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# OBLIGATIONS OF STATE AND NON-STATE ACTORS REGARDING THE HUMAN RIGHT TO WATER UNDER THE SOUTH AFRICAN CONSTITUTION

by Anna R. Welch\*

## INTRODUCTION

The South African Constitution, founded on a number of values including “human dignity, the achievement of equality and the advancement of human rights and freedoms,”<sup>1</sup> recognizes a vast array of social, economic, and cultural rights, including the right to have access to “sufficient water.”<sup>2</sup> In ensuring this right, the government must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”<sup>3</sup> The Constitution places general limitations on the Bill of Rights under Section 36(1) only to the extent that “the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” Inadequate resources in South Africa may also limit enforcement of socio-economic rights.<sup>4</sup>

Each person in South Africa is guaranteed 25 liters of free water each day, which is a little more than the minimum necessary for life.<sup>5</sup> Despite the formal recognition of the right to water and the promise of a basic water supply, many people throughout South Africa live without safe, accessible, and sufficient amounts of water. In 1998, some South African provinces began to privatize the water industry and charge users full cost recovery fees,<sup>6</sup> in an effort to promote efficient water use. Because many South Africans could not afford to pay for water, they were forced to look elsewhere for this basic right.<sup>7</sup> Thus, in February 2002, more than 100,000 people fell victim to a ten-month cholera outbreak after the water utility disconnected the tap, and people were forced to find water in polluted ponds and streams.<sup>8</sup> As a result, lack of access to water creates a new kind of apartheid in South Africa by separating those who can afford the increased price of water from those who cannot.<sup>9</sup>

Although the Constitution requires state actors to respect, protect, promote, and fulfill the right to water,<sup>10</sup> many private entities argue that they are immune from many of these obligations. Through an examination of the South African Constitution and relevant legal jurisprudence, this article argues that state and non-state actors have various constitutional obligations to ensure the progressive realization of the right to water and argues that, where water is publicly or privately supplied, the government must provide the necessary oversight and take positive steps to ensure compliance with these duties.

## ANALYSIS

Despite the problems associated with water privatization, little legal precedent exists to help determine the necessary obligations imposed on both state and non-state actors with

regard to the right to water. However, as corporate advisors and other institutions lobby for water privatization,<sup>11</sup> an analysis of these important obligations becomes especially crucial. South African courts have an important role in enforcing these various obligations and, at the least, must ensure that state and non-state actors desist from impairing or preventing the right of access to water.

## THE CONSTITUTIONAL COURT AND CONSTITUTIONAL INTERPRETATION

The formal recognition of the right to water remains a “paper promise” without mechanisms to enforce the right.<sup>12</sup> The South African Constitution mandates that both the South African Human Rights Commission (“Commission”) as well as the South African Constitutional Court have a special duty to ensure the realization of economic and social rights. The courts, for example, are obliged to ensure that the Bill of Rights is protected and fulfilled.<sup>13</sup> The South African Constitutional Court may decide on “any issue involving the interpretation, protection or enforcement of the Constitution.”<sup>14</sup> Unlike many constitutional courts around the world, the South African Court takes progressive steps to enforce the Constitution. The Court in *Fose v. Minister of Safety and Security* held that:

[p]articularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if need be, to achieve this goal.<sup>15</sup>

The Constitutional Court therefore is an important mechanism for granting the necessary remedies and for forging new tools when rights have been infringed upon.

As recognized in the South African Constitution, the Human Rights Commission must “require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water,

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social security, education and the environment.”<sup>16</sup> The Commission, therefore, acts as a monitoring tool to assess the realization of these rights. Moreover, the Commission and the courts in South Africa often work in conjunction with one another in the enforcement of these rights.<sup>17</sup>

The government has a wide margin of discretion regarding appropriate measures in realizing the right to water. In *Soobramoney v. Minister of Health*, for example, the Court concluded that the government did not violate the Constitution when it failed to provide complete access to dialysis treatment for those who did not have a chance of recovery, and instead limited access to the treatment for those with the greatest chance of recovery.<sup>18</sup> Because the Court recognized that resources are limited, it held that this was a reasonable allocation of the resources. The Court noted that it “will be slow to interfere with rational decisions taken in good faith by the political organs and medical organs whose responsibility it is to deal with such matters.”<sup>19</sup> Therefore, in the context of a citizen’s right to water, this case indicated that the government has discretion in how water will be allocated to its citizens.

Although the Court acknowledges that available resources may limit government action, it does require a duty of reasonableness, which should ensure that the government devotes some of its resources to the poor and most desperate.<sup>20</sup> Although the immediate recognition of socio-economic rights would be impossible, the Court has the duty to ensure that the government progressively realizes these rights through various measures that are designed to guarantee that the poor are protected and their rights are realized. The Court must ensure that, at the least, “the State and *all other entities and persons*” abide by “a negative obligation . . . to desist from preventing or impairing the right to access” socio-economic rights.<sup>21</sup>

In determining the reasonableness of government and private action, the Constitutional Court looks to relevant international law, the interconnection of the rights, and the social and historical context of the rights when interpreting the Constitution.<sup>22</sup> The South African Constitutional Court decides on matters concerning “any issue involving the interpretation, protection or enforcement of the Constitution.”<sup>23</sup> The Constitutional Court has a variety of approaches for interpreting the Constitution to ensure the interpretation is “generous” and “purposive” and “gives expression to the underlying values of the Constitution.”<sup>24</sup>

The South African Constitution requires a court to consider international law when interpreting its Bill of Rights. Section 39 of the Constitution states that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and may consider foreign law.” The Constitutional Court

recognized that international and customary law provides a useful framework for interpreting the South African Bill of Rights.<sup>25</sup>

Access to water is a fundamental human right recognized in treaties, declarations, and international law.<sup>26</sup> In 2002, the United Nations Committee on Economic, Social, and Cultural Rights issued General Comment No. 15, which declared the human right to water and held that safe drinking water is a “pre-requisite for the realization of other human rights.”<sup>27</sup> The U.N. General Comment requires that member states provide “sufficient, safe, acceptable, physically accessible and affordable water” to their citizens.<sup>28</sup>

The U.N. General Comment requires each ratifying country to ensure immediately that everyone enjoys the right to water and mandates that governments respect, protect, and fulfill their obligations.<sup>29</sup> Although the U.N. General Comment does not prohibit water privatization, it does require that water be treated as a social, and not necessarily as an economic, good. Water should also be free from arbitrary disconnections, unaffordable price increases, and contamination of water supplies affecting human health. The U.N. General Comment obliges states to ensure equitable distribution of water to disadvantaged groups.<sup>30</sup>

Any persons or groups denied their basic right to water should have access to legal or other appropriate remedies.<sup>31</sup> Where domestic or foreign corporations or third parties operate the water systems in certain countries, the U.N. General Comment requires governments to ensure that third parties distribute safe and accessible drinking water without discrimination.<sup>32</sup> The U.N. General Comment further mandates that water should never be used as a means of asserting political or economic pressure.

Although the U.N. General Comment does not prohibit third party participation in the water sector, it does mandate that governments ensure equitable access to water.

Furthermore, the Constitutional Court looks to the interconnectedness of the various rights. According to the Constitutional Court in *Government of the Republic of South Africa v. Grootboom*, the interconnectedness of the Constitution requires that various rights must be “taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.”<sup>33</sup> The right to water remains inextricably linked to South Africa’s basic democratic principles. Those in need of water will generally not focus on participating in politics or vote in local elections, rights that are guaranteed each citizen under Section 19(3) of the South Africa Constitution.<sup>34</sup> According to the World Health Organization (“WHO”), poor water quality and lack of access to water also affects the right to an education under Section 29 of the South African Constitution. Moreover, the WHO states that access to safe water in schools increases

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student attendance and reduces drop-out rates.<sup>35</sup> Furthermore, as noted in *Grootboom*: “realizing socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”<sup>36</sup>

Rights, that are of particular importance as they relate to access to water, are included in Section 11, which requires that “every person shall have the right to life” and Section 9, which requires that “every person shall have the right to equality before the law and to equal protection of the law.” The *Grootboom* Court also interpreted the right to adequate housing in Section 26 to include the right to have access to services, such as water and sewage.<sup>37</sup> Therefore, in analyzing the various provisions, the right to water is necessary for the realization of other rights, including, among others, the right to food, health, and adequate housing.

Finally, the Constitutional Court considers the social and historical context of each right when interpreting the Constitution. The demand to remedy the gross injustices of South Africa’s past has shaped the recognition of various rights within the South African Constitution. Thus, the Constitution should be interpreted with intent to transform the vast social injustices of the past.<sup>38</sup> Chief Justice Chaskalson in *Soobramoney v. Minister of Health (Kwa-Zulu Natal)* stated:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>39</sup>

The Constitution includes various social and economic rights, including the right to water, aimed to counter apartheid and South Africa’s history of gross disparities along social and economic lines.<sup>40</sup>

During apartheid, access to safe water was limited to the rich, white landowners who owned the water on their land.<sup>41</sup> Because of this link between land ownership and water, millions of South Africa’s poor were left with polluted, contaminated water. Even today, despite the formal recognition of the right to water, many people throughout South Africa, especially the poor, live without safe and accessible water.<sup>42</sup>

#### OBLIGATIONS OF STATE ACTORS TO RESPECT, PROTECT, PROMOTE, AND FULFILL THE RIGHT TO WATER

Although the national government can decentralize its power, it remains responsible for realizing socio-economic rights. Therefore, if the national government chooses to contract

with private water companies, it cannot contract away its obligations under the Constitution. These obligations continue whether water services are privately or publicly provided. Section 8(1) of the Constitution binds the state by mandating that the Bill of Rights “applies to all law, and binds . . . all organs of state.” Under Section 7 of the Constitution, the state is required to respect, protect, promote, and fulfill the Bill of Rights. The Constitution imposes both negative and positive obligations upon the spheres of government, including the national government, the provincial government, and the local government. Under the Constitution, these spheres are obligated to cooperate with one another by, for example, assisting and supporting one another and by coordinating their actions and legislation.<sup>43</sup> According to the *Grootboom* Court, “[l]ocal governments have an important obligation to ensure that services are provided in a sustainable manner to the communities that they govern.”<sup>44</sup> However, the national government bears the ultimate responsibility to ensure compliance with the state’s obligations.<sup>45</sup>

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#### The Duty to Respect

In looking to relevant international law, the U.N. General Comment lists examples of ways in which governments must refrain from interfering directly or indirectly with the right to water. These include the obligation to refrain from: (1) “engaging in any practice or activity that denies or limits equal access to adequate water;” (2) “arbitrarily interfering with customary or traditional arrangements for water allocation;” (3) “unlawfully diminishing or polluting water;” or (4) “destroying water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.”<sup>46</sup> The U.N. General Comment also states that a violation of the obligation to respect occurs where a government adopts discriminatory or unaffordable increases in the price of water, or arbitrarily or unjustifiably disconnects or excludes citizens from water services or facilities.<sup>47</sup>

The duty to respect requires that the government not interfere with citizens’ access to safe and sufficient water.<sup>48</sup> Therefore, in the context of water, the state may be in violation of its duty to respect where it has enacted policies that deny citizens access to water. Some South African provinces have adopted discriminatory and unaffordable increases in the price of water and unjustifiably disconnected citizens from water services through their cost recovery programs. Certain legisla-

tive measures support the exercise of cost recovery programs, including the White Paper on Water Policy, which states that charging the full price for water would promote the efficient use of water.<sup>49</sup> However, full price charging has led to a 300 to 600 percent increase in the cost of water that leaves those who make less than \$2 a day without access to water because they are unable to pay their bills.<sup>50</sup> Cost recovery programs, therefore, are not generally reasonable if the government does not also “devise, fund, implement and supervise measures to provide relief to those in desperate need.”<sup>51</sup>

Where water is privatized, the government is in violation of its duty to fulfill its obligation to citizens if it allows private water companies to arbitrarily disconnect water taps or to adopt discriminatory or unaffordable increases in the price of water. Cost recovery programs may unconstitutionally interfere with the enjoyment of the right to water if such programs leave those who cannot pay without safe and accessible water.

### The Duty to Protect

The duty to protect requires that the government adopt legislative and other measures to protect the poor and other vulnerable groups against private and public entities that violate their rights. Because private and public water companies tend to overcharge consumers and cut off water to those who cannot afford to pay the increased prices, the government must provide the necessary oversight to ensure compliance with its constitutional obligations.<sup>52</sup> Currently, many South African citizens are encountering disconnection to water services because they cannot afford to pay their water bills.

The Human Sciences Research Council in South Africa conducted a survey that revealed more than ten million people have been affected by water cutoffs since the end of apartheid. One Johannesburg woman noted that “[t]he problem is not that we do not want to pay for water . . . The problem is we cannot pay.”<sup>53</sup> Some argue that people should not be charged for such a basic necessity. One veteran of the anti-apartheid movement noted that “[t]he government promised us that water is a basic right. But now they are telling us our rights are for sale.”<sup>54</sup> These frustrations are common throughout much of South Africa as people are forced to drink polluted water because private companies and local municipalities have denied them this basic resource necessary for survival.

The U.N. General Comment states that the duty to protect the right to water “requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water.”<sup>55</sup> Third parties include individuals, groups, corporations, and other entities as well as agents of these entities.<sup>56</sup> States must therefore adopt “the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.”<sup>57</sup> Where water is privatized, the U.N. General Comment requires that:

State parties must prevent them from compromising equal, affordable, and physical access to sufficient,

safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

To ensure the protection of the right to water, the government should provide independent monitoring, regulation, and public participation. The government may be required to ensure that the private water supplier provides accurate information to consumers regarding water pricing and accessibility.<sup>58</sup> Section 195(1) of the South African Constitution requires that “[p]eople’s needs must be responded to, and the public must be encouraged to participate in policy-making.”

Moreover, WHO states that the government must protect citizens and ensure that water is accessible, safe and acceptable, and affordable. In one recent estimate, WHO found that “the poor pay on average 12 times more per litre of water than their counterparts with a municipal supply.”<sup>59</sup> The WHO argued that government must ensure the affordability of water by matching prices with what people can actually pay.<sup>60</sup> When third parties are controlling the water, the government must ensure that the private companies offer various price ranges to avoid water cutoffs. Water disconnections to the poorest in South Africa, who are unable to pay their water bills, are unjustifiable restrictions on the right to sufficient water. Thus, the government has failed to protect the right to water where it allows or fails to enact reasonable legislation to prevent private or public entities from denying equal access to adequate water.

### Duty to Promote and Fulfill

The duty to promote and fulfill requires that the state “take positive measures to ensure that those persons who currently lack access to the rights gain access to them.”<sup>61</sup> The U.N. General Comment explains that the duty to promote the right to water requires that the state promote appropriate education concerning the hygienic use of water, protection of water sources, and methods to minimize water wastage.<sup>62</sup>

*Grootboom* also requires that government measures must be reasonable both in their conception and in their implementation. The *Grootboom* Court held that a housing program, which did not provide for a short-term, low-income housing shelter for homeless people, violated Section 26 of the Constitution, which guarantees the right to have access to housing. In the context of water, the government is required to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of the right to water.<sup>63</sup>

The government is also required to take steps to achieve the intended result, and “the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.”<sup>64</sup> The Court held that it must determine whether the measure is implemented reasonably by being “sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements.”<sup>65</sup> In addition, the

measures must make appropriate provisions that ensure compliance with short, medium, and long terms needs.<sup>66</sup> A measure will not meet the reasonableness requirement if it ignores the needs of the most poor and desperate.<sup>67</sup>

The South African government has enacted measures that seek to progressively realize the right to water. For example, The Water Services Act requires that everyone have a right of access to basic water supply and that “[e]very water services authority must, in its water services development plan, provide for measures to realize these rights.”<sup>68</sup> Moreover, any procedures for limiting the water supply must be “fair and equitable.”<sup>69</sup> Any discontinuation must not result in a person being denied access to basic water services because he or she is unable to pay.<sup>70</sup> Water tap disconnections constitute a potential breach of constitutional and legislative obligations.

In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, the Court held that constitutional justification was required where the Council disconnected the water supply because users failed to pay. The Court held that a disconnection of this sort constitutes a prima facie breach of the Council’s constitutional obligation to respect the right to water. The High Court noted that “water supply may not be discontinued if it results in a person being denied access to water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.” The municipalities have the burden of proving that they are justified in disconnecting the water.<sup>71</sup>

Despite the Water Services Act, water throughout South Africa is being disconnected both by municipalities and by private water companies. Although immediate access to water to everyone remains impossible, the government is obligated to take steps toward the full realization of the right. In *Soobramoney* the Court acknowledged that the government might be limited by available resources when adopting new measures to progressively realize various socio-economic rights. It stated that:

What is apparent from these provisions is that the obligations imposed on the State by ss [Sic] 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources.<sup>72</sup>

The Court in *Grootboom* also noted “the State is not obliged to go beyond available resources or to realize these rights immediately.”

However, as more and more municipalities opt to privatize their water infrastructure, regulations play a vital role in ensuring the right to water. The government must provide the means for citizens to access water, including free water services, even if it means providing access to water to those who cannot afford to pay.<sup>73</sup> According to U.N. General Comment, governments are obligated to provide water when individuals are unable to “realize that right themselves.”<sup>74</sup> States must adopt necessary meas-

ures that may include “appropriate pricing policies such as free or low-cost water.”<sup>75</sup> Where companies seek to impose cost recovery programs, governments should ensure that every citizen could afford, and gain access to, the water supply on a nondiscriminatory basis.<sup>76</sup> Governments are allowed some flexibility when dealing with limited resources. However, after *Grootboom* it remains clear that, at minimum, state actors must ensure that their measures provide “temporary relief for people” with no access to basic socio-economic rights, such as water.<sup>77</sup>

The state must ensure that water is provided on an equitable basis and not merely to those who can afford the increasing cost of water. Approximately 78 percent of South Africa’s water is used by industry and only 12 percent by the general consumers.<sup>78</sup> Statistics reveal that a mere 27 percent of South Africans have tap water in their homes. Moreover, while South Africans consume about 12 percent of the country’s water, blacks generally consume only one tenth of that amount.<sup>79</sup> Pursuant to the Constitution, which aims to achieve “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms,”<sup>80</sup> the state is in violation of its constitutional obligations where it allows private water companies or local governments to adopt cost recovery programs that separate those who can afford the water from those who cannot.

#### OBLIGATIONS OF NON-STATE ACTORS

Throughout South Africa, non-state actors are supplying basic services central to human survival. The actions of private entities have profound implications for the human right to water, making it necessary for these entities to comply with their constitutional obligations. The South African Constitution is not directed solely to the public sphere; instead it obliges horizontal application of its Bill of Rights to non-state actors. Section 8(2) of the Constitution provides that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state [and] binds a natural or 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.” This provision therefore binds natural and juristic persons, including the private sphere. However, despite this Constitutional mandate, some commentators argue that the right to access to sufficient water should not impose positive burdens on private agencies.

Critics of horizontal application argue that constitutions regulate the public rather than the private sphere. This argument seems rooted in the notion of natural law, which prohibits government interference with private activities.<sup>81</sup> However, this notion of natural law allows non-state entities to violate basic human rights without accountability.<sup>82</sup> Because globalization has led to a growing amount of corporate control over some of the most basic human needs, human rights obligations should apply to the private sphere.<sup>83</sup> In other words, “[i]f a bill of rights is there to create a ‘culture of justification’ by those who wield political power, one would question the wisdom of letting those who wield other forms of power akin to state power, or of a nature resulting in violations of individuals’ or group rights, escape similar accountability.”<sup>84</sup>

The argument against horizontal application of the Constitution to the private sphere would render many constitutional provisions superfluous. The increased number of private actors supplying water and other basic rights would be free to ignore the basic rights recognized under the Constitution without consequence. Because water privatization is becoming increasingly common throughout South Africa, the argument against horizontal application to private actors undermines the basic values underlying the South African Bill of Rights and International Law.

The *Grootboom* Court indicated that private entities have a duty to respect socio-economic rights. According to the Court, Section 26 of the South African Constitution mandates, “at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right to access to adequate housing.”<sup>85</sup> The Court also stated “it is not only the State that is responsible for the provision of the houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.”<sup>86</sup>

### A Look to International Law Concerning Obligations of Non-state Actors

International law specifically mandates various obligations to non-state actors. Danwood Chirwa, in his article *Obligations of Non-state Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution*, looks to international law and emerging jurisprudence in determining the various direct and indirect obligations of non-state actors. The Universal Declaration of Human Rights, for example, explicitly mandates certain obligations on non-state actors. The Declaration’s preamble states that “every individual and every organ of society” must promote respect for the rights and take progressive steps “to secure their Universal and effective recognition and observance.” As Chirwa noted, “[n]either ‘organ of state’ nor ‘individual’ can be said to exclude corporations.”<sup>87</sup>

The African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, and the American Declaration of the Rights and Duties of Man also oblige non-state actors to take positive steps to ensure the various recognized rights.<sup>88</sup> Additionally, the preamble to the International Covenant on Economic, Social and Cultural Rights states that an individual, “having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”<sup>89</sup> Other international declarations such as the U.N. Declaration on the Elimination of All Forms of Racial Discrimination and the U.N. Declaration on the Elimination of All Forms of Intolerance, among others also recognize the positive and negative obligations required of non-state actors. Moreover, as discussed earlier, the U.N. General Comment requires indirect obligations on private actors where the state must ensure that third parties do not interfere in any way with the realization of the right to water.<sup>90</sup>

WHO posits that all individuals and stakeholders must comply with government plans, policies and laws intended to respect,

protect, and fulfill the right to water. Specifically, national and multinational private service providers should work to ensure equity in reliability of services, give priority to supplies for the most marginalized communities, and advance provisions directed toward an increase in the number of people served.<sup>91</sup>

### Specific Obligations of Non-state Actors

Because market forces cannot adequately regulate private water service providers, these non-state actors should be held to many of the same standards as applied to government service.<sup>92</sup> Many private companies supply and maintain a monopoly over water. Because these companies provide goods that people cannot live without and because they face little competition in the process, market forces will most likely not protect consumers.<sup>93</sup> Moreover, many of the major companies that provide water have vast amounts of power, both in the form of political power and in overall capital.<sup>94</sup> This creates a dangerous imbalance between the provider and the consumers, potentially leaving the consumers powerless to defend their interests. Therefore, to ensure the progressive realization of the right to water, private entities should abide by specific constitutional obligations.

The Constitution explicitly recognizes some duties that may be directly applied to private actors. Section 9(4) provides that “[n]o person may unfairly discriminate directly or indirectly against anyone.” Furthermore, Section 26(3) mandates that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.” Section 29(3) also states that “[e]veryone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race.” Although not explicitly directed toward private actors, many of the constitutional provisions listed above would be rendered superfluous if private actors could simply ignore constitutional mandates and unfairly discriminate against anyone without consequence, evict people from their homes without court orders, or discriminate because of race in a private school.

The various obligations required of non-state actors depend on the nature of the private actor’s participation in activities typically reserved for the state.<sup>95</sup> Section 8(2) of the Constitution states “the Bill of Rights binds a natural or a juristic person . . . 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.” Chirwa argued that South Africa should use the “state action” law criteria as used in the United States to determine the obligations of various private actors.<sup>96</sup> In other words, Chirwa argues that, as in the United States, a plaintiff must establish that the private actor is providing a traditionally public service to prevail. Therefore “private actors exercising the functions of the state would be held liable for human rights violations . . . [and] would be responsible to bear the relevant socio-economic rights obligations that the state would have borne.”<sup>97</sup> Where a private actor is supplying water services, it would be required to carry out the same obligations the Constitution imposes on the state with regard to the human right to water. In other words, it would be required to respect, protect, promote, and fulfill the right to

water. Thus, as mandated by domestic and international law, where the government decides to privatize its water services, non-state parties are required take affirmative steps toward the realization of the right to water.

## CONCLUSION

Public and private policies that allow for the disconnection of water to those who cannot pay their bills violate the South African Constitution and international law. Such disconnections create a new kind of apartheid that separates those who can afford to pay their water bills from those who cannot. One of the basic values of the South African Constitution seeks to eradicate

this type of unequal treatment. Where water is publicly or privately provided, the Court should act to ensure that the government respect, protect, promote, and fulfill the right to water. Furthermore, the government must enact reasonable legislation that ensures access to water to the most desperate in South African society. Although the government remains ultimately responsible for ensuring the right to water, private water companies that engage in the water services sector must also ensure this right. Without the enforcement of these duties, the Constitution will be a paper promise, allowing the gross injustices of South Africa's past to continue into the future.



# ENDNOTES: OBLIGATIONS OF STATE AND NON-STATE ACTORS REGARDING THE HUMAN RIGHT TO WATER UNDER THE SOUTH AFRICAN CONSTITUTION

<sup>1</sup> S. AFR. CONST. ch. 1, § 1.

<sup>2</sup> *Id.* at ch. 2, § 27(1)(b); WORLD HEALTH ORGANIZATION, *The Right to Water* 8 (2003) (stating that recognizing the right to water “constitutes an important step towards making it a reality for everyone . . . [because it] makes it a legal entitlement, rather than a commodity”), available at [http://www.who.int/water\\_sanitation\\_health/rightwater/en/](http://www.who.int/water_sanitation_health/rightwater/en/) (last visited Nov. 8, 2004).

<sup>3</sup> S. AFR. CONST. ch. 2, § 27(2).

<sup>4</sup> *Soobramoney v. Minister of Health (Kwa-Zulu Natal)*, 1997 (12) BCLR 1696 (CC) at ¶ 11.

<sup>5</sup> The White Paper on Water Policy, ¶ 5.2.1 (April 30, 1997); J. Bartram & G. Howard, *Domestic Water Quantity, Service Level and Health* WHO/SDE/WSH/03.02 WORLD HEALTH ORGANIZATION (WHO noted, however, that the 20 liters per day minimum “should not be taken as evidence that 20 liters per capita per day is recommended quantity of water for domestic use”), available at [http://www.who.int/water\\_sanitation\\_health/diseases/en/WSH0302.pdf](http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf) (last visited Nov. 8, 2004). In fact, 100 liters per day is WHO’s stated minimum for a healthy life, including the amount necessary to maintain healthy hygiene. *Id.*

<sup>6</sup> DAN TARLOCK, *Current Trends in United States Water Law and Policy: Private Property Rights, Public Interest Limitations and the Creation of Markets*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 190 (Edward H. P. Brans, et al. eds., 1997) (“The basic idea is that the market rather than administrators should determine the comparative value of water uses and be the vehicle to move water from lower to higher value uses, primarily municipal and environmental uses. To an economist, water is simply another commodity to be bought and sold with the lowest possible transaction costs.”).

<sup>7</sup> PETER GLEICK, *THE WORLD’S WATER: THE BIENNIAL REPORT ON FRESHWATER RESOURCES, 2002-2003*, 72 (Island Press 2002).

<sup>8</sup> MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD’S WATER* 52 (2002).

<sup>9</sup> Ginger Thompson, *Water Tap Often Shut to South Africa’s Poor*, N.Y. TIMES, May 29, 2003, at <http://www.globalpolicy.org/security/natres/water/2003/0529tap.htm> (last visited Nov. 8, 2004); THE CENTER FOR PUBLIC INTEGRITY, *METERED TO DEATH: HOW A WATER EXPERIMENT CAUSED RIOTS AND A CHOLERA EPIDEMIC* 6 (Feb. 5, 2003).

<sup>10</sup> S. AFR. CONST. ch. 2, § 7(2).

<sup>11</sup> THE CENTER FOR PUBLIC INTEGRITY, *PROMOTING PRIVATIZATION* (2003) at <http://www.icij.org/dtaweb/water> (last visited Nov. 8, 2004).

<sup>12</sup> Sandra Liebenberg, *The Protection of Economic and Social*

*Rights in Domestic Legal Systems*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 84 (Asbjorn Eide, et al. eds., 2001).

<sup>13</sup> See *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 BCLR (11) 1169 (CC) at ¶ 20 (“The question is therefore not whether socio-economic rights are justiciable under our constitution, but how to enforce them in a given case.”).

<sup>14</sup> S. AFR. CONST. ch. 8, § 167(7).

<sup>15</sup> *Fose v Minister of Safety and Security* 1997 (2) BHRC 434 at ¶ 69.

<sup>16</sup> S. AFR. CONST. ch. 9, § 184(3).

<sup>17</sup> Liebenberg, *supra* note 12 at 83-84.

<sup>18</sup> *Soobramoney* 1997 (12) BCLR 1696 (CC) at ¶ 11.

<sup>19</sup> *Id.* at ¶ 29.

<sup>20</sup> De Visser, *supra* note 41 at 23.

<sup>21</sup> *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 34.

<sup>22</sup> *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶¶ 22-29.

<sup>23</sup> S. AFR. CONST. ch. 8, § 167(7).

<sup>24</sup> *S. v. Makwanyane* 1995 (3) SA 391 (CC), ¶ 9.

<sup>25</sup> *Minister of Health & Others v. Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC).

<sup>26</sup> U.N. ESCOR, 29th Sess., General Comment No. 15, at 1, U.N. Doc. EC/12/2002/11 (2002) [hereinafter U.N. General Comment].

<sup>27</sup> *Id.* at art. 1, ¶ 1.

<sup>28</sup> *Id.* at art. 1, ¶ 2.

<sup>29</sup> *Id.* at art. 3, ¶ 20-29.

<sup>30</sup> *Id.* at arts. 22, 23.

<sup>31</sup> *Id.* at art. 5, ¶ 55-59.

<sup>32</sup> *Id.* at art. 5, ¶ 56.

<sup>33</sup> *Id.*

<sup>34</sup> S. AFR. CONST. ch. 2, § 19(3).

<sup>35</sup> WORLD HEALTH ORGANIZATION, *supra* note 2 at 7.

<sup>36</sup> *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 24.

<sup>37</sup> *Id.* at ¶ 35.

<sup>38</sup> *Soobramoney v. Minister of Health*, (Kwa-Zulu Natal) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at ¶ 8.

<sup>39</sup> *Id.*

<sup>40</sup> Sandra Liebenberg, *South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?* 1 (2002).



- 41 De Visser, Jaap Edward Cottle & Johann Mettler, *Realising the Right of Access to Water: Pipe Dream or Watershed* LAW, DEMOCRACY AND DEVELOPMENT vol. 7, no. 1 at 1 (2003).
- 42 THE CENTER FOR PUBLIC INTEGRITY, *supra* note 9.
- 43 S. AFR. CONST. ch. 3, § 41(1)(h).
- 44 *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶¶ 39-40.
- 45 *Id.*
- 46 U.N. General Comment, *supra* note 26, at ¶ 23.
- 47 *Id.* at ¶ 44.
- 48 De Visser, *supra* note 41, at 2.
- 49 DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT 2000 *White Paper on Municipal Service Partnerships*, available at [www.gov.za/whitepaper/index.html](http://www.gov.za/whitepaper/index.html) at 36.
- 50 THE CENTER FOR PUBLIC INTEGRITY, *supra* note 9.
- 51 *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 96.
- 52 WORLD HEALTH ORGANIZATION, *supra* note 2 at 6.
- 53 Thompson, *supra* note 9.
- 54 *Id.*
- 55 U.N. General Comment, *supra* note 26, at 23.
- 56 *Id.*
- 57 *Id.*
- 58 S. AFR. CONST. ch. 10, § 195(1)(g).
- 59 WORLD HEALTH ORGANIZATION, *supra* note 2, at 16.
- 60 *Id.*
- 61 Liebenberg, *supra* note 40, at 5.
- 62 U.N. General Comment, *supra* note 26, at ¶ 25.
- 63 *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 74.
- 64 *Id.* at ¶ 42.
- 65 *Id.* at ¶ 56.
- 66 *Id.* at ¶ 42-44.
- 67 *Id.* at ¶ 44.
- 68 Water Services Act 108 of 1997 at ¶ 3 (1)(3).
- 69 *Id.* at ¶ 4(3)(a).
- 70 *Id.* at ¶ 4 (3)(c).
- 71 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).
- 72 *Soobramoney* (1997) (12) BCLR 1696 (CC) at ¶ 11.
- 73 *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 44.
- 74 U.N. General Comment, *supra* note 26, at ¶ 25.
- 75 *Id.* at ¶ 27.
- 76 *Id.* at ¶ 12(c) (“Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized section of the population, in law and in fact, without discrimination on any of the prohibited grounds.”).
- 77 *Grootboom* 2000 BCLR (11) 1169 (CC).
- 78 De Visser, *supra* note 41, at 16.
- 79 *Id.* at 1.
- 80 S. AFR. CONST. ch. 1, § 1(a).
- 81 Danwood Mzikenge Chirwa, *Obligations of Non-state Actors in Relation to Economic, Social, and Cultural Rights under the South African Constitution*, 7 Socio-Economic Rights Project, COMMUNITY LAW CENTRE, University of Western Cape (2002).
- 82 *Id.*
- 83 *Id.*
- 84 *Id.* at 10.
- 85 *Grootboom* 2000 BCLR (11) 1169 (CC) at ¶ 34.
- 86 *Id.* at ¶ 35.
- 87 Chirwa, *supra* note 81, at 11.
- 88 *Id.* at 11-12.
- 89 *International Covenant on Economic, Social & Cultural Rights*, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (Jan. 3, 1976).
- 90 U.N. General Comment, *supra* note 26, at ¶ 23.
- 91 WORLD HEALTH ORGANIZATION, *supra* note 2, at 32-33.
- 92 De Visser, *supra* note 41, at 22.
- 93 BARLOW & CLARKE, *supra* note 8, at 127 (arguing that because corporations’ main goal is profit maximization, companies cannot adequately ensure the right to water).
- 94 *See Water Industry’s Cash to Political Campaigns Helps Fuel Effort to Privatize*, HOOVERS, February 12, 2003 (finding that not only are the major water companies expanding geographically but they are increasingly gaining political power around the world), available at <http://www.globalpolicy.org/security/natres/waterindex.htm> (last visited Nov. 8, 2004); THE CENTER FOR PUBLIC INTEGRITY, *supra* note 10 (explaining that corporations now lobby alongside the World Bank for privatization, and in the United States water companies have secured tax law changes that favor their investments and are lobbying for laws that force municipalities to consider).
- 95 Chirwa, *supra* note 81, at 25.
- 96 *Id.*
- 97 *Id.*