Corporate Power, Human Rights and Urban Governance in South African Cities

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Abstract

This article is concerned with the extent to which corporations involved in governing South African cities and towns are bound to the developmental objectives and socio-economic rights that urban governance efforts are constitutionally required to pursue. It considers the constitutional powers of local government over such non-state actors, evaluates their co-option and accountability in terms of local government legislation and discusses the evolution of their residual "horizontal" constitutional responsibilities.

Keywords

Corporations; urban governance; local government; socio-economic rights; horizontal application; municipal systems.

1 Introduction

Legal systems all around the world have for several decades enabled, resisted, overseen and/or mediated the rescaling, diffusion and fragmentation of state power, often depicted by the literature as a shift from "government" to "governance". Cities and towns have been closely-studied sites of this shift, which has typically coincided with the devolution of powers and responsibility formerly vested in national government to the municipal level.[1] Globally, urban governance has then typically involved the further fragmentation of power and its surrender to or sharing with a broad range of state and non-state actors (such as civil society or religious organisations, labour unions, corporations and knowledge institutions) in a broad range of institutional arrangements and processes and in terms of a broad range of governance instruments.[2]

Today it is widely accepted that "good" urban governance involves actors from all of society and that it is the task of forward-thinking local governments to guide, harness and steer the governance efforts of these actors towards communal ends.[3] In South Africa policy documents, local government performance reviews and academic literature have accordingly called for improved intergovernmental relations and for the increased formation of meaningful partnerships between municipalities and non-state actors to enable the achievement of the constitutionally enumerated developmental "objects of local government"[4] and the progressive realisation of the socio-economic and environmental rights guaranteed by the Bill of Rights.[5]

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1 See Curtis 2016 *Millenium*; Frug and Barron 2006 *Urban Lawyer*; Lobel 2004 *Minn L Rev*; Picciotto 2011 *Antipode*; Schragger *City Power* 44-75.

2 See Anciano and Piper *Democracy Disconnected* 12-13; Andrew and Goldsmith 1998 *IPSR* 108-109, 115; Curtis 2016 *Millenium* 463; Pierre 1999 *Urban Affairs Review*; Porras 2009 *Fordham Urb LJ* 541, 548-549, 590-591, 598; Schragger *City Power* 1-15, 104-134.

3 See Blanco 2015 *Cities*; Picciotto 2011 *Antipode*; Pierre and Peters "Urban Governance".

4 Listed in s 152(1) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).

5 See COGTA *Integrated Urban Development Framework* 50, 96, 99, 109; SACN

The close involvement of businesses in urban governance is not new, with the phenomenon of "company towns" predating contemporary local governance arrangements in many states. Several South African towns and secondary cities, from the diamond mining towns on the West Coast to the urban centres of the Free State goldfields and the industrial cities of the Vaal triangle, had their genesis as "company towns" and were constructed and/or initially managed by and for the exclusive purpose of serving major corporations whose commercial activities continue to lie at their heart to this day.[6]

Even in today's constitutional dispensation, corporations continue to be embroiled in different features of urban governance - sometimes merely as stakeholders in single projects, co-managers of precincts or contracted providers of site-specific services, at other times as strategic planners, dominant property developers, employers or benefactors. Importantly, while there is today democratically elected local government in all South African municipalities, the fates and fortunes of many South African mining and industrial towns remain "precariously dependent" on the one or two major corporations located there.[7] It is not uncommon for these corporations to have a determinative say over the socio-spatial configuration of a town, to drive its local economic development or even to assist with essential municipal service delivery.[8]

While the governance role played by local corporations is often lauded as a constructive display of civic virtue that contributes positively to local economic growth and development, service delivery and social cohesion,[9]

State of South African Cities 208, 285-288, 305; Du Plessis 2010 *Stel LR* 273-277; Palmer, Moodley and Parnell *Building a Capable State* 68-71, 176, 255; Rogerson 2010 *Development Southern Africa* 488-489; Rogerson 2010 *Urban Forum* 443-455.

6 See e.g. Carstens *In the Company of Diamonds* (re Kleinzee); Marais *et al* "Emfuleni" 85-88 (re Vanderbijlpark); Marais 2013 *Urban Forum* 507 (re Welkom); Rajak 2012 *Africa* 252-254.

7 Kotzé and Du Plessis 2014 *VRU* 454. Also see Marais 2016 *Local Economy* 70-71, 78; Marais, Nel and Donaldson "Secondary Cities" 163-168; Rajak 2012 *Africa* 253-254; Rogerson 2012 *Urban Forum* 111-112.

8 See the examples discussed by Campbell, Nel and Mphambukeli 2017 *Land Use Policy* 228 (infrastructure repair and service delivery in Witbank); Marais *et al* "Emfuleni" 95 (service delivery infrastructure in Emfuleni); Marais 2016 *Local Economy* 75, 79 (service delivery in Emfuleni and eMalahleni); Marais, Nel and Donaldson "Secondary Cities" 175 (water provision in Witbank); Rajak 2012 *Africa* 252-254 (spatial planning, infrastructure provision and social spending in Rustenburg).

9 See the examples discussed by Houghton 2011 *Urban Forum* 81-86 (developments driven through the Durban Growth Coalition); Peyroux 2006 *Trialog* 10-11 (city improvement districts in Johannesburg); Hamann 2004 *Natural Resources Forum* 283-284; Rajak 2012 *Africa* 253, 257 (skills development in Rustenburg).

it is as often associated with abuses of power and influence, unequal and unsustainable development, unfair labour practices, social stratification, exclusion, displacement and the myriad of negative environmental and social externalities of industrial activity.[10] Much has been written especially on the self-serving and ultimately unsustainable activities of mining companies, which stand accused of actively shaping unsustainable, unsafe, exclusionary and un-resilient cities and towns, only to inevitably abandon them, their municipal governments and their inhabitants to their own devices.[11]

Despite the wide array of scenarios in and degrees to which companies become and remain involved in urban governance, their governance activities largely remain legally unregulated. Conventionally legal systems around the world have insulated corporations from public-law responsibilities and allowed them to focus on attaining profit objectives without having to moderate these in relation to the social, economic and political needs of the societies in which they operate. For instance, corporations have generally been regarded as operating beyond the purview of human rights law, notwithstanding their significant capacity to violate human rights or to contribute to their realisation and fulfilment.[12] In recent years opposition to this state of affairs has led to increased state regulation of the human rights impacts of corporate activity, as well as to the gradual crystallisation of directly enforceable human rights obligations of corporations and to the rise of voluntary self-regulation regimes around corporate social responsibility.[13]

Despite the stated purposes of the *Companies Act* 71 of 2008 including to "promote compliance with the Bill of Rights ... in the Constitution, in the

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10 See the examples discussed by Erasmus 2020 https://www.dailymaverick.co.za/article/2020-12-07-engen-is-still-killing-us-says-durban-community-body-after-explosion-at-refinery/ (environmental infringements and associated corporate "bullying" by oil company in Durban); Lemanski 2007 *Cities* 455-459; Miraftab 2007 *Antipode* 603-609 (exclusion and displacement from city improvement district in Cape Town); Marais, Nel and Donaldson "Secondary Cities" 172 (acid mine drainage in Klerksdorp and Witbank); Hamann 2004 *Natural Resources Forum* 284; Rajak 2012 *Africa* 255-258, 267 (informal settlement formation and social division in Rustenburg).

11 See Campbell, Nel and Mphambukeli 2017 *Land Use Policy* 228; Field *State Governance of Mining* 26-29, 309; Kotzé and Du Plessis 2014 *VRU* 448-454; Marais 2013 *Urban Forum* 510-519; Meyersfeld 2017 *BHRJ* 32.

12 Bilchitz 2008 *SALJ* 754; Meyersfeld 2020 *SALJ* 449-450; Nolan 2014 *ICON* 62.

13 Examples from the literature critically assessing these global developments (which are beyond the scope this article) include Clapham *Human Rights Obligations*; Deva and Bilchitz (eds) *Human Rights Obligations of Businesses*; Macklem 2005 *International Law Forum*; Ssenyonjo 2008 *IJHR*.

application of company law" and to encourage “transparency and high standards of corporate governance ... given the significant role of enterprises within the social and economic life of the nation",[14] South African corporate law remains vague on the socio-economic responsibilities of corporations.[15] With the exception of the *Mineral and Petroleum Resources Development Act* 28 of 2002, which endeavours to "ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating"[16] and requires mines to commit themselves to "social and labour plans" (setting out the mine's role in local economic, skills and infrastructure development, poverty eradication and housing provision, as well as proposed measures to minimise the adverse community impact of mine closure) as a precondition for the award of mining licences,[17] socially conscious corporate governance and corporate social responsibility in South Africa occur predominantly in a voluntary, self-regulatory paradigm.[18] Moreover, South African corporate law nowhere explicitly acknowledges corporations' *de facto* involvement in local governance, even as such involvement has been on the increase.[19]

This article is concerned with the extent to which corporations involved in governing South African cities and towns are bound to the developmental objectives and socio-economic rights that urban governance efforts are constitutionally required to pursue. It considers the constitutional powers of local government over such non-state actors and evaluates their envisaged co-option and accountability in terms of local government legislation. Thereafter, it contemplates the broader horizontal application of fundamental constitutional rights, including socio-economic and environmental rights, to non-state actors positioned as "gatekeepers" to

14 Respectively ss 7(a) and 7(b)(iii) of the *Companies Act* 71 of 2008.

15 See Bilchitz 2008 *SALJ* 772-773; Kotzé and Fuo 2016 *JENRL* 300-302.

16 Section 2(i) of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

17 Section 25(f) of the *Mineral and Petroleum Resources Development Act* 28 of 2002 read with regs 41-42 and 46 of the Mineral and Petroleum Resources Development Regulations (last updated in GN R466 in Government Gazette 38855 of 3 June 2015). For assessment of the effectiveness of social and labour plans see Field *State Governance of Mining* 311-313; Hamann 2004 *Natural Resources Forum* 286-288; Kotzé and Fuo 2016 *JENRL* 309-311; Rogerson 2012 *Urban Forum* 108-109.

18 Bilchitz 2008 *SALJ* 772-773; Kotzé and Fuo 2016 *JENRL* 300-301. The dominant instrument in this regard is the Institute of Directors for Southern Africa's *King IV Report on Corporate Governance for South Africa* (IoDSA *King IV Report*), a "set of voluntary principles and leading practices", (35) which espouses a notion of "corporate citizenship" conferring on corporations "rights, obligations and responsibilities ... towards society and the natural environment" and requiring compliance with the Bill of Rights in a company's ordinary course of business (25, 45-46).

19 Kotzé and Fuo 2016 *JENRL* 293.

their enjoyment, and discusses several obligations that have thus far crystallised in jurisprudence relevant to the governance of urban space.

2 Urban governance authority, structures and processes

The power that local government exercises over non-state actors embroiled in urban governance, which directly impacts its ability to steer these actors' governance actions towards the achievement of communal goals, is intricately related to the power relationships between local government and the "upper levels" of state.[20] Local government requires both adequate "power to" shape urban spaces and processes and sufficient "power over" other actors with whom the "power to" govern is shared.[21] These powers reside simultaneously in their formal legal bestowment and in the will, skills and resources required to effectively wield them.

South African municipalities enjoy constitutionally ensconced power to govern, on their "own initiative" and without undue interference from national or provincial governments, a list of functional areas (including municipal planning, public places, electricity reticulation and water supply systems) that are central to urban form and functioning.[22] In other functional areas, such as housing, health services and public transport, municipalities exercise different degrees of delegated power under the supervision of national and provincial governments.[23] All three spheres of government are meant to coordinate their powers to provide "effective, transparent, accountable and coherent government for the Republic as a whole",[24] while the other spheres are enjoined to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."[25]

Predictably, municipalities have generally been able to influence the activities of non-state actors more decisively in relation to functional areas over which they wield decision-making power, whereas their steering ability has been more limited in relation to functional areas where such authority rests with other spheres.[26] Experience from elsewhere suggests that it is

20 Pierre and Peters "Urban Governance" 73-75; Turok 2013 *International Planning Studies* 178-181.

21 Anciano and Piper *Democracy Disconnected* 17-18, 234; Pierre and Peters "Urban Governance" 74.

22 Sections 151(3)-(4) and 156(1) read with Schedules 4B and 5B of the Constitution. For discussion, see Pieterse 2019 *ICLJ* 125-132.

23 Section 156(4) read with Schedules 4A and 5A of the Constitution.

24 Section 41(1)(f) of the Constitution.

25 Section 154(1) of the Constitution.

26 See Anciano and Piper *Democracy Disconnected* 241-242; Turok 2013 *International*

especially in their control over the physical form and functioning of urban space via the exercise of powers pertaining to spatial planning, zoning and land use management that urban local government's hold over business (the physical activities of which are by necessity place-bound and thereby subject to land-use regulation) is most tangible.[27]

It is therefore unsurprising that some of the most significant intergovernmental disputes in South Africa have involved indirect control over corporate activity through the wielding of these powers. In *Gauteng Development Tribunal*[28] the Constitutional Court vindicated the City of Johannesburg's attempts to control its own spatial planning processes by declaring legislation that allowed provincial planning tribunals to grant development permission over municipal land (which resulted in private developers being granted permission to build outside of locally determined development boundaries) unconstitutional for usurping the local government power of "municipal planning". In *Maccsand*[29] the Constitutional Court upheld the City of Cape Town's power over zoning by finding that this was not overruled by the national government's granting of a sandmining licence to a company seeking to mine dunes on land zoned as public open space. In *Habitat Council*[30] the Court invalidated legislation allowing private developers to appeal against municipal refusals of development planning permission to provincial authorities, stating that final decisions over land development should be guided by "parochial municipal interests".[31] While the intricacies of these decisions are beyond the scope of this article,[32] it is noteworthy that the Constitutional Court ostensibly appreciates the significance of local government's authority over urban space and has consistently safeguarded it in a manner that effectively subverts exercises of (even nationally-connected) corporate power to local oversight.

But "power over" non-State actors involved in urban governance involves far more than controlling their use of land. Urban co-governance takes a myriad of forms (ranging from legislatively regulated public-private

Planning Studies 178.

27 See Schragger 2009 *Harv L Rev*.

28 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).

29 *Maccsand v City of Cape Town* 2012 7 BCLR 690 (CC).

30 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* 2014 4 SA 437 (CC).

31 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* 2014 4 SA 437 (CC) para 23.

32 For discussion, see Pieterse 2019 *ICLJ* 133-143.

partnerships to *ad hoc* or informal arrangements) and governance decisions are taken in and implemented through an array of formal and informal fora and processes (such as external service delivery agreements, contract management or implementation agencies for private/public partnerships, business chambers, growth coalition partnerships, management boards of city improvement districts, or neighbourhood watch committees). Around the world the extent of local government's *de facto* involvement in and influence over these fora and processes typically varies significantly, meaning that they are also inconsistently publicly accountable.[33]

However, South Africa's *Municipal Systems Act* 32 of 2000 embraces a broad and inclusive concept of local governance that in principle subjects all urban governance actors, fora and processes to public-law principles. Section 2(b) of the Act determines in relevant part that a municipality

> (a) is an organ of state within the local sphere of government …
>
> (b) consists of
>
> (i) the political structures and administration of the municipality; and
>
> (ii) the community of the municipality
>
> (c) functions in its area in accordance with the political, statutory *and other relationships* between its political structures, political office bearers and administration and its community (emphasis added).

The Act proceeds to define the community of a municipality in relevant part as

> that body of persons comprising (a) the residents of the municipality; (b) the ratepayers of the municipality; (c) any civic organisations and non-governmental, *private sector* or labour organisations or bodies which are involved in local affairs within the municipality … and includes, more specifically, the poor and other disadvantaged sections of such body of persons (emphasis added).

and to determine in section 7 that

> the rights and duties of municipal councils and of the members of the local community … are subject to the Constitution, the other provisions of this Act and other applicable legislation.

The rights and duties of corporations who dabble in urban governance, as

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33 See Houghton 2011 *Urban Forum* 79; Newman and Verpraet 1999 *Regional Studies* 488-490; Picciotto 2011 *Antipode* 98-102; Porras 2009 *Fordham Urb LJ* 566.

members of the municipal "community" who contribute to municipal functioning through "political, statutory and other relationships", can thus be determined with reference to both the Constitution and to applicable local government legislation.

Several provisions in the Act explicitly link municipal governance with the constitutionally stipulated principles of cooperative government, the developmental objects of local government and the pursuit of socio-economic and environmental rights.[34] While many of the obligations elaborated in these provisions attach specifically to municipal councils, there are explicit indications that community members (including the private sector) must be involved in the governance decisions and processes that endeavour to comply with these obligations.

Section 5(1)(a)(i) of the Act determines that members of the community have a right to "contribute to the decision-making processes of the municipality"[35] whereas an entire chapter of the Act is devoted to the establishment and functioning of participatory structures and processes. Section 16(1) requires municipalities to develop a participatory governance culture and to include the community (including the private sector) in the preparation and implementations of their IDPs, budgets, strategic service delivery plans and performance management systems.[36] Section 17 adds that participation must take place both through political participation structures (such as ward committees) created by the *Municipal Structures Act* 117 of 1998 and by "other appropriate mechanisms, processes and procedures established by the municipality".[37] This is significant because it allows for the entire range of co-governance fora referred to above to be locally conceived and established as "formal" participatory structures of a municipality, and thereby to be linked into the mechanism of the *Municipal Systems Act*. This not only ensures that the municipal council retains an organising stake and influence in these fora but also opens them up for meaningful input and participation by residents and other community members, thereby countering the accountability deficit often inherent in

34 See e.g., ss 3, 4, 8 and 11(3) of the *Local Government: Municipal Systems Act* 32 of 2000.

35 Also see ss 3(2)(e), 6(2)(d)-(e) of the *Local Government: Municipal Systems Act* 32 of 2000.

36 See *Borbet South Africa v Nelson Mandela Bay Municipality* 2014 5 SA 256 (ECP), where a municipality was declared in breach of these provisions for failing to involve local corporations in deliberations over the annual budget.

37 Section 17(1)(b) of the *Local Government: Municipal Systems Act* 32 of 2000. Also see s 19 of the *Local Government: Municipal Structures Act* 117 of 1998.

unrepresentative "informal" or "private" decision-making structures.

The Act devotes a further chapter to integrated development planning, which makes it clear that a municipal IDP must draw together all the various governance activities that take place in a municipality, and must align and subject these to the achievement of municipalities' constitutional objectives and their pursuit of socio-economic and environmental rights.[38] IDP preparation and implementation processes are explicitly aligned to structures of cooperative governance and explicitly channelled through the municipality's community participation channels.[39] Section 35 of the Act determines that, once adopted, an IDP binds the council and functions as "principal strategic planning instrument which guides and informs all planning and development, and all decisions pertaining to planning and development, in the municipality". Importantly, IDPs also bind "all other persons", including the private sector, to the extent that their provisions are subsequently subsumed in or operationalised by municipal bylaws.[40]

Finally, in a chapter dedicated to the mechanics of municipal service delivery, the Act contains an elaborate framework for the conclusion, oversight and review of "external service delivery mechanisms", including provision for the delivery of municipal services through public/private partnerships.[41] These provisions, supplemented by provisions of and regulations proclaimed under the *Municipal Finance Management Act* 56 of 2003,[42] aim to ensure that public/private partnerships for the delivery of essential municipal services are formulated with detailed community consultation and input, that the obligations of private partners are carefully delineated, that municipalities retain strong and consistent oversight over externally provided essential services, and that public services are delivered transparently and in conformance with constitutional standards.[43]

Overall, the *Municipal Systems Act* admirably embodies the shift from "government" to "governance" and dynamically supplements local government's constitutional powers, functions and obligations. In particular,

38 Section 23(1) of *Local Government: Municipal Systems Act* 32 of 2000.

39 Respectively ss 24 and 29(1) of *Local Government: Municipal Systems Act* 32 of 2000.

40 Section 35(1) of *Local Government: Municipal Systems Act* 32 of 2000. See discussion by Du Plessis 2017 *LDD* 252-253; Van der Berg "Integrated Development Planning" 212-215.

41 Sections 76-84 of *Local Government: Municipal Systems Act* 32 of 2000.

42 See s 120 of the *Local Government: Municipal Finance Management Act* 56 of 2003 as well as the Municipal Public-Private Partnerships Regulations (GN R309 in Government Gazette 27431 of 1 April 2005).

43 See Chirwa 2004 *LDD* 191-195, 202-203; Steytler 2004 *LDD* 173, 178-179.

its chapters on participatory governance and integrated development planning enable municipalities to draw the myriad of non-state and hybrid governance activities that take place in their areas of jurisdiction into broader participatory structures and through municipal IDPs to ensure their alignment to the achievement of strategic and constitutional objectives.

Unfortunately, much of the Act's potential to function as a springboard for constitutionally aligned public/private urban governance endeavours remains unrealised outside of a few large metropolitan municipalities. Acute shortages of skills, capacity and resources cripple nearly all municipalities in secondary cities and small towns to the point where there is very little evidence of municipalities' purposefully wielding their constitutional governance competencies over and above an everyday struggle to keep the lights on and the taps running.[44] In particular, very few secondary cities have functional structures for participatory private/public governance.[45] Corporations' involvement in governance there tends to be *ad hoc*, uncoordinated and unaccountable, while their relationships with municipalities are not uncommonly hostile and steeped in mutual mistrust.[46]

By contrast, many corporations are well-resourced and have access to the very strategic planning, financial management and governance expertise that municipalities lack. While there have been instances of companies' contributing constructively to local governance precisely by putting these skills at municipalities' disposal,[47] this imbalance combines with an inequality in resources and accountability to allow corporations to dominate participatory governance fora, to strong-arm local government and communities into capitulating to corporate demands, and to ensure that IDPs and local government practices serve corporate rather than communal ends.[48] While research on both Durban and Cape Town's private/public "development partnership" platforms suggests that well-capacitated cities with strong control over their own development priorities and processes are (albeit not without difficulty) capable of directing the outcomes of governance platforms so as to be conducive to the achievement of cities'

44 See Rogerson 2010 *Urban Forum* 450-451; Turok 2013 *International Planning Studies* 180-181.

45 See Hamann 2004 *Natural Resources Forum* 287-288; Marais 2016 *Local Economy* 76; Marais *et al* "Emfuleni" 95; Rogerson 2010 *Urban Forum* 452.

46 See Campbell, Nel and Mphambukeli 2017 *Land Use Policy* 229; Marais 2016 *Local Economy* 76, 79; Rajak 2012 *Africa* 254; Rogerson 2010 *Urban Forum* 449, 455.

47 See Rajak 2012 *Africa* 257; Rogerson 2010 *Urban Forum* 454.

48 See Hamann 2004 *Natural Resources Forum* 279; Marais 2016 *Local Economy* 79; Marais *et al* 2017 *Extractive Industries* 169; Meyersfeld 2017 *BHRJ* 42-45; Rogerson 2012 *Urban Forum* 120, 126; Todes 2014 *African Studies* 255-256.

developmental objectives,[49] this appears not to be the case in the majority of secondary cities.

While well-intended, the provisions of the Act on external service delivery through private-public partnerships have further been criticised for being overly onerous and micro-managing to the point of discouraging all but the most skilled and capacitated municipalities from entering into or effectively overseeing formal public/private partnerships.[50] The effect of this is that the private delivery of essential services in many cities and towns occurs *ad hoc* and informally, outside of the participation, accountability and oversight frameworks envisaged by the Act.

Most debilitatingly, the participatory governance culture envisaged by the *Municipal Systems Act* has largely failed to materialise. The "political" participation structures established by the *Municipal Structures Act* are widely regarded as dysfunctional and overly dominated by party politics,[51] thereby failing as dialogic accountability fora. Moreover, as elaborated above, many municipalities in smaller towns and cities have simply failed to establish the tailormade participatory governance structures allowed for by the *Municipal Systems Act*. In particular, secondary cities and smaller towns often lack the capacity to independently conceive and formulate IDPs, or to meaningfully involve communities in these processes. This means not only that their IDPs tend to be consultant-written, cut-and-paste affairs betraying few authentic links to community participation processes or local developmental objectives, but also that the IDPs' potential to function as "herding" and "guiding" instruments for non-state governance efforts is wasted.[52] To illustrate, research in mining towns reveals that mining companies' corporate social responsibility investments and activities in terms of social and labour plans tend to be poorly aligned with municipal IDPs, and therefore seldom have sustained impact.[53]

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49 See Miraftab 2007 *Antipode* 613-615; Houghton 2011 *Urban Forum* 85; Todes 2014 *African Studies* 260, 265.

50 See Chirwa 2004 *LDD* 194-195; Palmer, Moodley and Parnell *Building a Capable State* 69; Rogerson 2010 *Urban Forum* 444; Steytler 2004 *LDD* 169-177; Steytler 2008 *TSAR* 520-521, 528-529.

51 On the shortcomings of ward councils in this regard see Barichievy, Piper and Parker 2005 *Politeia* 370-393; Palmer, Moodley and Parnell *Building a Capable State* 70-71, 127-128; Pieterse 2018 *VRU* 16-19; Ray *Engaging with Social Rights* 296-298.

52 See Campbell, Nel and Mphambukeli 2017 *Land Use Policy* 229; Van der Berg "Integrated Development Planning" 219.

53 See Marais 2016 *Local Economy* 74; Marais *et al* 2017 *Extractive Industries* 168-169; Rajak 2012 *Africa* 258-259. By way of exception, Rajak 2012 *Africa* 256-257 details attempts at aligning mining companies' social and labour plans with IDPs in Rustenburg.

Overall, it seems that, while South African municipalities are constitutionally empowered to steer local governance processes towards the achievement of developmental objectives, and while local government legislation allows for the establishment of structures and processes that effectively co-opt non-state actors and steer their efforts in this pursuit, this is belied by the realities in most corporate-dependent secondary cities and smaller towns. Wasted potential aside, municipalities' failure to leverage their constitutional powers and legislative competencies means that much day-to-day corporate urban governance in secondary towns continues to take place informally, inconsistently and unaccountably. Corporations, meanwhile, continue to conceive of their governance activities as separate from public objectives and of their relationships with local communities as nested in the "voluntary" "charity" of corporate social responsibility rather than in public responsibilities.[54]

3 Rights-based accountability for non-state actors

The frequent absence of functional fora for the apportionment of public responsibilities between state and non-state actors involved in urban governance in South Africa means that fallback public accountability for nonstate governance actors must be sought in broader constitutional structures.

While the direct enforcement of human rights obligations against non-State actors remains controversial and relatively rare in many constitutional systems, most systems now provide for the indirect enforcement of such obligations either via the regulation of private actions and interactions through domestic statutory or common law, or through the value-based alignment or development of domestic statutory or common law with human rights principles.[55] In addition, constitutional systems not uncommonly allow for the direct application of human rights to contexts where private entities fulfil functions conventionally associated with the state or where private entities are closely entwined with the state, although there is significant variation in the extent to which the private actors themselves are saddled

54 See Rajak 2012 *Africa* 267. On weaknesses in the conceptualisation and implementation of corporate social responsibility initiatives in South Africa see for instance Hamann 2004 *Natural Resources Forum*; Ramlall 2012 *Social Responsibility Journal*.

55 See the examples discussed by Chirwa 2006 *LDD* 30-37; Clapham *Human Rights Obligations* 499-521; Gardbaum 2003 *Mich L Rev* 412; Hessbruegge 2005 *Buff Hum Rts L Rev* 27-34; Macklem 2005 *International Law Forum* 281-289; Nolan 2014 *ICON* 67-72.

with the human rights obligations in question.[56] A handful of states further acknowledge the possibility of directly applying human rights to non-state actors, usually in the case of "special relationships" (such as employment, familial or contractual relationships) between rights-bearers and duty-holders.[57]

The South African Constitution explicitly provides for *all* these forms of "horizontal application" of the rights in the Bill of Rights.[58] Section 8 of the Constitution determines:

> (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) 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.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2, a court -
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, ...
>
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person,

whereas section 39(2) states:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

While much uncertainty remains over the exact scope, implications and implementation-mechanics of these constitutional provisions,[59] it seems clear enough that the rights in the Bill of Rights reign over all legally established or regulated processes, instruments and fora involved in urban

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56 See the examples discussed by Chirwa 2006 *LDD* 22-26; Clapham *Human Rights Obligations* 486-494; Ellman "A Constitutional Confluence" 446-449, 460-467; Gardbaum 2003 *Mich L Rev* 412-422; Hessbruegge 2005 *Buff Hum Rts L Rev* 47-62.

57 See the examples discussed by Chirwa 2006 *LDD* 37-45; Clapham *Human Rights Obligations* 442; Nolan 2014 *ICON* 78-80.

58 See Liebenberg *Socio-economic Rights* 68-69; Meyersfeld 2020 *SALJ* 440.

59 Debates over variations in vertical and horizontal application terminology and methodology are beyond the scope of this article. For a cogent summary and consolidation, see Bhana 2013 *SAJHR*.

governance (such as participatory governance structures established in terms of the *Municipal Systems Act*). Moreover, obligations imposed by rights enumerated in the Bill of Rights can in principle attach both directly (in and of themselves) and indirectly (via the portals of common or statutory law) to all state- and non-state actors embroiled in urban governance.[60] This holds true also for the socio-economic and environmental rights guaranteed by the Bill of Rights and may extend beyond the negative obligation to respect rights to also encompass positive obligations to protect, promote and fulfil them.[61] This means that in principle there is nothing in the text of the South African Constitution that prohibits corporations involved in governing South African cities from incurring (appropriately context-dependent) constitutional obligations to respect, protect, promote or fulfil socio-economic rights as well as civil and political rights.[62]

To be sure, the Constitution betrays a preference for indirect horizontality through the context-sensitive legislative elaboration of "private" human rights responsibilities.[63] In the urban governance context, such elaboration has included the horizontal operationalisation of environmental rights through the provisions of the *National Environmental Management Act* 107 of 1998[64] and the obligations imposed on mining companies by the *Mineral and Petroleum Resources Development Act* 28 of 2002 and its regulations.[65]

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60 See Bhana 2013 *SAJHR* 364-365, 373-374; Liebenberg 2008 *TSAR* 465-469; Nolan 2014 *ICON* 80; Pieterse 2007 *SAJHR* 161-163.

61 While ss 26(2) and 27(2) of the Constitution limit the obligation to take reasonable measures to achieve the progressive realisation of socio-economic rights to the State, and s 7(2) name-checks only the State in setting out obligations to "respect, protect, promote and fulfil" rights in the Bill of Rights, reading these provisions with ss 8 and 39(2) opens up a legion of regulatory paradigms for the "horizontal" enforcement of positive socio-economic obligations. See Liebenberg 2008 *TSAR* 469; Liebenberg *Socio-economic Rights* 70-71; Meyersfeld 2020 *SALJ* 441, 459; Nolan 2014 *ICON* 79; Pieterse 2007 *SAJHR* 161-163.

62 See Dafel 2013 *SAJHR* 593; Meyersfeld 2020 *SALJ* 443, 451-452; Pieterse 2007 *SAJHR* 157-159.

63 Bhana 2013 *SAJHR* 368; Ellmann "A Constitutional Confluence" 460; Liebenberg 2008 *TSAR* 471.

64 See Kotzé and Du Plessis 2014 *VRU* 455-459. "Horizontal" obligations contained in *National Environmental Management Act* 107 of 1998 include a duty to take reasonable measures to prevent environmental damage from occurring, continuing or recurring (s 28(1)) and a duty to take reasonable measures to contain and minimise the effects of emergency "incidents" that pose a danger to communities or the environment (s 30(4)). The principles listed in s 2 of the Act (including, for instance, that negative impacts on environmental rights must be prevented, limited or remedied– s 2(4)(iii)) are further made horizontally justiciable by s 32(1) of the Act.

65 See notes 16-17 above and accompanying text.

Beyond such statutorily crystallised obligations, it is clear from the text of sections 8 and 39(2) of the Constitution that the extent of non-State actors' human rights liability is strongly actor-specific and context-dependent, especially when it comes to positive obligations derived from socio-economic rights.[66] The literature posits various factors that should be taken into account when determining whether and to what extent a non-State actor ought to be bound by rights-standards in particular contexts. These include the nature of the non-state actor and its business; the nature and extent of the power and influence wielded and resources commanded and controlled by the non-State actor; the extent of the non-State actor's capacity to violate and/or realise the right; the extent to which and the circumstances under which the non-State actor fulfils or supplements roles or functions conventionally associated with the state; the nature and duration of the relationship between the non-state actor and rights-bearers and the power imbalances and patterns of dependency inherent to such a relationship; the degree to which the enjoyment of rights or access to the objects of rights hinges on the conduct of the non-state actor; the extent of the non-State actor's contractual undertakings or statutory or common-law obligations towards both co-implicated state-actors and rights-bearers; and so forth.[67]

South African courts' jurisprudence on the horizontal application of fundamental rights has been termed messy, inconsistent, vague and overly steeped in the private-public dichotomy.[68] Courts have readily acknowledged and affirmed the in principle horizontal applicability of rights in the Bill of Rights and have echoed the constitutional preference for indirect over direct horizontality, while emphasising that this does not preclude the context-dependent elaboration of direct horizontal obligations.[69] But they have not articulated particular horizontal obligations of non-State actors with much clarity, especially when it comes to socio-economic rights. Here, they have generally been hesitant to extend non-State actors' responsibilities beyond the negative obligation to respect the rights, even as they affirmed that doing so would sometimes be appropriate,

66 Meyersfeld 2020 *SALJ* 442-443, 451-452; Nolan 2014 *ICON* 78-79; Pieterse 2007 *SAJHR* 161.

67 See Bilchitz 2008 *SALJ* 777-779; Ellmann "A Constitutional Confluence" 461-467; Kotzé and Fuo 2016 *JENRL* 305-306; Liebenberg 2008 *TSAR* 467-469; Meyersfeld 2020 *SALJ* 445-446; Nolan 2014 *ICON* 89-90; Pieterse 2007 *SAJHR* 162.

68 See Bilchitz 2008 *SALJ* 774, 778; Liebenberg 2008 *TSAR* 475-477; Lowenthal 2020 *SAJHR* 268-272; Nolan 2014 *ICON* 81, 88.

69 See *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC) paras 96, 105-107, 122, 126; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 39-40, 48; *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 31-32.

with reference to factors similar to those expounded in the literature.[70] However, this is not to say that non-State actors have typically escaped constitutional accountability for the adverse human rights impact of their actions.

On the one hand, courts have rightly emphasised that it would be unfair to expect of private entities to bear the same socio-economic rights obligations as the state[71] and have affirmed that the state cannot simply escape its obligations by deflecting these onto the private sector, whether through contractual outsourcing or by way of organs of states' incompetence or neglect of their public responsibilities.[72] Courts have accordingly insisted on maintaining the primary nexus between socio-economic rights and the state, even when contemplating alleged infringement of the rights by non-state actors. This has practically manifested, for instance, in the joinder of local authorities to cases where eviction applications by private property-owners threaten the right to housing and risk rendering residents homeless,[73] in a finding that local authorities remain primarily responsible for satisfying the emergency housing needs of persons evicted from their homes at the behest of private land-owners,[74] in refusals to absolve local authorities from liability in cases where socio-economic rights have been infringed by the conduct of contracted "private" service providers,[75] and in the award of compensatory relief to parties who suffered losses as a result of neglect on the part of local authorities to enforce and protect socio-economic rights.[76]

On the other hand, where the outsourcing of public functions to non-state actors has had the effect of placing these actors in a position akin to that of the state, to the extent that the continued enjoyment of socio-economic rights hinged on the non-state actors' fulfilment of the functions, courts have

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70 See *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC) paras 123-125, 146-153, 168, 178; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 39-40; 42-44; 47-48; *Governing Body of the Juma Musjid Primary School v Essay* 2011 8 BCLR 761 (CC) paras 57-62.

71 See *Daniels v Scribante* 2017 4 SA 341 (CC) para 40; *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC) paras 15, 45.

72 See *Allpay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC) paras 58-60; *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) para 48; *City of Cape Town v Khaya Properties* 2016 5 SA 579 (SCA) paras 33-35; *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC) para 42.

73 As in *Lingwood v Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W) and subsequent cases discussed by Muller and Liebenberg 2013 *SAJHR*.

74 *City of Johannesburg v Blue Moonlight Properties* 2012 2 SA 104 (CC).

75 As in *City of Cape Town v Khaya Properties* 2016 5 SA 579 (SCA) paras 24-35.

76 As in *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC).

been willing to extend socio-economic obligations to the non-state actors even significantly beyond the terms of their initial contractual undertakings.

The Constitutional Court's judgments in the related cases of *Allpay Consolidated Investment Holdings* and *Black Sash Trust*, which required of a company contracted to administer the payment of social security benefits to ensure that workable payment mechanisms remained in place even after the expiry (and notwithstanding the initial voidability) of the contract, are the most far-reaching examples of this. In *Allpay* the Court reasoned that the company acquired constitutional obligations alongside the relevant state department because "it plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance" and because the contract unequivocally pertained to the fulfilment of a constitutional function.[77] As a result, when it came to the fulfilment of its responsibilities in terms of this contract the company "became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs" and could not walk away from the contract without ensuring that access to social security remained undisturbed.[78]

In *Black Sash Trust* the Court extended these obligations beyond the expiry of the contract, since this was necessary to avoid a "national crisis" of social security benefits going unpaid until such time as a workable new payment system could be established.[79] The Court depicted the company's lingering constitutional obligation as being sourced in its continued *de facto* positioning as the gatekeeper of the right, stating that

> once it is accepted that the constitutional obligations … are not sourced in any contract still in practical existence, but in their mutual constitutional obligation to ensure that the right to social assistance of the many people that have been dependent on past payment through [the company] are not rendered nugatory, the logic of private consensual agreement as the only way to determine the content of their respective reciprocal obligations … falls away.[80]

There have, however, been limits to courts' willingness to similarly transform the contractual obligations of non-State actors who simply enter into contracts that have the effect of advancing the fulfilment of public obligations

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77 *Allpay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC) paras 52-56 (quote from para 55).

78 *Allpay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC) para 59. Also see paras 66-67.

79 *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) para 51. See also paras 8, 15, 42, 62.

80 *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) para 48.

by the state. For instance, in *Khaya Properties* the SCA declined to hold a construction company which had delivered substandard low-cost housing under a contract with the City of Cape Town constitutionally responsible for providing inadequate housing because the Court felt that, unlike in *Allpay*, the contractor was not positioned as the gatekeeper to access to housing in the city. Instead, the Court regarded it as being bound only by the terms of its individual contract to deliver a limited set of houses to certain specifications, whereas the City retained constitutional responsibility to oversee the adequacy of the houses constructed by its contractors.[81]

While the *Khaya Properties* judgment has rightly been criticised for its restrictive understanding of public responsibility,[82] its employ of the "gatekeeper" assessment derived from *Allpay* is informative, not least because the notion of being positioned as "gatekeeper" to access to socio-economic rights also appears to have functioned as the determinant of the nature and extent of "direct" horizontal human rights obligations in cases where non-State actors were not closely contractually embroiled with the State.

In *Governing Body of the Juma Musjid Primary School* the Constitutional Court found that a private trust which had allowed its property to be used as the site for a school incurred a negative obligation to not exercise its property rights in a manner that impaired access to education, ostensibly since it had been positioned as a gatekeeper to such access, at least in the short term.[83] The trust could therefore evict the school from its property only once learners secured alternative access to education. More recently, in holding that a private school incurred a negative obligation to not unreasonably impair access to education of enrolled learners but not a broader positive obligation to provide education to all learners who require it, the Constitutional Court in *AB v Pridwin Preparatory School* distinguished *Allpay* (where positive obligations towards the broader population did arise) on the basis that the contract in *Allpay* positioned the company as the sole gatekeeper to access to social security, whereas alternative avenues to education remained open in the case of the private school.[84] While perhaps overly invested in upholding an unstable dichotomy between positive and negative obligations, *AB v Pridwin* has been welcomed for affirming the existence of (both negative and positive) horizontal socio-economic

81 *City of Cape Town v Khaya Properties* 2016 5 SA 579 (SCA) paras 22-35.

82 See Kotzé and Fuo 2016 *JENRL* 306-307.

83 *Governing Body of the Juma Musjid Primary School v Essay* 2011 8 BCLR 761 (CC) paras 57-62; 70. See Meyersfeld 2020 *SALJ* 466; Nolan 2014 *ICON* 83-85.

84 *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC) paras 146-147, 168, 178-179.

obligations, and for indicating that these can inhere in a "gatekeeper" scenario independently of the particular contractual terms that might initially have structured the relationship.[85]

This affirmation that the application of socio-economic rights cannot simply be ringfenced by contractual terms and cannot be precluded by mere virtue of the fact that all of the parties to a contract are "private" is in line with the Constitutional Court's finding in *Blue Moonlight Properties* that there is no qualitative difference between right-to-housing-related obligations arising from evictions conducted at the behest of a municipality on the one hand and those conducted at the insistence of private land-owners on the other.[86] It also resonates with the finding of the Cape High Court in *Victoria & Alfred Waterfront* that rights to livelihood and public presence derived from the constitutional rights to life and dignity apply equally in conventional public urban space and in urban precincts that are privately owned and managed.[87]

Read together, these judgments suggest that, while the obligations imposed by socio-economic rights usually attach more closely to the State, the fact of their application transcends the public-private dichotomy. This means that rights can apply to urban governance scenarios in appropriate contexts notwithstanding the nature of the actors involved, the nature of the space or processes that are governed, or the terms (or perhaps even the existence) of instruments that formally structure the governance arrangements. This appears to be because the overlap between socio-economic rights and the developmental obligations of local government serves to inject matters involving the realisation of socio-economic rights through local governance with public-law characteristics, notwithstanding the nature of the entities involved.

In a separate concurring judgment in *Residents of Joe Slovo Community*, Sachs J found that the rights and obligations embroiled in a dispute concerning the eviction and displacement of informal settlement residents in the course of an urban redevelopment project implemented through a public-private partnership were sourced not in the legal instruments or common-law background rules that structured their operation but simultaneously in the developmental obligations of local government and

85 *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC) paras 122-125. See Lowenthal 2020 *SAJHR* 263, 265, 269, 273.

86 *City of Johannesburg v Blue Moonlight Properties* 2012 2 SA 104 (CC) paras 86-95.

87 *Victoria & Alfred Waterfront v Police Commissioner, Western Cape* 2004 4 SA 444 (CPD) 448I-J, 450B-D, 451E-G, 452B-G.

the socio-economic rights articulated by the Constitution. This was taken further by a unanimous Constitutional Court in *Joseph v City of Johannesburg*, which found that the City's obligations in relation to electricity provision extended beyond the terms of contracts with consumers to also require procedural fairness towards residents who did not themselves have a contractual relationship with the City. The *Joseph* court stated:

> this case is similarly about the 'special cluster of relationships' that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles operate to govern these relations beyond the law of contract.[88]

Both *Residents of Joe Slovo Community* and *Joseph* focussed on the obligations of local government, but it seems from the passages quoted above that the "special cluster of relationships" sourced in the intersection between socio-economic rights and the developmental obligations of local government, which structures "clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time",[89] encompasses a far broader range of actors.[90] In *Cape Gate v Eskom Holdings* and in *Eskom Holdings v Resilient Properties* the Gauteng High Court and SCA respectively indicated that Eskom as an organ of state formed part of this "special cluster of relationships" and as such incurred public-law obligations towards residents of towns to which it supplied electricity, which meant that it could not simply discontinue electricity supply to municipalities which defaulted on their contractual payment obligations.[91] While these judgments both reined in corporatist action by a state-owned enterprise and do not themselves address the obligations of non-state actors, their broad conceptualisation of the "special cluster of relationships" together with their refusal to allow private (contractual) governance instruments to oust the application of public-law principles is instructive.

It then appears from the "horizontal application" cases discussed above that non-state actors whose *de facto* urban governance actions position them as "gatekeepers" to access to socio-economic rights are similarly embroiled in

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88 *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 24. Also see paras 17-18, 23, 31-38, 45-46.

89 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 343.

90 On the content and reach of the "special cluster of relationships" see Bilchitz 2010 *CCR*; Muller and Liebenberg 2013 *SAJHR* 562-564.

91 See *Cape Gate v Eskom Holdings* 2019 4 SA 14 (GJ) paras 130-140, 149-50; *Eskom Holdings v Resilient Properties* 2021 3 SA 47 (SCA) paras 11-18, 28, 58-60, 78.

the "special cluster of relationships" and must similarly conduct themselves in ways that respect, protect and advance such access. However, apportioning responsibility for the infringement of a right or imposing obligations for respecting, protecting or fulfilling it between state and non-state actors is clearly a highly context-specific, case-by-case exercise. The outcomes of this exercise will depend on the ways in which, the extent to which and the duration for which legislation, contractual arrangements or the *de facto* relationships between parties have positioned different state and non-state actors in relation to beneficiaries' access to and enjoyment of rights.[92]

While a more complete picture will inevitably emerge over time, a joint reading of the current state of "horizontal application" caselaw, caselaw giving effect to environmental, mining and housing legislation, and socio-economic rights caselaw reveals at least the following list of horizontal human rights obligations that may in appropriate circumstances apply to corporate non-state-actors in the urban governance context:

- Non-state actors' obligation to respect rights means not only that they must refrain from intentionally harming rights but also that they cannot walk away or be insulated from responsibility for infringements of rights that either result directly from or as causally linked externalities of their conduct. As in the cases of mines held responsible for the environmental damage or negative health consequences caused by their operations, this may involve a positive obligation to ameliorate, offset or compensate for harm caused, which can subsist beyond the life of a business.[93]

- Non-state actors may sometimes be expected to temporarily refrain from exercising their rights (flowing, for example, from land ownership or from the terms of a contract) until such time as any adverse rights impact of such an exercise can be ameliorated or avoided. As in cases where landowners must tolerate occupation of their properties until occupiers can be provided with alternative accommodation, this "duty of patience" may sometimes involve incurring and absorbing monetary

92 Also see Meyersfeld 2020 *SALJ* 445-446.

93 See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* 2006 5 SA 333 (W) paras 16-17 (former mine directors remain responsible for fulfilling obligations under environmental legislation and s 24 of the Constitution) as well as the settled class action between mining companies and former workers who developed silicosis in the course of their employment. For discussion, see Field *State Governance of Mining* 308-312; Kotzé and Du Plessis 2014 *VRU* 467-475; Kotzé and Fuo 2016 *JENRL* 305.

losses.[94]

- Non-state actors must conduct "human rights impact assessments" of proposed commercial or industrial activity, in the course of which they must meaningfully consult affected community-members and civil society organisations.[95] In addition, non-state actors positioned as gatekeepers to access to rights may be required to continuously engage with the beneficiaries of rights over the terms and circumstances of their access to rights, and to display *bona fides* in the course of such engagement.[96]

- Non-state actors must conduct their "public business" in ways that strengthen the state's ability to respect, protect, promote and fulfil rights. This means at least that their actions may not undermine state attempts at rights-based governance and may entail having to support the state through their actions.[97]

- Where non-state actors themselves provide essential urban services or access to other socio-economic rights, or where they are involved in maintaining the systems through which these are provided, they may be required to continue doing this until such time as another actor

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94 See *City of Johannesburg v Blue Moonlight Properties* 2012 2 SA 104 (CC) paras 40, 100; *Daniels v Scribante* 2017 4 SA 341 (CC) para 53; *Maphango v Aengus Lifestyle Properties* 2012 5 BCLR 449 (CC) paras 32-34. For discussion, see Dafel 2013 *SAJHR* 612-613; Kruger 2014 *SALJ* 334-340, 345.

95 As enforced in e.g. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) (consent of indigenous community required as prerequisite for commencement of mining operations); *Director: Mineral Development Gauteng v Save the Vaal Environment* 1999 2 All SA 381 (A) (environmental NGO afforded input into decision over granting of mining licence). See Kotzé and Du Plessis 2014 *VRU* 465-467.

96 See *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) paras 41-42. In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 30, 37-43, the Constitutional Court emphasised the value of *bona fide* and solution-orientated negotiations between the state, landowners and would-be evictees. The public obligation to "meaningfully engage" occupiers as a prerequisite for the constitutional reasonableness of an eviction was elaborated in *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 3 SA 208 (CC) paras 14-21. Its applicability to non-state actors was left open in *Occupiers of Saratoga Avenue v City of Johannesburg* 2012 9 BCLR 951 (CC) paras 17-18 but seemingly accepted in *Daniels v Scribante* 2017 4 SA 341 (CC) paras 61-64. See Dafel 2013 *SAJHR* 608-611; Pieterse 2018 *VRU* 24-25, 29; Ray *Engaging with Social Rights* 313-317.

97 See *Eskom Holdings v Resilient Properties* 2021 3 SA 47 (SCA) paras 23, 74-78, 88 (Eskom may not exercise its rights in a manner that would make it impossible for a municipality to fulfil its obligations towards its residents); *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 38 (landowners must enable cities to fulfil their service-delivery functions by ensuring that occupiers fulfill their payment obligations). For discussion, see Bilchitz 2010 *CCR* 74; Dafel 2013 *SAJHR* 613.

> can take over this responsibility. This obligation may extend beyond the terms of an initial contractual undertaking, although this is usually subject to compensation for extra-contractual costs incurred.[98]

The cumulative effect of the caselaw discussed in this section has been to restructure the public/private dichotomy when it comes to upholding human rights and to significantly alter the balances of private power in instances where rights are threatened or undermined.[99]

In the urban governance context, this has been visible especially when it comes to the exercise of private property rights, where jurisprudence vindicating the right of access to housing has had the effect of watering down property rights to the extent that urban residents now have significant power to resist eviction and assert their habitation interests against both state and non-state actors who seek to remake the urban fabric in ways that threaten or deprive enjoyment of housing rights.[100] While some commentators have lamented the comparatively meek seepage of human rights principles into contract and company law,[101] there are increasing indications, from the rights-based extension of contractual agreements beyond their initial terms to the statutory elaboration of environmental obligations and the statutory hardening and harnessing of corporate social responsibility undertakings, that the apportioning of responsibility for human rights in these fields is also gradually catching up with contemporary governance realities.

4 Conclusion

The shift from "government" to "governance" has blurred lines between public and private power, space, decisions, activities, responsibilities and accountability on various scales, though perhaps especially in the local, urban governance context. Amidst these blurred lines, it is clear that corporate power is increasingly harnessed or asserted in the course of everyday urban governance. Whereas nothing argued here should be read to detract from the primary constitutional responsibilities of local state

98 See *Allpay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC) para 66; *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) para 50.

99 Also see Kotzé and Du Plessis 2014 *VRU* 458.

100 Liebenberg *Socio-economic Rights* 76-81. For a detailed exposition and analysis of this shift, see Wilson *Human Rights* 57-125.

101 See Bilchitz 2008 *SALJ* 781-789; Liebenberg *Socio-economic Rights* 63-64, 81-86.

institutions,[102] private-sector involvement in urban governance is a growing reality that requires both conceptual and institutional accommodation. Accordingly, this article has highlighted the need for local government and local communities to assert effective power over the urban governance activities of corporations, as well as the need to bolster the rights-based accountability of corporations for the effects of both their governance- and commercial activities on local communities.

The article has shown that the current state of South African intergovernmental relations jurisprudence recognises and safeguards a space of local government autonomy over certain essential features of urban form and functioning within which it is up to municipalities to co-opt and steer governance efforts by non-state actors towards the achievement of constitutionally articulated developmental objectives. In this space, the provisions of the *Municipal Systems Act* allow for the local tailoring of dynamic and responsive fora for dialogic and participatory governance in which corporations can be held accountable by local communities. While it may be necessary to enlarge and better safeguard the functional spaces over which municipalities exercise control, and while intergovernmental relations can be more supportive of local government's steering role in urban governance,[103] the most significant challenge seems to be the development of both the will and the capacity to effectively steer urban governance at local government level.[104]

There is an urgent need to operationalise the "all of society" approach to governance embodied in the *Municipal Systems Act*. To this end further research is required on possibilities for the establishment of workable, dialogic and pragmatic participatory fora and procedural platforms for constructive co-governance at local government level. Ideally such fora and platforms should articulate with and buttress IDP-formulation and implementation processes, so as to enable these to take their intended place as fusion points for corporate social responsibility and other local civic endeavours.[105] Research is further required on the ways in which private

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102 In particular, this article has neither engaged with the extent to which local state failures increasingly necessitate corporate or community-based "intervention" in local government affairs, nor with the extent to which private actors ought to be assisted with or compensated for their efforts in this regard. But the institutional and accountability arguments advanced here apply also in those contexts.

103 Also see Anciano and Piper *Democracy Disconnected* 226-228; Field *State Governance of Mining* 232-237; SACN *State of South African Cities* 208-210, 234-236; 295.

104 See Hamann 2004 *Natural Resources Forum* 288.

105 See Meyersfeld 2017 *BHRJ* 51-52.

governance instruments (such as contracts, tender documents and memoranda of understanding) can better capture and reflect the public-law dimensions of corporate co-governance, especially around shared responsibility, risk and accountability. Effective local governance platforms and the adequate capturing of negotiated rights and responsibilities in appropriately flexible governance instruments would not only bolster municipalities' power over corporate activity but would also go a long way towards repairing dysfunctional relationships between local government and its non-state "stakeholders".[106]

But even if corporate urban governance were to continue on an *ad hoc* and informal basis, the article has shown that the constitutional jurisprudence around the horizontal application of fundamental rights has sufficiently evolved to hold businesses which are positioned as gatekeepers to the enjoyment of rights responsible for the rights impact of their actions, and to require of them to conduct their activities in a manner that maintains and advances access to rights.

Given the normative foundations of the South African constitutional order, corporations simply cannot focus their activities on generating profit without regard to the communities in and from which they operate.[107] By the same token, civically-minded corporations need to be met halfway by competent and responsive local governments who are willing and able to steer collective urban governance efforts towards the production of cities and towns in which both corporate and non-corporate residents can thrive.[108]

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List of Abbreviations

BHRJ	Business and Human Rights Journal
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
CCR	Constitutional Court Review
COGTA	Department of Cooperative Government and Traditional Affairs
Fordham Urb LJ	Fordham Urban Law Journal
Harv L Rev	Harvard Law Review
IDP	Integrated Development Plan
ICLJ	International Constitutional Law Journal
IJHR	International Journal of Human Rights
IoDSA	Institute of Directors in Southern Africa
IPSR	International Political Science Review
JENRL	Journal of Energy and Natural Resources Law
LDD	Law, Democracy and Development
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
SACN	South African Cities Network
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid Afrikaanse Reg
VRÜ	Verfassung und Recht in Übersee