a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant"). Economic, Social and Cultural Rights, United Nations High Commissioner for Human Rights, U. N. Economic and Social Council, UN Doc. E/2017/70 (UN 2017) para. 23.

877 General Comment No. 13: The Right to Education (1999) para. 45; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 32; General Comment No. 15: The Right to Water (2003) para. 19; General Comment No. 19: The Right to Social Security (2007) para. 42.

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

The Committee notes that retrogressive measures can only be impermissible when they are deliberate. This comes from the notion that the Covenant's command to take steps "with a view to achieving progressively" ESC rights suggests that an element of intention, rather than conduct, is associated with this obligation.[879]This means that states are not required to achieve full realization along a linear path of ever-increasing achievements. Rather, achieving the realization of social rights may stall, or even regress at times, as long as it is the *intention* of states to achieve full realization in a progressive manner. Therefore, the problem with retrogressive measures arises when the state implements them deliberately, thereby triggering a presumption that article 2 (1) obligations have been breached.[880]

Once a presumption of breach has been raised, it may be rebutted because not all deliberately retrogressive measures violate the terms of the Covenant. The Covenant is sensitive to the limited capacity of states, which makes it difficult for them to sustain ever-increasing socio-economic outcomes and may at times leave them with few choices other than to pull back service levels or administer austerity measures. However, retrogressive measures should be avoided and used only as a last resort when sufficient resources are no longer available to sustain or increase existing levels of socio-economic achievement. In this regard, the Committee insists,

> If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the state party's maximum available resources.[881]

In this way, the Committee has elaborated a doctrine for retrogressive measures, whereby a rebuttable presumption is raised against the lawfulness of deliberately retrogressive measures.

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879 Ibid.

880 Cf., Craven (1995) (arguing that the Committee has not gone far enough to recognize deliberately retrogressive measures as *prima facie* violations; instead it "comes close to this position but does so in an excessively tentative and ambiguous manner.").

881 General Comment No. 13: The Right to Education (1999) para. 45. See also General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 9; General Comment No. 15: The Right to Water (2003) para. 19; General Comment No. 19: The Right to Social Security (2007) para. 42.

6.3.2. Retrogressive Measures Should Meet the Criteria of Article 4

The ESCR Committee has limited the application of its doctrine to cases in which states have restricted the enjoyment of Covenant rights due to resource constraints. Moreover, very little insight has been provided into the application of article 4. Consequently, state measures that limit the enjoyment of social rights on account of resource constraints are considered under the retrogressive measures doctrine rather than under article 4. By insisting that retrogressive measures be evaluated under article 2 (1) rather than article 4, the Committee implies that restrictions on rights due to resources constraints are not the same as limitations. Consequently, resource-related restrictions are subject to a set of criteria that is more lenient than that which is established under article 4. When states reduce their financial support for essential NGOs, or when they decline to provide additional assistance although it is needed, the enjoyment of ESC rights provided by NGOs may be limited. As such, these limitations on ESC rights provided by NGOs qualify as article 4 limitations and should not suddenly fall under a more lenient standard of review simply because the government asserts that it lacks the resources to support the NGOs. The state's claim that it lacks adequate resources should be viewed with enormous suspicion when NGOs also fulfill the state's social rights obligations.

While the retrogressive measures doctrine requires the state to prove that resource-related restrictions on ESC rights were taken only after careful consideration of alternative measures, article 4 forbids the use of limitations unless they are implemented by law. And while the doctrine requires states to prove that retrogressive measures are fully justified by reference to the totality of Covenant rights and the maximal use of available resources, article 4 requires that limitations remain compatible with the nature of the rights being limited and that they promote the general welfare in a democratic society. The standards of article 4 are much more demanding than the Committee's doctrine as they require the involvement of some lawmaking process, and they suggest that some minimum level of rights must always be protected against limitations, even limitations motivated by resources constraints. In contrast to these high standards, the Committee has developed a list of factors to take into consideration when evaluating a state's justification[882] of retrogressive measures as well as the state's claim

882 In 2007, the Committee laid out a list of factors to consider when assessing whether the use of deliberately retrogressive measures is justified, in regards to respecting the right to social security. (General Comment No. 19: The Right to

that the unavailability of resources[883] is the reason for resorting to retrogressive measures.

While the retrogressive measures doctrine might be appropriate for evaluating the state's failure to advance realization or it's obstruction of realization by non-state actors, its use is improper for assessing the lawfulness of limitations to the enjoyment of rights already realized. Limitations on the enjoyment of rights must be assessed under the stricter standard of article 4 because they can cause greater harm to rights bearers since people tend to rely on and plan their lives around the expectation that existing standards of living will not suddenly and substantially decline. By subjecting restrictions on the enjoyment of existing Covenant rights under the relaxed standards imposed by article 2 (1), the Committee's doctrine of retro-

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Social Security (2007) para. 42.) The Committee notes that it will take into account whether:
(a) there was reasonable justification for the action;
(b) alternatives were comprehensively examined;
(c) there was genuine participation of affected groups in examining the proposed measures and alternatives;
(d) the measures were directly or indirectly discriminatory;
(e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and
(f) whether there was an independent review of the measures at the national level.
(Id.).

883 In the event that a state cites resource constraints as justification for using retrogressive measures, the Committee indicated that it would consider:
(a) the country's level of development;
(b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
(c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;
(d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
(e) whether the State party had sought to identify low-cost options; and
(f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason
(An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant: Statement, Committee on Economic, Social and Cultural Rights, U.N. Doc E/C.12/2007/1 (UN 2007) para. 10.).

gressive measures circumvents the protection built into the Covenant for the enjoyment of existing rights.

Some commentators question why all types of restrictions should not be treated as limitations under article 4. They argue that this distinction is unreasonable and less compatible with the purpose of the Covenant than a unified approach that treats all restrictive measures as article 4 limitations.[884] Alston and Quinn point out the risk that states would readily argue that any restriction on rights is a retrogressive measure in order to circumvent the hefty requirements of article 4. [885] They argue that resource-motivated constraints should be considered article 4 limitations on policy grounds. Doing so would make it more difficult for states to implement such measures, thereby reducing the likelihood that they will implement resource-motivated constraints in the first place.[886] Müller offers a unified approach under which a certain minimum core of each right would be protected against all limitations and retrogressive measures, without regard to resource constraints.[887]

Notwithstanding these concerns, the text of the Covenant supports the assertion that restricting the enjoyment of rights due to the unavailability of resources is not a violation of states' duties *per se*. However, that is not an excuse for removing from article 4's scrutiny all limitations that are due to resource constraints. To the contrary, they must be subject to article 4's scrutiny because doing so provides an additional safeguard to rights bearers that is absent from article 2 (1). In effect, once states fulfill the requirement of article 2 (1) by demonstrating that they in fact it lacks the necessary resources to ensure continued enjoyment of ESC rights, they are permitted to implement cutbacks or austerity measures that limit enjoyment. However, article 2 says nothing about the quality of the cutbacks or how these limitations should be designed. States could distribute financial assistance to NGOs in a transparent and legally determined manner that optimizes the enjoyment / realization of social rights rather than, for example, through patrimonial systems that fosters corruption and clientelism.

Article 4 is helpful in this regard because it requires that the limitations are compatible with the nature of the rights, which means that they must

884 Müller (2009) 585-591; Alston and Quinn (1987) 205-206.
885 Alston and Quinn (1987) 205.
886 Ibid 205-206; cf., Saul, Kinley and Mowbray (2014) 246-247 (reasoning that progressive realization and limitations on rights are distinct concepts, suggesting that articles 2 and 4 can be applied independently.).
887 Müller (2009).

avoid totally depriving ESC rights. This suggests that MELs should be protected from cutbacks as a matter of priority.[888] Article 4's requirements that the cutbacks be determined by law excludes arbitrariness or discretionary decision-making on the part of government officials about where and how to limit rights due to budget constraints. Where and how limitations will be made must be *legally* determinable, meaning administrative officers must follow objective criteria set by the law. Lastly, cutbacks to the enjoyment of rights must be designed and implemented in a way that promotes the general welfare, rather than privileging a select few, meaning that the brunt of the burden of austerity measures must not be placed upon vulnerable, historically disadvantaged or politically powerless groups. Without the additional layer of protection provided by article 4, austerity measures can do more harm to ESC rights than is needed to protect the financial sustainability of the state – at worst, a legitimate need for austerity measures can be exploited by political elites as a pretext to oppress undesirable or opposing groups when they are already made vulnerable by difficult financial times.

Treating all restrictions as though they were article 4 limitations does not appear consistent with the explicit text of the Covenant. However, the proper distinction is not restricted to whether limitations are taken on account of resource constraints, as the Committee has suggested. Rather, analysts must consider whether the restriction is a limitation on the enjoyment of rights and should be handled by article 4, or an obstruction to their realization and thus is thus governed by article 2 (1). Taken all together, the terms of articles 2, 4, and 5 indicate that limitations on the enjoyment of rights are subject to the special standard articulated in article 4, while other kinds of restrictions are either forbidden (i.e., measures that destroy or extensively limit rights) or permissible under a lower threshold of tolerance (i.e., obstructing or forgoing the realization of rights).

6.4. Balancing Rights Claims: Beneficiaries, NGOs and the Rights of Others

At times, it will be reasonable to restrict nonprofit activities that are essential for the realization or enjoyment of social rights if those nonprofit activities simultaneously injure the rights of others. In the taxonomy of NGO

888 See Christine Kaufmann, 'The Covenants and Financial Crises' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 303-333, 318-319.

types, the most difficult scenario for a state to address is the regulation of minimum inappropriate NGOs. These are NGOs that are essential for the realization of the minimum essential levels of social rights because the state has not yet ensured them, however they do so by means that are inappropriate. Restricting these NGOs will limit the very nature of the beneficiaries' social rights, triggering scrutiny under article 4. Yet, the state must assess the injury that their inappropriate means are causing and protect the rights of beneficiaries and others from interference. For example, a minimum inappropriate NGO could provide emergency health services to a community that lacks access to any other medical services, but it may restrict access to these nonprofit services to only members of a particular religious group. Setting aside the legality of such private forms of discrimination, it is inappropriate for the state to tolerate a scenario wherein the discriminatory provision of services is the only reasonably available means of realization/enjoyment, particularly in the field of MELs. Article 2 (2) of the ICESCR, article 26 of the ICCPR, and still more instruments of international law strictly forbid such discriminatory practices in the public sphere, yet when private actors are fulfilling public obligations, their discriminatory practices become part of the public sphere such that states bear an obligation to correct it. In such a scenario, a state would bear competing obligations that derive from competing rights claims: the claims of the NGO's beneficiaries to the highest attainable health, versus the claim of those denied services on account of their religion to the equal enjoyment of their rights, and particularly the MELs thereof.

Resolving this problem from a perspective that is only concerned with the rights of NGOs is fairly straightforward. The ICCPR guarantees the NGO's right to free association, but this is not an absolute rights as it may be limited "by law" when it would be "necessary in a democratic society in the interest of … the protection of the rights and freedoms of others."[889] With this specific limitation built into the same provision that guarantees the right to free association, the state could reasonably restrict the activities of the inappropriate minimum NGO because its methods are discriminatory. However, since articles 5 (2) of both the ICCPR and the ICESCR require states to consider how their measures affect non-Covenant rights, a social rights perspective must be integrated into the associational rights approach.

From an integrative perspective, however, the problem becomes more complicated. The state is stuck between competing obligations: to permit

889 ICCPR art. 22 (1)-(2).

the NGO to operate for the sake of its associational rights, to enable the NGO to operate for the sake of those enjoying minimum essential levels, and to restrict the NGO in defense of those suffering from unlawful discrimination. Resolving this dilemma requires a nuanced approach when regulating inappropriate (minimum) NGOs that properly balances of competing rights claims made by the NGO, by those receiving medical services and by those suffering from discrimination.

6.4.1. The Permissibility of Limiting ESC Rights to Protect the Rights of Others

At first glance, the ICESCR may not appear to support balancing competing rights claims. The text of the general limitations clause, article 4, only permits limitations to social rights for the purpose of promoting general welfare. Promoting "public order", "national security", "public health or morals" or "the rights and freedoms of others" are not explicitly recognized as legitimate grounds for article 4 limitations. The *travaux préparatoires* reveal that a proposal to include most[890] of these alternative terms was rejected by the drafters in favor of the singular legitimate aim of promoting general welfare. Commentators have argued that this suggests that the term "general welfare" should be understood in the narrowest sense so as to exclude these other rejected terms.[891] Indeed, some representatives rejected the idea of limiting rights on the grounds of public order or public morals, in part because these were vague terms that were difficult to interpret and in part because it was difficult to imagine a scenario wherein social rights would need to be limited in order to secure public order or morals.[892]

But why shouldn't "general welfare in a democratic society" include protecting the rights and freedoms of others? The text of article 5 (1) indicates that the aim of destroying or extensively limiting Covenant rights is never a lawful or legitimate cause for any state or non-state actor. This implies that the state acts legitimately when it limits nonprofit activities that aim to destroy or extensively limit Covenant rights of others, even if those

890 All terms were rejected except for 'national security', which was never proposed. (Müller (2009) 573.).

891 Alston and Quinn (1987).

892 See Draft Interntional Covenants on Human Rights: Annotations, U.N. Secretary-General, U.N. General Assembly, UN Doc. A/2929 (UN 1955) paras. 51-52.

NGOs would have also contributed to the realization/enjoyment of ESC rights for their own beneficiaries. This supports the assertion that states may at times limit ESC rights in order to protect the rights of others.

A closer look at the drafting history also supports this interpretation. When proposed, the general limitations clause was understood to be important precisely because it provided states with a way to balance competing rights claims.[893] It is rather likely that the drafters voted to exclude an explicit reference to protecting the rights of others because they considered it an inherent aspect of "promoting the general welfare in a democratic society". It is clear from the *travaux préparatoires* that some state representatives considered limiting ESC rights in order to respect the rights of others as being an obvious limitation recognized within democratic societies.[894] One state representative went so far as to declare that respecting the rights of others was "obviously" a limitation upon all rights that was "perfectly clear and justified" and one that "arose naturally in democratic societies".[895] Others reasoned that limiting ESC rights in order to protect the rights of others was already inherently authorized by the provision that was eventually renumbered as article 5 (1).[896] It is not obvious from the drafting history that, in a scenario where one person's rights are destroyed or extensively limited in the course of another fulfilling his or her own rights, the state is prohibited from interfering in these private affairs for the purpose of balancing the competing rights claims – taking instead a Darwinian approach of 'survival of the fittest'.

Upon closer examination, it appears that those who opposed including "protecting the rights of others" into the general limitations clause as an independent ground for limitations either did not see the added benefit of explicitly doing so, or were concerned that mentioning it independently of promoting the general welfare would have undesirable consequences.

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893 Summary Record of the 236th Meeting (1951) (see comments by Mrs. Roosevelt of the United States of America, which submitted the porposal for a general limitations clause in order to "restrict[] the rights of the individual only so far as was necessary to protect the rights of others".).

894 Summary Record of the 235th Meeting (1951) (see the comments of state representatives from France and Uruguay).

895 Summary Record of the 234th Meeting (1951) 21 (comments of the state representative from Uruguay, Mr. Ciasullo).

896 Summary Record of the 235th Meeting (1951) (see comments of Mr. Eustathiades of Greece, wherein he asserts that art. 18 (1) - which was later renumbered art. 5 (1) - recognized limitations based on respecting the rights of others. See also comments of Mr. Santa Cruz of Chile).

Most drafting members who opposed including "protecting the rights of others" represented the developing countries of that time, and in particular former colonial territories. They were concerned primarily with the right of peoples to self-determination. These representatives feared that the general limitations clause, and in particular limiting ESC rights for the purpose of protecting the rights of others, would totally invalidate the right of self-determination. Mr. Santa Cruz of Chile explained this sentiment during the 307th meeting of the Commission of Human Rights:

> There was one right, however, which would be completely nullified by that [general limitations] clause: the right of peoples and nations to self-determination… The Commission had recognized that that right included permanent sovereignty of the peoples over their natural wealth and resources and had gone on to say that in no case might a people be deprived of its own means of subsistence on the grounds of any rights that might be claimed by other States. A general limitations clause which stated that limitations could be imposed on that right on the grounds of recognition of and respect for the rights of others made that right completely inoperative, since it was obvious that there would always be a conflict of interests in that field between an underdeveloped country or colonial territory and the highly industrialized Powers which had gained control over their natural resources.[897]

It was not their assertion that the general welfare did not include protecting the rights of others, or that protecting the rights of others was not a legitimate and sometimes necessary reason for limiting ESC rights. Rather, members were concerned that explicitly enumerating the protection of the rights of others within a general limitations clause would establish it as an independent ground for limiting ESC rights that was *distinct from* – rather than part of – promoting the general welfare. They feared that such an interpretation would permit limitations that were potentially inconsistent with promoting the general welfare. State actions that limit or deprive the masses of very basic levels of realization and enjoyment in order to advance the realization of ESC rights for a few privileged individuals hardly resembles a measure that promotes the general welfare, and particularly within a post-colonial democratic society, although it technically protects the rights of others. There is no reason to conclude from the drafting history that promoting the general welfare within a democratic society excludes

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897 Draft International Covenants on Human Rights: Report of the Third Committee (1955) 7.

protecting the rights of others whenever doing so would in fact promote the general welfare rather than undermine it.

In my view, the terms of the Covenant permit state measures that balance competing rights claims. In addition to prohibiting state acts that aim to destroy or extensive limit ESC rights, the second function of article 5 (1) is to allow states to balance claims arising from competing rights. By denying individuals the right to destroy or extensively limit the ESC rights of others, article 5 (1) implicitly legitimizes state measures that limit ESC rights in order to protect the rights of others. The *travaux préparatoires* support this assertion. Some drafting members expressed the view that article 5 (1) alone or in combination with articles 4 and 5 (2) allowed for a balancing of community interests and individual interests, as well as balancing the need to limit one right in order to protect another.

For example, while discussing how to balance the right to health against the right of individuals to be free of forced medical treatment, the drafting committee rejected a proposal that would have included a specific limitations clause to authorize the use of "compulsory medical treatments" but only when it was "provided by law and for reasons of public health", and only to the extent that such a law did not go "beyond the limits imposed by respect for the human person."[898] In rejecting the proposal, some members reasoned that articles 4 and 5 of the ICESCR, as well as article 7 of the ICCPR[899], were capable of protecting individuals against affronts to human dignity and prohibiting extremely inappropriate means of ensuring the right to health.[900] Likewise, in an earlier drafting meeting of the Commission on Human Rights, members expressed the view that article 5 (1) fully covered the issue of protecting the rights of others.[901] The suggestion here is that articles 4 and 5, independently or in conjunction with one another, adequately authorize and equip the state for the task of properly balancing competing interests and rights claims.

Whenever the interests of NGOs are in conflict with those of beneficiaries, a balance must be struck between them. The duty of the state to regu-

898 Draft International Covenants on Human Rights: Report of the Third Committee (1957) paras. 148, 156 (l).

899 Article 7 of the ICCPR prohibits torture, cruel, inhuman or degrading treatment or punishment, particularly in relation to conducting medical or scientific experiments without securing the subject's free consent.

900 Draft International Covenants on Human Rights: Report of the Third Committee (1957) para. 155.

901 Report to the Economic and Social Council on the Eigth Session of the Commission (1952) para. 157.

late NGOs for the protection of beneficiaries' rights must be weighed against the duty of the state to respect the rights of NGOs. In order to do so, courts should take into account the rights of both parties whenever it evaluates whether NGO laws are too restrictive. If courts seek to protect the rights of only one party, they may inadvertently sanction the deprivation of rights belonging to the other. Still, it is not evident from the text of the Covenant *how* and *to what extent* ESC rights should be limited, such that the rights of others are adequately protected. How should competing interests that arise from different human rights claims be addressed and prioritized? Beyond prioritizing the alleviation of total deprivation, it is far from clear how these claims should be balanced against one another. In practice, courts find some way to resolve compete rights claims, but not all courts take a beneficiary centered approach when considering restrictions placed on NGOs, sometimes even failing to do so when the NGOs pose a threat to the rights of their beneficiaries.

The following sub-section reviews two related cases from courts in Uganda in order to provide some examples of judicial efforts to balance competing rights claims between NGOs and their beneficiaries, and what has happened when they refrain from doing so entirely. These cases are not meant to provide a comprehensive review of case law in Uganda or to be representative of any jurisdiction in Africa. Rather, they are illustrative of two opposing judicial paths that courts can take: one in which the interests of beneficiaries are taken into account, and another in which they are not.

6.4.2. Balancing Competing Rights: Examples from the Courts of Uganda

Although the following decisions constitute separate cases, each involves the same NGO that is called Caring for Orphans, Widows and the Elderly (COWE). The government tried to shut down COWE on the basis that it had allegedly stolen money from its beneficiaries. Many complained that COWE was operating a large-scale fraudulent scheme in which funds collected from thousands of beneficiaries went missing, although it was never conclusively determined whether it was the NGO or its employees that were responsible for the missing funds.[902] Upon being informed of the allegations against COWE, the NGO Board – a public supervisory body in

902 *Balikowa & Anor v. Uganda*, 2012 UGHCCRD 2, Criminal Appeal No. 003 of 2011 (UGHC 2012) (Uganda); Richard M. Kavuma, 'Ugandan Financial Fraud Victims: Still Fighting for Compensation Years Later' *The Guardian* (Jan. 13,

Uganda – revoked the NGOs' registration without giving it an opportunity to be heard. COWE lodged two complaints: a first lawsuit in which it sought relief in the form of the reinstatement of its registration, and a second lawsuit for monetary damages. COWE won in both suits.

In the first case, *Kaggwa Andrew & 5 Others v. Honorable Minister of Internal Affairs*, the court found that the NGO Board's order to de-register COWE was null and void; it ordered the Board to reinstate COWE's registration.[903] The court reasoned that the Board's failure to afford COWE an opportunity to be heard before revoking its registration was patently unlawful because it violated COWE's fundamental right to due process. The court did not consider whether it was justifiable for the Board to act so hastily in revoking COWE's registration, likely due to the fact that the government did not make an appearance to defend itself or to provide any evidence. The court did not once take into account the state's obligation to protect the public or COWE's beneficiaries, or whether the Board's drastic measures were necessary in order to protect the public and the beneficiaries against substantial and irreparable injury. Without considering why the state limited the NGO's right to be heard, the court could not balance the competing interests. Thus, it predictably concluded that the state's decision to de-register COWE was unlawful because it clearly limited the NGO's right to be heard.

In the second case, *Cowe (U) & Cowe LTD v. Attorney General* the court took notice of the state's duty to protect the public against unscrupulous NGOs, but nonetheless failed to balance the competing interests.[904] Instead, it discussed at length the importance of COWE's right to a fair hearing, and offered only a mere acknowledgement of the state's duty to protect the public.

This time, the government made an appearance to defend itself. It argued that the NGO Board cancelled COWE's registration "on grounds of public interest" in order to protect the public against COWE's allegedly fraudulent conduct. While the court certainly recognized that the state was dealing with competing rights claims, it does not appear to have consid-

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2016) <https://www.theguardian.com/global-development-professionals-network/2016/jan/13/ugandan-victims-still-fighting-for-compensation-years-late-cowe>.

903 *Kaggwa Andrew & 5 Others v. Hno Minister of Internal Affairs*, 2002 UGHC 21, HCT-00-CV-MC-0105 OF 2002 (UGHC 2002) (Uganda).

904 *Cowe (U) & Cowe Ltd v. Attorney General*, 2015 UGHCCD 78, HCT-00-CV-CS-O194-2004 (UGHC 2015) (Uganda).

ered whether and how the state's obligation to protect the public might limit COWE's procedural rights. The court writes,

> I agree with the submission of Counsel for the defendant that the NGO Board was exercising its duty in protecting the public when it revoked the plaintiff's certificate of registration and stopped all its operations. However, the NGO Board also owed a duty to the 1st plaintiff [COWE] in ensuring that it followed due process before such revocation in order to ensure fairness and control over any possible damage/loss that would most likely follow the revocation. When the NGO Board denied the 1st plaintiff its constitutional right to be heard before reaching the decision to revoke the Certificate of Registration, in my view, it breached the duty of care. The right to be heard is a fundamental procedure that any administrative body or tribunal is expected to observe and uphold; it embraces a whole notion of fair procedure and due process, and any decision reached in breach of this rule is void.[905]

The judge did not explain how she balanced the state's duty toward the NGO with its duty to protect the public, or whether the threat of harm to the NGO was greater than the treat of harm to the ESC rights of its "beneficiaries". She did not offer much any analysis as to how these duties relate to one another. At best, one can only speculate the court's reasoning was that although the state's duty of care to the public might have justified revoking COWE's registration and obstructing its operations, it did not justify the state's failure to follow proper procedures to ensure due process prior to taking such action. However, this says nothing of instances in which the state must act quickly to stop extraordinarily harmful activities of NGOs in order to protect the rights of beneficiaries, especially when the injury to beneficiaries could be as harmful as depriving them of their ability to realize or enjoy minimal levels of social rights.

It is clear that without a thorough consideration of the rights of beneficiaries to be protected against exploitation and abuse, the court can neither balance the rights involved nor begin to examine how the NGO's rights might be justifiably limited.

This was more or less a superficial acknowledgement of the rights of beneficiaries without affording them any weight in the balance. Having no counterweighing rights in the balance, the court understandably prioritized the fundamental right of COWE to be heard in all circumstances and ruled in COWE's favor. The court writes,

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905 Ibid.

> The right to be heard is a fundamental procedure that any administrative body or tribunal is expected to observe and uphold; it embraces a whole notion of fair procedure and due process, and *any decision reached in breach of this rule is void*.[906]

In both cases, neither court thoroughly balanced the competing duties of the state, or engaged in a theoretical consideration of how the duty to protect the beneficiary might at times be jeopardized if the state were always and categorically bound to fulfill its duty to provide the NGO with an opportunity to be heard. The result was that the courts conceptualized an unqualified and absolute state duty to provide NGOs an opportunity to be heard.[907] I do not mean to suggest that the outcome of the case was incorrect; indeed, the right to be heard is of paramount importance. I only intend to illustrate that the courts' analyses lacked any meaningful consideration of another set of very important rights: the social rights of beneficiaries, which includes the right to be free from exploitation that interferes with their realization and enjoyment of an adequate standard of living. Of course, even if the court had taken a beneficiary-centered approach, it still may have come to the same conclusion. The point is, however, without having even considered the rights of beneficiaries, the possibility of protecting those rights was also lost.

6.5. Conclusion

In summary, restrictive NGO laws can be evaluated as limitations on ESC rights whenever it is reasonably foreseeable that they will bring about an interference with the enjoyment or realization of ESC rights. When NGOs

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906 Ibid (emphasis added).

907 In yet another lawsuit involving COWE, an appellate court departed from this rigid view and concluded that COWE was not entitled to an opportunity to be heard before Uganda's central bank froze its financial accounts. The court was persuaded by a *prima facie* finding that COWE was acting criminally and that there was a substantial risk that allowing the NGO time to withdrawing its funds from the account would cause injury to depositors (i.e, its supposed 'beneficiaries'). (*Bank of Uganda v. Caring for Orphans, Widows & Elderly Ltd.*, 2009 UGCA 36, Civil Appeal No.35 of 2007 (UGCA 2009) (Uganda).) Although the *Kaggwa Andrew* and *Cowe (U)* courts strictly enforced the state's obligation to provide COWE with an opportunity to be heard, the *Bank of Uganda* court would not automatically impose procedural rules, emphasizing instead the need to guard against those who seek to abuse intended safeguards.

are essential for the realization or enjoyment of ESC rights – because the state is unwilling or unable to ensure the same – then it is reasonably foreseeable that restrictive NGO laws that obstruct these nonprofit activities will limit or even destroy ESC rights. As limitations on social rights, restrictive NGO laws that obstruct (minimum) substitutional and supplemental NGOs must be evaluated under article 4 because these NGOs are essential for the enjoyment of certain ESC rights. State restrictions on NGOs are permissible under article 4 when they are determined by law, they are consistent with the nature of the rights – suggesting they do not destroy the rights in question – and they promote the general welfare within a democratic society, which includes balancing rights claims and protecting the rights of others.

Protecting the rights of others is a legitimate state aim for limitations on ESC rights as long as doing so still promotes the general welfare within a democratic society. This means that states may limit nonprofit activities that are essential for the enjoyment of ESC rights in order to protect the rights of others or to protect non-ESC rights of beneficiaries against unscrupulous NGO activities. Moreover, article 2 (1) permits limiting the realization of social rights when NGOs would have done so through inappropriate means. In this way, articles 2 (1) and 4 permits state efforts to protect beneficiaries against inappropriate NGOs – even those that are essential for the realization and enjoyment of minimum essential levels.

Determining whether restrictive NGO laws are permissible is not an exact science. Judges will have to balance competing rights claims on a case-by-case basis. However, adjudicators should be wary of restrictive NGO laws that obstruct nonprofit activities when such activities are *essential* for the realization or enjoyment of ESC rights. Applying heightened level of scrutiny in these cases would be appropriate, such as the scrutiny required by article 4. In this way, a beneficiary-centered approach can have an insulating or legitimizing effect on the limitation of liberal rights claimed by NGOs,[908] and at the same time protect beneficiaries as well as the NGOs that help them against obstructive state interference.

908 See Marius Pieterse, 'The Legitimizing/Insulating Effect of Socio-Economic Rights' 22 Canadian Journal of Law & Society/La Revue Canadienne Droit et Société 1 (2007) (arguing that states can use socio-economic rights to curb or limit liberal rights (e.g., freedom to contract or private law), thereby ensuring all individuals in a society have meaningful access to social protection.).