

# The performance of the right to have access to social security

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## 1 INTRODUCTION: THE EVOLUTION OF RIGHTS AND THE VOICE OF THE BENEFICIARY

Is the South African Constitution a 'people's document'? Does it give voice to, encourage and protect the actions of the poor, the homeless, the marginalised and the excluded? If the meaning of the rights in the South African Bill of Rights emerges through a complex interaction between the words on paper and its 'open community of interpreters',<sup>1</sup> to what extent does it empower the 'practices of resistance and struggle' of the oppressed and marginalised, the poor and the homeless to '*name* human rights and to put them to *work*'?<sup>2</sup> Can we interpret the rights in the South African Constitution in such an activist way? This democratic conception of rights goes beyond, but draws upon Jennifer Nedelsky's idea that a 'constitutional dialogue' between the branches of the State should decide the content and meaning of rights in a society.<sup>3</sup> This dialogue should make specific allowance for the participation of the beneficiary in both words and action. In this sense the citizen becomes the subject or author of rights, and we may arrive at a conception of rights that enables democracy to exert real influence over society.

An activist interpretation – or 'performative' construction of the meaning of the Constitution – is possible.<sup>4</sup> Rights have to be performed in their social and historical settings, and State, civil society and market-based actions are fundamental to the realisation of rights, particularly socio-economic rights; and the South African Constitution, it is claimed here, can be interpreted in this way. In this sense we need to develop an understanding of socio-economic rights that acknowledges the contingent nature of these rights. Socio-economic rights are not only realisable in different ways at different times, but also depend on the relative abilities of different actors to realise them, and on the changing pref-

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1 Du Plessis L 'Legal academics and the open community of constitutional interpreters' (1996)12 *SAJHR* 214-229.

2 Baxi U 'Politics of reading human rights: Inclusion and exclusion within the production of human rights' in Meckled-Garcia S and Cali B (eds) *The legalization of human rights: Municipality perspectives of human rights and human rights law* (2006) 182. (Emphasis in original).

3 Nedelsky J 'Reconceiving rights as relationship' (1993) 1 *Review of Constitutional Studies* 1.

4 See also Malan N 'Rights, the public and the South African Constitution: Civil society and the performance of rights' (2008) 31 *Anthropology Southern Africa* 58.

erences of the beneficiary. These factors force us to consider socio-economic rights not only as things that need to be 'delivered' with some kind of unchanging 'core-content' but rather as concerted and co-ordinated efforts by multiple social actors and hence as broad social projects.<sup>5</sup> Chirwa is of the opinion that the horizontal application of rights requires 'that various actors discharge various levels of duty'.<sup>6</sup> These levels of duty are clarified in this reading of the Constitution by using the right to have access to social security<sup>7</sup> as an example. A paradigm for the realisation of socio-economic rights should take due cognisance of the limits of the State and the limits of self-provision, and address these inequities. A truly transformative interpretation of rights would empower the poor, the homeless, the excluded and the marginalised to overcome the limitations of the history, structure and abilities of society, and enable them to realise their rights in concert with different forms of social provision and the opportunities that there are in society. A step towards this objective would be to indicate how the Constitution empowers its 'open community of interpreters' to do so, as well as indicating what the results of this interpretation would be: The democratisation of rights by the allocation of different levels of duties to, and empowerment of, different actors.

This article is structured as follows: It starts by clarifying what a performative conception of rights entails by reference to certain perennial issues in the history and jurisprudence of socio-economic rights. This sets the terms of engagement with the Constitution and the jurisprudence of rights. The article shows how the Constitution gives substance to such a conception of rights that empowers multiple social actors, which in turn allows it to recognise the voice of ordinary citizens in the development of rights. It creates a new language of rights that empowers certain actors to realise rights themselves, and for others. This reading of rights has certain implications for State, market and civil society action, and I conclude with a discussion that clarifies these different responsibilities.

## 2 RIGHTS AND THEIR PERFORMANCE

Soon after the adoption of the 1996 Constitution, De Vos<sup>8</sup> made the statement that:

'The concept of the individual as an active subject of all economic and social development is fundamental to a realistic understanding of this obligation [to fulfil rights]. The individual is expected, whenever possible through his or her own efforts and by the use of own resources, to find ways to satisfy his or her own needs, individually or in association with others. However, use of a person's own resources requires that the person has resources that can be used – typically political power, land and/or capital, or labour.'

5 Pieterse E & Van Donk M 'Incomplete ruptures: The political economy of realising socio-economic rights in South Africa' 4-5 (Paper prepared for the Community Law Centre colloquium *Realising socio-economic rights in South Africa: Progress and challenges* (March 2002)).

6 Chirwa DM *Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution* (2002).

7 Section 27(1)(c) Constitution 1996.

8 De Vos P 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 SAJHR 87.

This quote implies quite strongly that the individual is the subject of rights, and that it is the abilities and position of this individual in society that would determine the extent to which rights may be realised. The implications of this view of rights are quite far reaching, and here the argument will be made that it could be construed to include the following: In the field of political philosophy it suggests that the social order created by rights would be created by empowered and active citizens, and that they would thus be in a position to transform the social order so that their own rights may be realised.<sup>9</sup> In this sense a performative conception of rights can be identified with a strong democratic programme that empowers citizens in society, as it is ultimately the abilities of citizens that realises rights, and we may argue that even the abilities of the State (primarily through taxation) are almost completely dependent on the abilities of the citizenry. Furthermore, it also suggests that due allowance should be made for the participation of the beneficiary or subject of rights (as opposed to the object of rights, which is the State) in the social programmes that realises rights. From here it follows that rights should also have as object social and economic policy, as this is what enables the subject of rights to realise their own rights. Socio-economic rights are realised by the grand social project of 'development', and in this sense we need to develop the jurisprudence of rights to actively engage in social and economic policy. Besides these concerns, which may be construed to include progressive recommendations on changing society, it is also necessary to acknowledge the inabilities of many to realise their own rights themselves, and that thus a performative conception of rights should also include a perspective on dependency and the interdependencies we all have in our own projects of realising rights. It is important to note that when the State faces clear limits in realising rights, the underlying social order is problematic: It may point towards gross inequality and underdevelopment in the sense that adequate access to resources, the factors of production and political power is lacking.

A strong democratic programme suggests multiple actors of rights, and seeing that it is the peculiar abilities, position and, most of all, the interdependencies of each in society that would realise rights, we have to accept the possibility that rights may be realised in co-operative endeavours by different actors at different moments in history. If we subscribe to the idea that society governs itself through democracy, it is clear that the citizen is much more than merely the atomic unit of society. Society governing itself implies that the citizen (together with other citizens) is the architect of society, and, furthermore, acquiesces to this created social order. Society, specifically the governors, can only make decisions based on the acquiescence and participation of the governed. The realisation of rights by the citizen is what the State should protect and foster as this also constitutes the material through which the State receives the means to realise rights. The State thus occupies a secondary place in the rights regime – as object of rights – after that of the subject of rights or the citizen. However, the question of State action for rights thus only

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<sup>9</sup> This draws upon the insight of Karl Klare that we have entered a period of 'transformative constitutionalism' in South Africa. See Klare KE 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

emerges after the citizen is unable to realise rights herself, and traditionally this is how the important social programme of social assistance was treated. However, this ignores the intimate and fundamental interdependencies we all have, and substitutes care-giving with social assistance. This does not mean the State should at this point enter the fray and supply the goods or services for the realisation of socio-economic rights. It could also mean that the State should first of all create the conditions for social actors to co-operatively realise rights, for instance, by regulating or compensating the market and civil society, so that they are enabled to realise rights themselves, and for others. Below I will show that this model could be supported by a reading of the South African Constitution on the realisation of socio-economic rights. It thus implies that the State's obligations are, first, to regulate society so that the factors of production (which could be more than land, labour and capital, and should include human capital, specifically education and health) are distributed equitably so that people are able to realise their rights themselves. A second level of regulation can be identified: To regulate the actions of secondary or non-State actors that realise the rights of others. It is only after these possibilities have been exhausted that we may identify direct duties of the State in the realisation of rights, and in this sense we may demand that the State supply the necessary goods or services accompanying rights directly.

A performative conception of rights should not necessarily be seen as retrogressive because of its emphasis on the abilities of the actor. In contexts of dependency, as is often evident with the right to have access to social security, this emphasis could nevertheless be retrogressive if not accompanied by measures that would either compensate the care-giver or supply the goods or services directly through state agencies. However, empowering subjects of rights to realise rights could avoid many of the problems associated with State provision, and has the benefit of building the content of rights on the wishes, needs and aspirations of the beneficiaries. Many critiques of rights as being culturally inappropriate or an instrument of hegemony can be countered with this view of rights. Even a conception of rights that takes it as the final and ultimate responsibility of the State would stand or fall by this criterion, as the State ultimately depends on the citizenry for its revenue – rights should be what people would choose if they had the opportunity to do so.

If we adopt a performative view of rights, it becomes inevitable then that we should consider issues of economic and social policy. This contextualises the nature and content of rights within their social and historical settings, and as such does not take rights as transcendental givens or essential categories that are unchanging over time. The notion of performative rights derives, amongst others, from the anthropologist Paul Richards'<sup>10</sup> opinion that agriculture is not 'knowledge' but rather 'performance'. Agriculture cannot be captured by instructions or procedures for the propagation of crops (although that helps) but it is rather that which can be performed under certain conditions and at certain historical moments. It is not feasible to understand rights in the sense of an a-historical product of culture, as they would have to be re-created

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10 Richards P *Indigenous agricultural revolution: Ecology and food production in West Africa* (1985).

in every historical moment over and over again, as circumstances change and resources wax and wane. Rights, furthermore, cannot be captured by technical prescription, as these need to be enacted time and again. Rights are, however, not indeterminate, and a performative view of rights could emerge once we understand the constraints under which action is taken. In this regard notice can be taken of the philosopher JL Austin's clarification of performative utterances.<sup>11</sup> This shows that rights are more than merely words on paper, but also points to the fact that rights are 'real' only when we subsequently commence with a certain procedure of action that would lead to the desired effect, and that this needs to be completed by certain actors. Talking of rights can thus be seen as talking of certain actions to be taken.

The performative approach to rights, furthermore, has strong affinities with what is emerging in philosophy as the human capability approach.<sup>12</sup> This perspective on rights is unavoidable because rights do invoke considerations of justice and 'we cannot undertake any sort of life unless we can carry out these basic human functions'.<sup>13</sup> The absence of the satisfaction of rights would make human life difficult. The ways we allocate resources to realising them, and the ways we articulate our preferences about how they are to be realised through our practical reason have to be done in a democratic context where argumentation, deliberation, the material resources of society and social choices count.

What is important in a contingent and performative view of rights is the need to find a conception of rights relevant for a particular society. To do so needs certain process freedoms which are important because of the difficulty of determining the content of rights. We need to ask:

'How can we go about ascertaining the content of human rights and of basic capabilities when our values are supposed to be quite divergent, especially across borders of nationality and community? Can we have anything like a universal approach to these ideas, in a world where cultures differ and practical preoccupations are also diverse?'<sup>14</sup>

The idea being defended here is that the content of socio-economic rights (indeed any right) cannot be seen as fixed as the content of rights seems to be less important than what they allow us to do, since 'we value capabilities ... and the possession of goods with the corresponding characteristics is instrumentally and contingently valued only to the extent that it helps in the achievement of the thing that we do value, viz. capabilities'.<sup>15</sup>

Focusing the 'core-content' approach to rights and John Rawls' idea of 'basic' public goods has been central in rights jurisprudence, but both these approaches do not place enough emphasis on the agency behind the realisation of rights.<sup>16</sup> A performative approach reminds us of the differing

11 Austin J L *How to do things with words* (1965) 14-15.

12 Sen A K 'Human rights and capabilities' (2005) 6 *Journal of Human Development* 151.

13 King P 'Housing as a freedom right' (2003) 18 *Housing Studies* 667.

14 Sen (n 12 above) 152.

15 Sen A K 'Rights and capabilities' in Honderich T (ed) *Morality and objectivity: A tribute to J L Mackie* (1985) 139.

16 Bilchitz D 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1; Bilchitz D 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484; Rawls J *A theory of justice* (rev ed 1999).

capabilities of different actors, including the State, and also of the fact that these actors inevitably have to co-operate and compete. This interaction is what establishes institutions over time, and it can also explain the ways welfare provision becomes part of the normal course of economic and social development. This approach may thus integrate our assessment of the realisation of rights with broader processes of change in society.

This view of rights implicates the relationships between social actors, and acknowledges the interdependencies between people and that this forms the base of its philosophical enumeration.<sup>17</sup> Kittay points to the fact that socio-economic rights cannot be realised by a compensatory system only, but also by the recognition of the interdependence of care-work.<sup>18</sup> Kittay<sup>19</sup> further argues that a system of social security should protect and compensate care-work. Underlying such a system is the acknowledgement that the abilities of people and society to realise rights, indeed even the functioning of such a compensatory system, fundamentally depends on the abilities of citizens in society. This needs a set of approaches to social regulation different from that which we have come to expect from a State-centred view of the duties of rights.

Such a view of social regulation, dependency and welfare will inevitably have to focus on the system of (public and philanthropic) funding of civil society organisations and of care-work that is often older than State-supported welfare intervention. It also suggests that the economy needs to be viewed as a system of co-operation that – as far as rights are concerned – implies the need for equitable access to the factors of production. Two crucial issues are apparent at this juncture: The need to make provision for the compensation of care-work, and the need for economic regulation to ensure equity in access

17 Nedelsky J 'Law, boundaries and the bounded self' (1990) 30 *Representations* 162; Nedelsky J (n 3 above); Kittay E F *Love's labor. Essays on women, equality and dependency* (1999).

18 Kittay (n 17 above) 28 articulates it as follows:

'The question for a connection-based equality is not: What rights are due to me by virtue of my status as equal, such that these rights are consistent with those of all other individuals who have the status of an equal? Instead, the question is: What are my responsibilities to others with whom I stand in specific relations and what are the responsibilities of others to me, so that I can be well cared for and have my needs addressed even as I care for and respond to the needs of those who depend on me?'

It is worthwhile to reflect upon reading this passage that Sachs J (in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 54) made the remark that:

'Health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence: the quality of air, water, and sanitation which the state maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; as well as the quality of health care furnished officially by medical institutions and provided informally by family, friends, and the community.'

He continues to say that in such a situation a 'broad framework of constitutional principles [is necessary to govern] the right of access to scarce resources and to adjudicate between competing rights bearers'. This, significantly, is 'defining [of] the circumstances in which the rights may most fairly and effectively be enjoyed'. These words are tantamount to sanctioning a performative conception of rights that depends for its effectiveness on the arrangements found in society. Although this case did not affirm the applicant's right to medical treatment, and was widely criticised for this, it did develop the jurisprudence of social rights in progressive directions.

19 Kittay (n 17 above) 140 – 141

to the factors of production. We should thus ask whether the Constitution will allow an interpretation of socio-economic rights that could incorporate these two issues. Besides the important issue of dependency dealt with above, a performative reading of rights will focus on how we should understand self-provisioning from a philosophical perspective, how economic and social policy affect rights, and, of course, procedural issues in creating the content of rights. I discuss each briefly before considering with the text of the Constitution.

### 3 THE PERFORMANCE OF SOCIO-ECONOMIC RIGHTS AND SOCIAL SECURITY RIGHTS: IDENTIFYING THE TERMS OF ANALYSIS

It was the inequities of economic production, the afflictions of the body, and the passage to old age that led to the idea of social security. The Roman Emperor Charlemagne promulgated one of the first poor laws in 779.<sup>20</sup> Booth and Rowntree's studies of pauperism and poverty in industrialising Britain, and, in France, Antoine-Nicholas de Condorcet's and August Comte's idea of 'social science' to improve social conditions,<sup>21</sup> ushered in the era of modern social security. Rights to social security are intertwined with the inequities of capitalism, and in a sense articulate Polányi's<sup>22</sup> idea that we need to tame capitalism lest it destroys itself. Rights to social security were articulated against the state (social assistance) and capital (social insurance) in both the context of the industrial revolution, and colonialism.<sup>23</sup> This feature of social security – as compensation for the inequities of capitalist production – has infused the character of socio-economic rights.<sup>24</sup> This characterisation of social rights understandably underplays the abilities of all, including the poor, to realise their own rights. It also leads to a moral deficit in those who are able to realise their rights, as the State as a corporate entity has to accept responsibility for the rights of the able, and this obscures both responsibility

20 Goodin R E and Mitchell D 'Foundations of the welfare state: An overview' in Goodin R E and Mitchell D (eds) *The foundations of the welfare state* (Vol 1) (2000) ix.

21 Ishay M R *The history of human rights from ancient times to the globalization era* (2008) 335.

22 Polányi K P *The great transformation: The political and economic origins of our time* (1957) 73.

23 Ishay M R *The human rights reader: Major political essays, speeches, and documents from ancient times to the present* (2ed 2007) 114-116; Mensch E V 'The colonial origins of liberal property rights' (1982) 31 *Buffalo Law Review* 654.

24 To gain clarity on the above issues, it is necessary to understand whether social security benefits are qualitatively different from benefits obtainable from social policy measures, and from 'development' in general (Dixon J *Social security in global perspective* (1999) 276). Economists seem to be happy to condone 'social security'-based intervention in the economy, whilst frowning upon other kinds of State intervention. We should question the practices of 'International Development' and its conditionality, since social security was the one factor that is common in the rise of the modern OECD states, but absent from international development aid (Townsend P 'The right to social security and national development: Lessons from OECD experience for low income countries' (2007) (Issues in social protection, ILO Discussion paper 18)! It is nevertheless difficult to distinguish in a watertight way between benefits in general and those that are 'social security' benefits, as all these benefits do have social security effects. (Oliver MP *et al* (eds) *Social security: A legal analysis* (2003) addresses this problem by distinguishing between formal social security (as social insurance and assistance), informal social security (through the family and civil society organisations) and indirect social security (benefits obtained through social policy delivery)). It seems that these effects (protection

and dependency. It also structures activism in such a way that the means of production are attacked, whilst this is in fact the means that the State, and those able to, would utilise to realise their own rights. These contradictions in what could be termed a liberal view of rights are ultimately disempowering for citizens, as they bestow on the State the authorship of rights (as it decides the terms and programmes of realisation of social rights) and thus fundamentally undermines the transformative potential inherent in those marginalised from the existent social order. Poverty and inequality – the objects of change for social security rights – are due to the character of the current social order. These problems can only be addressed by a change in the social order, and a compensatory system would contradictorily still depend on the means that create inequity to compensate for it. A performative view of rights would acknowledge the above contradictions as in the short term compensation is necessary, but, from a theoretical point of view, a solution has to be found for poverty, and this would have to lead to greater participation of the marginalised in the economy. This in fact is only possible if we acknowledge economic interdependence in society. The policy solution would thus steer towards the development of human capital in the people, and the expansion of the freedom of people, not only because the current ‘knowledge’ and service economy demands it, but because the act of participating in the economy constitutes the raw material through which it is ‘created’. Below I show that this view of the economy is accommodated by the requirement that there must be ‘access to’ the relevant socio-economic rights in the Constitution. This implies something different from receiving the things rights spoken of on demand, and rather suggests that we need to be mindful of how the structure of the economy allows these things to be realised. This opens the door to an appreciation of social and economic policy in constitutional interpretation.

The welfare state was a prominent feature of the post-war era, and institutionalised social security as never before. Social security occupies a very peculiar place in economic policy: it is a paradigmatic form of state economic intervention, and seems to be acceptable practice for States in the face of economic liberalism, reinforcing the contradictions mentioned above. Davis’s<sup>25</sup> idea that ‘constitutions have allowed a large degree of legislative discretion in choosing an appropriate form of governmental economic activity’, undoubtedly would lead economic policy makers to converge on the idea of social security to correct the imperfections of the market. It should, however, be clear that a neutral stance of a constitution vis-à-vis social and economic policy in the face of economic inequity would not be defensible

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against ‘human damage’) play a big role in economic development, and in this sense social security is different from, say, subsidised credit. The right to social security could refer to the formal benefits termed ‘social security’ but also to the protection that would result from all policy measures in place and the charity of those with a conscience (Dréze J and Sen). A ‘Public action for social security: Foundations and strategy’ in Ahamad E *et al* (eds) *Social security in developing countries* (1991). Due to the complexity of these many kinds of economic intervention, it is possible that we may never gain clarity on how social security is different from other benefits, and the issue lies rather in understanding to what extent, and how, this right would allow state interference in the economy.

25 Davis D ‘Economic activity’ in Chaskalson M *et al* (eds) *Constitutional law of South Africa* (1996) ch 29 4.

in the long run. A performative view of rights conjures up an image of an activist State that purposefully harnesses the means of capitalist production for the economic empowerment and participation of the poor. Self-provision implies not only that the subject can satisfy rights, but also that the subject can contribute resources to State compensatory projects. A critical requirement of this avenue for the realisation of rights would allocate certain duties and responsibilities to market actors, and the question of how to enforce a collective responsibility for business associations in civil society for rights needs to be clarified.

In cases where rights are realised by private actors, the claim has been made that the actions and resources of private actors represent part of the resources available to the State.<sup>26</sup> In this sense we need to see the State not as a governing entity or part of the ruling party, but as part of society. The question of subsidiarity to the State, and consequent responsibility, thus moves away from the State as a corporate entity, and towards civil society. Private actors are not only active in the realisation of the right to social insurance, but they are important actors in the provision of certain forms of social assistance, in the form of care giving but also micro-insurance and, related thereto, micro-credit. Their endeavours and resources need to be aligned with the values that shape a society. To what extent can we subsume the actors of such forms of social security under the provisions of the Constitution? Can private actors act in the public interest? With such a view of rights and social security, can we apply the Constitution to a field of social action (the 'free' or private economy) that affects many poor people's lives? Can we regulate the actions of important private actors that affect the lives of the poor, and still align their productivity and innovation to the values that underlie a society? It could give the poor a voice over the actions of more powerful actors and allow the energies of such private actors to benefit the poor, while they benefit from increased economic participation.

The economy that realises rights progressively is an economy that needs a strong and active, but not directly, interventionist State to structure its workings.<sup>27</sup> Such an economy would enable – in a progressive way – the realisation of rights by the actors participating therein. In this sense the resources of society are in fact being used for the realisation of rights. It also means that those who are directly involved in caregiving (as they realise rights 'in the name of' the State) could draw on the resources of the State as compensation for this task which is the final responsibility of the State. The State can thus realise its objectives through others, and in this sense we need to develop further the regulatory regime surrounding social and economic policy so that it adequately acknowledges the importance of rights. Porteous avers that business practices need to focus on creating opportunities and expanding the 'access frontier' which, in essence, is a comment on the structure of the economy and the magnitude of participation therein. This idea emerged in

26 Churchill C (ed) *Protecting the poor: A microinsurance compendium* (2006) 49-50.

27 Porteous D *Making financial markets work for the poor* (2004). Some call this a 'developmental state'.

the context of the Financial Sector Charter (which, inclusive of the current emphasis on broad-based Black economic empowerment,<sup>28</sup> is unfortunately quite silent on the realisation of rights) that demanded increased access by the unbanked into the mainstream financial services industry. What this underscores is that civil society associations, of both civic and market based players, have to accept a collective obligation for the realisation of rights in society.

The collective responsibility of firms and civil associations is thus very important to create such a system of accountability. Everyone who participates in the economy – unwittingly, but sometimes consciously – affects the economic structure. Individual freedom can be protected but a form of collective responsibility seems necessary. Certain economies are better able to realise rights than others. It is necessary to develop a critical view of how a certain economic structure affects poverty, but also how certain trajectories of growth enable people to realise their rights themselves. At this juncture it would be possible to examine economic policy, specifically competition policy. Is there a necessary diversity of firms in an economic sector that would maximise employment of, and benefits to, the citizens in general? A critical view of economic policy will strive for the participation by the poor in the development of economic policy so that they could directly campaign for measures to improve their plight, and work towards a more equitable structure for the economy through their participation. To do so implies an assessment not only of economic policy, but of the kind of jobs that are created. In addition, we need to assess the weight of different kinds of firms in the economy, as an issue in competition policy. Social policy should enable people to realise their rights themselves by investing in measures (like education and health) that increases their autonomy.<sup>29</sup>

If the above is the case, the question of the actors of these rights becomes focused on co-operative social projects. Can we push the idea of the horizontality of rights to the point where we see the citizen as actor and subject of rights who acts within the context of a democratically mandated State? It is possible to construe social policy measures closely on the living conditions and interests of beneficiaries, which is also possible with rights.<sup>30</sup> Participatory strategies devolve responsibility for rights to the beneficiary, but to say that rights could be autochthonously realised by economic participation goes much further than participation in social policy development. This bestows

28 *Broad-Based Black Economic Empowerment Act* 53 of 2003.

29 This approach to the realisation of rights to social security is evident among some of the advocates of 'developmental social welfare' which is the policy term adopted by the present government. This relates to how social security and other social policy measures, particularly, education, health and income opportunities, would 'foster inclusion of people in the development process through employment and self-employment and raise the standards of living of the poor and unemployed. Investments in building the capacities of poor people to participate productively in the economy through human capital development (such as education and skills development), social capital development (such as social networks), micro enterprises and credit' (Patel L *Social welfare and social development in South Africa* (2005) 30).

30 VenneKlaasen L *et al* 'Rights-based approaches and beyond: challenges of linking rights and participation'; (2004) (IDS Working Paper 235).

on the subject authorship of the content of rights by his or her endeavours in society. By being able to gain access to social security, health, housing, food and water, and the other rights, through the use of income is a significant means to satisfy these rights. But this model of how rights are to be performed can only serve as a basis for analysis if we are critical about whether there is equity in gaining access to the factors of production. It asks questions about the nature of participation; the governance of those organisations that attempt to realise rights for others; and about the institutional structure wherein all this takes place. It allows a critical perspective on both economic policy and the economic structure, and the place of human development in these. Rights thus apply to the State, to the programmes that facilitate influence over that State, as participatory programmes do, and the autochthonous endeavours we all make at times to realise our own needs and rights.

The above problems constitute fundamental issues in the interpretation of horizontal rights, and are particularly important in our understanding of how socio-economic rights are realised in society. A performative reading of rights in the Constitution has to address all these issues, and I do so below.

#### 4 THE PERFORMANCE OF RIGHTS AND THE TEXT OF THE CONSTITUTION

The above needs to be brought to bear on the text of the Constitution and the argument will run as follows: The horizontal application of the Constitution and the justiciability of socio-economic rights establish that non-state actors may realise rights, and that they have certain duties. This, and the question of 'appropriate social assistance', allows us to develop the right to have access to social security (and related rights) in ways that acknowledge both the responsibilities of the State as well as the responsibilities of non-State actors. It confirms that rights may be realised through a regulative and facilitative State. Furthermore, it is possible to give substantial protection to these efforts at realising rights if we consider the subsidiarity of such non-State actors to the State, and the consequent possibility that they be considered 'organs of State'. The democratic mandate of the State in this case is not in conflict with the actions of non-State actors, as the Constitution also emphasises the fact that the state should allow for the participation of the citizenry in the development of its own policies. As non-State actors are not subservient to the formal institutions of electoral democracy, it is necessary to conceptualise their accountability for the realisation of rights as a function of how the courts adjudicate cases and resolve disputes about socio-economic rights. This adjudication, through the rules of standing, establishes a democratic and deliberative accountability. Issues of social and economic policy are implicit in the fact that non-State actors realise rights (as policy is an inescapable fact of social and economic life), but receive formal and substantive recognition by the inclusion of the phrase 'access to' in the enumeration of selected socio-economic rights in the Bill of Rights. The inclusion of social and economic policy considerations in the realisation of rights, and considering the fact that a participatory ethos is implicit in the way rights are to be

realised, lead me to consider the implications the generous rules of standing that control access to the court have on the governance of non-State actors. The above arguments give substantial support to the idea that we should interpret rights as things to be performed, and I conclude on the implications of this for the responsibilities of the diverse range of non-state actors that may realise socio-economic rights.

#### 4.1 Horizontality and justiciability: the nature of the State and the empowerment of non-State actors

Section 7(2) of the Constitution demands that the State must 'respect, protect, promote and fulfil the rights in the Bill of Rights' – we have to see all the rights (political and civil, and socio-economic<sup>31</sup>) as justiciable. The socio-economic rights, under the South African Constitution, do not follow the classical separation of civil and political rights from socio-economic rights. It is evident in section 2 that 'law or conduct inconsistent' with the Constitution is 'invalid', pointing out that it is more than laws that have to uphold rights. As only States make laws, and because conduct refers to both the actions of people and that of States, people also have to uphold rights in their own conduct with others.

Section 8(2) reinforces the above by stating: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' In section 8(1) the application of rights to the State is affirmed, and the differences in these two sections of the Constitution allow an interpretation of rights that has direct bearing on the duties of both the State *and* non-State actors. It is clear that the Constitution places some measure of responsibility on society in general (family, civil society, State and market) to realise rights, but it does not sanction the absence of the State in this endeavour. As the State has a direct responsibility to realise rights, this construction of the rights regime, and particularly section 8(2), indicates that the responsibility of the State is to ensure that, when a right is indeed applicable to a non-State actor, a regulatory regime is created to ensure that rights are realised adequately through the conduct of others<sup>32</sup>. This construction empowers private actors to realise rights, and in this sense also allows us to determine what the duties of the State in this regard should be. Sections 26(2) and 27(2) mention that 'reasonable legislative and other measures'

31 Socio-economic rights are dealt with in s 22 on freedom of trade, occupation and profession, in s 23 on labour relations, s 24 on the environment, s 25 on property and, most importantly, ss 26, 27 and 28 delineate rights of access to housing, health care, food, water and social security, and the rights of children. Section 29 deals with education, and s 35 deals, amongst others, with the socio-economic rights of detained persons.

32 See also s 3(2)(b): 'All citizens are – equally subject to the duties and responsibilities of citizenship.' The 1948 Universal Declaration of Human Rights states in its Preamble that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...' and Art (29)1 declares: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' (Available at <http://www.un.org/Overview/rights.html>)

should be taken to 'achieve the progressive realisation' of rights. Legislative measures have the connotation that the State has a direct duty to ensure rights are realised, but could, if in conjunction with 'other measures', point to a more flexible view of State action. The objective of realising rights could be achieved by the facilitation and regulation of non-State actors, as is done in the regulation of the economic sphere through legislation, like the Companies Act.<sup>33</sup> This duty of the State includes not interfering in actions that others take to realise rights, in addition to enabling others to realise rights. Both these requirements imply a framework for action so that the actions of others may be changed and encouraged, if necessary, to realise rights.<sup>34</sup>

The empowerment of non-State actors to realise rights does suggest a substantial devolution of power. However, without some attempt at ameliorating the differences in resources between the State and non-State actors that realise rights, this devolution would be profoundly unjust. Without access to the resources of society, this will disadvantage many civil society based actors, particularly resource poor 'welfare' organisations. Fortunately this issue has been given some attention in the literature.

Liebenberg points out that, when social or economic rights are violated 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'.<sup>35</sup>

This possibility in the repertoire of remedies for violations of socio-economic rights is a progressive response to the challenges of horizontality, as it could

33 The South African Government's Department of Trade & Industry's guidelines for corporate law reform (*South African company law for the 21st century. Guidelines for corporate law reform* (2004)12) states: 'Good company law can create a protective and fertile environment for economic activity but it cannot, by itself, create that activity. Economic citizens in creating such activity respond to a wide range of incentives and disincentives, one of which is a clear, facilitating, predictable and consistently enforced governing law.'

34 Liebenberg S 'The interpretation of socio-economic rights' in Chaskalson M *et al* (eds) *Constitutional law of South Africa* 2ed (2005) ch33 7 mentions that the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has identified two aspects of the 'duty to fulfil' rights, of which one is to realise rights directly. The second is '[a] duty to enable and assist communities to gain access to socio-economic rights. This would include, for example, adopting enabling policies and legislation that facilitate and regulate access to the various goods socio-economic rights are designed to deliver'.

35 Liebenberg S 'The protection of economic and social rights in domestic legal systems' in Eide A *et al* (eds) *Economic, social and cultural rights. A textbook* 2 ed (2001) 70; (n 34 above) 62; 'Socio-economic rights' in Chaskalson M *et al* *Constitutional Law of South Africa* (1998) ch 41 52. The question of compensation has emerged in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA (CC). There are certain differences between *Modderklip* and the ideas discussed here. They are not substantial, and could be seen to establish the principle that compensation could be given to those who prevent the violation of others' socio-economic rights. Support for this programme of change can be found in Roman law. Although this is an altogether different field of the law than human rights, and although there are important differences between the current situation and the ethnographic context under the *pax Romana*, it is still worthwhile to investigate precedents for what we have in mind here. The idea of compensation for preventive relief has certain affinities with Roman law's *negotiorum gestio*. Thomas

ameliorate economic inequalities between State, market and civil society. It fundamentally affects the relationships between State and other actors when rights are at stake. Far from detracting from the democratic character of society, it in effect underlines the prominent place the individual should occupy in a democratic State. As the State emanates from people's consent, we may view the devolution of power to realise rights as flowing therefrom. Below I will show that this devolution cannot be done without some consideration of norms and standards. It illustrates Cohen & Arato's idea that civil society contributes to the 'rationalisation' of society, and the establishment of an ethical life independent of the State.<sup>36</sup> Giving people the opportunity and power to realise rights represents a principled and disciplined attempt at social development. As many organisations in civil society are already active in this terrain, we may speak of the institutionalisation of an autochthonous ethical orientation in civil society and in welfare.

The next issue that this article addresses is the question of appropriate social assistance. This is important, as we may expect substantial differences between civil society based and state based welfare delivery. This allows us to determine the nature of state-society relations in the realisation of rights by non-State actors.

#### 4.2 The question of appropriate social assistance

Section 27(1)(c) of the Constitution does not only delineate '...the right to have access to – social security...' but also that those 'unable to support themselves and their dependants' have a right to have access to 'appropriate social assistance'. Even if we come to identify social security exclusively with monetary compensation (which would be difficult), we should allow for intervention other than monetary compensation by referring to the need for 'appropriate social assistance'. Monetary compensation cannot, in the final analysis, be appropriate for all conditions and all kinds of needs. Civil society organisations, and perhaps some independent State institutions and corporations, could thus render assistance in ingenious and novel ways, and we may even include social services as relevant to this right. Some have upheld a strict separation between social security and social services,<sup>37</sup> where social services refer to non-monetary interventions. I would not advocate for a separation between these concepts, as it would negate the fact that the outcome of these measures is important. Part of official social assistance is the programme 'Social relief of distress' which includes, amongst others,

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JAC says: 'This was, in Justinian's compilation, the performance of some service for another, without his request or authorisation, which imposed on him a duty of compensation.' (*Textbook of Roman law* (1976) 321; also Kaser *M Roman private law* (tr Dannenbring R) 3ed (1980) 231-232). In the current case of human rights satisfaction, what might transpire is the following: an organisation, delivers home based care to terminal patients. After performance of these functions, it then approaches a court to claim from the State relief for services and expenses incurred in delivering home based care to people who have no recourse to the services on offer in the public health care system. The idea of *negtorum gestio* will enable us to clarify this situation.

36 Cohen JL and Arato *A Civil society and political theory* (1992).

37 The Children's Institute *South African child gauge 2007/2008* (2008).

the provision of food, seeds and farming implements. This separation is not tenable, and implies we need to be flexible in determining the content of this right, and in determining the nature and duties of the State in enabling non-State actors to realise rights.

The form the State should take in the project of enabling non-state actors to realise rights can be determined by a reading of sections 42(3) and 42(4) and sections 59, 72 and 118(1)(a) on Parliament and the National Council of Provinces, section 153 on Local Government, and section 195 on Public Administration, that sanction participation by the citizenry in the State's activities. The possibility of compensation for preventative relief underlines that the State retains a residual responsibility for rights, even if non-State actors are involved. That is why they should be regarded as forming part of the available resources of the State. To form part of the resources of the State in this regard has implications for the ethics of engagement and participation of civil society in the programmes of the State. Social security forms part of Public Administration, has implications for local government, and also needs to be given attention in Parliament and the National Council of Provinces. Non-state action should thus be accommodated in the processes of legislative and policy development of the State. As action is taken by such entities, we have to allow for regulative and facilitative duties of the State, as opposed to the duty to take direct action. This might not be a controversial practice, as there are ample examples available of such engagement. This issue is, however, not so simple, particularly if seen in the context of subsidiarity and the question of what an 'organ of State' is. This would allow the status of civil society organisations that realise rights to be elevated to an official level, and not only devolve resources to such organisations, but also strong requirements of justice.

### 4.3 The subsidiarity of organisations to the State

Subsidiarity is an age old principle in governance and refers to the need to devolve power and responsibility to its lowest practical level. Malherbe has examined the question of subsidiarity in the context of the privatisation of State assets, and concluded, after applying the so-called 'three tiered test',<sup>38</sup> that:

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38 Malherbe R 'Privatisation and the Constitution: Some exploratory observations' (2001) 26 *Tydskrif vir die Suid-Afrikaanse Reg* 5. See also Van der Vyver JD 'The private sphere in constitutional litigation' (1994) 5 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 385; Du Plessis LM 'The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa's transitional Constitution' (1994) 19 *Tydskrif vir die Suid-Afrikaanse Reg* 706; and Clapham A *The human rights obligations of non-state actors* (2006). In the interim Constitution (Constitution of the Republic of South Africa, 1993) application was more narrowly circumscribed than in the final 1996 Constitution. In this sense Du Plessis and Van der Vyver were reluctant to conclude that non-State actors could easily be considered 'organs of State'. It is important to note that the interim Constitution did not affirm socio-economic rights as justiciable, did not include social security rights, and had limited application to the private sphere.

'[I]n the case of the Bill of Rights, its horizontal application prevents bodies bound by the Bill of Rights from escaping through privatisation the application of the Bill of Rights to their conduct'.<sup>39</sup>

This also establishes that the performance of rights be considered a public function, and from a generous interpretation of the provisions that govern subsidiarity in the Constitution, it is clear that non-state actors that realise rights may be considered 'organs of state' due to their 'exercising a power or performing a function in terms of the Constitution or a provincial constitution; or ... exercising a public power or performing a public function in terms of any legislation'.<sup>40</sup> The jurisprudence deals with this issue by means of a three tiered test to determine whether a 'body' is an organ of State. Scholarship and case law<sup>41</sup> on this issue, particularly under the 1996 Constitution has supported this interpretation, precisely because it does apply to the private sphere.<sup>42</sup>

Malherbe's discussion is premised on the economic privatisation of government entities and was intended to give clarity on the privatisation of State run enterprises. It was not written with non-profit organisations, nor with current approaches to insurance, like micro-insurance, in mind. He emphasises that 'private bodies not established by law, but fulfilling some of their key functions under the supervision of the state, like old age homes' might be counted as organs of State<sup>43</sup>. This means that:

'banks, insurance companies and other private companies that must act in accordance with the applicable legislation, and old age homes and private schools that must register in terms of legislation, inter alia to qualify for subsidies ... do not operate in terms of these laws; their composition, powers and functioning are not prescribed by these laws and they could well act without them. The purpose of these laws is to regulate aspects of these bodies and not to make them organs of state.'<sup>44</sup>

39 Malherbe R (n 38 above) 18.

40 See meaning (b) of the definition of 'organ of state' in s 239 of the Constitution.

41 In the Witwatersrand Local Division (*Taylor, Adrian Moshe v Kurtstag NO, Rabbi M A* (case no 24825/03)) the Court had the opportunity to express its views on the application of the Bill of Rights to freedom of religion, which has implications for the degree to which the Bill of Rights applies to the private sphere. The Court upheld the right of the Jewish faith to 'to protect the integrity of Jewish law and custom' [58]. This did not mean that Jewish law, or any other associative activity, is outside the bounds of the Bill of Rights. Malan J [40] distinguished between religious issues and 'secular' issues, and consequently the nature of the issue would decide whether the Bill of Rights applies, irrespective of whether it is private or not. In this sense we may infer that public issues are clearly applicable to constitutional scrutiny. It is also possible that this underlies the definition of an 'organ of state' as 'fulfilling a public purpose'. When private actors take action that affects the public sphere, the Bill of Rights applies. The Court in the *Soobramoney* case (n 18 above) deferred its judgement to the expertise of the relevant medical practitioners, which implies some kind of subsidiarity. This is examined by Scott C and Alston P 'Adjudicating constitutional priorities in a transnational context: a comment on *Soobramoney's* legacy and *Grootboom's* promise, (2000) 16 *South African Journal on Human Rights* 243 who state: 'While there are limits to which many expert communities can act as the kind of front-line constitutional decision-makers, which is effectively what occurred at Addington Hospital, the basic principle of courts taking seriously proven expertise of other institutions in giving meaning to constitutional rights cannot be doubted.'

42 Rautenbach I M 'The Bill of Rights applies to private law and binds private persons' (2000) 25 *Tydskrif vir die Suid-Afrikaanse Reg* 296.

43 Malherbe R (n 38 above) 18.

44 Malherbe R (n 38 above) 8.

Not all non-state actors could thus be seen as organs of State. This is so because a public power or function refers in the first place to the powers and functions to be exercised in respect of the functional areas allocated to the state in terms of the constitution.<sup>45</sup> Welfare and social security are functions of the State according to the Constitution, and this allows us to see non-State actors that realise rights as 'organs of state' and as subsidiary to the State. This conclusion is consistent with the idea that compensation may be given to non-State actors that realise rights, and also underlines the need to develop a regime of governance of such non-State actors that would be substantially rights-based.

We have established the broad social conditions within which rights will be realised by non-state actors. I engage with section 27 of the Constitution below, in order to infer how this will impact on the right to have access to social security; and conclude the interpretation of the Constitution by examining how these rights are to be enforced by a court in order to establish a normative democratic framework to govern non-State actors that realise rights. The article concludes with a look at the terrain where this framework is relevant.

#### 4.4 'Access' and the vision of development in the Constitution

The inclusion of 'access to' in some rights in the Constitution presents the reader with certain difficulties of interpretation. It signals a clear difference from the way rights are enumerated in International Law, and at face value could mean that 'the Constitution guarantees each individual an opportunity to *apply* for social assistance, but does not guarantee social assistance'.<sup>46</sup> I am primarily interested in how this construction affects social and economic policy, and the means we may employ to realise rights. It seems that we may not be directly entitled to the things these rights speak of, but that the conditions for their realisation need to be there. This wording is there due to the fact that the Technical Committee that drafted this section thought it best to 'resist an interpretation that the state is obliged to deliver the rights directly and without charge to everyone. Those with sufficient resources will have the means of access ... and will not need state assistance to secure housing'.<sup>47</sup> The Constitutional Court declared that the 'Constitution does not give rise

45 Malherebe R (n 38 above) 8. Ellmann S 'A constitutional confluence: American 'State action' law and the application of South Africa's socio-economic rights guarantees to private actors' in Ellmann S and Andrews P (eds) *The post-Apartheid constitutions: Perspectives on South Africa's Basic Law* (2001) 450 is even more committed to this conclusion. He discusses housing and points out that if a builder is simply engaged in the activity of delivering low cost housing for a fee from the State, he does not incur the relevant constitutional responsibilities: 'If the builder is simply one of many contractors engaged in this effort, it should not be treated as an organ of state.' Thus, the substitution of the state by civil society organisations does not always lead to a re-definition of the limits of the State. He continues: 'But if, for example, a single builder or builders' association contracts to implement a large fraction of a province's low-income housing program, then it might well be appropriate to see that entity as having the kind of responsibility – and power – that qualify it as an organ of state.'

46 Van der Merwe D *Social welfare in the South African social security system* (1999) 7, (his emphasis) (CICLASS Publication Series 1/99).

47 In Liebenberg S (n 35 above) 26.

to a self-standing and independent right'.<sup>48</sup> Those who do provide these for themselves and others are thus contributing to the duty of the State to ensure that access may be gained to these rights, and this can be seen as part of the available resources of the State.

This approach to rights seems to underlie the judgment in the *Grootboom* case.<sup>49</sup> The Court emphasised that the provisions dealing with progressive realisation are key to understanding rights, unlike direct entitlement rights. In this sense it is significant that rights to education are enumerated without reference to 'access to'.<sup>50</sup> The rights of children are also not enumerated as such, and the courts' emphasis that even these 'direct' rights do not lead to direct entitlement strengthens my argument considerably. *Grootboom* mentioned: 'The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.'<sup>51</sup> This inclusion of 'access to' in the Bill of Rights contributed to the reluctance, albeit indirectly, of the Court to define the core minimum of the right.<sup>52</sup> If the core minimum was evident, then the case for direct access to the right would have been strengthened. Instead the Court stated:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of the right. These will vary according to factors such as income, unemployment, availability of land as well as poverty.<sup>53</sup>

A reading that emphasises the actions of individuals and organisations that realise rights follows this interpretation more consistently than a core content one.

'Access to' thus means, among others, that we should look at how the right is being realised in actual practice to infer its nature. *Grootboom* examined the implications of this at length:

'For a person to have access to adequate housing ... 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. A right of access to adequate housing also suggests that it is not only the

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48 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) paras 30-34.

49 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

50 See s 29 of the 1996 Constitution.

51 See *Grootboom* (n 49 above) para 71.

52 This aspect of the *Grootboom* judgment has been criticised as it could create the impression that rights are 'watered down' if not seen as direct obligations of the State, and thus 'children's claims do not have to be accorded priority'. (Sloth-Nielsen J 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 229; Roux T 'Giving money to children: The state's constitutional obligations to provide child support grants to child headed households' (2004) 20 *South African Journal on Human Rights* 151). However, as Sloth-Nielsen later shows (*Realising the rights of children growing up in child-headed households. A guide to laws, policies and social advocacy* (2004) 5), the UN Convention on the Rights of the Child could also be read to support this interpretation because it 'promotes the family's role in realising the rights of the child' (above). It is possible to realise rights in a progressive way within these constraints.

53 See *Grootboom* (n 49 above) para 32.

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.<sup>54</sup>

A programme to realise rights based on the above would have to acknowledge non-State actors, as well as a conception of the duties of the State that entails the regulation and facilitation of such non-State actors. It would also include a consideration of social and economic policy, as well as scrutiny of the social conditions under which rights may be realised or violated. It does make demands on the State to ensure that each individual is enabled by social and other policy to function adequately in society. Whether this can be made justiciable is a different matter. From the discussion above we may cautiously infer that the state's responsibility would primarily be to ensure that we live in a society where each person is able to provide for and protect themselves. Subjects of the State have a claim on the State only when these social structures, family and community structures fail to protect the individual. The State, in turn, is responsible to make it possible for these structures to contribute to the realisation of rights, and in this sense has to intervene in society and the economy if necessary. This is a first level of duty – to ensure society makes it possible to gain access to rights. A second level of duty would relate to the abilities and prerogatives we all have to realise our own rights, and in this sense the formation of human capital, through educational, health and other social policies should be considered. A third level of duty would have to deal with the provision of safety nets, like a social assistance system, if the above two systems fail.

*Grootboom* is about housing, but is surprisingly vocal on the right of access to social security. The fungibility of social security payments illustrates the plurality underlying this view of the realisation of rights. 'If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.'<sup>55</sup> This suggests that minimal government responsibility for socio-economic rights rests in social security provision. Related to this, however, *Grootboom* also states: '[I]ssues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing.'<sup>56</sup> Social assistance could constitute a minimum social policy measure, but a house, on the other hand, if rented out, would also be relevant to social security rights. Social security reform will have implications for all the other rights, and although politically and economically a remote possibility, social security could thus substitute for measures, such as the housing programme. The same could, however, be said of 'development', social and economic policy, and the ability of everyone in society to participate herein.

54 *Grootboom* (n49 above) para 35.

55 *Grootboom* (n 49 above) para 36.

56 *Grootboom* (n 49 above) para 78.

As it is 'development' that supplies many of the entitlements and capabilities we need to live a life of dignity, equality and freedom. This strongly emphasises the horizontal character of rights, and suggests that the right to development, seen as the realisation of all interdependent rights,<sup>57</sup> is in the final analysis, what makes socio-economic rights real. Nevertheless, if social security payments are to substitute for a governmental housing programme, a strong private market in housing ought to be there to enable people to access this right. It is clear that the general functioning of society is implicated in this view of rights, and a particular role for the state vis-à-vis a well functioning and equitable market, healthy environment and just social context.

#### 4.5 The governance of non-State actors

If we have a horizontal regime of rights, how do courts ensure that rights are realised adequately? In the absence of a minimum core, it becomes difficult to determine this as there cannot be any concrete standards of delivery. This indeed seems to be the single most important strength of a minimum core approach. Another solution to this problem does present itself, and draws on the right to approach a court,<sup>58</sup> and the communicative dynamic that would emerge in such a conversation.

The implications of section 38 for the present discussion are obvious and far reaching. It not only invokes the idea that a court is the locus of a substantively open dialogue about rights, but also affirms rights of members of organisations and/or the public over the State and associations or groups in society. Read together with sections 7 and 8 of the Constitution, which imply substantive horizontality, it strengthens powers of 'anyone' listed over such non-State (and State) actors. It makes the horizontality of rights real, in the sense that 'anyone' listed may act when rights are violated by 'anyone' else.

It is also clear that the open and transparent dialogue that section 38 engenders is one where influence could travel both from and to the State, and from and to citizens vis-à-vis associations and firms. This participatory ethos complements the participatory ethos of the State in its engagement with the public in social policy development. This section structures accountability towards rights in a democratic, as opposed to a technical, way. This has dangers, as not everyone has the ability or means to approach a court, but in the final analysis an abstract standard would have to be subservient

57 Sengupta A 'The human right to development' (2004) 32 *Oxford Development Studies* 179.

58 Section 38 of the Constitution deals with the enforcement of rights. This creates the court as a forum where society may participate in the conversation about rights, and any aspect of rights could in principle be raised there. The relevant section reads as follows:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —

(a) anyone acting in their own interest;  
 (b) anyone acting on behalf of another person who cannot act in their own name;  
 (c) anyone acting as a member of, or in the interest of, a group or class of persons;  
 (d) anyone acting in the public interest; and  
 (e) an association acting in the interests of its members.'

to access to the courts as well. Accountability is thus in the final analysis a democratic accountability.

Section 38 does not only apply to the act of realising rights, it could also open up an organisation or firm to outside review. It safeguards the voice rights of members of an association, or beneficiaries of a firm, over them. In addition, it allows access to such organisations. Accountability to the general public is now also a feature of the horizontal realisation of rights. Private organisations that affect the enjoyment of rights will now find that interested parties might have access to their workings because their conduct affects rights and is thus in the public interest. The democratic character of such organisations will increase, and the content of a right will better reflect its social meaning.

This democratic character – susceptibility to outside interests – has another advantage. Because members and beneficiaries are not always the same, the competencies of voice and exit will fall short when services and care are extended to persons (beneficiaries) outside the organisation. Placing access to a court alongside voice and exit rights could help in making organisations accountable to persons whose voice and possibility of exit cannot affect the organisation. What we, therefore, have is an organisation that is compelled, possibly in a discursive fashion, to be democratic internally as well as externally, and to deliver services with a public ethos. The information that members may bring to an organisation through their voice rights, would allow the development of differential measures to satisfy the right. It would make the right, in a radical sense, appropriate. The organisation or firm has to open itself to those who may be outside the organisation, but have an interest in its workings. Both these requirements would make the organisation public in character. Justiciability in this context thus means that non-State actors that realise rights have to uphold a public character. It is thus necessary to explore further how democratic governance can be realised in the context in which an organisation functions, and whether the services delivered are indeed relevant to the right in question. Civil society as a creature of its constitutional, social and political context would thus be further compelled to exhibit public and democratic tendencies.<sup>59</sup>

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59 Cohen J and Rogers J 'Secondary associations and democratic governance' (1992) 20 *Politics and Society* (Special Issue: Secondary Associations and Democracy) 426 clearly state that this democratic character of associations and their social dialogue is not a matter of fact. We have to keep in mind that 'the 'right' sorts of associations do not arise naturally. It then proposes to supplement nature with artifice: through politics, to secure as associative environment more conducive to democratic aims'. They add: 'Groups and group systems differ not only quantitatively but qualitatively with respect to such features as the pattern of their internal decision-making, their inclusiveness with respect to potential membership, their relations to other associations, and the nature and extent of their powers. The art of associative democracy consists in matching group characteristics with assigned functions and – now admitting the fact of artifactuality – cultivating those characteristics appropriate to functions consistent with the norms of egalitarian democracy.' (428)

## 5 CONCLUSION

Certain requirements for State and non-State action are implied in the discussion above. The duties of the State (besides its incontrovertible final responsibility for rights) concern it as a regulative and facilitative entity. The State must make resources available to compensate non-State actors, but should also develop a regime to regulate the funding of non-State actors by other non-State actors. It should also be aware that economic regulation cannot, in the final analysis, be left only to market forces, and it is necessary to see economic regulation as an instrument to realise rights. In this sense issues, like competition law, the dominance of certain firms in certain sectors, and the dominance of certain sectors over the economy, need to be given attention.

As far as the governance of civil society is concerned, the State should understand its responsibilities in this regard as going beyond a negative obligation based purely on the right to association or assembly. It does imply that civil society be given access to institutions of economic regulation, but it also implies certain changes to the regime of civil society as far as the relationship between beneficiaries, recipients and donors is concerned. It is necessary to develop fora where development aid and its effects on the realisation of rights may be discussed. It is also necessary to give attention not only to how the voice of the beneficiary can feature in such a forum, but also in the democratisation of civil society itself. Attention should be given to the voice, exit and access rights of potential and actual beneficiaries to civil society organisations that are active in the terrain occupied by rights. It also demands that we appreciate the need to empower the public in the realisation of rights, and in this sense we should acknowledge the artifactuality of the public sphere, civil society and economic actors and their regulation. Rights make demands on non-State actors, and the character of non-State actors should reflect the needs of society, the requirements of democracy, and the progressive development of human capabilities.

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