



Christiaan Pieter Naude Malan

# **CIVIL SOCIETY AND THE TRANSFORMATION OF SOCIAL SECURITY**

THE PERFORMANCE OF THE RIGHT TO HAVE ACCESS TO  
SOCIAL SECURITY IN SOUTH AFRICA

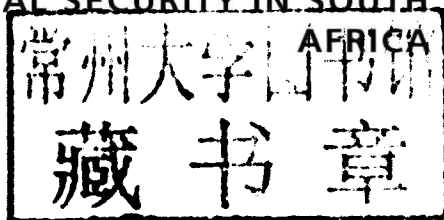


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**CIVIL SOCIETY AND THE TRANSFORMATION OF  
SOCIAL SECURITY: TOWARDS A PERFORMATIVE  
CONCEPTION OF THE *RIGHT TO HAVE ACCESS TO*  
*SOCIAL SECURITY* IN SOUTH AFRICA**

by

**Christiaan Pieter Naudé Malan**

## **Dedication**

This thesis is dedicated to the memories of Philip Lintvelt, Ivan Massyn and Vusi Ngema.

## **Acknowledgements**

The writing of this thesis has been a steep mountain to climb. I had the help of many fellow climbers, and this is the moment to acknowledge and thank them all for the help, companionship and camaraderie received. I owe a debt that is not repayable to many who have helped me.

I embarked on this journey after collaboration with Marius Olivier on a SANPAD funded project called “A new paradigm for social security in South Africa.” In this project, I worked with Kees van der Waal on a paper called “A developmental perspective on a new paradigm for social security in South Africa.” I was interested in the politics of civil society at the time, and was stimulated by Marius’s notion that “indirect and informal social security” could present solutions to the social security needs of South Africa. Above all, I would like to thank Marius for allowing me to work under him, and for the leadership and insight he has shown in helping me to bring this text to a close. I have to mention Adriette Dekker and George Mpedi, who served, respectively, as initial co-ordinator and researcher for the SANPAD project, who helped me shape my initial ideas on what this thesis could become. At this early stage of the work, it was not possible, or conceivable that it would arrive where it did today.

The writing up of a proposal for this study, which served before the Senate of the then Rand Afrikaans University, was the first stage of this project. I have to acknowledge the constructive feedback I received from members of the Faculty of Law on this proposal. At this stage it was meant to be a *Doctor Philosophiae* in both the faculty of Arts (my ‘home’ faculty) and the Faculty of Law. It emerged at this stage that the human rights issues to do with the transformation of Social Security would be the most interesting and rewarding path to take. I consequently enrolled with Prof Ig Rautenbach to complete a course on the Bill of Rights in the L.L.B. curriculum, and it was in his classes that I first identified the niche in the human rights discourse where I might be able to make an original and valuable contribution.

Standing in the background to this academic activity, was Patti Joshua and the late Vusi Ngema from the Northern KwaZulu-Natal Community-based Organisation Network (or *Senzokuhle* as they were known at that time). The idea was that I should study this organisation in order to evaluate the suggestions made by Marius that informal and indirect social security could help in increasing social protection in South Africa. Eventually the issues covered proved to be too expansive to bring them into the orbit of an empirical study, but I would like to mention that the experience I gained in the field was crucial in understanding how we could devolve responsibility for rights to civil society-based actors. I hope to complete this empirical project, which is now temporarily on ice, in the near future, and thus make the view of rights developed here more relevant to those who struggle at the grassroots-level to live a decent life.

I also spent many days in the township of Mamelodi outside Pretoria with the AGAPE Healing Community. Stanley Liffshitz of UNISA Psychology and Corrine Oosthuizen of Psychology at the UJ were extremely helpful and sympathetic to my work, and formed a protective context for me to explore the issues I was to understand only later. I originally envisaged to complete rural and urban research in this project, and I learnt the things I should know about life in South Africa both from the people of Mamelodi and from the people of the Eshowe district and surrounding areas. If I have to dedicate this to anyone, it should be to them. In this regard, I also have to mention the people of Tateni Home-care Services, specifically Sr. Veronica Khosa, who pioneered this approach to treating terminal patients. During this time, I also became acquainted with the people of the Bohlabatatsi area in Mamelodi, specifically those who called themselves “Tswelopele.” It was John Lubisi who became like a good friend to me whenever I sought his advice on things I encountered there. Many people lent me their ears during this time, and to all these people I am indebted to.

The project also took interesting and unforeseen turns. In the second year of this endeavour, I was offered a Visiting Research Fellowship at the Centre of African Studies at Cambridge University. Dorian Addison, Ato Quayson, Christopher Clapham, and

Chris Forsythe from African Studies were most helpful and encouraging to me when I started working on the manuscript. I was lodged at Wolfson College during my stay in Cambridge, and it was the opportunity to live again like a student, with nothing but my own work to occupy my thoughts that really inspired me to think through my own insecurities and difficulties about the thesis. I would like to thank Gordon Johnson and Anne McGowan from Wolfson for their kindness during my time there. In addition, Sir Derek Oulton of Madelene College went out of his way to welcome me and make me feel at home there, and for this I am very grateful. The people at Cambridge did not only treat me very well, but confirmed my deepest wishes about what an academic life has to be. Cambridge is a deeply spiritual and auspicious place. The interactions I had there will forever be etched in my experience and I hope to be an ambassador for this little English town that is, for those who know, the centre of the Universe.

I also have to mention the friends and acquaintances I made whilst resident in Cambridge. Paul Komba and Anna Dialo, my fellow Fellows from African Studies, the acquaintance I made and lost with Maria Pappanikolaou from Quaternary Geography and many others. I also thank the members of the Cambridge Karate Club, for the hours of hard training that gave me the necessary diversion from studies that kept me sane. In the same vein, I have to thank my fellow students from Wolfson, who made me feel more like a human being and less of a monk when I had to take the necessary sustenance together with them from the local pub.

Back in South Africa, the people who, inadvertently and directly became involved in this endeavour also deserve mention. My first assistant, Lilo du Toit whose work for me never even became relevant (!) helped me to clarify my ideas, and eventually came to work under me and taught me a thing or two about civil society organisations. The members of staff at the Centre for International and Comparative Labour and Social Security Law (CICLASS) were also extremely helpful, specifically Janet Liebenberg who served as excellent administrator of this centre. Elmarie Fourie, the chief researcher for the Centre was the first to (independently) start using my ideas, and this first alerted me to the possibility that “I might be onto something” with this thesis. At this point, it is also



necessary to mention Bill Mitchell, Pieter Fourie and Chris Forester, who were the last to read the manuscript before examination. Without their help at the end, the thesis would have been substantially more difficult to complete.

Many others, from UJ, Cambridge and other places also deserve mention. These include: Leila Patel, Francie Lund, Ran Greenstein, Carina van Rooyen, Thea de Wet, Kelly Luck, Henry Mushonga, Derek van der Merwe, Johan van der Walt, Nicola Smit, Peter Alexander, Ester Ferreira, Kobus Naudé, Rory Ryan, Renatta Serra, Hennie Lötter, Johan Snyman, Willem van Genugten, Lucy Williams, Heather Brooks, Hermann Siemens and the many students that I had the privilege to discuss my ideas with. If I have left out anyone who deserves to be mentioned, please understand my oversight.

At a personal level, I have to thank my family for their support during these long years. My son Francois Malan McDonough deserves special mention. It was when he started complaining about the thesis himself that I realised what effects this work has on others, and consequently, I had to start thinking of how this acknowledgements page will have to look like. I have to mention my friends, specifically those who venture into the mountains with me ever so often, Errol Nienaber and Adrian Clarke for their support at times, and hostility to this thesis at other times. Many a good day was not spent scaling the cliffs of this country because of this thesis. I know they will never forgive me. I would also like to extend a vote of thanks to the Sensei of Honbu Dojo in Johannesburg, and the Karate-ka that train there. They instilled in me the strength of character to complete this thesis with a smile on my face.

Naudé Malan  
Norwood, Johannesburg

## **Summary**

Civil society organisations have and will be mentioned as partners, agents and autochthonous actors of social security. This has come about through advances in insurance products, through the kinds of social action engaged in by civil society organisations, and through the devolution of state power to citizens and civil society organisations. Rights to social security are decisively affected by the use of civil society organisations in the social policy field, and the implications of this use are investigated. This reality of the changing nature of social action needs to be brought to bear on human rights, if rights are to respond adequately to the concerns of injustice, inequality and poverty today. The thesis develops a framework within which civil society-based action could be made rights-based and justiciable, and which could guard against the retrogressive substitution of state action by civil society-based activity.

Civil society-based action can be seen as upholding rights if it conforms to the fundamental requirements of human rights. These fundamental requirements derive from a *performative* conception of rights that sees the individual as subject of rights and as the fundamental actor of rights. This view of rights sees rights as dependent on the abilities and volition of all in society, and is presented as an alternative to a realist view of rights, as well as a view of rights as derived from basic human functionings. The intersection of this view of rights, the reality of non-state action for rights, and the legal discourse around socio-economic rights is the central problem that this thesis addresses. The legal discourse has only partially recognised this form of social action, and this thesis proposes a framework within which we may interpret and assess whether civil society action is indeed conducive to the realisation of rights. This framework includes democratic norms for conduct inside civil society organisations, for the interaction between civil society organisations and other actors, like the state and market, and also delineates the role of the court in this performative conception of rights. These interactions will shape the

content, and nature of socio-economic rights, and here these insights are made applicable to the right to have access to social security in South Africa.

The thesis discusses the suitability of South African civil society for this normative programme developed here. I analyse South African civil society, its historical role in transformation, in the current context, and its place in social and economic policy. There are ample opportunities for participation by civil society organisations in the further reform of the social security system. The realisation of novel ways to realise the right to have access to social security through civil society organisations for South Africans would depend on clarity on how civil society organisations could contribute to the enjoyment, realisation and performance of this right.

The framework of accountability developed here has precedents and roots in law, civil society theory and in the discourse of social security. I analyse each, and I show how the social security discourse has incorporated civil society organisations in its historical development. Currently, it is a leading avenue for the further development of this discourse. However, this possibility – which intersects with the discourse of civil society – would depend on civil society being able to realise normative ends in its interaction with wider society. To gain clarity on this I analyse the civil society discourse, and critically point out problems that could stand in the way of this normative project. However, theorists of civil society have emphasised how this problem can be overcome; I draw on these writings to substantiate and legitimate the framework of accountability developed earlier. The realisation of this framework of accountability and action would enable civil society organisations to realise normative ends in society, and thus contribute to the realisation of rights. This vision of how rights could be realised is also discussed from a legal point of view, and I point out the features of the legal discourse that would support my thesis. The central objective of the thesis is to show that the South African constitution can support this reading of rights and the place of civil society action in its realisation.

I engage in a construction of the South African Constitution in order to give greater support to my view of rights and what kind of social action we would want from civil society. In this reading, I emphasise the following: The need to respect the rights in the Bill of Rights points towards a view of rights dependent on the free volition of the subject of rights, and thus we may suppose that rights include an emphasis on autochthonous action. The free volition of the subject of rights, however, is dependent on the “rules of standing” and this creates a context of mutual accountability inside organisations towards its members, and a system of accountability of the organisation towards society in general. This supports my contention that the way to visualise civil society accountability for rights depends on a “social ecology” amongst the actors involved.

The next part in this construction concerns the wording in the Constitution. The Constitution qualifies the socio-economic rights with the phrase “access to...” and I show that this does not imply a retrogressive or conservative view of rights. I show that it is consistent with a view of non-state actors as bearers of rights, and that it allows us to conceive of rights as performative. This in effect strengthens the ways society may be expected to realise rights. From here, three issues arise: what is the nature of socio-economic rights? And, are civil society actors to be viewed as “organs of state” in the realisation of rights, and to what extent may we expect them to become subsidiary to the state in the realisation of rights? I point out that we need to re-think the doctrine of a core-content of rights if we see rights as performative. I conclude by clarifying to what extent we may see civil society organisations as such.

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