

# Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’

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## Summary

*This article examines the disjunctures between the universal aspiration of human rights norms and the complexity of their interpretation and application in diverse and pluralistic contexts. It examines the extent to which a deliberative model of democracy can assist in promoting a more dialectical relationship between the universal and particular in human rights constitutional adjudication. The article further evaluates the potential of the mechanism of meaningful engagement employed by the South African Constitutional Court in the context of evictions jurisprudence to negotiate the tension between the universal normative values and purposes of human rights, and the democratic ideal of popular participation in the making of decisions which affect people’s daily lives.*

## 1 Introduction

Over centuries national and international struggles have sought to protect certain values and interests regarded as fundamental to

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human thriving in widely diverse political, economic, social and cultural contexts. Values which today lie at the heart of human rights law – individual and collective self-determination, human compassion and solidarity, human dignity, equality and freedom – have inspired great revolutions, social movements and liberation struggles against colonialism, apartheid and other forms of domination.<sup>1</sup> For all its imperfections, its false starts, and the dashed hopes when it fails to deliver on its lofty promises, human rights remain a significant discursive and mobilising force against systemic forms of marginalisation and structural injustice.<sup>2</sup>

International human rights law, particularly as it developed post-1945, aspires to universal validity and application. Thus, the great founding document of the protection of human rights under the auspices of the United Nations (UN), the Universal Declaration of Human Rights (1948) (Universal Declaration), proclaims the concepts of ‘inherent dignity’ and ‘the equal and inalienable rights of all members of the human family’, and calls on member states of the UN ‘to secure their universal and effective recognition and observance’.<sup>3</sup> In the African context, the African Charter on Human and Peoples’ Rights (African Charter) recognises the universal impulses of fundamental human rights ‘that stem from the attributes of human beings’, whilst alluding to the need to develop a particular conception of human and peoples’ rights informed by the ‘historical tradition and values of African civilisation’.<sup>4</sup>

At national level, a bill of rights incorporating a greater or lesser number of the human rights norms recognised under international human rights law is a common (although not universal) feature of established and new constitutional democracies. Courts are given a significant role in interpreting and enforcing all or some of the provisions of the relevant bills of rights with varying remedial powers.<sup>5</sup>

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1 On the evolution of human rights as a political and cultural construct, see L Hunt *Inventing human rights: A history* (2007); S Moyn *The last utopia: Human rights in history* (2010).

2 Young describes ‘structural injustice’ as a situation in which ‘social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities’. IM Young ‘Responsibility and global justice: A social connection model’ (2006) 23 *Social Philosophy and Policy* 102–114. For a recent account of the mobilising potential of human rights against various forms of structural injustice in Africa, see LE White & J Perelman (eds) *Stones of hope: How African activists reclaim human rights to challenge global poverty* (2011).

3 Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III), UN Doc A/810, Preamble.

4 African Charter on Human and Peoples’ Rights, 1520 UNTS 217, concluded 27 June 1981; entered into force 21 October 1986, Preamble.

5 See generally R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006).

On the African continent, South Africa, along with a number of other African states, are examples of this trend in transitional constitutional democracies.<sup>6</sup>

But these international, regional and national claims of human rights law to universal normative validity and application does not come without a cost. One of these costs is the reduction and oversimplification of the complexity of the particular.<sup>7</sup> The abstract, broadly-formulated normative commitments of human rights are not self-evidently equipped to respond well to the shifting, intertwined and diverse power relations, socio-economic needs and cultural identities encountered in contemporary societies. The result can be that these power relations, needs and identities are either ignored or receive only a superficial exploration and response. The outcome is frequently an entrenchment of the *status quo* and disillusionment with the unfulfilled emancipatory and transformative claims of human rights discourse.<sup>8</sup> This is what Brown describes as the fundamental paradox of rights, namely, 'the paradox between the universal idiom and the local effect of rights'.<sup>9</sup>

The article grapples with the question of how can we make sense of the aspiration of human rights law (in its broadest sense) to embody a set of universal normative prescripts and the myriad particular contexts and realities in which those norms must be interpreted and enforced by judicial bodies. Is it possible to identify conceptions of rights, understandings of democracy, and strategies of adjudication that may be better suited to generating a more creative dialectic between the ideals of universal human rights and the particularity and determinate character of needs and identities of persons in various contexts?

I start by considering how the institutionalisation of human rights norms, through their enforcement by judicial and quasi-judicial

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6 For an overview, see S Gloppen *et al* (eds) *Courts and power in Latin America and Africa* (2010) ch 5.

7 Other critiques of rights expose how the claims of human rights law and practices to ideological neutrality obscure how particular interpretations of rights advance distinct ideological projects. See IG Shivji *The concept of human rights in Africa* (1989), ch 1 & 2; M Mutua *Human rights: A political and cultural critique* (2008).

8 There exists a vast literature traversing critical legal studies, legal anthropology, and development studies which engages the critique of rights and exposes and engages the tension between universalism and particularism in human rights discourse and law. A small sample of this literature includes M Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363; PJ Williams 'Alchemical notes: Reconstructing ideals from deconstructed rights' (1987) 22 *Harvard Civil Rights - Civil Liberties Law Review* 401; J Kirkemann Boesen & HO Sano 'The implications and value added of a human rights-based approach' in BA Andreassen & SP Marks (eds) *Development as a human right: Legal, political and economic dimensions* (2010) 45; AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002); M Goodale & S Engle Merry (eds) *The practice of human rights: Tracking law between the global and the local* (2007).

9 W Brown *States of injury: Power and freedom in late modernity* (1995).

bodies, frequently operates to deepen the tension between the universalist impulse of human rights norms, and initiatives to develop tailored solutions to particular problems through the participation of those directly affected. Thereafter I explore the implications of situating constitutional adjudication of human rights norms within a deliberative model of democracy, and explore its potential to bridge the gap between universal and particularism in human rights adjudication. The final part of the article considers the recent adjudicative strategy of meaningful engagement developed by the South African Constitutional Court in the context of eviction disputes. I evaluate the potential and limits of meaningful engagement to generate transformative responses to the paradox of the 'universal idiom' and the 'local effect' of rights. It is hoped that some of the benefits as well as the pitfalls of meaningful engagement identified in this article will contribute to current debates within the African context on effective judicial mechanisms for enforcing socio-economic rights.

## 2 The 'paradox of institutionalisation'

The broader paradox of universality and particularism referred to by Brown is compounded by what Baynes refers to as 'the paradox of institutionalisation'.<sup>10</sup> Broadly formulated human rights norms have to be interpreted and applied by institutions such as domestic courts, UN human rights treaty bodies and, within the African context, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court).<sup>11</sup> But the interpretation and enforcement of indeterminate human rights norms create the well-known tension between human rights and democracy.

In the context of this article, I focus on the relationship between the exercise of judicial power and the concept of participatory democracy, rather than the familiar 'counter-majoritarian dilemma' with its narrower focus on the relationship of courts to the legislative and executive institutions of representative democracy.<sup>12</sup> In this context, a number of critiques can be levelled against courts assuming an

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10 K Baynes 'Rights as critique and the critique of rights: Karl Marx, Wendy Brown, and the social function of rights' (2000) 28 *Political Theory* 451-457.

11 The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), OAU/LEG/EXP/AFCHPR/PROT (III) in 2004 has created renewed impetus for the project of developing the normative content and effective enforcement of the rights in the African Charter.

12 On the distinction between direct and representative democracy, see J Cohen & C Sabel 'Directly-deliberative polyarchy' (1997) 3 *European Law Journal* 313-320-321.

overly activist or managerial role in human rights adjudication.<sup>13</sup> The following four interrelated critiques are particularly relevant to the themes addressed in this article.

First, the judicial and quasi-judicial bodies widely charged with enforcing human rights norms domestically or internationally risk being perceived as 'paternalistic' institutions which curtail the opportunities of 'the people' to determine the fundamental norms by which they will govern themselves and their communities.<sup>14</sup> Second, participatory decision making is arguably more capable of achieving just and sustainable solutions to particular problems because the participants are more attuned to local needs and identities.<sup>15</sup> A rejoinder would be that judges are nonetheless suited in human rights adjudication to laying down broad normative principles based on fundamental human interests or values that should guide decision making.<sup>16</sup> While this is a valid conception of judicial competencies, the practical implications of these broad normative pronouncements in a diversity of different circumstances are nonetheless likely to remain deeply contested.<sup>17</sup>

A third critique, emanating particularly from the critical legal studies tradition, points out that courts are traditionally unresponsive to the more far-reaching political, social and economic reforms required to remedy the underlying conditions which generate systemic injustices. The tendency towards stability and preservation of the *status quo* in adjudication has a 'depoliticising' effect on fundamental contestations concerning deeply-entrenched distributions of political and social

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13 On the distinction between strong and weak forms of judicial review and managerial versus other forms of judicial role conceptions, see M Tushnet *Weak courts, strong rights* (2008) 18-42; KG Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8 *International Journal of Constitutional Law* 385.

14 See, eg, Habermas's critique of Dworkin's conception of the judge as Hercules operating within 'the solitude of monologically conducted theory construction'. J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (1998, trans W Rehg) 223-225; See also the analysis of critics of judicial review by C Zürn *Deliberative democracy and the institutions of judicial review* (2007) 4-6 141-161.

15 Cohen & Sabel (n 12 above) 324.

16 See, eg, A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56 *Current Legal Problems* 579 587-589 (locating the courts' institutional capacity to adjudicate socio-economic rights in the capacity of judges to pronounce on conditions of life undermining human dignity).

17 See Dixon's critique of a strong judicial role in determining the 'minimum core' of socio-economic rights. R Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391 401-402 416-417.

power.<sup>18</sup> This can have a delegitimising effect on community struggles aimed at radical social change.

Finally, judicial procedures, interpretive methods and doctrinal categories are blunt instruments for dealing with particularity and difference. Some of the accepted categories of human rights law – ‘vulnerable groups’, ‘prohibited grounds of discrimination’, ‘the poor’ – create and entrench fixed identity patterns which sit uncomfortably with fluid and shifting identities and allegiances. This makes it notoriously difficult for court-centred human rights law to respond effectively to multiple and intersecting forms of disadvantage experienced by various groups on grounds such as race, gender and class.<sup>19</sup>

Underlying each of these critiques of adjudication is the interrelationship between substantive human rights norms and procedural norms of democratic participation. In other words, how should the institution of judicial review be conceptualised in a system which values democratic participation in resolving social disputes? Is it possible to develop adjudicative strategies which can mitigate the concerns of judicial paternalism, enhance responsiveness to local needs, create space for radical social mobilisation, and better negotiate the complexities of difference? Fundamental to this endeavour is the model of democracy within which the institution of judicial review of fundamental rights is embedded. It is this broader theoretical issue to which I turn in the following section before returning to the questions posed above in the context of the adjudicative strategy of meaningful engagement in socio-economic rights disputes.

### 3 Rights within a deliberative democratic paradigm

A strongly representative model of democracy creates a strong opposition between aggregative decision making<sup>20</sup> by elected

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18 See Baynes (n 10 above) 457; D Brand ‘The “politics of need interpretation” and the adjudication of socio-economic rights claims in South Africa’ in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17.

19 For accounts of the difficulties which legal normative frameworks and mechanisms encounter in responding to the complexity of intersecting forms of disadvantage, see K Crenshaw ‘Demarginalising the intersection between race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’ (1989) *University of Chicago Legal Forum* 139; J Conaghan ‘Intersectionality and UK equality initiatives’ (2007) 23 *South African Journal on Human Rights* 317.

20 Aggregative, representative models are premised on determining majority preferences of elected representatives through mechanical methods such as counting votes. See, eg, the account by Zurn (n 14 above) 73-76 of the differences between aggregative and deliberative models of democracy. According to Cohen & Sabel (n 12 above) 321, the essential distinction between representative and more direct models of democracy lies, not only in the level of participation, but the topic on the agenda: ‘Direct democracy requires decision on substance, whereas representative democracy involves choice on legislators who decide on

representatives of the people and the enforcement of human rights norms by unelected judges. On this conception rights will remain constraints on the democratic process.<sup>21</sup> Such a conception of democracy faces a number of obstacles in attempting to bridge the chasm between universalism and particularism in human rights adjudication. The aspiration of people to participate in determining the content and application of the fundamental norms that govern their lives is diluted through the institutions of the judiciary and representative institutions such as the legislature, executive and administration. In what follows I argue that a deliberative model of democracy holds greater promise in reconciling the tension between broadly-formulated, universal human rights norms, and the value of democratic participation in resolving particular disputes.<sup>22</sup>

There are three features of deliberative democracy which make it particularly suiting to fulfilling this role. First, the deliberative model of democracy is, as Benhabib points out, based on a discourse theory of ethics which supply the general moral principles from which human rights norms may be derived.<sup>23</sup> The first principle is described by Benhabib as the principle of 'universal moral respect' and is derived from the fundamental presupposition of discourse ethics which considers the participants 'to be equal and free beings, equally entitled to take part in those discourses which determine the norms that are to affect their lives'.<sup>24</sup> The second principle of discourse ethics described by Benhabib is that of 'egalitarian reciprocity'. This principle vests in each individual 'the same symmetrical rights to various speech acts, to initiate new topics, to ask for reflection about the presuppositions of the conversations, and so on'.<sup>25</sup> As Benhabib argues, the step to

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substance.'

21 There have been numerous attempts to explain and justify the 'counter-majoritarian' dilemma of constitutional review within systems of representative democracy. For a review of the major theoretical positions, see Zurn (n 14 above) 31-67.

22 S Benhabib 'Towards a deliberative model of democratic legitimacy' in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 69 explains the key premises and features of a deliberative democratic model as follows: 'According to the deliberative model of democracy, it is a necessary condition for attaining legitimacy and rationality with regard to collective decision-making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals. The more collective decision-making processes approximate this model the more increases the presumption of their legitimacy and rationality.' Zurn (n 14 above) 70 places 'reasons-responsiveness' at the core of deliberative conceptions of democracy. He goes on to note that 'deliberative democracy does not just stress reasoned civil discussion – it stressed *politically relevant and effective* reasoned discussion.'

23 Benhabib (n 22 above) 69.

24 Benhabib (n 22 above) 78.

25 As above.

deriving a system of basic rights and liberties from the recognition of these two moral principles is not very wide:<sup>26</sup>

Basically it would involve a hypothetical answer to the question, if it is plausible for individuals to view one another as beings entitled to universal moral respect and egalitarian reciprocity, which most general principles of basic rights and liberties would such individuals also be likely to accept as determining the conditions of their collective existence?

Thus, a system of rights based on respect for human dignity, autonomy and equality are intrinsic to the deliberative model of democracy. They enable its proper functioning as opposed to being constraints on its operation.<sup>27</sup>

However, the precise content, application and implications of these principles and the rights they give rise to are neither self-evident nor self-executing. They must be worked out through processes of democratic deliberation and debate.<sup>28</sup> This is consistent with the reality of modern constitutional democracies in which the content and implications of basic human rights such as freedom of speech are constantly subject to public debate and contestation. As Benhabib observes, ‘although we cannot change these rights without extremely elaborate political and juridical procedures, we are always disputing their meaning, their extent, and their jurisdiction’.<sup>29</sup> Human rights norms are thus fundamental to a deliberative conception of democracy whilst allowing ample space for dialogic engagement with their concrete entailments in a range of different contexts.<sup>30</sup>

A common criticism at this juncture is to point to a circularity problem in that deliberative democracy presupposes the mutual recognition of basic rights by all participants whilst, on the other hand, insisting that participants in a political system should play a significant role in giving content to such rights through deliberative engagement.<sup>31</sup> However, theorists of deliberative democracy point out that this is not a vicious

26 As above. See also Zurn (n 14 above) 229–232; R Alexy ‘Discourse theory and human rights’ (1996) 9 *Ratio Juris* 209-235.

27 See Habermas (n 14 above) 118-131.

28 Thus Benhabib (n 22 above) 79 notes that ‘the precise meaning and entailment of the norms of universal moral respect and egalitarian reciprocity are subject to discursive validation’.

29 Benhabib (n 22 above) 79.

30 As Baynes (n 10 above) 463 observes, in Habermas’s discourse theory ‘the system of rights is universal, not in the sense that it specifies a pre-given set of natural rights, but rather in the sense that it presents a general schema or “unsaturated placeholder” that legal subjects must presuppose if they want to regulate their living together by positive law. It is thus constitutive of the legal medium, yet at the same time, it is not fixed or determinate. The system of rights must be developed “in a politically-autonomous manner” by citizens in the context of their own particular traditions and history.’ Baynes refers in this context to Habermas (n 14 above) 125 128-129.

31 T Roux ‘Democracy’ in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2006) ch 10, 14-15 18.



circle. It accurately depicts the reflexive or recursive relationship between rights and democracy – both presuppose each other for their proper functioning. While the circle exists at a theoretical level, it has critical bite in practice. It invites first-order claims for the recognition and fulfilment of human rights, as well as second-order claims about whether the procedures and institutions through which such first-order claims are determined allow for full and equal participation by all affected.<sup>32</sup> In other words, the relationship between democracy and human rights need not be a zero-sum game. A general framework of rights is essential to ensure processes of fair democratic deliberation based on mutual respect. At the same time, there is significant scope for the concrete implications of these general rights norms to be worked out by the beneficiaries through democratic deliberation in a variety of different contexts. The implications of this reciprocal relationship between rights and democratic participation for the institution of judicial review are explored further below and in part 4.

The second feature that makes deliberative democracy suited to mediating between the universal and the particular is that it takes seriously value pluralism in contemporary democracy. It emphasises the institutional procedures and practices for decisions on matters that would be binding on all by requiring parity of participation<sup>33</sup> and public reasoning<sup>34</sup> as a basis for reaching agreements (even if only partial and provisional) on the norms that are to govern people's collective lives. Parity of participation requires that the social, economic and political barriers which create subordinated groups or classes of people be redressed. These groups or classes are denied the social recognition or access to the economic resources to participate as equals in the diverse array of institutions which wield power over people's lives in society. Whilst the reality of diverse world views and value systems are recognised, deliberative democratic theorists do not presume that people's prior value-systems and views are fixed and immutable, but rather that they are capable of adjustment (or even transformation) through deliberative engagement with other perspectives and world

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32 See Benhabib (n 22 above) 78-79; N Fraser 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Fraser & A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 7 44-45.

33 One of the most sophisticated analyses of the intersecting axes of participatory parity – redistribution, recognition and political participation – in contemporary capitalist societies is provided by Fraser (n 32 above) 7 229-223; see also N Fraser 'Social exclusion, global poverty, and scales of (in)justice: Rethinking law and poverty in a globalising world' (2011) 3 *Stellenbosch Law Review* 452.

34 According to Cohen, 'a deliberative conception puts public reasoning at the centre of political justification'. He describes the public reasoning that distinguishes deliberative democracy as the advancement of reasons in deliberation which 'others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable'. See J Cohen 'Procedure and substance in deliberative democracy' in Benhabib (n 22 above) 95 100.

views.<sup>35</sup> However, its ultimate legitimacy and application does not depend on requiring people to change their prior preferences, values or world views.<sup>36</sup> Feminist theorists, in particular, have contributed to a critique of traditional versions of ‘the common good’ in deliberative democratic theory which have tended to suppress deep conflicts of value and interests. Young has developed a sophisticated account of deliberative democracy which explores the possibilities of co-operation on fundamental questions of governance across differences:<sup>37</sup>

A discussion is liable to break down if participants with deep conflicts of interest and value pretend they have common interests, because they are unable to air their differences. If, on the other hand, they mutually acknowledge their differences, and thereby mutually acknowledge that co-operation between them requires aiming to make each understand the others across those differences, then they are more likely to maintain co-operation and occasionally arrive at rough-and-ready provisional agreement.

Finally, modern accounts of deliberative democracy are not premised on the impractical and even possibly undesirable notion of a single deliberative assembly. Rather, these accounts emphasise that deliberative democracy should operate at a variety of different levels and through a range of institutions. It coexists with the mechanisms for citizen participation in the institutions and processes of representative democracy. However, deliberative democracy enriches and deepens representative democracy by expanding the opportunities for people’s active participation in a broad range of decision-making processes. It thus represents a more substantive conception of democracy than participating in periodic elections and in the formal mechanisms created for allowing citizens input in the institutions of representative democracy. Through creating multiple sites of dialogue and avenues of participation, the aim is to encourage greater participation in the public and private institutions which affect various aspects of people’s lives.<sup>38</sup>

Most theorists of deliberative democracy would accord courts an important role as deliberative forums. They do more than simply resolve disputes between parties on the basis of legal norms, but also shape and are shaped by broader political discourses. This is particularly evident when they interpret and enforce broadly-formulated and frequently contested human rights norms. In the context of United States constitutional law, Benhabib points out that

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35 Benhabib (n 22 above) 73; IM Young *Inclusion and democracy* (2000) 24.

36 See Cohen (n 34 above) 100.

37 Young (n 35 above) 44.

38 See Benhabib (n 22 above) 81-82. Fraser refers to a heterogeneous, dispersed network of many publics as well as ‘subaltern counterpublics’. See N Fraser ‘Rethinking the public sphere: A contribution to the critique of actually existing democracy’ in C Calhoun (ed) *Habermas and the public sphere* (1992) 109 121-123.

rights are never really 'off the agenda' of public discussion and debate even in the face of authoritative interpretations by the US Supreme Court on questions of abortion, free speech and affirmative action. The content and implications of these rights remain contested and contestable. Rights are 'constitutive and regulative institutional norms of debate in democratic societies that cannot be transformed and abrogated by simple majority decisions'.<sup>39</sup> Although constitutional rights are generally entrenched and cannot be altered without extremely elaborate political and juridical procedures, their meaning, scope and application are always being contested and debated. This aligns with what was stated above, that human rights norms constitute general controlling principles, but their concrete implications in various contexts are always subject to debate and frequently struggles between contesting social groups.

Within a deliberative model of democracy, courts potentially play a valuable role in protecting the vital interests and values which human rights norms seek to protect. In addition, they seek to preserve the conditions for fair and equitable participation in decision-making processes through which human rights are given concrete effect (for instance through legislation and policy processes).<sup>40</sup> Many of the rights in the South African Bill of Rights, ranging from freedom of association, freedom of expression, access to information and just administrative action, enable and facilitate people's involvement in a range of decision-making processes which define and affect their rights. The Bill of Rights thus protects a set of substantive values and interests as well as people's right to participate in fundamental decisions that affect these values and interests. In this way, we can make sense of the description of the Bill of Rights in section 7(1) of the Constitution as 'a cornerstone of democracy in South Africa', enshrining the rights of all people in our country and affirming 'the democratic values of human dignity, equality and freedom'. This expresses the interdependence between human rights and democratic participation, and reinforces Justice Sachs's insight that 'the procedural and substantive aspects of justice and equity cannot always be separated'.<sup>41</sup>

At their best, courts can become an institutionalised site for hearing marginalised voices and according deliberative attention to their human rights claims. Through the public, institutional character of litigation, these voices can be amplified and channelled into the formal structures of political decision making and policy formulation.<sup>42</sup> Ideally, the adjudication of human rights norms can facilitate participatory parity in all spheres of political, economic, social and cultural decision

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39 Benhabib (n 22 above) 79.

40 See generally Zurn (n 14 above).

41 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39 (*Port-Elizabeth Municipality*).

42 Zurn (n 14 above) 242.

making where power is wielded and decisions are made which have a profound impact on people's lives.

However, it is equally possible for courts to develop interpretations of rights which are insensitive to the contextual realities and power-relationships in which various groups experience rights violations. Courts may also be insufficiently sensitive to the reasonable diversity of ways in which rights can be interpreted and realised in practice without undermining their normative purposes and values.<sup>43</sup> These manifestations of the 'paradox of institutionalisation' discussed above create an inescapable tension between the substantive and procedural dimensions of justice in human rights litigation. Courts may either be too weak in developing the substantive normative content of rights, deferring instead to democratic decision-making processes.<sup>44</sup> At the other end of the spectrum, they may be overly prescriptive at the rights definition, review or remedial phases of human rights litigation, thereby foreclosing appropriate democratic participation in rights definition and implementation. Depending on the circumstances of particular cases, such participation may be more capable of achieving just and sustainable solutions to human rights problems and issues. Without broad-based, continual human rights dialogue and engagement, human rights are likely to have only a very superficial purchase in society and are unlikely to be implemented in an effective, sustained manner.<sup>45</sup>

This tension between substantive and procedural justice in the adjudication of human rights norms tracks the tension between universalism and particularism in adjudication. An overly weak assertion of the universal values of human rights may result in arbitrary, localised decision making over questions of fundamental rights. Conversely, too strong an assertion of general universal prescripts may result in vague, broad statements of values which are not responsive to the unique needs and circumstances of particular cases.

This creates particular challenges for adjudication. Courts must endeavour to craft an appropriate response in the context of particular cases which does not amount to an abdication of judicial

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43 For a discussion of these tendencies in the context of socio-economic rights adjudication, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 39-42.

44 Reliance on the doctrines of separation of powers and deference are common judicial strategies for deferring to the institutions of representative democracy. See K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009); D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

45 For accounts of how rights emerge from and in turn influence community and social processes, see S Mnisi Weeks & A Claassens 'Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them' (2011) 22 *Stellenbosch Law Review* 823; J Perelman & KG Young, with the participation of M Ayariga 'Freeing Mohammed Zakari: Rights as footprints' in White & Perelman (n 2 above) 122.

responsibility for interpreting rights and articulating their normative values and purposes. At the same time, conceiving rights as integral to a deliberative democratic paradigm requires that courts strive to foster (or at least avoid foreclosing) democratic participation in working out the concrete implications of these norms in a variety of different circumstances. As Sachs J observes, if adjudication is to respect both the substantive and procedural aspects of justice, '[t]he managerial role of the courts may need to find expression in innovative ways'.<sup>46</sup>

The following part of this article considers the potential of the adjudicative strategy of 'meaningful engagement' deployed by the South African Constitutional Court to mediate these tensions in the context of its jurisprudence pertaining to the eviction of impoverished occupiers from their homes. As will be seen, the Court has made use of orders of 'meaningful engagement' at both the review and remedial stages of evictions cases. The potential and pitfalls of this turn to engagement in social rights adjudication will be analysed and evaluated.

## 4 Meaningful engagement

### 4.1 Constitutional and legislative context

Disputes relating to the eviction of persons from their homes directly implicate section 26(3) of the Constitution, which provides:<sup>47</sup>

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In addition, in terms of sections 26(1) and (2), the state is required to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right of everyone to have access to adequate housing. This means that all state action in relation to an eviction of persons from public or private land must conform to the criteria of reasonableness developed in the Court's major socio-economic rights jurisprudence.<sup>48</sup>

A range of legislation has been enacted to give effect to this right in different contexts, including the significant Prevention of Illegal

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46 *Port Elizabeth Municipality* (n 41 above) para 39.

47 In *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 para 34 (*Grootboom*), the Constitutional Court drew attention to the close interrelationship between the three subsections of sec 26.

48 For an analysis of these criteria, see Liebenberg (n 43 above) 146-163. The Constitutional Court has confirmed that the duty of relevant organs of state (such as local authorities) to ensure the provision of temporary alternative accommodation applies even when occupiers are evicted by private parties. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). This legislation vests in courts a broad discretion based on ‘justice and equity’ in considering whether, and under which conditions, unlawful occupiers may be evicted from public or private land.<sup>49</sup> Early in its jurisprudence on PIE, the Constitutional Court held that a key factor in determining the fairness of an eviction is whether ‘proper discussions, and where appropriate, mediation have been attempted’.<sup>50</sup> The Court held that in seeking to resolve the conflict between property and housing rights in eviction cases, ‘the procedural and substantive aspects of justice and equity cannot always be separated’.<sup>51</sup> This signalled an affirmation by the Court that the housing rights protected in section 26 of the Constitution, in addition to conferring substantive benefits, entitle unlawful occupiers to participate in the process of finding a just solution to what often appears as the intractable conflict between their housing rights and the property rights of landowners.<sup>52</sup>

#### 4.2 Turn to engagement: The *Olivia Road* case

The participatory dimension of resolving rights conflicts was substantially expanded on in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*<sup>53</sup> (*Olivia Road*). This case concerned an attempted eviction by the City of Johannesburg of a number of impoverished residents of so-called ‘bad buildings’ from the inner city where the circumstances of their occupation were deemed to constitute a threat to their health and safety in terms of, *inter alia*, the National Building Regulations and Standards Act 103 of 1977 (NBRSA). The eviction proceedings were part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg as part of the Council’s Inner City Regeneration Strategy. After the hearing of the application for leave to appeal and argument in the matter, the Constitutional Court issued an interim order requiring the City and occupiers to:<sup>54</sup>

engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

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49 On the development of evictions law under the influence of sec 26(3), see AJ van der Walt *Constitutional property law* (2006) 410-419; Liebenberg (n 43 above) 268-311.

50 *Port Elizabeth Municipality* (n 41 above) para 43.

51 *Port Elizabeth Municipality* (n 41 above) para 39.

52 The significance of participation was grounded in respect for the human dignity and ‘personal moral agency’ of occupiers. *Port Elizabeth Municipality* (n 41 above) para 41.

53 2008 3 SA 208 (CC).

54 *Olivia Road* (n 53 above) para 5 (interim order para 1).

The parties were ordered to report back to the Court on the results of the engagement.<sup>55</sup> The Court indicated further that account would be taken of the contents of the report in the preparation of the judgment or in issuing further directions should this become necessary.<sup>56</sup>

The outcome of this meaningful engagement order was a comprehensive settlement agreement between the parties. This agreement included steps for rendering the buildings safer and more habitable, as well as detailed provisions relating to the relocation of the occupiers to alternative accommodation in the inner city. The latter included the identification of relevant buildings, the nature and standard of the accommodation to be provided, and the calculation of the rental to be paid.<sup>57</sup> The agreement further stipulated that this alternative accommodation was being provided pending the provision of suitable permanent housing solutions being developed by the City 'in consultation' with the occupiers concerned.<sup>58</sup> This settlement agreement was endorsed by the Court on 5 November 2007.<sup>59</sup>

In its subsequent judgment, the Court elaborated on its reasons for making the engagement order, and the purposes and nature of such engagement. It affirmed the basic principle is that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. The Court derived the legal basis for the requirement of meaningful engagement directly from a range of constitutional provisions, but particularly from section 26 which, as noted above, entrenches the right of access to adequate housing, and imposes the obligation on the state to act 'reasonably' in realising this right.<sup>60</sup> Whether there has been meaningful engagement is furthermore one of the 'relevant circumstances' to be taken into account in terms of section 26(3) of the Constitution.<sup>61</sup>

The Court described the objectives of such engagement to include ascertaining what the consequences of an eviction might be, whether

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55 *Olivia Road* (n 53 above) para 5 (interim order para 3).

56 *Olivia Road* (n 53 above) para 5 (interim order para 4).

57 Rent was to be calculated at 25% of the occupiers' income and the occupiers were allowed to stay in the property until permanent accommodation became available to them.

58 Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg dated 29 October 2007 (copy on file with author). The terms of the engagement order are summarised by the Court in *Olivia Road* (n 53 above) paras 24-26.

59 *Olivia Road* (n 53 above) para 27.

60 In *Grootboom* (n 47 above) para 17, the Court held: 'Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).'

61 *Grootboom* (n 47 above) paras 18 & 22.

the City could help in alleviating any dire consequences, whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the City could or would fulfil these obligations.<sup>62</sup>

A number of the key features of meaningful engagement in the context of an eviction can be distilled from the judgment, including serious consideration of the alternative accommodation needs of the particular occupiers.<sup>63</sup> The Court emphasised that the nature and extent of the engagement must depend on the context. Thus 'the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement' involving 'competent sensitive council workers skilled in engagement'.<sup>64</sup> In a small municipality where the numbers of people affected by evictions are much smaller, *ad hoc* engagement may be appropriate.<sup>65</sup> The Court went on to observe:<sup>66</sup>

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

Meaningful engagement requires that the parties engage with each other reasonably and in good faith. Intransigent attitudes or the 'making of non-negotiable, unreasonable demands' undermines the deliberative process.<sup>67</sup> Proactive solutions must be pursued and civil society organisations should facilitate the engagement process in every possible way.<sup>68</sup> Finally, the engagement process must be characterised by transparency as secrecy would be counter-productive to the process of engagement.<sup>69</sup> In any eviction proceedings, a municipality would be required to provide 'a complete and accurate account of

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62 *Olivia Road* (n 53 above) para 14.

63 *Olivia Road* (n 53 above) para 18.

64 *Olivia Road* (n 53 above) para 19.

65 As above.

66 *Olivia Road* (n 53 above) para 15.

67 *Olivia Road* (n 53 above) para 20.

68 As above.

69 *Olivia Road* (n 53 above) para 21. This gives expression to transparency as a relevant criterion in the assessment of reasonable action by the state in realising socio-economic rights. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 123.



the process of engagement including at least the reasonable efforts of the municipality within that process'.<sup>70</sup> Should this record show that the municipality had failed to engage with the affected community, or had behaved unreasonably during the engagement process, this fact would constitute 'a weighty consideration against the grant of an ejectment order'.<sup>71</sup>

The Court concluded that the Supreme Court of Appeal should not have granted the eviction order in the circumstances of the case in the absence of meaningful engagement between the parties.<sup>72</sup> The Court also held that, by failing to affirm the relevance of the availability of alternative accommodation in the decision by the City to issue notices to vacate, the Supreme Court of Appeal had not fully appreciated the interrelationship between section 12(4)(b) of the Act and section 26(2) of the Constitution.<sup>73</sup> Finally, the Court held that section 12(6) of the NBRSA, which imposes criminal liability for a failure to comply with a notice to vacate without provision for judicial oversight of the eviction, was inconsistent with section 26(3). By way of remedy, the Court read appropriate wording into the section to provide for judicial oversight of evictions in terms of section 12(4)(b) of the NBRSA.<sup>74</sup>

The description by the Court of the requirements of 'meaningful engagement' exhibit many of the key features of a deliberative conception of democratic participation described in part 3 above. The interim order of meaningful engagement resulted in a settlement agreement between the occupiers and the City of Johannesburg which substantially met all the occupiers' concerns regarding the location, quality and affordability of the alternative accommodation to be provided upon their eviction from the buildings.<sup>75</sup> The order facilitated a participatory, contextualised solution to the impasse which had developed around the City's concern to avoid habitation of buildings which posed a danger to health and safety, and the residents' interest in having access to adequate alternative accommodation in proximity to the places where they pursued their livelihoods. As indicated, the Court proceeded to deal in its judgment with a number of legal issues pertaining to the importance of meaningful engagement as a constitutional requirement in eviction disputes as well as the constitutionality of the NBRSA.

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70 *Olivia Road* (n 53 above) para 21.

71 As above.

72 *Olivia Road* (n 53 above) para 23.

73 *Olivia Road* (n 53 above) para 45.

74 *Olivia Road* (n 53 above) para 54 (order para 6).

75 For a detailed account of the engagement process by the skilled public interest lawyer representing the occupiers, see S Wilson 'Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of "meaningful engagement"' (2011) 22 *Urban Forum* 1.

Nevertheless, it failed to deal with a number of other legal issues which are of systemic significance to those who find themselves in a similar position to the occupiers in the broader Johannesburg as well as the country as a whole. These issues were expressly raised by the applicants and elaborated on by the *amicus curiae* submissions.<sup>76</sup> Thus, the Court failed to engage the issue whether the issuing of the ‘notice to vacate’ notices by the City in terms of section 12(4)(b) of the NBRSA constituted administrative action, thereby attracting the hearing or public inquiry procedures in terms of the right to just administrative action as given effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).<sup>77</sup> Similarly, the Court declined to decide whether the eviction was subject to the requirements laid down in section 6 of PIE.<sup>78</sup> Perhaps most significantly, the Court declined to deal with the systemic question raised by the occupiers regarding whether the City had put in place a reasonable plan for the permanent housing of the occupiers and the many other poor people resident in the inner city.<sup>79</sup> It was estimated that approximately 69 000 other residents of the Johannesburg inner city were similarly facing eviction and the applicants and their legal representatives also sought to represent this broader class of persons. The Court stated that it had no reason to doubt that the City would also negotiate in good faith with other similarly-placed occupants.<sup>80</sup> In addition, the Court expressed its reservations about acting as the ‘court of first and last instance’ in an abstract and generalised evaluation of whether the City’s housing plan was reasonable in relation to the entire class of similarly-placed occupiers.<sup>81</sup> If necessary, particular occupiers could bring a case to the High Court making specific allegations concerning the compliance of the City with its housing obligations in relation to them.<sup>82</sup>

In many respects, the Court’s judgment is a welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing. A failure to engage meaningfully is to be treated by courts as a weighty

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76 The Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) were joint *amici curiae* in both the Supreme Court of Appeal and the Constitutional Court. See their *amicus curiae* submissions on-line at <http://www.constitutionalcourt.org.za/Archimages/10661.PDF> (accessed 15 May 2012).

77 *Olivia Road* (n 53 above) paras 7, 9 & 39. See G Quinot ‘An administrative law perspective on “bad building” evictions in the Johannesburg inner city: *City of Johannesburg v Rand Properties (Pty) Ltd*’ (2007) 1 *ESR Review* 25.

78 *Olivia Road* (n 53 above) para 38. A court may grant an order for the eviction of unlawful occupiers in terms of PIE at the instance of organs of state if it is in the public interest to do so (sec 6(1)(b)). The public interest is defined as including ‘the interest of the health and safety of those occupying the land and the public in general’ (sec 6(2)).

79 *Olivia Road* (n 53 above) paras 32-36.

80 *Olivia Road* (n 53 above) paras 34-35.

81 As above.

82 *Olivia Road* (n 53 above) para 35.

consideration against the grant of an eviction order. Those directly affected by decisions impacting on their housing rights are given an opportunity to participate in exploring the implications of these rights in their particular, localised circumstances. In this way, the Court avoids imposing top-down solutions that may not be attuned and responsive to local contexts and needs.

However, there is a real danger that meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively-empty process of local dispute settlement.<sup>83</sup> This would undermine the normative underpinnings of deliberative democracy discussed in part 3 above.<sup>84</sup> It should also be borne in mind that in *Olivia Road*, the Court scrutinised and endorsed the agreement reached pursuant to its engagement order. It did so because meaningful engagement had been specifically ordered by it upon the conclusion of the parties' argument.<sup>85</sup> However, it emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.<sup>86</sup> The implication is that not all engagement processes will be subjected to the judicial scrutiny and approval which took place in *Olivia Road*. There is no guarantee that the process or outcome of engagement between communities and authorities will respect and vindicate relevant constitutional rights. This is a particular concern given the power imbalance which exists between deeply disadvantaged groups facing homelessness in an eviction situation, and local authorities or private landowners. Communities who lack the support of non-governmental organisations (NGOs) or public interest lawyers are particularly vulnerable in this context, and may not be in a position to secure the effective protection of their housing and other rights in an engagement process. Meaningful engagement would thus fail to meet Fraser's criterion of 'participatory parity' for just deliberative fora.<sup>87</sup>

Regulatory measures and the allocation of appropriate resources could assist in redressing skewed power relations in the encounter between officials and impoverished communities in engagement

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83 These dangers are evident in the manner in which the Constitutional Court applied meaningful engagement in the matter of *Mamba v Minister of Social Development* CCT 65/08, Court Order dated 21 August 2008. See B Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 107 111 122.

84 See nn 24-27 above and accompanying text.

85 *Olivia Road* (n 53 above) paras 27-30.

86 *Olivia Road* (n 53 above) para 30.

87 See n 33 above and accompanying text.

processes.<sup>88</sup> However, equally important for ensuring the protection of the rights of marginalised communities is the need for a substantively-reasoned interpretation of the obligations imposed by socio-economic rights such as the right of access to adequate housing in section 26 of the Constitution.<sup>89</sup> Judgments which elaborate on the nature and implications of housing rights in an eviction context provide the constitutional normative framework within which the search for particular solutions through meaningful engagement between the parties must take place.<sup>90</sup> Such a normative framework is essential for enabling the parties, the public and the courts (if engagement ultimately breaks down) to assess whether the processes and outcomes of the engagement are consistent with the Constitution.

Such normative parameter setting is also important for guiding human rights-compliant responses and policy setting in other contexts where similar problems are faced. It is arguable that the Court in *Olivia Road* missed an important opportunity to sketch normative markers for the resolution of a widespread systemic problem facing a large group of highly vulnerable people facing eviction from sub-standard accommodation in South Africa's urban areas. Normative guidance is essential given the authorities' preference for requiring evicted city-dwellers to relocate to townships and informal settlements situated at the periphery of towns and cities, thereby reinforcing the deeply-entrenched legacy of apartheid spatial planning in South Africa. It is only through taking both process and substance seriously that engagement as an adjudicatory strategy in the context of human rights can successfully negotiate the tensions between universalism and particularism.

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88 See, in this regard, the discussion by Ray of the proposals emerging from a Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights. Ray (n 83 above) 107 116-120; B Hepple 'Negotiating social change in the shadow of the law' (2012) 139 *South African Law Journal* 248 256 (forthcoming). Bishop cautions, in this context, that the institutionalisation of engagement processes may serve to undercut more radical forms of participatory democracy. M Bishop 'Vampire or prince? The listening constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313 361-364.

89 On the importance of substantive reasoning in the interpretation of rights guarantees within a deliberative democracy conception of transformative constitutionalism, see Liebenberg (n 43 above) 44-51.

90 Housing rights scholars have emphasised the importance of these substantive normative markers in the context of meaningful engagement. See L Chenwi "'Meaningful engagement'" in the realisation of socio-economic rights: The South African experience' (2011) 26 *South African Public Law* 128 152-154; K McLean 'Meaningful engagement: One step forward or two back? Some thoughts on *Joe Slovo*' 223 238-239.

### 4.3 Diluting the potential of meaningful engagement: The *Joe Slovo* case

A subsequent case which invoked meaningful engagement as a strategy, primarily in a remedial context, is the judgment of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>91</sup> (*Joe Slovo I*). This case concerned an application in terms of PIE by organs of state to evict and relocate a large, settled community of approximately 20 000 people from their homes in the Joe Slovo Informal Settlement on the outskirts of Cape Town in order to facilitate a major housing development, the so-called N2 Gateway Project. It was argued that the eviction and relocation of the community to 'temporary resettlement units' (TRUs) located in Delft, some 15 kilometres away from their present homes, was required to enable the upgrading and building of formal housing in terms of the N2 Gateway Project. A decision was taken that *in situ* upgrading of the Joe Slovo site was not feasible and the community should accordingly be relocated to Delft. An initial commitment that 70 per cent of those relocated would be able to return to low-income housing in the upgraded development did not materialise in phase 1 of the project.<sup>92</sup>

The trust between communities and organs of state was further eroded by the fact that rentals in the development were pitched substantially higher than initially envisaged and greater emphasis was placed on bonded housing. This rendered the housing opportunities inaccessible to the vast majority of the families in the Joe Slovo community.<sup>93</sup> Moreover, many residents feared that the relocation to Delft would destroy their already fragile livelihood and communal networks, and that they would lack access to the schools, transport and other facilities on which they depended in the Joe Slovo settlement. Following resistance by the residents to their eviction and relocation, the housing authorities applied for and obtained an eviction order from the Western Cape High Court in terms of PIE.<sup>94</sup> The residents of Joe Slovo appealed to the Constitutional Court and judgment was handed down on 10 June 2009.

The Court agreed on the outcome and a common order.<sup>95</sup> However, five different judgments were delivered by Yacoob J, Moseneke

91 2010 3 SA 454 (CC).

92 The other 30% was to be reserved for residents of backyard dwellings in Kwa-Langa.

93 The income of the majority of the families in the Joe Slovo settlement was below R3 500 per month. See *Joe Slovo I* (n 91 above) paras 31-34 (*per* Yacoob J); para 307 (*per* O'Regan J); paras 371-376 (*per* Sachs J).

94 *Thubelisha Homes & Others v Various Occupiers & Others* Case 13189/07 (C) (10 March 2008).

95 The Court summarised the grounds on which all the justices agreed that the order should be made. *Joe Slovo I* (n 91 above) paras 1-10.

DCJ,<sup>96</sup> Ngcobo J,<sup>97</sup> O'Regan J, and Sachs J.<sup>98</sup> Each of these judgments provided different reasoning in support of the order. The outcome was that the eviction order was upheld, but the Court subjected the implementation of the order to detailed conditions. Thus, the eviction was made conditional on the applicants being relocated to TRUs situated in Delft or another appropriate location.<sup>99</sup> The Court's order contains detailed specifications regarding the nature and quality of the alternative accommodation which the authorities were obliged to provide.<sup>100</sup> It also obliged the respondents to ensure that 70 per cent of the new homes to be built on the site of the Joe Slovo informal settlement were allocated to Joe Slovo residents.<sup>101</sup> Significantly, the order requires an ongoing process of meaningful engagement between the residents and respondents concerning various aspects of the eviction and relocation process.<sup>102</sup> The parties were directed to report to Court on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order.<sup>103</sup>

However, a major point of concern in this judgment is how quickly the Court retreated from the substantive promise of meaningful engagement in *Olivia Road* as a key consideration in determining whether an eviction order was justifiable in the particular case. A clearly perfunctory, inadequate engagement process regarding the need for the community to be evicted (with all the accompanying disruption to lives and livelihoods this implied), as opposed to the *in situ* upgrade argued for by the community, was essentially condoned. The flawed nature of the engagement between the officials and community is described as follows by Sachs J in his judgment:<sup>104</sup>

There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision making itself.

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96 Sachs J concurred in the judgment by Moseneke DCJ.

97 Langa CJ and Van der Westhuizen J concurred in the judgment of Yacoob J.

98 Moseneke DCJ and Mokgoro J concurred in the judgment of Sachs J.

99 *Joe Slovo I* (n 91 above) para 7 (Order para 4).

100 *Joe Slovo I* (n 91 above) para 7 (Order paras 9–10). As Mbazira observes, the detailed prescriptions in the Court's order concerning the nature and standard of alternative accommodation to be provided stands in stark contrast to other cases where the Court has been unwilling to engage with the substance of what adequate housing entails, even at a minimal level. C Mbazira 'Grootboom: A paradigm of individual remedies versus reasonable programmes' (2011) 26 *South African Public Law* 60 79.

101 *Joe Slovo I* (n 91 above) para 7 (Order para 17).

102 *Joe Slovo I* (n 91 above) para 7 (Order paras 5 and 11).

103 *Joe Slovo I* (n 91 above) para 16.

104 *Joe Slovo I* (n 91 above) para 378 (*per* Sachs J, footnotes omitted).

This top-down form of engagement represents a retreat from the structured and reciprocal deliberative process which the Court endorsed in *Olivia Road*.<sup>105</sup> The acknowledged inadequacies in the engagement process did not vitiate the ultimate decisions taken concerning the Joe Slovo community. Essentially, the Court held that the greater good which the N2 Gateway project sought to achieve along with the need for 'realism and practicality'<sup>106</sup> outweighed the defects in the engagement process.

In *Olivia Road*, the Court appeared to lay down the principle that the absence of meaningful engagement should ordinarily be a weighty consideration against the grant of an eviction order.<sup>107</sup> Meaningful engagement, on this interpretation, constitutes a substantive normative criterion derived from section 26 of the Constitution. *Joe Slovo* represents a retreat from this principle. Instead of playing the role of a normative principle, meaningful engagement is deployed in the remedial phases to ensure participation in the nuts and bolts of the implementation of the eviction order. In this context, meaningful engagement is used in a manner similar to the type of participatory structural interdicts described by scholars of public interest litigation in the US context.<sup>108</sup> As McLean argues, the Court essentially found an eviction to be just and equitable even in the absence of meaningful engagement, thereby retreating to 'an even narrower conception of reasonableness in section 26(2) of the Constitution'.<sup>109</sup> The judgment is thus normatively weak,<sup>110</sup> but contains strong remedial safeguards in respect of the implementation of the eviction order.

On 31 March 2011, after various extensions of the original order had been sought and granted, the Court handed down a judgment

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105 *Olivia Road* (n 53 above) para 19.

106 See *Joe Slovo I* (n 91 above) para 117 (*per* Yacoob J). In a similar vein, O'Regan J writes that fair process 'should not result in unnecessary and prolix requirements that may strangle government action' (para 296).

107 See n 71 above and accompanying text.

108 See CF Sabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1016. The African Commission on Human and Peoples' Rights has also required participation or dialogue between states and communities in implementing its recommendations in certain communications relating to socio-economic rights and the right to development. See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 71; *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229; *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 251.

109 McLean (n 90 above) 241.

110 Apart from its own previous jurisprudence in *Olivia Road*, important normative criteria could have been derived, eg, from the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, developed under the auspices of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living. See UN Doc A/HRC/4/18, 5 February 2007 (Annex 1).

discharging the eviction order it had granted in *Joe Slovo I*.<sup>111</sup> The engagement reports to the Court by the Minister for Human Settlements (the second respondent) and the MEC for Human Settlements, Western Cape (the third respondent) eventually indicated the feasibility and intention of the respondents to pursue an *in situ* upgrading of Joe Slovo rather than relocation. The Court held that, although orders of the Court ought not to be discharged lightly, it had a discretion to discharge orders evicting people from their homes where the change was necessitated by exceptional circumstances and considerations of justice and equity.<sup>112</sup> In this particular case, these criteria were met as it was common cause that the most likely course for the redevelopment of the Joe Slovo settlement area would be *in situ* development.<sup>113</sup> Many aspects of the original order could and would no longer be complied with, such as the relocation to TRUs, the original timetable, and the 70/30 split in the allocation of homes in the final development.<sup>114</sup> In addition, there had been little or no engagement in relation to the relocation process, nor was there likely to be any engagement in relation to relocation in future.<sup>115</sup> The Court's original order contemplated that the relocation process was to commence about two months after the order was made and any agreement concerning amendments to the timetable was to be placed before the Court less than a month after the date of its order. The supervised eviction order did not contemplate the commencement of execution over a year and a half after the order was made.<sup>116</sup> In effect, there had been a fundamental change in circumstances since the original order was made, and the original order was no longer necessary or implementable. In this regard, the Court pointed out that it would not have granted the original eviction order had it 'not found that the relocation could not be said to be unnecessary'. It went on to state:<sup>117</sup>

Indeed had it not been necessary to relocate the residents for the purpose of housing development or any other compelling reason, the application [for eviction] would probably have been dismissed.

The irony is inescapable. Had the necessity of evicting 20 000 people to a temporary resettlement area a substantial distance from their homes been properly explored by the authorities through meaningful engagement with the community and their expert advisors, the costly and time-consuming litigation might have been avoided. The

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111 *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC) (*Joe Slovo II*).

112 *Joe Slovo II* (n 111 above) para 28.

113 *Joe Slovo II* (n 111 above) para 30.

114 As above.

115 As above.

116 *Joe Slovo II* (n 111 above) para 36.

117 *Joe Slovo II* (n 111 above) para 29.



time and energy of all role-players could rather have been invested in the actual process of redeveloping and upgrading of Joe Slovo. Although meaningful engagement does not, as Ngcobo J noted, require the parties 'to agree on every issue', it does require 'good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side'.<sup>118</sup> There should be a serious and sustained effort to reach mutual accommodations in relation to the disputed issues. There are telling indications that the engagement that took place prior to the decision to embark on an eviction exercise did not conform to the basic principles of structured interaction, an exchange of public reason-giving, mutual listening,<sup>119</sup> and a joint exploration of solutions to accommodate the concerns of the other.<sup>120</sup> As discussed in part 3 above, these represent the key features of processes of deliberative decision making.<sup>121</sup>

The extent to which the Court was prepared to condone the defective engagement process in *Joe Slovo* can also be contrasted with its more robust affirmation of what the impact of a lack of meaningful engagement on the granting of an eviction order should be in *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal*<sup>122</sup> (*Abahlali*). The majority and minority judgment differed only on whether it was possible to interpret the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 consistently with section 26(2) of the Constitution, including the requirement of meaningful engagement prior to evictions. The minority judgment of Yacoob J held that section 16 of the Act could be read as requiring meaningful engagement prior to the institution of eviction proceedings. He held:<sup>123</sup>

If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful

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118 *Joe Slovo I* (n 91 above) para 244.

119 On the significance of listening (as opposed to merely 'hearing') in participatory and deliberative democratic processes, see Bishop (n 88 above) 323.

120 One would ideally have wished to have a more detailed description and analysis of the engagement process with the Joe Slovo community regarding the upgrading of the settlement, specifically in relation to the decision to relocate the residents as opposed to pursuing an *in situ* upgrade. Nevertheless, some of the abovementioned defects in the engagement process can be gleaned from the following paragraphs in the judgment: *Joe Slovo I* (n 91 above): paras 28-34; para 109 (*per* Yacoob J); paras 166-167 (*per* Moseneke DCJ); paras 245-247 (*per* Ngcobo J); paras 297-304 (*per* O'Regan J); paras 378-384 (*per* Sachs J).

121 See Muller's characterisation of meaningful engagement as a deliberative democratic partnership drawing on Arnstein's ladder of citizen participation. G Muller 'Conceptualising "meaningful engagement" as deliberative democratic partnership' (2011) 3 *Stellenbosch Law Review* 742 753-756.

122 2010 2 BCLR 99 (CC). This decision was handed down less than a month before judgment in *Joe Slovo I* was handed down.

123 *Abahlali* (n 122 above) para 69.

occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.

The majority *per* Moseneke DCJ held that this reading of section 16 was not reasonably plausible and that section 16 was unconstitutional in that it did not give effect to the constitutional and legislative requirements of meaningful engagement and the principle that evictions may only be resorted to as a measure of last resort.<sup>124</sup>

It could be argued that the engagement required on the implementation of the eviction order in *Joe Slovo I*, coupled with the detailed specifications concerning the standard of alternative accommodation to be provided, contributed to the eventual resolution of the dispute between the community and the authorities. This argument may hold more than a grain of truth, but it does not detract from the criticism of the dilution of meaningful engagement as a substantive normative criterion in determining whether an eviction is consistent with section 26 of the Constitution and the justice and equity requirements of PIE. The structured order handed down by the Court may have contributed to a localised solution to the Joe Slovo dispute, but at the expense of affirming the normative purposes and values underpinning the constitutional protection of housing rights. *Joe Slovo* represents a dilution of meaningful engagement's potential to promote deliberative participation by citizenry in decisions affecting their rights within clearly-articulated normative parameters.

#### 4.4 Meaningful engagement: Conceptualising the courts' role

The mechanism of meaningful engagement developed in cases such as *Olivia Road*, *Joe Slovo* and *Abahlali* has the potential to promote localised, contextual solutions to human rights conflicts. It can also stimulate systemic administrative and political reforms to facilitate participation by communities in resolving rights conflicts and implementing policies and programmes to give effect to rights.<sup>125</sup> The court's role within this model is not to develop comprehensive specifications of constitutional rights, but rather to prod and stimulate communities and public and private institutions to develop tailored policies and programmes informed by constitutionally-grounded reasons. As described by Cohen and Sabel:<sup>126</sup>

[T]he responsibility of constitutional courts ... is to require that problem solvers themselves make policy with express reference to both constitutional and relevant policy reasons. You might describe this as a genuine fusion of constitutional and democratic ideals: a fusion, inasmuch as the conception

124 *Abahlali* (n 122 above) paras 113-115.

125 For a nuanced exploration of the systemic potential of meaningful engagement, see B Ray 'Extending the shadow of the law: Using hybrid mechanisms to develop constitutional norms in socio-economic rights cases' (2009) 3 *Utah Law Review* 797.

126 Cohen & Sabel (n 12 above) 335.

of democratic process includes a requirement that constitutional reasons be taken into account, as such. The aim is a form of political deliberation in which citizens themselves are to give suitable weight to constitutional considerations, and not leave that responsibility to a court.

However, meaningful engagement as a mechanism to facilitate constitutionally-informed deliberation remains inadequate without the Court exercising its responsibility to articulate what would constitute acceptable 'constitutional reasons' in the context of the various rights in the Bill of Rights. This requires developing the purposes and values which the various rights seek to advance together with relevant criteria for assessing whether particular policies or practices are consistent with these purposes and values. A substantive interpretation of the rights in the Bill of Rights is not only essential for the setting of the engagement agenda, but it should also provide an evaluative framework for assessing the outcomes of the engagement exercise. In the end, all participants should have to account for the consistency of any provisional agreements emerging from engagement with the normative commitments of the Bill of Rights. In this way, the normative framework serves as a safeguard against negotiated settlements which simply reflect the interests of the more powerful party in the engagement process.

In essence, therefore, the courts should not abdicate their role to articulate and enforce the normative parameters within which engagement processes on socio-economic rights such as housing should occur. This indeed represents an affirmation of universal standards beyond the particular context. At the same time (as noted above) there is broad scope for deliberative participation on precisely which legislative or policy measures and institutional responses would be consistent with these normative standards.<sup>127</sup> This space between broadly-formulated human rights standards and their particular applications should be used by courts to encourage and, in certain contexts, require deliberative engagement between relevant stakeholders. At the review stage of human rights enforcement, a court could adopt the position that, in the absence of such prior engagement, they will be slow to grant relief to the defaulting party. This is in effect what the Constitutional Court affirmed in *Olivia Road*, but failed to give effect to in *Joe Slovo*. At the remedial stage, there is much untapped potential in the structural interdict remedy to facilitate engagement on the concrete measures required to give effect to the human rights goals set by a court at the review stage of a socio-economic rights case. Through the reporting-back requirements and

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127 In *Grootboom* (n 47 above) para 41, the Court held, in adopting the reasonableness model of review for positive socio-economic rights, that 'it is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations'. See also art 8(4) to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution A/RES/63/117 (5 March 2009) (not yet in force).

the exercise of supervisory jurisdiction, a court can exercise control over the process and outcome of deliberative engagement between the parties to ensure that agreements reached are consonant with the normative parameters and goals initially set by the court.<sup>128</sup> In so doing, adjudication can facilitate deliberative democracy in giving effect to human rights norms in particular contexts.

The mechanism of meaningful engagement has thus far been deployed by the South African courts primarily in the adjudication of eviction disputes.<sup>129</sup> As the above analysis of the case law suggests, there is still much work to be done by activists, government officials, scholars and courts before meaningful engagement begins to play a significant role in human rights adjudication in South Africa.

## 5 Conclusion

In evaluating the contribution of Lefort<sup>130</sup> to the challenges of the universal and particular in human rights law, Baynes observes as follows:<sup>131</sup>

For Lefort, by contrast, the universal and the particular are not simply opposed to one another, nor is democracy defined over against (individual) rights. Rather, democracy and rights mutually suppose one another in a way that leaves the relation between the universal and the particular open to contestation and continuous revision or reformulation.

In this article I have sought to explore how the universal normative standards represented by human rights can be rendered more responsive to people's particular needs and unique circumstances. I have argued that a deliberative democratic understanding of constitutionalism and judicial review offers the most hopeful theoretical underpinnings for this enterprise. Finally, I have explored a concrete adjudicative strategy adopted by the South African Constitutional Court which attempts to prod communities, state officials and private landowners to find tailored solutions to the myriad complex issues which arise in eviction disputes through

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128 For a more in-depth exploration of the potential of structural interdicts, see generally Sabel & Simon (n 108) above; Liebenberg (n 43 above) 424-438.

129 See, however, its appearance in a recent case concerning education rights, *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (see particularly paras 63-65 and para 76, including the Order of the Constitutional Court dated 25 November 2010 replicated at footnote 87 of the judgment). There are also unresolved questions regarding the relationship between meaningful engagement and procedural fairness in administrative law. See Quinot (n 77 above); Muller (n 121 above) 745-752.

130 C Lefort 'Human rights and the welfare state' in C Lefort (ed) *Democracy and political theory* (1988) 39; C Lefort 'Politics and human rights' in JB Thompson (ed) *The political forms of modern society: bureaucracy, democracy, totalitarianism* (1986) 250.

131 Baynes (n 10 above) 460.

deliberative engagement.<sup>132</sup> The Court has generally tended to avoid comprehensive, final prescriptions on what the housing rights enshrined in section 26 of the Constitution entail. In so doing, it has created the space for the stakeholders in evictions disputes to explore the implications of these rights in the context of their particular circumstances.

As I have sought to demonstrate, however, the pendulum has swung too far in the direction of promoting localised settlement negotiations, and too far away from developing the normative guidelines within which deliberative engagement between the stakeholders should occur. A too narrow focus on the particular can result in an undermining of the potential of human rights adjudication to pose an ethical challenge to systemic forms of social injustice. Despite these shortcomings, there is much to be gained through continuing experimentation with mechanisms to promote dialogic engagement on the concrete entailments of human rights in various contexts.

The constitutional adjudication of human rights in South Africa will have achieved much if it succeeds in deepening both deliberative democracy and the integration of human rights norms in policy-making processes. The African Commission and African Court and national courts across the continent can gain valuable insights from the South African experience in experimenting with deliberative mechanisms at the review and remedial stages of human rights adjudication.

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<sup>132</sup> See in this regard Sachs J's eloquent description of the unique dynamics of each eviction dispute in *Port Elizabeth Municipality* (n 41 above) para 31.