



Social action in the South African Constitution

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Social action, as a key concept in social theory, is used in this article to understand the extent to which social actors can intervene in society in order to address economic inequalities. This article clarifies the place of social action in social theory and in a select number of socio-economic rights cases. These bring into view an emphasis on state, market and civil society actors, as well as individuals. The article identifies and clarifies how such actors and actions are supported and regulated by the South African rights regime. This has implications for the notion of core-content to rights and the nature of relief sought through a claim on rights; for the participation of citizens in welfare and other state programmes, and for the compensation rights-actors may expect from the state for taking social action. The article concludes by identifying key themes that concern social action in the South African rights regime.

Social action is a key concept in Max Weber's idea of sociology. Social action is action taken in society that is guided and structured by the subjective experience of being in a society, and it takes the behaviour of other actors in consideration. Social action, as Weber (1991: 228) conceptualised, is "rationally expedient" in the sense that "'societal action' [...] is methodically ordered and led, [and] superior to every resistance of 'mass' and even 'communal' action". In many ways, law embodies this kind of rational social action. This is extended to take note of the idea of action that has to be taken or completed in order to realise human rights, and socio-economic rights, in particular. This kind of action includes the development of welfare programmes or immediate emergency relief. It is possible to equate Weber's idea of social

action to the actions necessary to realise rights due to the affinity of such action to bureaucratisation, a key characteristic of social action. Approaches such as social movement theory, civil society perspectives, and work on business, development and poverty relief have emphasised the need for a diversity of social actors and actions for democratisation, social change and development (McAdam et al. 1996, Cohen & Arato 1992, Bernstein 2010). This has also influenced debates on rights. Many social actors, often in the name of realising rights, undertake action as social or public action, and this impresses on us the need to understand the place of such action and social actors in a human rights regime.

Contemporary discussions of social action have emphasised the need to understand the “structure” of society as the rules and resources of social production wherein action takes place (Giddens 1984: xxxi, 2-5). Human rights and socio-economic rights, in particular, refer to actions that have to be undertaken in furthering the ends of a particular society (such as planning for health care). In an important sense, human rights supply such a structure that guides the actions of the state as a human rights actor. Socio-economic rights concern the interaction between economy and society. The degree, kind and frequency of state intervention in the economy is a classic example of social action. However, a sociological perspective would point out clearly that the state is not the only actor with the ability and opportunity to act in the name of society. This article aims to show that such other actors and actions can be accommodated by the South African Constitution and rights regime (RSA 1996). The South African 1996 Constitution incorporated nearly the entire range of rights we find in the Universal Declaration (UN 1948); however, section 8(2) of the South African Constitution, which suggests that rights apply both vertically to the state and horizontally to the wider society, immediately broadens our repertoire of actors that may realise rights (Malan 2009). This article explores the horizontal application of the Constitution, and allows us to clarify and distinguish between rights-based action and other kinds of action and to understand how to further human rights through social action, often by actors other than the state. This could contribute to such actors realising rights, and this has progressive potential. The article answers the following questions: Who is the actor of rights in the South African Constitution? What kinds of action realise rights? What kind of relief could such action produce, and how does this affect the participation of the citizen or subject of rights (who is, in a sense, the fundamental social actor of rights) in the realisation of human rights?

1. Social action and rights regimes

In his study of the political economy of welfare, Esping-Andersen (1990: 2) proposes as a “rights regime” the “complex of legal and organizational features [that] are systematically interwoven”. This has some affinity to Weber’s “social action” and Giddens’ “structure”, and is used, in this instance, to specify the types of social action and actors we may expect in the realisation of socio-economic rights. We need to know what rights regime is implied in South Africa in order to be able to identify the powers and opportunities granted to different actors in their attempt to realise rights. Esping-Andersen (1990: 26-9) identifies liberal, corporatist and social democratic welfare states, reminding us that “[t]he welfare state cannot be understood just in terms of the rights it grants. We must also take into account how state activities are interlocked with the market’s and the family’s role in social provision” (Esping-Andersen 1990: 21). Consequently, we may imagine a rights regime in South Africa that regulates different kinds of actors and social action.

Esping-Andersen (1990: 26-7) identifies the liberal states of Western Europe and the US as rights regimes. The liberal welfare state developed entitlement rules for social rights which are “strict” in that they guarantee “only a minimum” (Esping-Andersen 1990: 27). Therefore, individuals and market actors undertake social action in order to realise socio-economic rights, in this instance social protection, by means of social insurance schemes, and state action is severely limited to minimal social assistance programmes with reduced benefits (presumably to ‘force’ people to undertake their own insurance). This allocates an important place for the market as *de facto* actor of rights, distributing the fruits of growth along the lines of individual contribution that reflects market participation. The liberal conception of rights and social and state action was the first modern idea of rights and emerged in the context of settlement of the US and its idea of minimalist state intervention and freedom of the individual (Nedelsky 1991). It is a kind of benchmark against which we can judge other forms of social and public action.

The liberal paradigm’s emphasis on negative and limited state action to realise rights derives from the distinction between positive and negative duties (Berlin 1969). In a classical liberal sense, human rights prescribe a clear and limited role for the state, but then only for rights to life, liberty and property, and do not acknowledge the extensive post-war list of socio-economic rights. This follows from liberalism’s peculiar conception of property rights. Locke (1978: 159) indicates that “no political society can be, nor subsist, without having in itself the power to preserve the property [of the subject]”. A state that preserves the property of its subjects prohibits others from appropriating it, and restrains

itself from doing so. This has led to the doctrine of state action as negative action – to refrain from interfering in the property regime, which favours political and civil rights, as these are realised through the freedom of the subject. This follows from the ‘natural law’ doctrine which states that rights are universally evident upon the application of reason, and true rights are inherent to being human (Lauren 2003: 13–5, Ishay 2008: 88). Consequently, only coercion can limit people from exercising their rights, as they would flow ‘naturally’ from human freedom. The right to property is a case in point. Some may argue that it is a socio-economic right, but when modern rights emerged during the colonial period, the right to property was considered a civil right (Shapiro 1996: 21–4). Consequently, to protect people from violation of the right to property, the state had to refrain from ever appropriating it. Hence, the ideal of freedom – that freedom is to act without state interference, in a way that is compatible with the same degree of freedom of others – became the hallmark of what liberal rights are. A contemporary commentator (Bernstein 2013: 179, 208), who defends this liberal conception of rights, identifies the effects of “invisible corporate citizenship” as contributing to human rights; this follows from the normal process of business development that falls under the right to property. However, these benefits are indirect (emphasising negative action by the state, as they flow from mere economic participation) and unlike corporate social responsibility’s direct delivery of benefits which Bernstein eschews. This issue is important in South Africa, as the prevalence of poverty suggests more state intervention and not more business. Market-based social action thus needs to be justified as contributing to human rights and, in this regard, Bernstein (2010: 30) asks: “How can companies answer to the multiplicity of interests and concerns that exist even in smaller communities?” that is part of human rights. We will address this question below.

Esping-Andersen (1990: 27) further identifies “corporatist welfare states”. These states have constructed rights regimes that emphasise the family and civil society as subsidiary actors, in specific relation to the state. The classical example concerns welfare regimes that were developed in partnership with the church in corporatist states such as Prussia. Civil society actors, albeit only the church and perhaps the medieval guilds, played a key role in organising the working population around social protection schemes. In a sense, this follows some of the tenets of liberalism, as the state is not intervening in the economy unilaterally, but in partnership with civil society actors. However, actors do acquire some kind of statutory powers in such an arrangement which elevates their ‘private’ action to that of ‘public’ action or action subsidiary to the state. This raises the following question: Can private actors complete public projects in order to realise rights? This issue is relevant to this discussion, as many NGOs do so in the social development field in South Africa.

A third welfare regime identified by Esping-Andersen (1990: 27) is the “social democratic welfare state” in which we note a “peculiar fusion of liberalism and socialism”. Socialism is, in many ways, the opposite of liberalism, as it gives the state not a residual or minimalist responsibility for social action, but regards the state as the central and comprehensive social actor. The state has to deliberately and purposefully intervene in society not only to satisfy rights, but also to structure society on clear socialist principles. State intervention in the economy is necessary and this has historically, at least, made socio-economic rights the exemplary case of state-led (and direct) public action. This implies a clear picture of the state realising rights on demand for the population, and brings into relief the possibility of direct and immediate, as well as redistributive action by the state. When is such direct action appropriate for the realisation of rights in South Africa? Behind the social democratic welfare state stands class compromise (Esping-Andersen 1990: 16). Class compromise suggests that a deliberative process is under way to decide on the content of such direct relief. This emphasises the need for clarity on the way in which citizens are mobilised in participating in the realisation of their rights, be it through parliament, and/or organisations such as unions, or by direct individual citizen participation.

This article will emphasise how multiple social actors can undertake action to contribute to the realisation of socio-economic rights, and point out how this is supported in the South African rights regime. The analysis will proceed along a number of themes that are particular to the idea of multiple social actors for rights. These themes include the role and place of state, civil society and market action in the realisation of rights. A further issue that emerges clearly in discussions of socio-economic rights concerns the nature of the relief that it may release and procedures to gain access to it, which is fundamentally shaped by our choice of actors. This is important as it clarifies further not only state and non-state action, but also how responsibility for rights is borne by society. To do so, we examine the notion of a core content of the rights that would specify the kinds of relief necessary. This is different from a procedural conception of state action, and we clarify where the current jurisprudence stands on this issue. Should non-state actors realise rights of others, the prospect of gaining compensation from the state is investigated. We can distinguish direct relief by the state, but also relief and realisation by non-state actors as well as the self-provision of rights. This leads us to consider the rightful place of people’s participation in socio-economic rights. This idea is examined in the context of state mandates to decide, as elected representative of the people, how rights are to be realised and the idea that popular participation can determine the content of rights. These issues are not an exhaustive list that can specify how we should understand socio-economic rights, but are nevertheless strategically relevant to understand how rights are, in

fact, realised in a complex society where the state is not always the pre-eminent social actor. The article concludes by identifying the salient themes underlying the peculiar rights regime evident in the South African Constitution.

2. Human rights and social change: do we know what rights mean?

To illustrate the importance of the present investigation, we need only to examine the current state of the jurisprudence on socio-economic rights in South Africa. Many have questioned the relevance and the utility of rights for poverty relief. The *Mazibuko* case was considered three times by the courts, first the South Gauteng High Court,¹ then the Supreme Court of Appeal,² and lastly the Constitutional Court (hereafter *Mazibuko*).³ The discrepancy between academic analyses and the conclusions of the Constitutional Court bring into relief our nascent understanding of rights. This article does question the centrality of state action in many current negative assessments of the efficacy of rights in South Africa. Without a clear understanding of what rights mean, we will not be able to address poverty. In their discussion of the *Mazibuko* case, Bond & Dugard (2008: 2, 8, 34) criticise the attempt by the City of Johannesburg to provide water to poor residents by means of pre-paid water meters. Their critique revolves around the commodification of water that this implies, and this is considered retrogressive, as human rights should not be a commodity. This indicates a real unease with the idea of the market as a means to realise rights. Others (Bilchitz 2002, 2003, Liebenberg 2010) have emphasised that we need to focus on the core content of rights in order to successfully engage in poverty relief. The argument is that a core-content conception of rights would guard against retrogressive policy that delivers less than adequate rights to beneficiaries. It also has strong affinity to the state as guarantor of rights of last resort, emphasising once again the importance of gaining clarity on the actor of rights in South Africa. Liebenberg (2010: 466-80) pointed out that the courts – particularly in the *Mazibuko* case – emphasised a procedural conception of rights over that of a core-content conception, which is then equated with less-than-adequate realisation of rights. A procedural conception moves the debate away from a core-conception idea and broadens the idea of social action to include actors other than the state. This move is supported, as certain benefits are attached to a diversity of actors realising rights.

1 *Mazibuko and others v City of Johannesburg and others* Case no. 06/1386530 April 2008 (unreported).

2 *City of Johannesburg and Others v Mazibuko and Others* (489/08) 2009 (3) SA 592 (SCA).

3 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

The idea of a minimum core content of rights, as discussed earlier, seems to divide South African jurisprudence on human rights. This idea is often traced to the fourth of the *General Comments* of the UN Committee on Economic, Social and Cultural Rights (UN 2004), and it may have originated in the ‘residual’ character of the liberal welfare regime. This became a leading theme in the *Mazibuko* case, as both the High Court and the Supreme Court of Appeal, but not the Constitutional Court, stood fast on specifying the minimum amount of water to which citizens are entitled. If the Constitutional Court was averse to following this paradigm for the realisation of rights, we need to probe the implications of this move away from a core-content idea of rights and a “reasonability” and procedural assessment of government response (Liebenberg 2010: 151, 163). This approach, in fact, directly points to choice of development strategy in the realisation of rights, which suggests that the “structure” wherein rights are realised may be more important than the exact form the relief takes (Lehman 2006). The question this poses concerns the nature of rights. Are rights and the things they speak of best articulated in a minimum core-content approach, or as the outcome of a certain deliberative and participatory social process (which implies local and cultural variation)? The core-content approach is thus intimately linked to the question of how this core is decided, and the examination of a core-content approach to rights can only be completed by reference to broader issues such as beneficiary participation, the state’s democratic mandate and the use of expert civil servants. A practitioner will immediately add that the ways in which rights are realised reflect the internal dynamic among these actors. We should rather ask: Can rights structure this dynamic for progressive ends?

Another argument (Pieterse 2007: 799) has emphasised the concrete relief we should expect from rights: we need rights to “connect concretely” to their intended beneficiaries. Should this concreteness not materialise, rights become an ideological means to contain the political activism of potential beneficiaries and would not lead to lasting social change (this immediately underlines civil society action as relevant for the effective realisation of socio-economic rights). To understand this ‘concrete connection’, we need to understand the role and reach of participation in rights, as it is clear that there are few means available to establish such a connection. Rights indicate a principle of governance (“the governed governing themselves”) and, although many may say, for instance, that socio-economic rights need to be realised or ‘delivered’ to the population (which implies a direct impact on the poor), it is impossible to seriously consider rights without reference to a broader procedural view of social change.

Social rights had an important source in critical commentaries on industrialisation and capitalism (Ishay 2008: 135, Lauren 2003: 55). This is borne out clearly by the history of the welfare state. It had to act in the name of the

poor and voiceless; however, early debates on the “indigent” and “deserving” poor led to an institutional response where the abilities of the poor were negated, favouring state unilateralism (Roebroek 1993: 20). It is instructive to note that the programmes of the welfare state were not decided by a mass participatory approach, but rather through a specialist agency, the International Labour Organisation (ILO), initially through Convention 102 of 1952 (ILO 1952) that indicated the ‘9 classic risks’ that played a large role in shaping social policy in Europe and elsewhere. This reliance on experts and the ILO as an international institution not only masked the class compromise of the post-war welfare state, but also precluded extensive participation in the decisions on many social policies. The South African Constitution emphasises public participation, suggesting that we need to see participation in a more extensive way than in the classical welfare state.⁴ How this, and the issues discussed earlier emerge in a select number of cases is discussed below.

It is clear that, in order to understand rights, we need to acknowledge the ways in which a multiplicity of actors leads to social programmes. Multiple actors, acting in the context of social programmes (which could be purposefully state-led economic development programmes or social movement activism) affect the kind of relief we may expect, the ways in which we should consider compensation for such actions, and the participation of the beneficiaries. An explanation of these issues enables us to gain clarity on what the South African rights regime proposes, and this, in fact, sets out a framework wherein activism, social policy and self-provision each play a role in constructing a peculiar South African rights regime.

3. The concept of the actor of rights

In a discussion about hunger and public action (Sen 1981), the Food and Agriculture Organization (FAO) deliberately adopted a capability perspective that emphasises the “political structures that connect people to food” (Pritchard 2012: 56). In this sense, the capability perspective allows us to understand broad social action for rights and how that could be used in programmes designed to realise these rights. It builds upon liberalism in that the individual is emphasised above the state in such a way, however, that social policy and individual choice, as well as the market as social provider become prominent, blending many of the strategies of welfare states into a new approach. In analysing the right to development, Sen (2000) (as the UN’s independent expert) draws

4 See sections 43(3) and (4), 59, 72, 118(1)(a), 153 and 195.

heavily on this perspective. He seems to imply that all rights should be realised simultaneously, and by individuals themselves.⁵ According to him, the right to development implies “the constant improvement of the well-being of the entire population and of all individuals, on the basis of *their active free and meaningful participation* in development and in *the fair distribution of benefits* resulting therefrom” (Sengupta 2000: 3). He identifies the right to development with human development, adding that “[o]nly the individuals themselves can realise the right”, as the state is only there for the “creation of conditions for realizing the right and not for actually realizing the right itself” (Sengupta 2000: 3). The subject of the right to development lives in a society where all individuals would be able to enjoy all rights mainly through their own abilities and through participating in those endeavours of society that would result in rights being realised. Sengupta (2000:11) repeats article 2 of the Declaration on the Right to Development, which states: “The human person is the central subject of development and should be the active participant and beneficiary of the right to development”. This idea of social action places the individual at the centre of the realisation of rights and this might be an apt way to describe the rights regime in the South African Constitution.

This view of rights does have affinity with the democratic metaphor of the governed governing themselves. Nevertheless, to conceive of an agent realising her/his own rights is a radical notion in the history of rights. It indicates the subject of rights as both beneficiary and bearer, while these two categories have been clearly separated in talks on rights by the historical emphasis on the state as human rights actor. Sengupta rightly identifies the capability approach as unlike a state welfare paradigm that would deliver to the citizenry that which rights mention. The capabilities of the individual are the primary means for the realisation of rights. This approach views rights as outcomes of human participation in society and choices made by them which are fostered and facilitated by the state, and enabled by the market. It negates the idea of a corporate entity, the state, which stands between the governed and the governing whose choices and interests may override those of the people.

Sen (2004) has promoted the idea of focusing on human capabilities for development, and further emphasises the affinity between capabilities and rights (Sen 2005). Capabilities can describe the opportunities that rights need to protect, but are not well suited to describe the procedural aspects of rights, and needs to be supplemented by “social choice theory” to become relevant to rights, or “freedoms”, as he often calls them (Sen 2004: 337, 2005: 152). Hence, in order to understand how rights can be promoted, we need to focus both on what people

5 See the text of the *Declaration on the Right to Development* (UNGA 1986) above article 1.

can do, their social policy context, and on social deliberation and participation which could structure the processes whereby opportunities manifest themselves.

Sengupta (2000) heavily draws on Sen's approach, and it is clear that he considers not only the expansion of human capabilities, but also placing human capabilities at the centre of development and the realisation of human rights. A liberal approach regards the choices that people make as an exercise of freedom, but the human development paradigm views capabilities not as the outcome of freedom, but as constitutive thereof. The political programme that this paradigm will engender focuses on the capabilities of the person; these are embedded within social policy programmes, particularly education, health and employment, which, in turn, need to be realised through a deliberative and participative approach, mainly by individual action. The content of rights thus has to be decided by social deliberative processes, and by individual choice and capability (Sen 2005: 152). Consequently, people's own choice, as it is enhanced by health care, education and employment, provides the means to realise rights. This indicates the relation between the capabilities of the individual and social policy delivery as subtheme of the idea of the beneficiary as actor of rights. Social policy does realise certain rights, but it is the active exercise of capabilities that makes these rights real and appropriate. It also highlights the centrality of socio-economic rights for the realisation of civil and political rights. Unlike liberalism, it states that civil and political rights depend on the capability of the person to flourish in a certain political economy.

The emphasis on the individual as actor begs the question of both individual and collective action for rights. The capability approach emphasises that individuals can realise rights through adequate social policy – thus indirect – support. The public purpose may be served through collective and individual action, in addition to state action. A significant and complex regime of recognising civil society in social policy delivery in South Africa has emerged that touches on rights. This emphasises civil society not only as direct providers, but also as facilitators of the realisation of rights. This emphasis on the role and significance of non-state actors – as actors subsidiary to the state – implies changes to our idea of core content to rights, and allocates a clear place to the participation of the beneficiary in a rights regime. I clarify this below by reference to social programmes that allow civil society participation, and by examining how non-state actors can gain access to the resources of society.

4. Public action for rights in South Africa: Who is the actor of rights?

The process of writing the South African Constitution early on engaged with the question of the nature of state and public action. The jurisprudence to date has emphasised that state action includes positive conduct and that it should be formulated as state programmes in a broad sense of the word, with “indirect entitlement” (Liebenberg 2010: 230). Indirect entitlement has meaning in contradistinction to the state supplying goods on demand to the people. If rights are realised cooperatively between the state and other actors, we need to speak of indirect entitlement. This may be peculiar to the nature of children’s rights in South Africa, mainly due to the right of the child to parental care that then influences the enjoyment by the child of other rights, as these rights have to be claimed from the parents.⁶ However, following the *Grootboom* cases that declined to affirm direct entitlements, it seems probable that the impossibility to claim rights on demand and directly would lead to a subsidiarity in realising rights, as actors intermediate to the state are implied in realising rights “indirectly”.⁷

The scope and need for positive action received attention in the certification hearings for the 1996 Constitution.⁸ The objection was made that socio-economic rights could not be regarded as ‘real’ rights, as they were not universally accepted (which the court acknowledged) nor as justiciable, as this would indicate state action that transgresses the separation of powers (RSA 1996: 800). The court indicated that it was acceptable and, on the other hand, inevitable, not only for socio-economic rights, but also in the case of political and civil rights, that state action to realise them would imply budgetary expenditure and, hence, positive action. This affirmed the justiciable nature of socio-economic rights. This indicates a post-liberal approach to rights in South Africa. The state has to act in order to realise rights, and the individual acts in the context of the social policies available to realise rights. However, further clarity is needed on the precise nature of this action.

Section 7(2) of the Constitution indicates that the state must “respect, protect, promote and fulfil the rights in the Bill of Rights”. “Respect” and “protect” indicate that it should allow and protect rights if already realised (suggesting positive action

6 See section 28 of the Constitution.

7 *Grootboom v Oostenberg Municipality* 2000 JDR 0074 (c); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), hereafter *Grootboom*.

8 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

in “protecting” and that others might do so, and these achievements need to be protected). “Promote” and “fulfil” suggest direct actions by the state. This regime recognises the justiciable nature of all rights (Liebenberg 2010: 83-4). Public action is not only the passive ‘unfolding’ of the will of the people (corresponding to state restraint), but rather also active intervention in society by the duty bearers (who could include state and non-state actors). We should view active intervention not only as acting ‘in the name of’ the people, but also as enabling people to actively participate in society and to make both normative and practical decisions about rights, as is implied in section 8(2) of the Constitution. This implies a way of viewing rights not as goods to be delivered, but rather at their realisation within a process of interaction among social actors in society and the economy. This, in turn, implies that rights need to be regarded as part of social projects that involve cooperation in society that goes beyond individual claims and entitlements. This brings into view the economy itself as a means to realise rights, indicating that a way could be found within the Constitution to understand the relations between civil and political rights (inclusive of participation) and socio-economic rights (which concern the provision of material benefits).

The Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*⁹ (hereafter *Grootboom* 2000: 87) indicated that “a comprehensive and coordinated programme progressively to realise [the obligations of rights]” has to be in place. *Grootboom* turned on the fact that the state did not have a plan in place to cater for those needful of housing in the most desperate circumstances, whereas a reasonable plan would cater for all levels of society. Consequently, as far as housing is concerned, it would have to proceed from the fact that

... housing entails more than bricks and mortar. It requires available land, appropriate services such as provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right of access to adequate housing in section 26 (2000: 66-7).

And it made a remarkably clear comment on the multiplicity of actors for rights when it asserted that

9 *Grootboom* (n 5).

[a] right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels in society. State policy dealing with housing must therefore take account of different economic levels in our society (2000: 66-7).

The above shows the multiple forms of action that would be necessary in order to realise rights. A reasonable plan will materialise through both state and non-state means, including market participants. The court was reluctant to mention that the state should develop programmes to deliver housing, social security, food and water, among others, almost upon demand from the citizens. Neither *Grootboom* (2000: 80), nor the other cases discussed below, supports this interpretation. This doctrine to indirectly realise rights could be based on the inclusion of the phrase 'to have access' to the major socio-economic rights in the Constitution, which implies that we do not have rights to housing, but rather rights 'to have access' to housing. This is consistent with the idea that rights may be realised through developing the capabilities of persons, by encouraging the active involvement of civil society, and through the conduct of business, which manufactures and manages many of the matters we include under socio-economic rights. The South African Constitution is able to regulate all these actors. This opens up corporate conduct to scrutiny from the perspective of rights, as this kind of action does affect rights. A reasonable 'plan of action', employing both positive and negative action, could include similarly 'reasonable' demands on ordinary people and powerful private actors to participate in such programmes that realise rights. I further examine the application of rights to civil society organisations below and I attend to its application to corporations later. This emphasis on a multiplicity of social actors in the rights regime in South Africa could have great progressive potential.

5. Non-state actors and the realisation of socio-economic rights: the regulation of subsidiary actors

Civil society organisations and their role in welfare are an issue that pre-dates the birth of the modern state. The matter between *National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others* (hereafter NAWONGO) does clarify aspects of the constitutional status of such organisations, and does affirm subsidiary actors as bearers of the corresponding

duties.¹⁰ This case concerned the levels of subsidy the Provincial Department of Social Development paid to non-governmental organisations (NGOs) that render services on its behalf. These services included the provision of care for children, old-age homes for the elderly and other persons in need. A crucial issue (paragraphs 34–5) was that the state Department of Social Development funded its own old-age and children's homes at a much higher level than it subsidises NGOs' children's and old-age homes. This procedure was found to be unacceptable. The court stated that an equitable regime of compensation for civil society actors was necessary, recognising that such NGOs are realising the rights of its beneficiaries. Their actions to realise rights are performed subsidiary to, or on behalf of the state. This underlines the social policy support that rights imply.

Non-state actors may be compensated by the state, and social policy should accommodate this. However, a stronger position articulated by Liebenberg (2005: 62) could recognise autochthonous action performed independent of the state as contributing to the realisation of rights. This may occur when social or economic rights are violated and non-state actors step in to do so. The courts, being empowered to develop the common law in the context of their domestic jurisdiction, could fashion

an award for preventative damages against the state [...] made in favour of an independent state institution (for example a Human Rights Commission) or a non-governmental organisation with the necessary skills and programmes aimed at preventing future violations of the right in question. The recipient may be ordered to present a plan of action and to report back to the court on its implementation at regular intervals (Liebenberg 2005: 62).

The empowerment of non-state actors to realise rights suggests a substantial devolution of power. Without some attempt at ameliorating the differences in resources between state and non-state actors that realise rights, this devolution of power would be profoundly unjust. As a social actor, civil society does have obligations to realise socio-economic rights (either substantively or procedurally). Should civil society actors be able to claim compensation and public support, we

10 *National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others* Case no: 1719/2010. Free State High Court. (Unreported) Citations are from this unreported judgement; *National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others* 2013 JDR 0936 (FB).

might see responsibility for rights becoming diffused throughout society, and this could establish a clearly democratic rights regime.

As civil society organisations mobilise resources for certain social objectives, they could be viewed as forming part of the resources of society available for the realisation of rights (Jaquier et al. 2006). The old liberal notion of realising the public good through private interests is given a new interpretation. This 'invisible hand' is, in fact, a highly regulated hand, where the spirit of rights, but most importantly, the equitable regulation of private actors could realise the public good.

In the *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AGRI SA and others, Amici Curiae)* (hereafter *Modderklip*) case, we find the strongest affirmation to date that social policy objectives may be realised through non-state actors.¹¹ The court stated that "[i]t is unreasonable for a private entity such as *Modderklip* to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation" (2005: 22, 13). This judgement nevertheless preserves a default duty for the state, in the form of compensation for public action taken, but, in essence, it suggests that a public programme of civil society taking responsible and, at times, autochthonous action to realise rights is possible. In this case, a farmer approached the court for relief after his farm was invaded by a community of homeless people. He succeeded in obtaining an eviction order, but the state was, for various reasons, unwilling to execute this. However, the Supreme Court of Appeal, and then the Constitutional Court granted him relief for the loss of his rights to property. Van der Walt (2005: 21), for instance, emphasised that this is about an indirect horizontal application of rights to non-state actors, which is consistent with the view taken so far. Indirect application would moderate all claims we may have towards the state through intermediary actors. However, it is clear that non-state actors will realise the rights of others, and these actions could take place within a suitable public programme to encourage such action, or such action could be done autochthonously.

Modderklip and *NAWONGO* would sanction the subcontracting of state functions to non-profit organisations. This does not only bring about requirements to compensate actors, but would also make them human rights decision-makers, and the power that accompanies this devolution needs to be considered accountable. The mechanisms, which the state may use to ensure

11 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AGRI SA and others, Amici Curiae)* 2005 (5) SA 3 (CC).

the right kind of conduct in these non-state actors so that they realise rights, were given crucial content in a case dealing with the foster-child grant. The South Gauteng High Court in *Makhuvela* deliberated on the eligibility and payment of a foster-child grant, in the context of a claim for compensation from the Road Accident Fund, to a beneficiary.¹² The Road Accident Fund wanted the amount paid as foster-child grant to the foster parent to be subtracted from the amount claimed from the Road Accident Fund. The court quoted from the often cited *Zysset and Others v Santam Ltd*: “a wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party”. The applicant was thus awarded the full amount of the foster-child grant.

The noteworthy issue in this case, however, is how the responsibilities of the foster parent towards the child were interpreted. The court concluded that the foster-child grant “is given to the foster parent to enable him or her to comply with his or her obligations to the child” and the “primary purpose” of this grant is “the realisation of the constitutional rights of the child through the intervention of the foster child parent” (2010: 34). From the judgement, it is clear that the grant ‘enables’ the foster parent to comply with certain ‘obligations’ towards the child. In the *Grootboom* judgement, it was emphasised that

there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes (2000: 81).

This implies clearly a regulatory regime and social policy support where the state’s responsibilities are integrated with those of non-state actors. The recognition of subsidiary actors in the realisation of rights is visible in the design of South Africa’s Child Support Grant (Lund 2008). It is designed to “follow the child” by paying the “care-giver” of the child. This grant explicitly acknowledges as goal the compensation of the caregiver. This regulatory regime allocates clear responsibilities to non-state actors and places these duties within a framework of social policy delivery that supports the capabilities of non-state actors.

Children’s rights could be interpreted in this manner.¹³ How the rights of the child are realised – in other words, the exact means whereby ‘family care

12 *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSI).

13 See section 28(1)(b) of the *Constitution* and the *Children’s Act*, 38 of 2005.

or parental care' is realised – would depend more on the choices, abilities, preferences and identity of the parent and the family than on the nature of the social policy support such as a grant (which is a specified amount of money). The idea that the child is wholly a ward of the parent is negated by the residual responsibility that the state has to pay the grant, and it has the prerogative to inspect the conditions in which the child lives. However, the parent has more responsibility and duty than the state in this regard, as the parent has the freedom to exercise certain choices in realising these rights. In addition, it is unfeasible that the state is able to realise the rights of the child completely, as the developmental needs of children demand duties (and personal relationships) from other people. It is clear that the nature of children's rights indicates the subsidiarity of the grant recipient – which is often the parent (as opposed to the beneficiary, who is the child), to the state in the realisation of rights. However, social policy should reinforce these actions, thus enhancing the capability of the parent or caregiver to care for the child. This is how children's rights may be realised in the long term. Short-term action for immediate relief obviously implies a different system of delivery, but this cannot stand as a general model of how socio-economic rights need to be delivered. It seems more appropriate to emphasise the capability of the actor of rights when socio-economic rights are realised.

6. The content of rights: exploring the reach of participation in the deliberative Republic

Article 12(1) of the Convention on the Rights of the Child (UNGA 1989) states that the child has a right to “express” his/her own “views freely” (or as the South African Children's Act 38 of 2005: Ch 2, section 10 implies, to “participate” in any matter affecting the child). This means that the rights regime has to make allowance for the involvement of non-state actors. The *Mazibuko* judgement gives some clarity on this complex participatory regime, although some aspects of the judgement may be wanting. This judgement emphasised that the state has a clear and leading role to play in determining “what the achievement of any particular social and economic right entails” (2010: 20). If the state has such a clear and leading role, we may ask what role could be ascribed to the participation of the beneficiary in the process. The court was loath to question the decisions of the state and the judgement was criticised, not only because it meant that the state could unilaterally decide how a particular right had to be satisfied.¹⁴

14 Bond & Dugard 2008, Liebenberg 2010: 466-80.

Other criticism concerned the court's reliance on expert evidence that seemed to lower the standards of public participation.

The interaction between experts and the state in judgements on rights was first hinted at in the *Soobramoney v Minister of Health, Kwazulu-Natal* case (hereafter *Soobramoney*).¹⁵ This case emphasised the lower levels of decision-making competence of the doctors at Addington Hospital. The scarcity of resources for renal dialysis and the condition of the patient were decisive factors in the decision not to grant the applicant access to renal dialysis. Although the judgement was criticised, Scott & Alston (2000: 243) noted that "expert communities can act as [...] front-line constitutional decision-makers". This finding is significant, as the reliance on expert evidence in deciding the content of rights may clash not only with bureaucratic decisions, but also with the demands of popular participation in social policy delivery.

Consequently, the suggestion in the *Mazibuko* case (2000: 20, 51, 52) that social programmes are also "subject to democratic popular choice" should be interpreted as a broadening of social participation beyond expert stakeholders and as a safeguard against state unilateralism. The state does provide extensive opportunities for participation, through local Integrated Development Plans and many other opportunities. The *Mazibuko* judgement did not order meaningful and further engagement between people and the state. This is regrettable, as it is possible to view participation as meaningful within the broader process-oriented approach that has emerged from the court.

Such a deliberative and participative approach is strengthened by the Constitution. The *Rules of Standing* in section 38 of the Constitution that controls access to the courts would not only allow an open conversation about rights, but it could also be brought to bear on other actors such as NGOs and corporations who may affect the enjoyment of rights in society. Section 38 empowers "anyone" to approach the court to act in their own interest, for others, the public or in the name of an association's members. This creates an opportunity to confront powerful interests when rights are affected. The court needs to become a forum where the content of rights may be decided, not by itself, but rather by the democratic conversation that would emanate from an open forum of deliberation that the court has to offer and foster. 'Democratic political choice' extends into the proceedings of the court itself. This broad participative ethos is evident in a number of cases, particularly where numerous *amici curiae* participate in the proceedings.

15 *Soobramoney v Minister of Health, Kwazulu-Natal* (1) SA 765 (CC).

As a long historical tradition, human rights shape the content of rights. A communicative approach to rights, however, suggests that this tradition is ongoing. We may afford the subject of rights the opportunity to do so directly under the provisions of section 38. Rights have to be decided on through participation in a conversation of multiple voices that stretches across time and space. This communicative regime is an appropriate response to the subsidiarity of non-state actors (who may be independent of the state), and will expose powerful actors (such as corporations) to communicative and deliberative scrutiny, importantly by less powerful actors. The *Guiding Principles for Business and Human Rights* (UNGA 2011: paragraphs 3(d), 15(b), 16, 17, 18(b), 20(b), 21 and 28) recommends that business engage in similar communicative fora in order to realise its own obligations towards human rights. This signals a broad communicative ethos in the global rights regime and is a means to enable and compel social actors to uphold rights. This may be expanded further by reference to the numerous provisions in the Constitution that demand public participation. This solution could resolve the implicit tensions between state, expert and beneficiary participation when the content of rights needs to be decided. The court then becomes a forum for democratic conversation on rights and a means of examining and shaping the substantive content of the rights in the Bill of Rights.

7. Conclusion: policy models and making development based on rights

The rights regime in South Africa shows a strong affinity to a capabilities approach. A social-democratic, corporatist and liberal approach are all evident in the South African rights regime, but the way in which social actors are mobilised in the rights regime goes beyond the principles of these approaches. Rights in South Africa should be viewed not as matters to be delivered to the citizenry, but rather as social programmes that need both state and non-state actors for its realisation. This is a distinguishing feature of South African jurisprudence on rights. Rights will acquire a local character and their meaning, content and means of implementation will reflect local realities, due not only to participation in deciding the content of rights, but also to the expansion of actors and actions (peculiar to local conditions) relevant for rights. It is through the participation of the subject or actor of rights in governance that society will change. The state has a duty to develop processes for such participation and collaboration, over and above its underlying and incontrovertible duty to act in the last resort. It is thus clear that the fundamental model – and efficacy – of rights lies with the abilities of the individual in society, and of society itself to respond. This democratisation of rights holds clear implications for both policy models and political philosophies.

The way in which we reconcile the negativities of liberal market-based development with social values was often termed a balancing act: allowing capitalism to create destruction, while a welfare regime reconstructs (Polanyi 1957, Donnelly 2003: 202, Bernstein 2010: 50). This informs the liberal, corporatist and social democratic welfare regimes, but this metaphor is not completely relevant to the South African rights regime. It underlies an orthodox approach to socio-economic rights. Giddens (1984: 256-7) states correctly that this engenders class divisions, that in one scenario

will be overcome as part [of revolution to socialist society]. For liberals, however, who deny the possibility of achieving such a revolutionary reorganisation of society, the threat of power is omnipresent. Power signals the existence of conflict and the potentiality of oppression; thus the state should be organized in such a way as to minimise its scope, taming it through parcelling it out in a democratic fashion.

Giddens' comments reveal how power shaped both liberal and socio-economic rights. He adds that "such views are untenable" and this is meaningful only if we ascribe agency to actors. The actor as human being is a "knowledgeable" agent capable of influencing the actions of others (Giddens 1984: 281). Rights should be regarded as bestowing agency on actors, and this is how they need to be realised.

The human development or capability approach converges with this view of social action. Social policy has to enable the individual to act. Negative effects of growth need to be countered not by balancing, but by fostering and shaping human capability in alternative directions. The objectives of society are to be found in peoples' own will, not in abstract quantities of goods produced. Hence, it makes sense to view the person's choice as the founding element of the state and the driver of development and social change. From this view of social action, we can characterise the South African rights regime as incorporating statutory, deliberative, subsidiary and autochthonous duties and privileges.

Social assistance-type programmes are created and implemented by law and these imply standards of conduct that are often derived from International Law. This emphasises direct and urgent relief by state agencies as a measure of last resort. However, this also implies standards of conduct to regulate the conduct of others and to enable others to act. As this takes place, the conduct of actors changes the content of a right. Local actors may move the content of rights away from international and universal standards. This changes the core content of rights, but does not necessarily detract from a universal conception. It merely indicates that universal and core-content ideas are indicative, but not conclusive of what rights mean.

There is a clear deliberative and participatory dimension to social action for rights in South Africa. This includes participation in service delivery, in the decisions the state makes, and it flows from the broad participative character of democracy. As far as rights are concerned, reference has to be made to deliberation in the court, which implies an open and accessible conversation. This conditions the content and nature of rights to reflect the participants in this conversation and their interests. The court is the facilitator of this conversation and it is in this act of facilitation and mediation between interests that the normative dimensions of rights need to be enhanced.

We are also able to identify a subsidiary dimension to rights. This subsidiarity flows from participation and from the horizontal application of rights in South Africa. This also includes autochthonous action, and the South African Constitution could also accommodate action taken autonomously by the subject of rights independently from the state. In addition, such action has to respect, promote, protect and fulfil rights. Policy should endeavour to increase the capabilities of individuals, but this should not detract from state action as social assistance (unconditional and delivered on the basis of need). This shift to empower the individual holds the potential to innovate in the rights discourse and is perhaps the most important shift in our understanding of rights that the South African Constitution has made.

Rights and their realisation, according to the programme sketched earlier, could be accommodated by “framework law” for each individual right that structures the activities of all social actors, or through a democratic or constitutional experimentalism that can reveal the undiscovered nature of rights as an endeavour which many actors have to complete (Khoza 2004, Dorf & Seibel 1998). This can lead to an alternative programme of human rights-based development that would realise the fundamental imperative underlying human rights, namely an attempt of the subject of rights to govern history, and itself.

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